CANADA'S PERIODICAL ON REFUGEES

REFUGE

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CURRENT ISSUES IN REFUGEE AND HUMAN RIGHTS POLICY AND RESEARCH

Introduction

Sharryn Aiken

This issue of *Refuge* is intended to provide a forum for both the participants and faculty of the 1998 Summer Course on Refugee Issues to discuss and elaborate upon the topics addressed in the course. Throughout one intensive week in June, the Centre for Refugee Studies hosted 52 participants and 34 faculty who came together to share insights on refugee protection and related human rights issues. Due to the enthusiastic response we received to our call for papers, the forthcoming issue of *Refuge* will include additional Summer Course contributions.

The papers presented here touch on a diversity of seemingly unrelated themes: an analysis of genocide and humanitarian disaster in Acholiland in northern Uganda, an examination of the theoretical basis for establishing an international mechanism to promote accountability for international crimes, an overview of the recently negotiated *Rome Statute* for an International Criminal Court and its potential for reducing human rights violations, a study of how the "language of law" serves to justify asylum decisions that defy both common sense and logic, and finally, an exploration of the ethical challenges faced by researchers conducting interviews with refugees and refugee service providers. Yet the articles all speak to a shared commitment to the struggle for justice and human rights, for a world in which global initiatives to eradicate the root causes of forced migration are supported and complemented by efforts to enhance genuine protection for refugees and the internally displaced.

Ogenga Otunnu's article on genocide in northern Uganda examines the

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systematic and gross human rights violations that have been perpetrated upon the Acholi people by both the state and its challengers over the past twelve years. These ongoing atrocities have received scant attention on the part of the international community despite the magnitude of the crisis. Otunnu documents the plight of over 470,900 Acholi who have been violently and involuntarily uprooted from their homes to squalid conditions in "protected camps" in the Gulu and Kitgum districts. International support for the Museveni regime based on regional, economic and political interests has led to the characterization of Uganda as a peaceful, democratic country that protects human rights. Through the words of an Acholi refugee woman we learn how this support has translated to the denial of asylum by western, industrialized states to Acholi who have fled persecution.

From a discussion of the experience of the Acholi in northern Uganda, we move to an examination of the role of international criminal tribunals in promoting human rights by combating impunity for the perpetrators of genocide and war crimes. Both Iris Almeida and William Schabas acknowledge the deficiencies of newly minted plans for a permanent International Criminal Court but remain optimistic about the promise of the *Rome Statute*. Schabas questions whether a Hitler, Pol Pot, Karadzic or Bagosora would actually be deterred by the threat of punishment but concludes that the most significant contribution of an International Criminal Court may be in establishing the truth of major atrocities in circumstances where domestic courts have failed. From the perspective of refugees who have been the victims of these atrocities, perhaps the most serious flaw in the *Rome Statute* is the absence of universal jurisdiction over offenders. For the Court to exercise jurisdiction, either the state of nationality of the accused or the state where the crime took place must have ratified the statute. The problems many countries face are not problems of crimes committed on their soil but of dealing with suspected war criminals who have fled to a perceived "safe haven." The Court will only assume jurisdiction in these cases if the state of nationality of the accused and the state where the crime has been committed agree. The jury is still out as to whether the long-awaited International Criminal Court represents a disappointing step backwards or as Almeida and Schabas suggest, a historic opportunity.

Departing from the theme of enhancing accountability mechanisms for the perpetrators, the final two papers in this issue of *Refuge* explore important dimensions of the refugee experience in asylum states. Anne Triboulet recounts the story of Mariama and her daughters, refugee claimants from Guinea. Two disparate decisions on the merits of Mariama's claim underscore the inherent dangers of the juridical language that is used to define a "well founded fear of persecution." In a broader context, Triboulet highlights the subtextual messages communicated through positive characterization of the free flow of goods and capital in contrast to the emphasis on security in regard to the movements of people. An implication of Triboulet's observations is the need for a critical examination of the extent to which refugee law and its application are shaped and conditioned by these popular metaphors.

Through participant observation and direct interviews with refugees and refugee service providers in the United States and Canada, Claudia Maria Vargas exposes the ethical challenges of doing qualitative refugee research in schools, hospitals and community clinic contexts. After outlining the issues specific to a variety of service environments, Vargas emphasizes the need for researchers to understand their personal location and the importance of preserving a balance between the intertwined roles of advocate and critical theoretician. An ethical framework for the researcher must incorporate historicity, cultural sensitivity, trust, empathy, protection for the privacy and confidentiality of refugees and refugee service providers as well as respect for their human trauma. To the extent that refugee policies in countries of asylum

and resettlement appear to be increasingly shaped by popular myths and misconceptions about refugees rather than reliable social science data, the need for sound refugee research is greater than ever. Adopting the principles identified by Vargas should ensure that the research does not undermine the interests and needs of refugees themselves.

In a world in which there are an estimated 17 million refugees and 27 million internally displaced people, a world in which one person out of every 120 is uprooted, the face of contemporary refugee issues is both complex and multifaceted. Questions of social science, law and morality converge in efforts to enhance international refugee protection. We hope that the articles contained in this issue of *Refuge* will contribute to the ongoing discourse on these themes. ■

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The Path to Genocide in Northern Uganda

Ogenga Otunnu

Abstract

Uganda, as a territorial state, is the "child" of the late nineteenth century European expansionist violence. Since the construction and consolidation of the despotically strong but infrastructurally weak state, the country has witnessed intense political violence, gross violations of human rights, destruction of property, internal displacement and refugee migrations. Today, Acholiland in northern Uganda is ravaged by a genocidal war, internal displacement, refugee migrations, humanitarian disaster and other forms of systematic violations of human rights. Yet, these crises have not received adequate attention from scholars, policy makers, human rights organizations and the rest of the international community. What are the causes of the crises? Why do the crises persist? Who are the protagonists? What are the effects of the crises on the society? Why has the international community failed to respond to the genocide and humanitarian disaster? These are some of the questions this article will attempt to address.

Précis

L'Ouganda, comme entité territoriale, est l'«enfant» de la violence expansionniste européenne de la fin du dix-neuvième siècle. Depuis la constitution d'un état, fort en terme de prise despotique, mais faible en terme d'organisation infrastructurelle, ce pays a été le théâtre de violences politiques intenses, de patentes et directes violations des droits humains, de destructions, de déplacements internes et de migrations de réfugiés. Aujourd'hui, l'Acholiland, situé au nord de l'Ouganda, est ravagé par une guerre entraînant un génocide, des déplacements internes, la migration de réfugiés, le désastre humanitaire et une multitude de formes de violations systématiques des droits humains. Ces crises multiples n'ont pourtant pas encore vraiment attiré l'attention des universitaires, des décideurs, des organisations humanitaires et du reste de la communauté internationale. Quelles sont les causes de ces crises? Pourquoi se perpétuent-elles? Qui en sont les protagonistes. Quels sont les effets de ces crises sur l'ensemble de la société? Pourquoi la communauté internationale a-t-elle failli au devoir de faire face au génocide et au désastre humanitaire ougandais? Telles sont quelques-unes des questions que cet article va tenter de soulever.

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Working Definitions of Genocide

Discussions about genocide have produced more confusion than clarity. For one thing there is little agreement on the meaning of the word, the phenomenon it is meant to describe, how to study it, what causes it, how it affects societies, how people respond to it, or what to do with it. Here, the working definitions of genocide provided by R. Lemkin and L. Horowitz are adopted.

R. Lemkin defines genocide as follows: an act of deliberate depopulation of a group; the actual physical and biological extermination of an ethnic, racial or religious group; a deliberate measure intended to impoverish and starve a target population; a deliberate measure aimed at undermining the social order of a target population; an act whose objective is to dismantle the community's moral principles; an assault on the culture of a target group that ultimately deprives the group of its identity by means of ethnocide; an act calculated to cause mental and physical harm, terrorize, dehumanize and humiliate members of a target group.[1]

L. Horowitz describes a society that is genocidal as follows: a society that tries to resolve problems by destroying a group; a polity that is incarceration-oriented, imprisoning as many members of the group as possible; a society that is torture-prone, resorting to inflicting extreme forms of bodily and mental harm on the victims; a society which is harassment-prone, impeding a group's ordinary lifestyle and freedom of movement by a persistent series of annoyances; a polity that is shame-oriented, tending to humiliate or disgrace the target group; and a society that is guilt-prone, inculcating in the group being persecuted a sense of collective self-reproach.[2]

Background: An Overview

The path to genocide has its origins in the nature of the state, and the profound crisis of legitimacy of the state, its institutions, the incumbents and their challengers.[3] To begin with, during the phase of colonial penetration, the colonial state was despotically weak and infrastructurally weak.[4] This state was an important site of violence, genocide and anarchy. While the state, its institutions and the incumbents acquired imperial and international legitimacy, they had a profound crisis of legitimacy among the colonized.[5] Once the colonial regime consolidated its power, the state became despotically strong and infrastructurally strong. Although state powers provided order and stability, the state, its institutions and the incumbents continued to experience a major crisis of legitimacy. The state also maintained important characteristic features of a genocidal state.[6]

During the period of decolonization, the regime attempted to democratize the polity. This political project weakened the machinery of repression and provided the colonized with the opportunity to openly challenge the legitimacy of the state, its institutions and the incumbents. The result was that violence and lawlessness enveloped the colonial state. Indeed, the violence and anarchy that characterized the period of decolonization were directly related to

the profound crisis of legitimacy of the state, its institutions and the incumbents. The violence and anarchy also highlighted the re-emergence of a despotically strong but infrastructurally weak state.[7]

The first post-colonial regime inherited a despotically strong but infrastructurally weak state. The state, its institution, the incumbents and their challengers had a profound crisis of legitimacy in some parts of the country. The marriage between the Uganda People's Congress (UPC) and the Kabaka Yekka (KY), and Milton Obote's effort to nominate Sir Edward Mutesa to the Presidency, were some of the attempts made to address the profound crisis of legitimacy of the state and the regime. These attempts made both the state and the regime somewhat despotically weak but infrastructurally strong, except in the war-torn Rwenzori portion of the country. However, the status of the "Lost Counties," the economic crisis that began to ravage the country, and the Cold War politics in the Congo and the rest of the region, eroded the faltering politics of legitimization. In the end, the UPC-KY marriage of legitimization collapsed, leading to a major crisis of legitimacy of the state, its institutions and the incumbents, particularly in Buganda. The result was that violence, repression, gross violations of human rights and lawlessness claimed the political terrain in Buganda. From that moment, both the state and the regime became despotically strong but infrastructurally weak.[8]

In 1971, General Idi Amin seized power. Faced with a profound crisis of legitimacy, the regime massacred many of its challengers, mostly Acholi and Langi. Attempts to address the crisis of legitimacy by the regime included the appointment of some members of political parties, some members of major institutionalized religions, and scholars into the cabinet. The return of the Kabaka's remains for national burial, and the expulsion of Asians, were also intended to address the crisis of legitimacy of the regime. However, as regime challengers waged a protracted guerrilla war against the government, the economy continued to decay, and factionalism tore apart the cabinet and the army, both the state and the regime became despotically weak and infrastructurally weak. The result was that anarchy, repression, violence and lawlessness became the order of the day.[9]

In 1979, the Uganda National Liberation Front (UNLF) assumed power. Factionalism within the front, violent struggles for power, corruption and dictatorship, the divisive politics of liberation, and protracted guerrilla warfare, preserved the powers of the state and regime: despotically weak and infrastructurally weak. Such a state and regime became an important site of anarchy, violence and repression. In fact, this state, like that of its predecessor, acquired important characteristics of a genocidal state.[10]

When Obote assumed power in 1980 (Obote II), the crisis of legitimacy persisted for a number of reasons: the politics of liberation alienated many people; the results of the elections were violently contested; some of the politicians who were genuinely defeated in the elections, including Yoweri Museveni, took arms to fight to regain power; and those who had been ousted from power waged a protracted guerrilla warfare. The result was that both the state and regime became despotically weak and infrastructurally weak in those parts of the country where armed insurgencies escalated: Buganda and West Nile. In these two regions, anarchy, lawlessness, concentration camps, repression, and genocide violence defined both the state and regime. Regime challengers also became genocidal in these regions: they destroyed property and massacred unarmed civilians. The persecution of Rwandese refugees and Banyarwanda, and the violation of the rights to asylum by some Rwandese refugee warriors also took place during this period.

Profound crisis of legitimacy within the UPC, the cabinet and the army, escalated the anarchy, repression, violence and lawlessness to other sectors of the society. In the end, the faltering regime was toppled in 1985 by a section of the army, led by some Acholi officers.

In July 1985, General Tito Okello seized power. The Okello regime attempted to address the crisis of legitimacy by reaching negotiated settlements with the Democratic Party (DP), the Conservative Party (CP), the Federal Army (FEDEMU), Uganda Freedom Army (UFA), Uganda Rescue Front (URF), Former Uganda Army (FUNA), and a faction of the UPC. However, attempts to appease the National Resistance Army (NRA), led by Museveni, failed. Its religious commitment to the policy of appeasement and its feverish attempts to a negotiated settlement with the NRA, made the regime neglect its administrative responsibility in the country. The result was that both the regime and the state became so despotically weak and infrastructurally weak that unprecedented anarchy and lawlessness embraced the country. Indeed, it was during this period that state powers became so weak that the state only existed because it was recognized by international laws and international persons.[11]

The Path to Genocide in Northern Uganda

In January 1986, Museveni seized power. The defeated Gen. Okello and his Uganda National Liberation Army (UNLA) fled to Acholiland and southern Sudan, where the UNLA committed atrocities against unarmed civilians. By the end of March 1986, Lt. Gen. Museveni had effectively consolidated his power throughout the country, thereby making both the state and the regime despotically strong and infrastructurally strong. During that period, stability returned to every part of the country, including Acholiland.[12]

However, Museveni's army, the NRA, that had been quite disciplined during the period, began to arrest, detain, beat, rape and murder unarmed civilians in Acholiland. Some former members of the UNLA who reported to the NRA and National Resistance Councils (NRC), as requested by the government, were also tortured, and in many instances, murdered by the army. The soldiers also looted livestock and

other movable property from Acholiland. According to the government, these atrocities, especially those committed in Namokora from May to July 1986, were the work of the 35th Battalion of the NRA. This battalion, it claimed, comprised former members of FEDEMU who had joined the NRA after the fall of Kampala. FEDEMU, the regime insisted, comprised mainly of Baganda combatants who decided to avenge the lost their relatives at the hand of the UNLA in the Luwero Triangle during Obote II. The widespread looting by the NRA, it further claimed, was the work of the former members of FEDEMU who wanted to reclaim what had been looted from Buganda by the UNLA during the Luwero war. The atrocities committed against the Acholi, therefore, were presented by the regime as a continuation of ethnic conflict between the Baganda and Acholi.[13]

Former members of FEDEMU, however, claimed that the atrocities were committed by Rwandese and Banyankole members of the NRA. According to this view, the government shifted the responsibility for the atrocities on former members of FEDEMU because it had began to discriminate against the Baganda members of the NRA. Also, that the explanation offered by the government was intended, in part, to protect Rwandese refugee warriors in the NRA and NRM against the growing anti-Rwandese sentiments in the country. Furthermore, FEDEMU explained, the 35th battalion was made up of UFM, not FEDEMU.[14]

The widespread and intense atrocities that the regime of Lt. Gen. Museveni committed, generated a profound crisis of legitimacy in Acholiland. The atrocities and other related acts of terror and systematic violations of human rights by the regime were considered by the Acholi as acts of genocide for a number of reasons. First, the NRA had humiliated the Acholi by defeating them militarily. The humiliation was quite devastating to the Acholi because some of them believed that they were the most outstanding warriors in Uganda. This belief was partly influenced by the fact that the Acholi had provided a significant portion of the army in the country for the most part of both the colonial and post-colonial periods. Second, Museveni and his political appointees dehumanized and humiliated the Acholi by repeatedly referring to the ethnic group and its culture as backward and primitive. Genuine grievances by the Acholi were also presented by the regime and its scholars as evidence of inferiority, backwardness and primitiveness. Third, the victimization and murder of some prominent Acholi leaders by the regime were seen as attempts to undermine the faltering social order of the group. Fourth, confiscation of livestock, the violent relocation of hundreds of thousands of Acholi to "protected camps" by the government, the pillage of Acholiland, including destruction of crops and water wells by the regime, were seen as measures aimed at impoverishing and starving the target population. Fifth, the widespread rape of both women and men by the NRA, the terror tactics the NRA employed in the area, torture, including *kandoya*,[15] and murder of thousands of unarmed civilians, were perceived as deliberate measures calculated to cause mental harm and exterminate the Acholi.[16]

The systematic persecution of the Acholi by the NRA provided one of the anti-regime armed groups, the Uganda People's Democratic Army (UPDA), with popular support in Acholiland. With this support, the UPDA, predominantly Acholi, attacked and captured Ukuti village, near Namokora, in August 1986. The victory of the UPDA was partly aided by the Sudan government which supported the insurgents because the Museveni regime provided arms and political support to the armed opposition group, the Sudan People's Liberation Army (SPLA).[17]

The NRA responded with overwhelming reprisals against unarmed civilians in Namokora. For example, at least 40 civilians were executed in one incident by the NRA. This massacre, among many others by the NRA, forced thousands of people to flee in search of security and protection.[18] Unfortunately, there was no security and protection in the entire Acholiland. In fact, Acholiland had become a war zone where armed protagonists targeted unarmed civilians as well. The UPDA, for example, tortured and massacred some unarmed civilians whom it referred to as "traitors." It also waged a protracted and harrowing war against members of another anti-regime armed group, the Holy Spirit Movement (HSM).[19]

The HSM, led by a self-proclaimed prophetess, Alice Auma (Lakwena), became the most dominant anti-regime armed group in Acholiland from late 1986 until its demise at the end of 1987. Like the UPDA, the HSM gained a strong foothold in Acholiland as a direct result of the atrocities committed by the NRA. It also dislodged the UPDA from the area because the latter had become brutal and ineffective. Unlike other insurgency groups in Acholiland, the HSM combined religious idioms and contemporary military strategies to mobilize military and political support from the population in Acholiland, Lango and Teso. Its primary objectives, the HSM claimed, were to remove the genocidal regime of Museveni, cleanse Acholiland and the rest of the country, and institute a regime based on social justice, respect and fear of God.

During its short existence, the HSM fought, won and lost many battles against the NRA. It also tortured, maimed and massacred many unarmed civilians who disagreed with its philosophy or disobeyed its order or failed to adhere to the Ten Commandments, as interpreted by Lakwena and her political aid, Professor Isaac Newton Ojok (Minister of Education in Obote II). Thousands of its supporters also perished in the hands of the NRA because they fought largely using Christian hymns, sticks, stones arrows and bows against a modern army. The NRA further took advantage of the war and tortured, raped, abducted and killed many innocent people in Acholiland, destroyed crops, schools, hospitals and boreholes, and confiscated more livestock from the area.[20] Another important aspect of the war was that the military engagement between the HSM and the UPDA, and the HSM and the NRA, violently uprooted hundreds of

thousands of Acholi. The overwhelming majority of the uprooted population languished in the war zone without humanitarian assistance and protection.

The humanitarian crisis and persecution of unarmed civilians in Acholiland continued after the decisive defeat of the HSM by the NRA near Jinja (fifty miles from Kampala) in late 1987. This time, Lakwena's father, Severino Lukoya, reorganized remnants of the defeated HSM, predominantly Acholi, into HSM II. The objectives, tactics and strategies of HSM II remained the same as those of Lakwena's HSM. For example, throughout its brief existence (1988–1989), HSM II terrorized and killed many Acholi whom it perceived as its opponents. It also caused the deaths of hundreds of its supporters who faced the NRA with Christian hymns, sticks, stones, bows and arrows. The NRA responded by adopting the same objectives, tactics and strategies: it burned down more houses and granaries, destroyed more crops and schools, confiscated more livestock, raped, maimed and murdered many more Acholi.[21]

The path to genocide was further paved by the activities of Joseph Kony's Lord's Resistance Army (LRA). The LRA was formed at about the same time as HSM II in late 1987. Soon, the LRA became the most organized, the strongest and the most brutal insurgency group in Acholi. Like the previous armed opposition groups, it was almost exclusively Acholi. Like the UPDA, it received military assistance from the Sudan government. The Sudan government provided military assistance to the LRA because the SPLA was armed by the Museveni regime. The military assistance the LRA received from the Sudan government; the overwhelming brutality of the NRA in its war of pacification in Acholi; the continuous humiliation and disgrace of the Acholi by the regime; the persistent attempts by the regime to inculcate in the ethnic group being persecuted a sense of collective self-reproach; the unwillingness of the Museveni regime to resolve the crisis in Acholi through a negotiated settlement; the disintegration of the UPDA following the controversial and conflict-laden Pece Peace Agreement; and the demise of the HSMII, strengthened the LRA.

As soon as the LRA gained military prominence in Acholiland, it attacked the NRA, overran a number of military detachments, seized large quantity of arms and ammunition, destroyed a number armoured vehicles, killed many NRA soldiers and captured many more. In fact, the LRA became so powerful that it roamed Acholiland almost without a military challenge from the NRA. It also spread its insurgency activities to Lango and Teso.

The LRA has also attacked, captured, abducted, maimed and killed many members of the Local Defense Units, especially the "bow-and arrow" brigades. The primary roles of the brigades, which comprises exclusively Acholi, are to defend the area against the LRA, and report the presence of LRA and its sympathizers to the NRA. These roles made the brigades an important military target. For example, on April 22, 1995, the LRA attacked the LDU centre in Atiak in Gulu district. An estimated 72 members of the LDU and unarmed civilians were killed in the attack. Some unarmed civilians, especially women and children were tortured and abducted.[22]

Since 1995, the LRA has actively used land mines in the conflict. The result is that a number of government soldiers, members of the LDU and peasants have been maimed and killed. Also, land mines are often planted near wells and granaries, in farms and along footpaths and roads. This method of warfare has made Acholiland extremely dangerous, especially for women who travel long distances to fetch water and collect firewood, and peasants who must till the land for subsistence.

Another form of warfare the LRA continues to use in the conflict is abduction of women and children. For example, in March 1989, it abducted 10 girls from St. Mary's College Aboke, in Lango. In October 1996, it abducted 152 girls from the same school. After the headmistress of the school appealed to the commanders of the LRA, 109 girls were released. While some of the women and children who were abducted become soldiers, others were forced to become wives of LRA officers. Girls and boys who escaped from the LRA report of systematic rape, mutilation and other forms of torture experienced by the victims who were unable to walk the long and difficult journey with the LRA.[23]

The NRA/Uganda People's Defence Force (UPDF) responded to the presence of the LRA by planting land mines in various places in Acholiland. Most of the land mines were manufactured by the army in Nakasongola near Bombo. The army has also attempted to contain the insurgency by executing suspected LRA collaborators. In some instances, the army hands over those it has branded LRA collaborators to mobs to beat them to death. For example, on August 16, 1996, the UPDF handed over a number of suspected LRA collaborators to a mob in Gulu town. As ordered by the army, the mob beat the suspects to death. This incident took place in the presence of the 4th Division Commander, Col. J. Kazini, and the Deputy Commander of the Division, Major. S. Ssemakula. Col. Kazini has since been promoted to the rank of a Brigadier and has become the Army Chief of Staff.[24]

In its protracted war of pacification, the UPDF has destroyed many homes and killed many unarmed civilians in Acholiland. The systematic destruction of homes and massacres of unarmed civilians have resulted, in part, from the repeated and unrestrained use of helicopter gunships to dislodge the LRA. For example, on August 31, 1995, an estimated 100 homes were destroyed and 210 unarmed civilians were killed in Lukung, near Kitgum, when one of the helicopter gunships opened fire on what the NRA described as a column of LRA. Many more civilians have been executed by the army, even in areas that are under its control. For example, in what is popularly known as the "Kitgum District Bar Incident of 1995," the army killed 38 and injured 8 civilians who were drinking in a bar in Kitgum.[25]

The systematic use of terror, abduction, mass rape, harsh beatings during

questioning, mass detention of civilians and other forms of torture against civilians have increased in the counter-insurgency in Acholiland. For example, R. Gersony in *The Anguish of Northern Uganda*, notes that:

> Brutal beating of civilians during questioning in rural areas was described as routine. This is reported not only when army patrols reach villages through which rebels may have passed, or which they believe to be collaborating with the LRA ... Rape appears to be a continuing problem.[26]

Gersony further notes that:

> A widespread complaint in Gulu town is that at night the UPDF soldiers in civilian dress, or civilian thugs with whom such soldiers collaborate, prey upon the civilian population through looting and—in isolated cases—killing of those who resist ... A number of cases have apparently been confirmed by the local authorities.[27]

D. Mowson, a representative of Amnesty International at the "Kacoke Madit" in London in July 1998, also noted that, "while rebels are guilty of widespread human rights abuses, UPDF has, over the years, also been caught red-handed committing similar atrocities."[28]

Another strategy that the UPDF has adopted in the war against the LRA is to forcibly relocate a large number of the civilian population to "protected camps." For example, in October 1996, the UPDF forced over 100,000 people in Gulu to relocate to a "protected camp." As a recent report observes,

> In most cases, civilians were given a three-day deadline for moving. Although reluctant to leave their homes, they were advised that if found in rural areas they would be treated as "rebels." The Government had made no advance arrangements for health, sanitation, food or other assistance, aggravating the increased infant mortality which predictably arose in these locations.[29]

The violent relocation of unarmed civilians into camps is intended to achieve a number of objectives: make it difficult for the rebels to mobilize new recruits; deprive the rebels of food supplies and other support from the population; punish the Acholi for not voting for Museveni in the 1996 election; and deter the insurgents from attacking army detachments in Acholiland. It is hoped that the violent relocation would deter the LRA from attacking the detachments because the insurgents would have to kill their own people in the camp before they can destroy army detachments which are located in the camps. The government, however, suggests that its military strategy is intended to reduce the number of civilian fatalities during counter-insurgency in the area.

Humanitarian Disaster and the Myths of Protection in "Protected Camps."

There are two categories of the civilian population that are internally displaced. The first comprises hundreds of thousands of civilians who were forced by the government to abandon their homes and farms for "protected camps." Those who were violently uprooted by the UPDF from their homes in Gulu in October 1996 belong to this category. The UN Assessment Mission (1997) also notes that 14 other "protected camps" that were created in 1996 and 1997 by the UPDF in Gulu District belong to this group. As J. Rone observes, camps that belong to this category were created through violence by UPDF:

> [T]hose [civilians] who chose to remain behind were ordered to move to the camps by the UPDF officers ... in some cases were beaten if refused to move. A number of witnesses claimed that the UPDF shelled near reluctant villages in order to create fear and force the civilians to move.[30]

The second comprises those civilians who fled to the "protected camps" because of unrestrained terror by both the LRA and UPDF. Members of both categories, who number over 470,900, were violently and involuntarily uprooted from their homes to the camps (see tables 1 and 2). Almost half of those in the camps are children under 5 years old and women (see table 3).

Table 1: Conservative Estimates of the Number of Internally Displaced Persons (IDPS) per Camp in Gulu District

Sub-division	County	Number of IDPs
Amuru	Kilak	32,000
Awe	Kilak	11,000
Pabo	Kilak	20,000
Atiak	Kilak	14,000
Awach	Aswa	8,000
Onyama	Aswa	6,000
Coo-pe	Aswa	9,000
Palaro	Aswa	4,000
Labwonyaro-moo	Aswa	5,000
Patiko	Aswa	7,000
Gwenya-deyo	Aswa	6,500
Cwero	Aswa	5,200
Alero	Nwoya	28,000
Anaka	Nwoya	36,000
Koc-Goma	Nwoya	5,000
Koc-Ongako	Nwoya	7,000
Acet	Omoro	16,000
Odek	Omoro	11,000
Bobi	Omoro	7,000
Lakwara	Omoro	6,000
Gulu	Municipality	50,000
Total		297,400*

Table 2: Conservative Estimates of the Number of Internally Displaced Persons (IDPS) per Camp in Kitgum District

Sub-division	County	Number of IDPs
Lacek-Ocot	Aruu	7,500
Acholi-Buu	Aruu	5,000
Pajule	Aruu	22,000
Kalongo	Agago	6,000
Patongo	Agago	21,000
Palabek-Kal	Lamwo	9,000
Padibe	Lamwo	7,000
Nam-Okora	Chua	20,000
Kitgum	Town	50,000
Total		147,500

* There are 26,000 Acholi who fled and live in camps in Kigumba and Karuma in Masindi District.

Source: n.a., *Internal Displacement in Acholi, 1998*. n.p. Deposited at the Wider Consultation on Uganda (WiCU), London.

Table 3: Children under Five-Years Old and Women Living in Displaced Camps in Gulu District

Camp	Population
Acet	3,500
Alero	6,600
Amuru	23,306
Anaka	2,500
Awach	13,613
Awer	3,733
Koch Goma	10,000
Lalogi	1,853
Olwal	6,893
Opit	7,483
Pabo	42,556
Pagak	8,303
Palaro	7,600
Patiko/Ajulu	9,511
Unyama	3,134
Angung	758
Apyeta	1,800
Co-pe	1,500
Cwero	5,212
Kaladima	1,344
Labongo Gali	4,397
Paicho	6,847
Palenga	4,000
Parabongo	6,000
Total	208,443

Source: Anne-marie dos Reis Mendes, *Nutritional Survey: Children under 5 Years Old and Female Adults living in Displaced Camps in Gulu District, Uganda*, Action Contre la Faim—USA, April 1998.

The internally displaced persons live in overcrowded camps without sanitation, clean and adequate water, basic medical services and adequate food. In June and July 1998, it was widely reported in Uganda that the little food that the IDPs receive in the camps contains broken glass. The result of the inhumane conditions is that children are not only malnourished, but are dying in large number from measles, malaria, cholera and dysentery. For example, Gulu District Medical Officer, Dr. Paul Onek, notes that 12 children died in UPDF protected camps in Kaunda ground and Pece Community Centre in Gulu between October 16 and 22, 1996. This figure is representative of the high infant mortality in the camps. Onek concludes his report by observing that more people are dying daily from secondary effects of the war than from the war.[31] Pece camp leader, Mary Layado, also notes that many people are dying of starvation and diseases related to overcrowding and lack of food. She attributes the deaths and starvation to "lack of food and drugs from both the government and NGOs."[32] According to a Government Settlement Officer in Charge of Refugee Integration, lack of food is partly caused by the UPDF and government officials:

> In certain cases, humanitarian assistance meant for the IDPs has always [sic] been diverted by Government forces. Government troops in some instances have used food assistance meant for the internally displaced. In addition, government officials entrusted with the task of managing relief are known to have diverted it for their own use.[33]

The humanitarian crisis is exacerbated by the destruction of granaries and crops by the army and rebels, confiscation of livestock by the army, land mines, the harrowing war and terror which have persisted for over 12 years, and recurring droughts and famines in the area.

The humanitarian crisis has resulted in part from the reluctance of many international humanitarian organizations to provide assistance to the IDPs in the camps. The response of the humanitarian organizations is based on the following reasons: the violent relocation of the population to the camps by the UPDF which suggests that the camps were constructed to protect the interests of the government, not those of the civilians; the unwillingness of the government to arrange for basic material well-being of the population as required by the Geneva Convention; the co-location of the "protected camps" or "protected barracks" and military detachments in places such as Pabo and Amuru that make the civilians a first line of attack by the rebels against the army; confiscation of humanitarian assistance by the UPDF; the unwillingness of the UPDF to provide protection to the "protected camps;" the failure or unwillingness of the government to end the war that has ravaged the area for over a decade; the reluctance by the government to provide full and free access to humanitarian and human rights organizations and the media; the determination of the government to withhold or distort information about the nature, intensity and magnitude of the humanitarian crisis in Acholiland; and the unwillingness of the government to declare Acholiland a "disaster zone." The unwillingness of the government to declare Acholiland a disaster zone, the organizations claim, is a result of government's propaganda which suggests that there is no humanitarian crisis in Acholiland, and that the government is in full control of the situation in the area. Given the fact that the "protected camps" were not created to protect the population, the organizations further maintain, providing assistance to them violate the neutrality required to protect the IDPs. Some humanitarian organizations have also refused to provide humanitarian assistance because of the pervasive insecurity in Acholiland.[34]

The government, however, denies the accusations made by some humanitarian organizations. It claims that, although there are serious problems in the camps, they do not amount to a humanitarian disaster. The situation in Acholiland, it further insists, is under control. In fact, it suggests that the insurgencies do not pose any serious security problems to the civilian population in Acholiland. Furthermore, it maintains that everything possible is being done to protect the IDPs from the violence of the LRA. What humanitarian organizations should do, it urges, is to respect the sovereignty of the state and provide assistance in a manner similar to what is being done by humanitarian agencies in other parts of the country.[35]

While the debates about humanitarian assistance persist, the IDPs in Acholiland continue to perish. They also faced increased insecurity and severe lack of protection in the "protected camps." Indeed, both the UPDF and the LRA abduct, rape, terrorize and murder IDPs. For example, in late June 1998, the

Presidential Advisor, Major Kakoza Mutale, arrested and tortured over 150 IDPs from "protected camps" in Gulu. In an attempt to justify the persecution of the IDPs, he branded them supporters of rebels. The action of the Presidential Advisor forced the members of parliament from Acholi to accuse him "of arresting innocent civilians from Gulu protected camps and branding them rebel collaborators." The MP vowed to kill him, if he dared cross back into Acholiland.[36] In June 1998, the LRA attacked the camp at Lacekocot in Kitgum District and abducted 20 IDPs. The attack, one in a serious of similar incidents, forced an estimated 28,000 IDPs to threaten to desert the camp because the army had not only failed to protect them, but had become a major source of insecurity and terror.[37] Thus, a government Settlement Officer in Charge of Refugee Integration observes that:

> Whereas IDPs in northern Uganda ... fled their homes due to insecurity, attacks on their camps have continued in areas where they fled to. Newspaper reports have quoted both rebels and government forces continuing harassing displaced persons.

Prisons in Gulu and Kitgum, he further notes, "are full of IDPs as tax defaulters." He concludes his observation by pointing out that, besides suffering from intimidation, rape, harassment and abductions, the IDPs have lost property to both LRA and UPDF.[38]

The Myth of Asylum by the Victims of the Path to Genocide

Although systematic and gross violations of human rights by both the Museveni regime and its armed challengers have persisted for nearly 12 years, those who escaped persecution from Acholiland are often denied asylum by democratic and industrialized governments, especially Canada, Sweden, Norway, the United Kingdom and the United States. Contrary to overwhelming evidence, governments of these states maintain that the Museveni regime is democratic, protects and enhances human rights, and provides peace, stability and protection to the people in Acholiland. The support for the Museveni government, which translates into denying asylum to people from Acholiland, is based on the following: Uganda's unwavering commitment to the Structural Adjustment Programs (SAPs) of the World Bank and International Monetary Fund (IMF); Uganda's commitment to protect and enhance the economic and political interests of some Western states in the Great Lakes region; the insignificance of human rights and democratic practice as legitimate criteria for supporting governments in Africa; the humanitarian fatigue and foreign policy crises in the West that suggest the need to defend the status quo; the ability of the Museveni regime to control the most visible, populous and sensitive portions of the country; reports and publications by scholars and humanitarian and human rights organizations that distort the nature, intensity and magnitude of the crisis in Acholiland; the effective and efficient propaganda of the government through its lobbies and scholars in many capitals, including Washington, London and Ottawa; and the refugee deterrence policies of Western governments.

An account of an Acholi refugee woman in the United Kingdom will demonstrate the myth of asylum by genuine refugees from Acholiland. The refugee woman, whose family was one of the wealthiest in Acholiland, fled to the UK in May 1997. Her story was verified by many people, including the author, Cathy Majtenyi (journalist for the *Catholic Register*, Toronto) who carried out a field research in Kitgum and Gulu, four Acholi elders who attended "Kacoke Madit" in 1998, and a prominent church leader in Kitgum. Here is the voice of the refugee woman:

> My daughter who was studying in a secondary school in Kitgum was abducted by the LRA in late October 1996. She was raped many times by the rebels. Luckily, she managed to escape. After trekking for many days, she reached Kitgum. Since my husband had appealed to the UPDF to locate her, he took her to the army to report her return. Surprisingly, the army described my daughter as a spy for the LRA. She was then terrorized and asked to identify LRA collaborators in Kitgum. The army terrorized her partly because one of our relatives is a member of the LRA. Thereafter, some army officers threatened that I surrender my houses and factory in Kitgum to them, if I wanted my family to stay alive. The same officers claimed that I was also spying for the LRA because one of my relatives is a member of the LRA. In early January 1997, the army attacked my house, killing two of my servants at night and setting the two buildings on fire. In late March 1997, I was ambushed by the UPDF. In the ambush, my lorry was destroyed and I was shot. Although the bullet was later removed from my body, I am still receiving treatment in London.
>
> While the UPDF was terrorizing us, the LRA was also busy threatening our lives. According to some LRA supporters in Kitgum, the LRA was going to eliminate us because my daughter revealed the identity of LRA officers and the location of LRA units in Kitgum. We also received numerous death threats from ordinary people who were in the protected camps. These people wanted to kill us because some of their relatives had been abducted or killed by the LRA. Another reason why they wanted to kill us was because of our relative who is a member of the LRA. The persecution we faced from the government, rebels and ordinary people, discouraged us from seeking protection in the camps. In fact, the camps are not safe because people are abducted, raped and killed by the LRA, supporters of LRA, UPDF, government supporters, and aggrieved civilians.
>
> When I arrived in the United Kingdom in May 1997, I was too scared to apply for asylum because I was told that many Acholi were being deported to Uganda. I was also too uncomfortable to share my trauma and that of my daughter with anybody. About a month after my arrival, my daughter joined me in London. Upon her arrival, she applied for asylum. A few months later, I applied for asylum. To our surprise, the British government rejected our applications. Yet, two of my sons have been

granted indefinite leave to stay in the country. Furthermore, everybody in Kitgum knows what happened to me, my daughter and the rest of my family. Even a prominent church leader from Kitgum has confirmed most of our stories. Of course, he could not write much about my daughter because we learnt that she was actually abducted by the UPDF, not LRA. My son, you interviewed us in Kitgum in April 1997 while you were collecting information about the war. You approached us because you had heard from other people in Kitgum what had happened to us.

Both my daughter and I have nightmares. We are sleepless because the decision by the British government has forced us to re-live the persecution we suffered in Uganda. My son, tell me: who is a refugee? Is it not someone like me or my daughter who has been persecuted by everyone: the government, rebels, supporters of the government, supporters of the LRA, and ordinary civilians who took the law into their own hands? Who should protect people like us? I hear the British talk about human rights, but do I have human rights? Does my daughter have human rights? Do the people who are dying at home have rights?

Conclusion

In May 1997, a government official in Gulu told a conference that an estimated 50 percent of the entire Acholi population—over 300,000 Acholi—have perished in the protracted war since 1986. Based on other reports as well, the DP adopted the estimate and demanded an investigation into possible genocide in Acholiland. The DP based its demand, in part, on the United Nations Security Council resolutions on genocide. It also called for a judicial investigation into massacres, mass rapes and torture carried out against unarmed civilians in Acholiland by the UPDF.[39]

In a similar view, the Rt. Rev. Bishop Onono-Onweng of the Diocese of Northern Uganda paints a picture of genocide in Acholiland: massacre of civilians, mass rape, widespread terror and lack of protection in Acholiland, starvation and deaths from diseases related to starvation, lack of basic health care, and destruction of schools and hospitals by both the LRA and UPDF.[40] The Resident District Commissioner of Kitgum, George Odwong, added that:

> The consequences of this insurgency are numerous and obvious. Over time, the people and their social codes have become overwhelmed and disorganized by the magnitude of this problem. Testimonies of awful experiences among all categories of people reveal the extent to which people have suffered physically and psychologically. As a result of the degradation of the status of the people, they are now compelled to live under very stressful conditions like displacement, abduction, deprivation, victimization, humiliation, separation, and institutionalization.[41]

An elder from Gulu who attended the "Kacoke Madit" in London in July 1998 made a similar observation:

> It seems that both the government and the rebels are determined to exterminate the Acholi. The overwhelming majority of government troops and members of the LDU who are killed by the LRA are Acholi. Members of the LRA who are killed by the UPDF are Acholi. Innocent people who are abducted, raped, terrorized and killed by the UPDF and the LRA are Acholi. So, whenever the government celebrates the massacre of the rebels, it is celebrating the death of Acholi. Similarly, whenever the rebels celebrate the massacre of government troops, it is celebrating the death of Acholi ... Almost 90 percent of the entire population of Acholiland is in concentration camps, without food, security, human rights and human dignity. Additionally, it is estimated that over 300,000 Acholi have died as a result of the war. Isn't this genocide?[42]

The foregoing observations are consistent with the working definitions of genocide adopted in this study.

Efforts to end the genocide are being led by religious leaders, Acholi Parliamentary Group (APG), Wider Consultation on Uganda (WiCU), Kacoke Madit and other informal groups. These groups are exerting pressure on both the government and LRA to reach a negotiated settlement. For example, during a meeting organized by religious leaders, with the support of the UNDP (June 28, 1998), appeals were made to both the government and the LRA to negotiate a settlement. The meeting also called for reconciliation that focuses, in part, on the need to adopt traditional Acholi conflict resolution mechanisms. Also, *Bedo Piny Pi Kuc* (Sitting Down for Peace), as the meeting was referred to, highlighted reasons why the genocidal war has dragged on for 12 years: lack of morale among the NRA/UPDF; the unwillingness of the protagonists to find a peaceful solution to the conflict; the support being provided to the SPLA/SPLM by the Museveni regime; the support being provided to the LRA by the government of Sudan; opposition to a negotiated settlement by some high-ranking UPDF officers and powerful civilians who are benefiting from the war; the active involvement of some powerful Western governments in the war by using Uganda and Acholiland as a base to fight against the Sudan government; and the profound crisis of legitimacy of the Museveni regime in Acholiland.[43]

In a similar vein, Kacoke Madit (KM)—which brought together non-partisans, supporters of the regime and opponents of the regime—called for a negotiated settlement and reconciliation to end the war in Acholiland. In its London resolutions of July 19, 1998, KM deplored "the heartless and manipulative role being played by certain foreign powers, non-governmental organizations, and individuals who have vested interest in the perpetuation of the conflict." It also underscored the urgent need for humanitarian assistance to be taken to the people of northern Uganda who are dying of starvation. Another important resolution called upon the government of Uganda to declare Acholiland a disaster zone so that the international community may respond urgently to the humanitarian crisis. Kacoke Madit also called upon the Museveni regime to adhere to its constitutional obligation to protect the lives and property of its citizens in Acholiland.[44]

Track Two or people-to-people diplomacy that these groups have embarked on, offers important channels of communication and creates options for negotiated settlements. However, this approach should be complemented by Track One diplomacy, where official representatives of governments, regional and international organizations play active roles. Track One diplomacy brings more resources, incentives, muscle and higher prestige to mediation than Track Two diplomacy. Official mediators may also improve the chances of a negotiated settlement. This is particularly important because the Museveni depends on military and diplomatic assistance from Canada, United Kingdom, the United States, Sweden, Norway and other industrialized states. The LRA, for its part, depends on military support from the Sudan.

Mediation should be supported by sanction regimes and forceful actions to ensure compliance from the LRA and the Museveni regime. Both parties to the conflict should be denied the ability to resupply arms, ammunition, and hard currency. Preventative action should focus on creating political, economic and military barriers to lower the level of armed engagement. There is also urgent need to carry out a massive humanitarian operations to halt the genocide. Equally, there is an urgent need to have mediators that are perceived by both parties to the conflict as fair and just. This perception is important if a high-quality and durable settlement is to be reached. Scholars, international organizations, the media, human rights and humanitarian organizations should expose violations of human rights and support a negotiated settlement to the war. The general public also has an important role to play: it should petition respective political leaders and governments to support a negotiated settlement and policies that protect human rights.[45]

Halting genocide in Acholiland and the raging wars in other parts of Uganda requires a coordinated national, regional, continental and international approach to early warning and early response, conflict resolution and humanitarian intervention. It is only by adopting such a policy that the genocidal wars in the Sudan and Burundi will also be brought to an end. The ravaging war in the Democratic Republic of Congo also requires a similar approach. This war resulted, in part, from attempts by Uganda and Rwanda, heavily armed by South Africa and the United States, to use Congolese-Tutsi to topple the despotic regime of President Kabila. With the military support that Kabila has obtained from Zimbabwe, Angola and Namibia, the war has sucked in many African countries. The escalation of this war has not only shuttered the myths of a new generation of African leaders, but has also called into question the legitimacy of the state, the incumbents, their challengers and supporters. Equally, the war threatens to tear apart the faltering continent. This war will also generate more refugees and internally displaced persons, and consume the scarce resources needed to contain the socioeconomic decay and political upheavals in Africa. ■

Notes

1. R. Lemkin, *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for International Peace, 1974).
2. L. Horowitz, *Taking Lives: Genocide and State Power* (New Brunswick, NJ: Transaction, 1982). See also, F. Chalk and K. Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT: Yale University Press, 1990), especially 29; L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT: Yale University Press, 1981).
3. For working definitions of legitimacy see, for a start, J. H. Scholar, *The Legitimacy in Modern State* (New Brunswick, NJ and London, U.K.: Transaction Books, 1981), 17–30; A. Moulakis, ed., *Legitimacy* (Berlin and New York: Walter de Gruyer, 1986), 2–5; R. Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press, 1990), 5–59. N. N. Kittrie, *The War Against Authority: From Crisis of Legitimacy to Social Contract* (Baltimore/London: The Johns Hopkins Press, 1995), highlights tensions, instability and violence that emanate from a crisis of legitimacy.
4. For informed debates about state powers, see J. A. Hall, ed., *States in History* (Oxford: Basil Blackwell, 1986).
5. The legitimacy of both the state and regime were based on imperial European international laws (the Berlin Conference of 1884–1885) and agreements which Britain reached with other imperial powers interested in the territory.
6. See O. Otunnu, *Political Violence in Uganda, 1890–1998* (Forthcoming, 1999), chap. 2.
7. Ibid.
8. Ibid., chap. 3.
9. Ibid., chap. 4.
10. Ibid., chapter 5.
11. Ibid., chapter 7.
12. See, for example, R. Gersony, *The Anguish of Northern Uganda Results of a Field-Based Assessment of the Civil Conflicts in Northern Uganda*, a Study Commissioned by the United States Embassy, Kampala and USAID Mission, Kampala, August 1997, 13.
13. See O. Otunnu, "Uganda and the Rise of RPF," in H. Adelman and A. Suhrke, eds., *The Path of Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick, NJ. Transaction Books, Fall, 1998), chap. 2; *Political Violence in Uganda, 1890–1998*, chap. 8 (Forthcoming, 1999). See also, Amnesty International, *Uganda: The failure to Safeguard Human Rights* (London: AI, 1992), 11.
14. O. Otunnu, "Rwandese Refugees and Immigrants in Uganda," in Adelman and Suhrke, eds., *The Path to Genocide*, chap. 1, and "Uganda and the RPF," in *The Path to Genocide*, chap. 2, explain why and how Rwandese refugees in Uganda joined the NRA/NRM, and the growing anti-Rwandese sentiments in Uganda. See also, Six Baganda, former members of FEDEMU, interviews by the author, London, July 13 and 15, 1998.
15. According to Amnesty International, *Uganda: The Failure to Safeguard Human Rights* (London: AI, 1992), 87, "*Kadoya*, also known as 'three-piece tying,' involves tying the victim's arms together above the elbows, behind the back. It is extremely painful, putting great pressure on the chest, causing difficulties in breathing and sometimes permanent damage to the arms. A variation, known as 'briefcase,' involves the victim's legs also being tied behind his back. The victim may then be suspended above the ground."
16. Sixty-eight Acholi elders, interviews by authors, December 1987 and July 1988, Kitgum, Gulu and London. Later human rights organizations and the press reported these gross violations of human rights by the NRA. According to A. Rake, "Museveni must act," *New Africa*, November 1989, 27, observes that "once disciplined National Resistance Army has been shown to have become as brutal and haphazard as those of Idi Amin and Milton Obote at their

worst. This is not just our view. It has been borne out by Amnesty International and by the Uganda press (even the government press)." See also, Uganda Law Society, *Matters of Concern to Uganda Law Society* (Kampala: Uganda Law Society, April 9, 1990), 1–11; "Law Society Hits at Government Record," *Weekly Topic*, Kampala, Friday, 27 April 1990, 16; Amnesty International, *Uganda—Death in the Countryside: Killings of Civilians by the Army* (London: AI, December 1990), *Extrajudicial Executions* (London: AI, April 29, 1991), *Uganda: The Failure to Safeguard Human Rights*, (London: AI, 1992), 10–62, 70–81; Report of the Committee on International Human Rights of the Association of the Bar of the City of New York, *Uganda at Crossroads—A Report on Current Human Rights Conditions*, July 1991, especially 29–32.

17. See, for a start, Gersony, *The Anguish of Northern Uganda*, 22.
18. Amnesty International, *Uganda: The Failure to Safeguard Human Rights*, 19–62, highlights numerous extrajudicial executions, massacres and other forms of gross violations of human rights by the NRA in Acholiland, Lango, Teso and Buganda.
19. Otunnu, *Political Violence in Uganda*, chap. 8.
20. See, for example, Amnesty International, *Uganda: The Failure to Safeguard Human Rights*, 13–66; Gersony, *The Anguish of Northern Uganda*, 24–25.
21. Otunnu, *Political Violence in Uganda, 1890–1998*, chapter eight. See also Amnesty International, *Uganda: Failure to Safeguard Human Rights*, 10–81; Gersony, *The Anguish of Northern Uganda*, 29.
22. See, for example, Gersony, *The Anguish of Northern Uganda*, 38.
23. For elaborate accounts of abductions and torture of women and children by the LRA, see Human Rights Watch, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (Washington, DC: HRW, 1997); Amnesty International, *Breaking God's Command: The Destruction of Childhood by the Lord's Resistance Army* (London: AI, 1997); Human Rights Watch, *Crises in Sudan and Northern Uganda: Testimony of Jemera Rone, Human Rights Watch, Before the House Subcommittee on International Operations and Human Rights and Subcommittee on Africa, July 29, 1998* (New York: HRW, 1998), especially 14–17.
24. See Gersony, *The Anguish of Northern Uganda*, 45.
25. Otunnu, *Political Violence in Uganda, 1890–1998*, chap. 8. Gersony, *The Anguish of Northern Uganda*, 45–46, provides a lower estimates of the homes destroyed and the civilians killed by the UPDF in the two incidents.
26. Gersony, *The Anguish of Northern Uganda*, 46–47.
27. Gersony, *The Anguish of Northern Uganda*, 47.
28. See *The Monitor*, Kampala, Monday, July 20, 1998, 2. See also, State Department, *Uganda: Country Report on Human Rights Practices, 1997* (Washington, DC: State Department, 1998).
29. Gersony, *The Anguish of Northern Uganda*, 48.
30. Human Rights Watch, *Crises in Sudan and Northern Uganda*, 13.
31. See "12 Die in UPDF Protected Villages," *Monitor*, June, 1997. See also "UN Seeks Food for North," *The New Vision*, Monday, 26 April 1997, 40.
32. See "12 Kids Die in Gulu Camps," *The New Vision*, Wednesday, 25 June 1997, 11.
33. Mugumya, *Uganda's Internally Displaced Persons*, 20.
34. Five officials of three major humanitarian organizations based in Kampala. Conversation with author, London, July 1998. See also, Gersony, *The Anguish of Northern Uganda*, 50–51; Mugumya, *Uganda's Internally Displaced Persons*, 15–16.
35. See, for example, G. Mugumya, *Uganda's Internally Displaced Persons: Towards Durable Solution* (Kampala, Ministry of Local Government, 1997), 15–16; "12 Die in UPDF Protected Camps," *Monitor*, Wednesday, October 30–01 November, 1996.
36. See *The Monitor*, 1 July 1998, 7.
37. See, for example, *New Vision*, Monday, 29 June 1998, 10.
38. Mugumya, *Uganda's Internally Displaced Persons: Towards Durable Solution*, 18, 22, and 26.
39. See the Democratic Party, *Northern Uganda—Towards a Durable Solution: Peace, Justice and Democratic Self-Governance with Reconciliation and Development*, Kampala, May 19, 1997.
40. The Rt. Rev. Bishop Nelson Onono-Onweng, quoted in "Acholi Leaders Seek Peace for War-torn Northern Uganda," *EIR* (London), 7 August 1998, 59–61.
41. George Odwong, Resident District Commissioner of Kitgum, quoted in "Acholi Leaders Seek Peace for War-torn Northern Uganda," 58.
42. An elder from Gulu, 72 years old, interview with the author, London, July 20, 1998.
43. *Declaration of the Bedo Piny on Peace and Reconciliation in Acholiland, Gulu, June 26–28, 1998*. Efforts to use Track Two Diplomacy in the conflict is described at length by D. Pain, "The Bending of Spear," December 1997. Unpublished report deposited at WiCU.
44. *Kacoke Madit, Resolutions, 1998*.
45. See Otunnu, "Conflict and Conflict Resolution," *Refuge* 16, no. 6 (December 1997): 3–5. ❐

Accounting for Crimes: The Role of International Criminal Tribunals in Effectively Addressing Impunity

Iris Almeida

Abstract

In this paper, the author examines the ways in which accountability for international crimes could become a practical reality. She takes the position that "impunity" is inimical both to justice, and to lasting peace and democracy in post-conflict societies and proposes a conceptual framework for the international rule of law as an alternative. She also argues that a strong, independent and permanent International Criminal Court (ICC) would ensure the kind of universal enforcement of international law that will lead to a progressive, long-term reduction of human rights violations.

Précis

Dans cet article, l'auteur examine de quelle façon la responsabilité juridique pour crimes internationaux peut devenir une réalité pratique. Elle défend la position selon laquelle l'idée d'«impunitée» est incompatible autant avec l'idée de justice, qu'avec les idées de paix durable et de démocratie dans les sociétés post-conflictuelles. Elle propose comme alternative un cadrage conceptuel pour le code des lois internationales. Elle développe aussi l'argumentation selon laquelle la Cour pénale internationale (CPI) serait le plus sûr garant du seul type d'application des lois internationales susceptible de mener à long terme à une graduelle réduction des violations des droits humains.

Genocide, ethnic cleansing, crimes against humanity. These are words that conjure up powerful images of extreme brutality and utter disregard for the dignity of the human being, and are often associated with the Second World War. But crimes of this heinous nature continue to occur around the world, even as we speak. In early May of this year, British Rights Activists witnessed "widespread systematic destruction" in southern Sudan, as government-armed Islamic fundamentalists slaughtered hundreds of mostly Christian civilians.[1] In Sierra Leone, withdrawing military forces have reportedly destroyed at least 36 villages in recent weeks, while committing horrific atrocities against unarmed civilians, including rapes, mutilations and killings.[2] And in Afghanistan, the Taliban army has recently blocked supply routes to the Hazarajat region, home to an ethnic minority of more than 1.5 million, in order to starve the "rebels" who presently control the region; but instead, it is civilians who are starving and dying.[3]

In all of these cases, little or nothing has been done. Perpetrators of these crimes are in effect able to continue to violate international law with impunity, as the international community looks on with indifference, or simply paralysed by political considerations. Clearly, the situation must change.

And there are modest signs that it will. Indeed, the search for stable, credible, non-politicized mechanisms for dealing with heinous international crimes might be approaching an historic moment. Between June 15 and July 17 of this year, delegations representing 148 member states of the United Nations convened in Rome in order to negotiate a treaty establishing a permanent International Criminal Court (ICC). On July 17, 1998 the statute was adopted after a dramatic vote requested by the United States in which 120 states voted in favour, 21 states abstained and 7 states voted against. For the statute to come into force and the Court to be established, 60 states must now ratify the treaty. If established in the right way, this Court could strike a formidable blow against violators of international law, who, in so many cases, have managed to flout international legal norms for far too long, managing to avoid any form of accountability for their crimes.

Why should Canadians care if these violations only occur in countries separated from us by distance and culture? In short, because human rights violations hurt all of us. Ensuring the strict and uniform application of international law to the perpetrators of such crimes is of vital importance for all Canadians for a number of reasons.

Firstly, on a purely philosophical and cultural level, the protection of human rights are rooted in universal values that Canadians share: heinous crimes, such as genocide, mass murders, torture, rape and military sexual slavery have long been and continue to be repugnant acts that are simply unacceptable to Canadians. The values that Canadians share with citizens around the globe require that efforts be made to stop such crimes when possible, and to do all that can be done to bring the perpetrators of such crimes to justice.

Secondly, in 1997–98, it is estimated that $90 million of the Canadian International Development Agency (CIDA) was oriented to human rights, democratic development and good governance initiatives in overseas developmental assistance countries. Yet impunity, as we shall see, in so far as it acts as a stumbling block for democracy, stands to wholly frustrate these Canadian foreign policy objectives in developing countries. Human lives, including those of Canadians working for change in these regions, truly do hang in the balance.

Finally, Canadian foreign policy has made a priority of providing international leadership in the battle against impunity by pursuing several avenues

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in the field of international law and justice. Our government has demonstrated a firm commitment to treaties on international crimes by not only adopting and ratifying them itself, but also by encouraging other states to do likewise. Moreover, Canada has pledged its support for the creation and effective implementation of international *ad hoc* tribunals for the former Yugoslavia and for Rwanda, with particular emphasis on programmes of witness protection. Most recently, Canada has been at the forefront of the group of like-minded states advocating for the creation of a strong International Criminal Court at the Conference of Plenipotentiaries. Given this agenda, it is imperative that Canadians be aware of the key issues, in order to evaluate and keep a close eye on their government's policy direction with respect to initiatives against impunity in general and the International Criminal Court in particular.

It is with these considerations in mind that we propose to examine the ways in which accountability for international crimes can become a practical reality. In order to do so, however, we must first establish, in specific terms, the reasons why impunity is inimical not only to justice, but also to lasting peace and democracy in post-conflict societies, and therefore why the battle against impunity is so critical. We will then attempt to evaluate the relative success of the various mechanisms which have aimed, since World War II, to apply international law to perpetrators of heinous crimes both in international and domestic armed conflict situations. Finally, as we shall see, for true justice to be served, it is essential that international law and international legal tribunals take account of gender-sensitivity: the perspective of the female victim and witness of sex or gender-related crimes must be reinforced.

Combatting Impunity: The Importance of Bringing Perpetrators of International Crime to Justice

Before addressing the ways in which impunity for international crimes has been and could be combatted, it is essential to first understand why the battle against impunity is so crucial. To do so, let us begin by defining a concept inextricably linked to impunity: the international rule of law. This will allow us to highlight the connection between impunity for violent crimes and the vicious circle of continuing violence which plagues a considerable number of countries where the rule of law is, for all intents and purposes, nonexistent.

The Culture of Impunity: Flouting the Rule of Law

The notion of the "rule of law" is one of the most basic principles of internal law, i.e., the law that applies within the territory of a sovereign state. Although the specific meaning given to the expression "rule of law" might differ from society to society, at least one fundamental element reoccurs in almost all domestic legal systems: the "justiciability of fundamental rights," that is the ability for citizens to "invoke guaranteed rights and freedoms before tribunals against all organs of the State."[4] This, in turn, provides the basis for equality within a democratic regime, because no citizen, not even a government leader, is above the rule of law.

In the international system, the concept of a rule of law is rather novel, yet, without question, it has begun to take root as a desirable, if not essential objective. Indeed, it was the almost unfathomable brutality and scope of the atrocities committed during the two World Wars that shocked the conscience of humankind and moved the international community into action towards establishing an international rule of law. Since then, numerous international treaties and conventions were adopted in order to protect the most fundamental rights of human beings and to ensure that such atrocities would never happen again.

As a result, international law, a mixture of customary and treaty-based law, as it stands today, does in fact criminalize certain egregious violations of human rights from which, in theory at least, no domestic law can derogate. These crimes, which include crimes against humanity, genocide and war crimes,[5] are characterized as having attained a level of *jus cogens*: they establish "inderogable protections and the mandatory duty to prosecute or extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies."[6]

The problem is, international law on *jus cogens* crimes is simply not being applied uniformly and systematically, as the principles of the rule of law and of justice dictate. This means that a considerable number of perpetrators of international crimes have been successful in flouting the international rule of law and escaping punishment.[7] This culture of impunity has serious consequence for the stability and well-being of post-conflict societies.

Impunity Begets Further Crime: The Vicious Circle of Violence

When perpetrators of horrific crimes such as genocide, war crimes and crimes against humanity go unpunished, the consequence is not simply an offence to morality, but in fact represents one of the most dangerous obstacles to peace and democracy: an unending cycle of revenge and retributory violence.

Indeed when victims of international crime are given no recognition and no means for peaceful, legal redress, they become cynical and frustrated with the state. They begin to turn to violent means in order to seek revenge, in order to seek a kind of personal or vigilante justice.[8] This further undermines transitional regimes, which are already fragile, and can sometimes lead to their total destruction.

Several worrying events around the globe provide compelling illustrations of this phenomenon. Earlier this year, we witnessed the hostage-taking and ensuing standoff with government officials in Peru by the Tupac Amaru guerilla forces. More recently, one can point to the attack on security personnel at a Colombian prison by the Revolutionary Armed Forces of Colombia, which allowed more than 324 inmates to flee.[9] Such violent outbreaks are not confined to Latin America: ethnic minority rebels

in the break-away Abkhazian region of the Republic of Georgia have now been accused of ethnic cleansing against ethnic Georgians living in and around this region.[10]

All of these cases are telling examples of how impunity can set-off an unending spiral of violence for past suffering. The instability generated by such vigilante justice only serves to undermine democracy, by lending credence to the claims of military leaders that only tyrannical governance can ensure peace. This, in turn, spurns more violence against so-called dissidents, and both peace and democracy collapse. This is precisely what occurred in Argentina in the 1960s and 1970s. As recent events indicate, if effective measures are not taken to end impunity, the same pattern of violence to avenge violence can once again set in, as is the case in Latin America, where fledging, transitional democratic regimes are struggling to stay afloat.

Criminal Prosecutions: Breaking the Chain of Violence

One of the keys to stopping the chain of violence is to end impunity for the crimes of tyrannical government leaders of the past before the cynicism and frustration of citizens pushes them to see vigilante justice as the only acceptable solution. If transitional regimes are to garner the kind of widespread, popular support they need to be durable, then they must dare to use in a timely manner the windows of opportunity available to them in the early phase of transition, before the euphoria fades. They must ensure that appropriate legal mechanisms are established and adequately funded with international, bilateral and multilateral cooperation, so as to seek out and hold accountable perpetrators of past human rights violations. The objectives of these mechanisms should be three-fold:

1) *investigate and make public the "Truth"*: for a victim of a crime against humanity, the "right to truth is a part ... of a greater right to justice;" thus the State has an obligation to "establish the truth about the repressive structure that led to the commission of [such crimes], including the chain of command, the orders given, the establishments that were used, and the mechanisms knowingly used to insure impunity and secrecy in these operations;"[11]
2) *allow for adequate redress for victims*: this should include, where appropriate, financial compensation, rehabilitation (physical, psychological, etc.) and restitution (if possible, e.g., returning wrongfully seized property, restoring a job to victim who was imprisoned, etc.).[12]
3) *ensure a fair and impartial trial, based on the principle of the rule of law*: not only must justice be done, it must be seen to be done. This means that prosecutions should be widely publicized and accessible and that they must not be based on *ex post facto laws*, but rather on well established international law, such as the *jus cogens* law against genocide, war crimes and crimes against humanity. Procedures must also be strict: due process and the accused's right to full answer and defence must be upheld.[13]

Access to the Truth, adequate redress and *bona fide* prosecutions are all fundamental obligations placed on States by international law.[14] They are also a very necessary step in ensuring that a society emerging from government-sponsored mass victimization can heal itself and move forward.

Mechanisms of Accountability: An Historical Review of Post-World War II Initiatives

If ending impunity is such a critical goal to ensure peace and democratic development through the application of the rule of law, how have domestic and international law fared in achieving this goal?

Unfortunately, one quickly realizes that the results are inconsistent at best and sorely inadequate at worst, despite some successes in fighting impunity in certain particular cases. Let us examine the various accountability mechanisms established and in use since World War II, by focusing firstly on the domestic level and, secondly, on the international level. Is there any alternative to these institutions for dealing with the kinds of pervasive massive human rights violations and for battling impunity for these crimes, both of which continue to this day?

The Role of Domestic Law

In an ideal world, every state would not only have internal laws that prohibit the kinds of egregious violations of human rights that genocide, war crimes and crimes against humanity represent, but they would also have the kinds of judicial instruments that would allow for the effective prosecution and punishment of such crimes. Sadly, in so many countries, this is simply not the case.

Instead, even when laws do exist, their enforcement is rendered impossible because of either a lack of resources, a lack of political will, or both. Witness the 1997 show trial of Pol Pot carried out by his Khmer Rouge comrades in Cambodia: although sentenced to life imprisonment, Pol Pot died in April of this year, without ever having served even one day of his sentence. He lived with outright impunity until the very end, surrounded and protected by his supporters, who still revered him. Pol Pot died without ever being held accountable for the genocidal massacre of 2 million Cambodians, which he is alleged to have personally engineered. Clearly, in the case of Cambodia, domestic courts were simply unwilling and unable to serve justice.

Of course, it is political interests that create this institutional incapacity and inaction. Such has also been the case not only in Cambodia, but also in Colombia, Venezuela and Brazil in recent decades. Furthermore, often times, due to political pressures, or simply as a prerequisite for the cessation of hostilities, would-be or recently installed civil governments are compelled to offer military criminals blanket amnesty for all serious crimes. Laws establishing such blanket amnesties were especially frequent in Latin America during the 1980s and 1990s, as evidenced by the cases of El Salvador, Guatemala, Haiti, Peru and Uruguay.[15]

The case of South Africa may represent a counter-example, however. Some argue that the choice to emphasize national reconciliation by offering selective amnesty through a Truth and Reconciliation Commission (TRC) was a necessary compromise between "Nuremberg-style trials for the leaders of the former apartheid government" and "blanket amnesty," both of which would have led to the break-down of negotiations between the African National Congress [ANC] and the de Klerk government that ultimately resulted in the end of the apartheid regime.[16]

Furthermore, the TRC legislation did not allow for the kind of impunity seen in Latin America. Under the TRC law, amnesty was only granted after a suspect applied to the TRC, and through his or her testimony, provided the Commission with what was judged to be "full disclosure" of his or her human rights violations, based on specific criteria laid out in the legislation. Furthermore, the law prescribed time limits for applications: 14 May 1997 was the cut-off point. From that point onwards, no amnesty could be granted by the Commission.[17]

Nevertheless, it remains to be seen whether the South African Truth and Reconciliation Commission can "serve justice in a longer term perspective."[18] In other words, although it is undeniable that the political compromise reached in South Africa with respect to accountability for crimes under the former tyrannical regime allowed for the transition to a democratic regime, the fact remains that domestic law makes this regime, in many cases, unable to punish perpetrators of crimes that are clearly illegal under international law.

Indeed, the question becomes even more pertinent when one considers the blanket amnesty laws of Latin America, not to mention the judicial vacuum witnessed in Cambodia. Do any mechanisms exist at the international level to ensure that, regardless of domestic legal and political particularities and inadequacies, perpetrators of heinous crimes are still made to answer for them?

International Law in a Domestic Context

When domestic law proves inadequate, what role can be played by international law? In principle, as we have already seen, international law, as it has developed through custom, judicial precedent and treaty, currently proscribes a number of *jus cogens* crimes, including genocide, war crimes, and crimes against humanity.[19] The high status of this law has at least two significant consequences. Firstly, there is an obligation (*obligatio erga omnes*) placed upon states to extradite or prosecute an accused suspected of having committed one or several of these crimes (also known as the principle of "*aut dedere aut judicare*") whenever there is sufficient evidence to support these allegations. Secondly, these crimes are punishable by any state, regardless of the exact geographic location in which they were committed. In other words, according to this principle, commonly referred as to universal jurisdiction, international law recognizes any state has the requisite sovereignty to prosecute *jus cogens* crimes, even when they are committed outside the territory of that particular state.[20]

The problem is that in practice, these principles of international law are often not implemented by states, in spite of their signatures and ratification of numerous international treaties. There are of course exceptions. For example, Canada and Belgium, in addition to having ratified the Geneva Conventions, have adopted internal laws that specifically proscribe the most serious international crimes, such as genocide and war crimes.[21]

Other exceptions to this rule of non-implementation can be seen in certain countries of the South that have carried out domestic prosecutions of persons accused of gross violations of human rights. For one, Ethiopia has been investigating and prosecuting, since 1993, individuals responsible for genocide and war crimes that occurred under the Mengitsu military dictatorship, which plagued that country from 1974 to 1991.[22] And Argentina has prosecuted in the past decade or so, numerous military leaders who had carried out forced disappearances during the "Dirty War" of the 1970s and early 1980s.[23]

But even in cases such as these, where domestic law specifically allows for the criminal prosecution of those accused of international crimes, legal institutions may often not have the kinds of resources necessary for carrying out adequate investigations and prosecutions. Further, political leaders may interfere with the judicial process, in order to spare military leaders who are allies of theirs in government. Or worse yet, the entire judicial system itself might be so unstable or corrupt as to make the goal of fair and expeditious trials completely unattainable.[24]

How can we ensure, in the light of these shortcomings of domestic regimes in the implementation of international criminal law, that impunity for the most serious crimes does not continue unopposed in the future?

The Lessons of Nuremberg, The Hague and Arusha: The Relative Progress of Ad Hoc International Criminal Tribunals

The international community has, on a small number of occasions, found the courage and political will to come together in order to fight impunity by overcoming the paralysis or non-existence of strong, impartial domestic legal institutions. The solution adopted in these cases was an international criminal tribunal.

The Nuremberg Trials immediately proceeding the Second World War were an important step in the process towards a stable and meaningful international rule of law. At the time of the formal adoption of the International Military Tribunal Charter in 1945, Germany was being occupied by Allied troops and German sovereignty was effectively being exercised by Allied powers. As such, in order to ensure a fair and efficient trial of senior Nazis, it was obvious that an international effort would be required.

Pursuant to the IMT Charter, which was eventually signed by nineteen

states,[25] the Tribunal was to have jurisdiction over three crimes: the "crime against peace," "crime against humanity" and "war crimes."[26] The United States especially saw these trials as a unique opportunity to make binding international law and was therefore adamant that they be carried with impartiality and be limited to the specific crimes appearing in the Charter. Efforts were made by British and American prosecutors to emphasize at the time that the justice being meted out at Nuremberg was not retroactive: the crimes specifically punishable under the IMT Charter were simply derived from prior customary international law.[27]

It took almost fifty years, but the precedent of Nuremberg was finally made use of during the decade of the 1990s, which saw the creation of two more *ad hoc* international criminal courts: the International Criminal Tribunal on the Former Yugoslavia (ICTY) at the Hague and the International Criminal Tribunal on Rwanda (ICTR) at Arusha. Both of these *ad hoc* tribunals were set up following large-scale human atrocities which galvanized the international community towards, among other measures, a judicial response to the crimes that had already been committed in order to fight impunity and create some kind of deterrent effect against further massive violations of international law.

In effect, the ICTY and ICTR were a considerable improvement upon the Nuremberg precedent, which some have called "victors' justice." Not only did the ICTY and ICTR incorporate new substantive international law from the past fifty years to the precedents of Nuremberg, particularly with respect to the procedural rights of the accused, these *ad hoc* tribunals are truly international bodies in the sense that both their judges and their prosecutors are supplied by a wide variety of countries, none of which were parties to the conflict which gave rise to the crimes being prosecuted.[28]

Nevertheless, while these tribunals have represented significant progress towards a strong and stable international rule of law and the elimination of impunity for serious human rights violations, they have not escaped criticism and controversy. The main deficiency plaguing these types of *ad hoc* tribunals is their vulnerability to political manipulation and obstructionism.

In the first place, achieving consensus on how and when they are created and how they will function is no easy task: it took the Security Council almost two years between the time at which it was first informed of the atrocities being committed in Yugoslavia and the date at which it finally appointed a Prosecutor; two years later, although seventy-five indictments had been issued, only two individuals had stood trial.[29] Furthermore, the ability of such tribunals to effectively apprehend and prosecute suspected international criminals is severely hampered by the noncooperation of states, such as the Federal Republic of Yugoslavia (Serbia and Montenegro), that harbour these suspected criminals, because these individuals are intimately linked to the political leadership of the state, if they are not the actual political leaders themselves.[30] Finally, precisely due to the non-permanent nature of these tribunals, any deterrent effect is almost certainly lost, not only for would-be criminals in states other than the former Yugoslavia and Rwanda, since the ICTY and ICTR only have jurisdiction over those territories, respectively, but also because, even within those regions, the tribunals are temporally constrained and generally lack adequate resources, such that there is no guarantee of how long they will continue to exist.

Towards an Effective International Criminal Court: Making the Right Choices

These deficiencies highlight the grave importance of a permanent and effective International Criminal Court (ICC) in the quest for a uniform and systematic application of international law to end the culture of impunity that prevails in so many countries around the world. Indeed, only a strong, independent and permanent ICC can ensure the kind of universal enforcement of international law that will lead to a progressive, long-term reduction of human rights violations.

Building on the work of the International Law Commission during the late 1940s until the mid-1950s, which led to a Draft Statute for an ICC in 1954 that was never formally adopted by any state, the UN once again began in 1989 to develop a statute that would provide for the establishment of a permanent ICC. Since 1989, a total of six UN Preparatory Committees have progressively refined the Draft Statute of the ILC. It would have appeared that all that was left to be done was to adopt it. The truth is, at the commencement of the United Nations Diplomatic Conference last June, the Draft Statute still contained over 1,300 bracketed texts and offered numerous options to choose from.

Thus, there remained a significant chance that states will be pressured towards a sort of lowest common denominator consensus, which would be truly anathema to the underlying goal of battling impunity. In the opinion of numerous leading non-governmental organizations and human rights defenders, a weak, toothless court could be even worse than no court at all, because it would only encourage further atrocities by proving the international community's lack of resolve when it comes to the battle against impunity.

In order to ensure that the ICC would be truly credible and effective, unprecedented concerted lobbying action was pursued by non-governmental organizations and a group of like-minded states went on. Their work focussed on ensuring some of the following essential attributes:

1) *guaranteed inherent jurisdiction over genocide, crimes against humanity and war crimes*: as in the case of the ICTY and ICTR, the Court must be empowered to be seized with cases involving these most serious international crimes, regardless of the citizenship or physical location of the accused. States must not be entitled to opt-out of the Court's jurisdiction at their will if an effective and uniform ap-

plication of international law is desired.

2) *an independent Prosecutor*: the Prosecutor must have an *ex officio* power to launch investigations based upon information from a wide variety of sources, and not exclusively on the basis of a situation referred by the Security Council or a given State. An independent Prosecutor would not only ensure that political concerns do not taint the judicial process through obstructionism, but would also contribute to a more vigourous battle against impunity.
3) *state cooperation*: in order to avoid the kinds of obstacles which have afflicted the *ad hoc* tribunals of the recent past, the ICC needed the power to compel states to apprehend and transfer suspects, to grant access to witnesses and to gather and share evidence. The Court judgements needed the power to be enforced by signatory states, including the sentences and compensation orders for victims.
4) *recognition of the specificity of gender-related crimes and capacity to protect victims and witnesses of such crimes*: the ICC statute needed to expressly include gender-specific crimes as coming under crimes against humanity. Rape and other similar crimes of serious sexual violence and abuse aimed specifically at women have for too long been ignored. As well, mechanisms needed to be set up to provide adequate witness protection and preparation for trial, so as to avoid the revictimization of vulnerable witnesses, particularly women victims of sexual violence, who might suffer reprisals in their communities for coming forward. Indeed, if the Court did not wish to deter victims from coming forward in the first place, their anonymity was to be guaranteed. Finally, Court personnel needed to include experts in gender issues, so that all stages of the trial, from investigation to indictment, prosecution and/or sentencing were to be free of gender-based discrimination.

The key highlights of the Statute adopted in Rome may be succinctly summarized as follows:

The Court will prosecute natural persons (individuals) (article 25). It will cover events that occur once the treaty is in force (article 11). The Court will have "automatic jurisdiction" over genocide, war crimes, crimes against humanity and aggression (article 5). The crime of aggression will be defined at a later date. The Court will be divided into 4 organs: the Presidency, the Divisions of the Court, the Office of the Prosecutor and the Registry (article 34). 18 Judges will sit on the Court and serve on a full-time basis for a 9 year term of office (articles 35–36). States would have to take into account the need for fair gender and regional representation in the choice of judges (article 36 paragraph 8). Cases can be referred to the Court by Prosecutor, the UN Security Council or by states-parties (article 13). The Prosecutor thus will have the ability to start investigations *proprio motu*. The Court may exercise jurisdiction only when one of two states is a state party or gives its consent, namely the state of the nationality of the accused or the territorial state (article 12). Noninternational armed conflict which is the predominant form of conflict in the world today is included in the definition of war-crimes (article 8). Crimes against humanity will have to be "widespread and systematic" as well as linked to a policy and directed at civilians (article 7). This will effectively prevent the Court from taking up isolated acts, regardless of how horrific these acts and their consequences are. Gender crimes such as forced prostitution, trafficking in women and children and forced pregnancy are included as war crimes and crimes against humanity (article 7 paragraph 2(f); article 8 paragraph 2(b)(xxii)). The Statute provides for a victim and witness unit under the Registrar (article 43 paragraph 6), as well as a Legal Advisor on Gender crimes (article 42 paragraph 9). The death penalty which is still part of domestic law in many countries was not included. Although the Court does not have the power to order state compliance itself, the Court may request the states parties to cooperate (articles 86–87). This cooperation includes collection of evidence, arrest and surrender of a person, protection of victims and witnesses and seizing proceeds of crimes (articles 89–93). No reservations are permitted under the Statute (article 120).

Clearly the Statute adopted remains far from perfect. Nevertheless, it is the best possible compromise that could be negotiated in order to get the largest number of states to adopt it and thus enhance the potential for its ratification and coming into force.

Conclusion

The opportunity to finally establish a strong, stable and uniform application of international law through the creation of a permanent International Criminal Court now stands before us. The key is to learn from the past, and in particular, from the moderate successes and undeniable shortcomings of the various legal mechanisms used over the past five decades to combat impunity.

Only an international rule of law that provides access to truth and equal justice for all can effectively end the cycle of violence and instability that has plagued so many countries attempting to undergo the often turbulent and painful transition from tyranny to democracy. As we have seen, it is only by holding perpetrators of gross human rights violations accountable for their crimes that we can move forward. Justice truly is the *sine qua non* condition for long-lasting peace and democratic development.

In order to ensure that this historic opportunity is not lost, members of civil society must mobilize state action. States must be reminded of the importance of actually following through with their commitments in the battle for the universal application of humanitarian law and respect for human rights in general. To further this end, civil society must demand not only continued state support for existing accountability mechanisms, whether they be domestic courts or international *ad hoc* tribunals, but also must lobby for the early ratification of the ICC treaty by at least 60 states so that an effective and credible Interna-

tional Criminal Court can come into force. The battle for Truth and Justice for all citizens of the world is far from being won. Nevertheless, if the necessary political will can be mustered in the coming months and years, we will certainly succeed in striking a formidable blow against impunity and thus provide the necessary environment for participatory and sustainable democratic development. ■

Notes

1. C. Davies, "Genocide in Sudan: Aid-worker Reports on Aftermath," *The [Montreal] Gazette*, May 26, 1998, at B1.
2. J. Beltrame, "World's Fury Rains Down on Pakistan," *The [Montreal] Gazette*, May 29, 1998, at B1.
3. Ibid.
4. J.-Y. Morin, "L'État de droit: émergence d'un principe de droit international" (1995). Recueil de cours de l'Académie de droit international 10 at 182 [author's translation].
5. Some jurists would also include torture, aggression, piracy, slavery and slave-related practices as crimes of *jus cogens*. See, for example, C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" [hereinafter C. Bassiouni, International Crimes], in C. Bassiouni & C. Joyner, eds., *Reining in Immunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17–21 September 1997*, (Quercy: Association internationale de droit pénal, 1998) 133 at 139.
6. C. Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" [hereinafter C. Bassiouni, Accountability] in Joyner & Bassiouni, eds., *supra* note 5, 45 at 56.
7. For example, among the estimated 285 armed conflicts between 1945–1996, only 49 had given rise to some form of legal redress: see J. Balint, "An Empirical Study of Conflict, Conflict Victimization and Legal Redress 1945–1996," in Joyner & Bassiouni, eds., *supra* note 5, 101 at 119.
8. See, for example, N. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms For Mass Violations of Human Rights," (1996) 59:4 Law and Contemporary Problems 127 at 128.
9. Serge F. Kovaleski, "Rebels Give Colombia a New Black Eye," *International Herald Tribune*, Edited in Paris, May 27, 1998 at 9.
10. Ibid., at 5.
11. J. Méndez, "The Right to Truth," in Joyner & Bassiouni eds., *supra* note 5, 255 at 263.
12. See Amnesty International, *Disappearances and Political Killings: Human Rights Crisis of the 1990's—A Manual for Action*, (Amsterdam: Amnesty International, 1994) at 167–68. Amnesty International's recommendations were specifically oriented towards redress for victims of forced disappearances, but can be applied to victims of other state-supported crimes.
13. See, for example, Art. 9 and Art.14 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171.
14. See J. Dyke and G. Berkley, "Redressing Human Rights Abuses," (1992) 20:2 Denver Journal of International Law and Policy 243 at 244–45. They identify several sources of international law that compel states to prosecute human rights abuses, including treaties (e.g., Convention on the Prevention and Punishment of Genocide, December 9, 1946, 7 U.N.T.S. 227; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 4, 1985, 23 I.L.M. 1027 (1984); etc.); customary law, as exemplified by the Nuremberg and Tokyo trials; and jurisprudence, such as the ruling in the *Velazquez Rodriguez* Case 28 I.L.M. 291 (1989), where the Inter-American Court on Human Rights stated that each state party has a "legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."
15. D. Cassel, "Lessons From the Americas: Guidelines For International Response to Amnesties For Atrocities," (1996) 59:4 Law and Contemporary Problems 197 at 200.
16. Ibid., Justice Richard Goldstone quoted at 222.
17. A. Boraine, "Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights," in Joyner & Bassiouni, eds., *supra* note 5, 221 at 222–23.
18. H. S. Greve, "'Do Not Interfere ...' Recording the Facts and the Truth," in Joyner & Bassiouni, eds., *supra* note 5, 245 at 252.
19. C. Bassiouni, Accountability, *supra* note 6, at 56.
20. C. Bassiouni, International Crimes, *supra* note 5, at 137.
21. Canada has successfully prosecuted a number of Nazi war criminals residing in Canada: see I. Cotler, "National Prosecutions, International Lessons: Bringing Nazi War Criminals in Canada to Justice," in Bassiouni & Joyner, eds., *supra* note 5 at 161. In Belgium, the Law of 16 June 1993 explicitly affirms the principle of universality for war crimes: see M. Swartenbroekx, "Moyens et limites du droit belge," in A. Destexhe & M. Foret, eds., *De Nuremberg à La Haye et Arusha*, (Brussels: Bruylant, 1997) at 122.
22. See G. Wakjira, "National Prosecution: The Ethiopian Experience," in Bassiouni and Joyner, eds., *supra* note 5, 189 at 189.
23. For a detailed treatment of the domestic trials of military leaders of the "Dirty War" in Argentina, see J. Malamud-Gotti, *Game Without End: State Terror and the Politics of Justice* (Norman, OK and London: University of Oklahoma Press, 1996).
24. See S. Landsman, "Alternative Responses To Serious Human Rights Abuses: Of Prosecution and Truth Commissions" (1996) 59:4 Law and Contemporary Problems, 81 at 85.
25. See C. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 Harvard Human Rights Journal 11 at 29.
26. B. Ferencz, quoted in *International Campaign For the Establishment of the International Criminal Court in 1998* (Rome: XPRESS-ROME, 1997) at 35–36.
27. See, for example, A. Wieviorka, "Les Procès de Nuremberg et d'Eichmann, en perspective," in Destexhe & Foret, *supra* note 21, 23 at 25.
28. See Kritz, *supra* note 8 at 130.
29. See C. Bassiouni, *supra* note 25 at 45.
30. Ibid., at 39–45. □

The International Criminal Court: An Historic Step to Combat Impunity

William A. Schabas

Abstract

Fifty years after it was originally promised in article VI of the Genocide Convention, the International Criminal Court (ICC) has finally seen the light of day. It was created by the Rome Conference, which met from June 15 to July 17, 1998, following four years of intense negotiations. This article provides an overview of the Rome Statute for an International Criminal Court along with a discussion of entry into force of the treaty.

Précis

Cinquante ans après que sa création ait été promise à l'article VI de la Convention contre le génocide, la Cour pénale internationale (CPI) a finalement vu le jour. Elle fut créée à l'occasion de la Conférence de Rome, tenue du 15 juin au 17 juillet 1998, après quatre ans d'intenses négociations. Cet article donne une vue d'ensemble du Statut de Rome pour une Cour criminelle pénale, accompagnée d'une discussion de l'entrée en vigueur du traité.

What will be known as the *Rome Statute of the International Criminal Court* was adopted on July 17, 1998, at the conclusion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The *Statute*, which is an international treaty, provides for the establishment of an international criminal court upon its ratification or accession by sixty States, a process that may take several years. Once the treaty comes into force, the Court will be in a position to try individuals for four categories of international crimes: genocide, crimes against humanity, war crimes and aggression. There are important pre-conditions to the exercise of jurisdiction by the Court. First, national justice systems must have been deficient; in effect, the Court is only "complementary" to existing domestic judicial mechanisms and may operate only when they have failed, for a variety of reasons specified in the *Statute*, to act. Second, the Court may only try individuals who are nationals of States parties to the treaty, or individuals who are accused of committing crimes on the territories of States parties. If found guilty, offenders may be sentenced to terms of life imprisonment.

The adoption of the *Rome Statute* is the conclusion of efforts at the establishment of international justice which can be traced to the end of the First World War. But the limited examples of international criminal justice for such serious crimes have been confined to *ad hoc* institutions, created so as to deal, retroactively, with particular situations—Nazi Germany, Japan, the former Yugoslavia and Rwanda. The new Court will operate only prospectively, trying crimes that occur after its creation. As a permanent international institution, it will work in close association with the United Nations although it is formally independent.

This paper presents a brief overview of the *Rome Statute* and the features of the new International Criminal Court.

Historical Background

Historians of international criminal law often begin with the medieval trial of Sir Peter of Hagenbach, who was tried and executed because of his reign of terror in the fortified town of Breisach.[1] But the *Treaty of Versailles* provides the first contemporary experiment in international justice. Article 227 contemplated the trial of the Kaiser by an international tribunal, although this never took place because of the Netherlands' refusal to extradite.[2] The *Treaty of Versailles* also envisaged the trial before Allied military tribunals of persons accused of violating the laws and customs of war.[3] Germany subsequently opposed the surrender of those chosen for trial by the Allies, arguing that the trial of many of its principal military and naval leaders would imperil its Government's existence. A compromise was effected, deemed to be compatible with article 228 of the *Versailles Treaty*, whereby the Supreme Court of the Empire in Leipzig would judge those charged by the Allies. Lists were prepared naming 896 Germans, but only a handful were ever actually brought to trial under charges laid according to Germany's Military Penal Code and its Imperial Penal Code.[4]

During the interior period, there were attempts to create a permanent international criminal court, and in 1937 a treaty to this effect was signed by thirteen states, but it never came into force.[5] As the Second World War drew to a close, the United Nations War Crimes Commission also prepared a draft statute for an international criminal court.[6]

The great breakthrough was the adoption on August 8, 1945, in London, of the *Charter of the International Military Tribunal*.[7] The *Charter* was actually used for only one trial, that of twenty-three "major war criminals" of the Nazi regime which began in November 1945 and finished on October 1, 1946. The Tribunal was empowered to convict for war crimes, a concept already well-established in international law, but also for crimes against peace and crimes against humanity, whose recognition was more controversial. The International Military Tribunal's judgment is a seminal historical document on the atrocities of the Nazi system.[8] Companion proceedings were undertaken against Japanese war criminals before the Tokyo Tribunal under a statute that was modelled on the *Nuremberg Charter*.[9] Most Nazi and Japanese war crimi-

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nals, as well as their collaborators, were tried before national courts of the States where the crimes took place or by military tribunals set up by the Allied victors. In Germany, the most important of these were held at Nuremberg from 1946 to 1948 by American military courts, pursuant to Control Council Law No. 10.[10]

The *Convention for the Prevention and Punishment of the Crime of Genocide*, adopted December 9, 1948,[11] envisions the eventual establishment of an international criminal court.[12] In 1950, following work in International Law Commission on the establishment of an international criminal jurisdiction, the General Assembly of the United Nations agreed to set up a committee charged with preparing a draft treaty.[13] But after two postponements in the General Assembly,[14] the international criminal court project was shelved for more than thirty years. At the request of the Assembly, the International Law Commission eventually returned to the issue.[15] The Commission presented its final report to the General Assembly in 1994.[16] But in the meantime, events had overtaken the Assembly. In May, 1993, the Security Council, in an innovative move that relied on Chapter VII of the *Charter of the United Nations*, created an *ad hoc* international tribunal for crimes committed in the former Yugoslavia since 1991.[17] In November, 1994, it took a similar step for Rwanda.[18]

The General Assembly decided to proceed with the project, and struck an *ad hoc* Committee to examine the draft prepared by the International Law Commission.[19] The Committee met during 1995 and reported back to the Assembly.[20] Clearly, much more work needed to be done, and the Assembly convened a Preparatory Committee intended to prepare the ground for a diplomatic conference.[21] The Preparatory Committee met for sessions of several weeks in 1996, 1997 and 1998. Its final report was submitted to the Diplomatic Conference held in Rome at the headquarters of the Food and Agriculture Organization, over five weeks beginning June 15, 1998.[22] The Conference, in keeping with contemporary practice, eschewed voting on various proposals and attempted to resolve contentious matters by consensus, a process which results in provisions with which nobody is entirely happy but with which everybody can live. By July 16, most of the issues in the *Statute*, including an immense number of technical details relating to comparative criminal law, had been resolved, although a few major and politically-charged questions remained to be determined. Early in the morning of July 17, which was the final day of the Rome meeting, the Bureau of the Conference, chaired by Canadian diplomat Philippe Kirsch, presented the assembled delegates with a compromise "package" drawing on the consensus texts worked out over the previous five weeks and recommending solutions for the most difficult issues. The proposal met with general agreement, although a few voices were raised in opposition, notably those of India and the United States. In the final plenary, the United States insisted that the *Statute* be put to a vote, despite the fact that its near unanimous support was already evident. The delegates voted in favour of the *Statute*, by 120 to 7, with 21 abstentions.[23]

Complementarity

The fundamental premise of the Court's existence is the principle of "complementarity." The *Statute* gives national legal systems the first chance to try offenders. Only when domestic justice refuses to act may the International Criminal Court exercise jurisdiction. The principle is in some ways analogous to the approach taken by international human rights treaties, which allow the international adjudicative organs to be petitioned by individuals only when domestic remedies have been exhausted.[24] In many situations, domestic courts will be unwilling to proceed against their own nationals, who may be in positions of political authority, for such crimes. The Court will then be empowered to act. There may also be cases where the national legal system has broken down and is simply unable to function. Situations of complementary are also expect to arise when national legal proceedings have amounted to sham trials, held for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. In addition, the Court may exercise jurisdiction when national trials are not conducted independently or impartially in accordance with the norms of due process recognized by international law, or are conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[25]

Complementary shifts the onus back to States to ensure that they have effective mechanisms for the trial of international criminals. States are, in effect, entitled under international law to try not only their own war criminals, something they are often loathe to do, but also those who have no connection with the State itself but, for various reasons, find themselves on its territory. The concept is known as "universal jurisdiction" and an increasing number of States have amended their criminal legislation in order to allow national Courts to undertake such trials.[26] If the principle of complementarity is effective, then the International Criminal Court will have a small caseload. The problem of impunity will have been solved by in effect sending the ball back to those who have primary responsibility for prosecution, the national Courts.

The regime of complementarity stands in contrast to that of "primacy," which is what is provided for the *ad hoc* tribunals.[27] If the prosecutor of the Yugoslav or Rwanda tribunals wishes to take a case before the *ad hoc* tribunals, there is no question of whether domestic efforts at justice have been inadequate. In the *Tadic* case, the Yugoslav tribunal sought jurisdiction over an offender whose proceedings had already begun in Germany.[28] There was no suggestion that justice would not be done by the German courts. But the Rwanda tribunal, in a case where it initially sought to exercise jurisdiction over an individual who had been charged by the national courts of Rwanda, decided to withdraw its request and to allow the Rwandan courts to exercise justice.[29]

Subject Matter Jurisdiction

The International Criminal Court has jurisdiction over four categories of crime: genocide, crimes against humanity, war crimes and aggression.[30] These offences are generally recognized as being at the core of international criminal law. They have formed the basis of previous international prosecutions by tribunals at Nuremberg, Tokyo, The Hague and Arusha, and are considered to have a customary legal basis, even in the absence of a precise text. The essence of these four crimes is that they essentially correspond to serious violations of human rights, although some dispute whether the Court and its *Statute* fall within the scope of human rights law. During the drafting of the *Rome Statute*, there were efforts to include what are known as "treaty crimes," violations of specific conventions dealing with such matters as hijacking, terrorism, drug trafficking and torture. But the delegates to the Diplomatic Conference were unable to reach consensus on mechanisms to include these somewhat secondary matters within the jurisdiction of the Court, and they were eventually excluded.

Genocide is the first crime to be enumerated in the *Statute* of the Court.[31] It was first defined in a General Assembly Resolution in 1946, and subsequently in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide.*[32] According to the *Convention*, genocide consists of killing or other acts with an intent to destroy, in whole or in part, a racial, ethnic, national or religious group. The definition in the 1948 *Convention* has often been criticized for its omission of political, social, economic and other groups,[33] but the delegates to the Diplomatic Conference wisely chose not to tamper with a widely accepted text. In any case, any lacunae in the *Convention* definition fall under the heading of crimes against humanity, and there is consequently no danger of impunity.

Crimes against humanity represents an important evolution in the law, because any requirement that such crimes be committed within the context of an armed conflict is eliminated. This had been the case at Nuremberg,[34] and the Security Council had perpetuated the suggestion by imposing a similar requirement in the case of the former Yugoslavia.[35] Nevertheless, the International Criminal Tribunal for the former Yugoslavia has stated that customary law requires no such *nexus* with armed conflict and crimes against humanity,[36] and the *Rome Statute* establishes this principle beyond any doubt. Crimes against humanity are defined as being acts committed as part of "a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[37] The acts themselves are enumerated in the text, and include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, enforced disappearance, apartheid, persecution and other inhumane acts. Particularly important is the attention given to gender-related crimes, which are defined as "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." The reference to "forced pregnancy" was extremely controversial as some States saw this as an implicit recognition of the right to abortion. Use of the term "gender" in the provision dealing with persecution was also a source of considerable debate, and led, as a compromise, to the addition of a definition: "the term 'gender' refers to the two sexes, male and female, within the context of society."[38]

On the scale of seriousness, war crimes generally fall somewhat below the thresholds for genocide and crimes against humanity, if only because they are punishable as individual acts and do not require any special intent element or evidence that they are widespread or systematic. However, the *Rome Statute* sends a signal to the prosecuted in the *chapeau* of the war crimes provision: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[39] The war crimes provisions are extremely detailed, and represent an obsession with codification that may ultimately result in excessively narrow interpretations by the Court. War crimes are divided into four categories, the first two concerned with international armed conflict, the second two with internal armed conflict. They correspond to those offences known as "grave breaches" of the *Geneva Conventions of August 12, 1949*[40] and of *Protocol Additional I*,[41] to serious violations of the laws and customs of war and in particular of the *Hague Regulations*, to violations of common article 3 of the *Geneva Conventions*, and to certain breaches of *Protocol Additional II.*[42] Despite the fact that the detailed provisions largely reflect customary norms, there are some innovations, for example in the prohibition of recruitment of child soldiers.[43] Another new offence, "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,"[44] was decried by Israel as a cynical political gambit by its adversaries and led Israel to vote against the *Statute*. One of the great inadequacies of the list is its failure to adopt a general prohibition of weapons that cause unnecessary suffering. The *Statute* prohibits use of poisonous gas,[45] and of dumdum bullets,[46] but not chemical, biological and nuclear weapons![47]

Aggression was the most difficult of the crimes to define, although a General Assembly Resolution provides all of the elements necessary for a satisfactory text.[48] The heart of the problems was clarifying the role of the Security Council which, under the *Charter of the United Nations*, has the mandate to determine when aggression occurs.[49] Despite the efforts of the Non-Aligned Movement, no consensus could be reached. Thus, aggression is part of the subject matter jurisdiction of the Court, but subject to the subsequent adoption of a provision by the Assembly of States Parties defining the crime and setting out the condi-

tions under which the Court shall exercise jurisdiction with respect to this crime.[50]

The four crimes make up the "automatic jurisdiction" of the Court, in that any State, in ratifying the *Statute*, accepts jurisdiction over them. A last-minute compromise designed to lure France into the final consensus added the possibility of "opting out" on jurisdiction over war crimes. Under article 124, a State, on becoming a party to the *Statute*, may declare that, for a period of seven years after the entry into force of this *Statute* for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes. Such a "deal" was severely criticized at the close of the conference by some non-governmental organizations. In practice, it represents a rather small concession. The history of international war crimes tribunals in Nuremberg, Tokyo, The Hague and Arusha shows that war crimes are rarely, if ever, prosecuted separately from crimes against humanity. In other words, once a war crime is of sufficient gravity to deserve the attention of an international prosecutor, it has attained a level of seriousness so as to meet the threshold for crimes against humanity. The possibility that individuals will escape international criminal responsibility because a few States decide to opt out pursuant to article 124 seems remote indeed, and can hardly be considered a major blemish on the *Statute*.

Jurisdiction over the Offender

The International Criminal Court may establish jurisdiction over individuals on two bases. They may be tried if they are nationals of a State party to the *Statute*, and they may be tried if the crime has been committed on the territory of a State party of the *Statute*.[51] This result is a compromise between two extreme positions, vigorously defended at the Diplomatic Conference by Germany and the United States. Germany wished for the Court to exercise universal jurisdiction, given that the States parties would all be competent, as a question of international law, to exercise universal jurisdiction, and therefore in a position to transfer or delegate this to the international tribunal. The United States desired a far more limited scope for the Court, limiting its jurisdiction to nationals of a State party. In this way, as long as the United States remained outside the treaty regime, no American citizen could ever be tried by the International Court. The United States argued that the German proposal would eliminate any distinction between States that had ratified the *Statute* and those that had not. Germany answered that under the United States proposal, obvious candidates for the Court's jurisdiction would escape justice because of the unlikelihood that their own State would ever ratify the *Statute*.

Both proposals had their flaws. As the debate unfolded on the German proposal, it became clear that many States actually disagree with the proposition that universal jurisdiction exists for the core crimes as a question of customary law, even though this view has been widely defended by scholars. Thus, the Conference may well have set back the development of the law on this point by showing, academic commentators to the contrary, that the claims of universal jurisdiction to customary status may be exaggerated. By insisting upon an exaggeratedly optimistic conception of the law as it now stands, Germany may have achieved the opposite of what it intended. On this point, the United States noted its unsuccessful efforts to have Pol Pot prosecuted by such States as Canada, Spain and Israel under the universal jurisdiction provisions of their national legislations. Universal jurisdiction does not exist in reality, argued the United States. But in doing so, it seemed to defeat its own claim that the Court could not assume universal jurisdiction. If the United States was agreeable to prosecuting Pol Pot under universal jurisdiction, how could it oppose, as a question of principle, the International Court doing the same? The answer would appear to be that universal jurisdiction is acceptable for Cambodians but not for Americans, acceptable for Pol Pot but not for William Calley or Robert McNamara.

The resulting provision means that during the foreseeable future, many international criminals will still escape the jurisdiction of the International Criminal Court. But this should surprise nobody, given the fact that the Court is created by treaty and is based on the consent of States. The argument that "rogue States" will not ratify has its shortcomings, because the democracy of today may be the rogue State of tomorrow, as the record in human rights treaties has shown. The two genocides in recent decades, those of Cambodia and Rwanda, were both committed on States parties to the *Genocide Convention*.[52] In addition, many States may see the value in ratifying the *Statute* as a protection against foreign military intervention, even if aggression as such remains undefined. Had the *Statute* existed decades ago, Grenada, Panama, Cambodia and Viet Nam would all have been protected against war crimes committed by foreign soldiers on their own territory by virtue of their ratification. In conclusion, the jurisdiction over the person that is set out in the *Rome Statute* is incomplete yet sufficient enough to promise a Court that will make its mark against impunity.

Relationship with the Security Council

The two *ad hoc* tribunals were created by decisions of the Security Council of the United Nations, acting under Chapter VII of the *Charter of the United Nations*. Their potency and effectiveness derives from the binding force of Council decisions and the Council's ability to adopt further implementation measures. But any role for the Council carries with it the danger of political interference. The undemocratic composition of the Council, with its five permanent members all of whom have a veto power, representing an outdated conception of world power, makes any involvement for it even more unpalatable. In its 1994 draft statute, the International Law Commission felt that political realities dictated a form of veto by the Security Council on any prosecution by the Court.[53] The proposed provision was widely inter-

preted as meaning that a situation would escape the jurisdiction of the Court as long as it was on the agenda of the Council. A compromise proposal developed by Singapore at the August, 1997 meeting of the Preparatory Committee recognized a possible right for the Council to demand a stay of proceedings, but required the Council to act affirmatively by resolution, thus allowing one permanent member or any seven of its members to block such a measure. The final version, article 16 of the *Rome Statute*, takes this a step further, requiring the Security Council to renew any such resolution every twelve months.

In exercising this extraordinary power, the Security Council is required to act pursuant to Chapter VII of the *Charter*, that is, in response to threats to the peace, breaches of the peace and acts of aggression. The Council has given this notion a large scope in recent years, reaching deep into the field of human rights in a manner that could hardly have been intended by the drafters of the *Charter*. In imposing a Chapter VII qualification as a criterion for Security Council intervention in the work of the Court, the *Rome Statute* would seem to give the Court the possibility of judicial review of Security Council decisions, a power that thus far has escaped organs created under the *Charter* itself.

It may well be argued that article 16 of the *Rome Statute* is completely unnecessary. If the Security Council is the supreme law-making body of the United Nations, pursuant to article 25 of the *Charter of the United Nations*, and if the obligations under the *Charter* prevail over any incompatible obligation resulting from another treaty, then the Security Council could presumably order a stay of proceedings before the Court in any case, relying on *Charter* article 103. It is to be hoped that both bodies will respect the mission of the other, the Security Council exercising its power to intervene with prudence and circumspection and only in the rarest of cases, and the Court proceeding with great caution in matters pending before the Security Council that touch on sensitive issues of international peace and security.

The "General Part" of the *Rome Statute*

In contrast with the legal instruments upon which international prosecutions have been based in the past, the *Rome Statute* includes a bold new initiative in what is really comparative criminal law. The *Statute* contains what common-law criminal codes call a "general part" and what Romano-Germanic codes define as "general criminal law." These are basic rules governing the non-retroactivity of offences and punishments, participation in criminal offences by accomplices and conspirators, and the admissibility of defences such as duress, self-defence, mistake of fact or of law and obedience to superior orders. Much of this is highly technical and, in essence, a distillation of principles of law common to most if not all national systems.

One area in which international criminal law goes well beyond most domestic law is in its attitude to commanders or superiors. Under the command responsibility principle, developed at trials following the close of the Second World War, military commanders can be held liable for the acts of their subordinates even where there is no proof that an order was given or even that the commander knew of the acts committed by the subordinates. In its most extreme form, this amounts to a type of criminal liability for negligence. It was highly controversial when first bruited in 1945,[54] but has since become more accepted, and the principle of command responsibility is recognized in *Protocol Additional I*[55] as well as in the statutes of the *ad hoc* tribunals.[56] The *Rome Statute* takes this one further step, providing for the command responsibility not only of those in a military hierarchy but also civilian superiors. Nevertheless, civilian superiors are held to a lower standard, and can only be prosecuted on this basis if they were wilfully blind as to the acts committed by those subject to their supervision.[57]

Codifying general principles may be aimed at fettering judicial discretion. This would seem to be the case with respect to the defence of duress or coercion. The International Criminal Tribunal for the former Yugoslavia, which has no detailed "general part" in its *Statute*, has had to make its own rulings on the admissibility of defences. In the case of duress, it has decided that such a defence may never be entertained in the case of crimes against humanity.[58] But the *Rome Statute* overrules the Tribunal, allowing for the defence of duress to any charge before the Court.[59] The *Rome Statute* also departs from existing international criminal law in the case of the defence of superior orders. A text in the *Nuremberg Charter* formally outlawed resort to such a defence, saying the argument could only be invoked in mitigation of sentence but not to challenge guilt.[60] Similar provisions appear in the *Statutes* of the two *ad hoc* tribunals. But the *Rome Statute* allows the defence on the condition that the order not be "manifestly unlawful."[61] While it does not completely exclude the defence in cases of genocide and crimes against humanity, it does state that orders to commit such crimes are, by definition, manifestly unlawful. Although it codifies the rules governing some defences, the *Statute* does not prevent the Court from admitting other defences,[62] and under this provision it may eventually allow defences such as military necessity and reprisal.

Procedure

Cases before the Court may be initiated by any of the States parties, by the Security Council acting pursuant to Chapter VII of the *Charter of the United Nations*, and by the Prosecutor, acting *proprio motu*.[63] In the latter case, the Prosecutor cannot proceed until authorization has been obtained from the Pre-Trial Chamber of the judges. In cases where the States parties or the Security Council initiate the prosecution, the Prosecutor may in the exercise of his or her discretion decide to drop the case, but in such circumstances must justify its decision before the Pre-Trial Chamber.[64]

The Office of the Prosecutor is a separate and independent organ of the Court. It is headed by the Prosecutor, who is assisted by one or more Deputy Prosecutors.[65] The Prosecutor and the

Deputy Prosecutors are elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The independence of the Prosecutor was a major issue in the preparatory work of the *Statute*, some States invoking the improbable scenario of the out-of-control "Dr. Strangelove prosecutor." Judicial review of the Prosecutor by the Pre-Trial Chamber was the compromise formula enabling an enlargement of the Prosecutor's autonomous powers.

There are to be eighteen judges, elected on secret ballot by a two-thirds majority of the Assembly of States Parties. The judges are to be nominated by the States parties and are drawn from two groups, specialists in criminal law and in international law, and are expected to be representative of the major legal systems. The *Statute* specifically provides for "[a] fair representation of female and male judges,"[66] a standard that falls somewhat short of calls for full gender balance but that will certainly prevent the Court from emulating the International Court of Justice, which had its first woman member in history only in 1996. Once elected, the judges elect three of their number, the President, and the two Vice-Presidents, who together make up the Presidency. The Presidency is responsible for the administration of the Court and other functions established by the *Statute*.[67] Members of the Presidency sit full-time at the Court's seat in The Hague, the remaining fifteen judges being on call to sit as cases arise. The President sits on the Appeals Division together with four other judges. The Court also has a Trial Division and a Pre-Trial Division, each made up of no less than six judges. The *Statute* suggests that the international law specialists will tend to sit in the Appeals division, whilst the criminal law experts, particularly those with significant trial experience, will be directed towards the Trial and Pre-Trial Divisions. Trials are heard by benches of three judges who decide by majority vote. The Pre-Trial Chambers are composed of either three judges or by a single judge, depending on the matter before the Court.

The Registry, headed by the Registrar, is "responsible for the non-judicial aspects of the administration and servicing of the Court."[68] The Registrar is elected by an absolute majority of the judges, but taking into account any recommendation by the Assembly of States Parties.

Both investigation and trial are governed by procedural rules that draw on both inquisitorial and accusatorial legal approaches, that is, the common law and Romano-Germanic systems. For example, the operation of the Pre-Trial Chamber is in many ways analogous to that of the *chambre d'accusation* in the French system.[69] Like the instructing magistrate of the inquisitorial system, the Prosecutor is required to "investigate incriminating and exonerating circumstances equally."[70] The provisions governing trial leave many of the details to the Rules, yet to be adopted, and do not indicate any clear bias favourable to either inquisitorial or accusatorial systems. Practice before the *ad hoc* tribunals has shown that procedures vary considerably depending on the predisposition of the presiding magistrate, and that within general provisions of the sort found in the *Statute* there is a considerable degree of flexibility with respect to the orientation of the procedural regime. In any case, by the time a matter gets to trial, even the inquisitorial system becomes more and more accusatorial. One aspect of the inquisitorial system is essentially ruled out, however, the trial *in absentia*. While the guilty plea procedure familiar to common law systems is allowed for, a detailed provision carefully regulates its operation.[71]

Detailed provisions outline the rights of suspects or accused at both the investigation and trial phase of the proceedings. These are drawn from international human rights instruments, principally article 14 of the *International Covenant on Civil and Political Rights*,[72] but in some cases go beyond the existing texts. For example, both the suspect at the investigation phase and the accused at the trial phase have the right to remain silent without their silence being used by the Prosecution in any way to suggest culpability.[73] While this right is recognized in some legal systems, others do not respect it, and there is no authority on an international level to support it being considered a fundamental right. The accused is entitled "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks."[74] This is somewhat broader than the *International Covenant*, which states that the accused is entitled "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[75] Other "new" rights are also granted to the accused: to make an unsworn oral or written statement in his or her defence;[76] and not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.[77] There are no "reverse onus" references in the definitions of crimes so the import of the latter right is unclear. But judges might give it a broad interpretation and rule that a variety of evidentiary presumptions, which are really no more than common-sense deductions from the proof, run afoul of the provision. It also remains to be seen whether human rights tribunals, internationally or domestically, will be inspired by the innovations of the *Statute* and use its terms in a dynamic interpretation of the somewhat aging provisions under which they are governed.

Upon conviction, the Court may sentence an offender to life imprisonment, or to a fixed term with a maximum of thirty years.[78] The Court may only impose life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Sentences are to be served in prisons of States parties to the *Statute*, in accordance with agreements negotiated with the Court.[79] In all cases, the sentence is reviewed after two-thirds of it has been served, or in the case of a sentence of life imprisonment, after

twenty-five years.[80] The sentencing provisions represented an extremely delicate compromise. Several States in Latin America, have constitutional provisions prohibiting life imprisonment. Others, in Europe, have recognized the same principle through the caselaw of their constitutional courts. But there were extreme views on the other end, particularly from many Arab and Islamic States, and Commonwealth Caribbean States, desiring that the *Statute* recognize the death penalty. Capital punishment was out of the question, and even the United States, which employs the death penalty enthusiastically within many of its internal jurisdictions, spoke against its use as an international sanction. Were the death penalty to be allowed under the *Rome Statute*, many States might have refused to cooperate with the Court in matters of extradition or surrender. By excluding the death penalty and allowing life imprisonment only in extremely serious cases, and always subject to mandatory review, the *Statute* sends a progressive message of clemency that, it is to be hoped, will support the efforts of penal law reformers within domestic systems.[81]

A growing concern within international human rights law for the situation of the victims of human rights abuses is reflected in several provisions of the *Statute*.[82] The most important is article 75, which allows the Court to provide for reparations to victims of the crimes that it adjudicates. The Court is to "establish principles" with respect to reparations, including restitution, compensation and rehabilitation. Upon request and even, in exceptional circumstances, on its own initiative, the Court may "determine the scope and extent of any damage, loss and injury to, or in respect of, victims." The Court is empowered to order a convicted person to make reparation. A Trust Fund is established under the *Statute* into which monetary reparations are to be paid and from which they are to be distributed.[83] Execution of these orders will depend largely upon co-operation by States parties, and may require them to make amendments to their own civil legislation.

At the heart of the obligations assumed by States parties is the duty to cooperate with the Court at various phases of investigation and trial.[84] Upon receipt of an arrest warrant from the Prosecutor, States parties are required to give effect to the warrant.[85] The *Statute* refers to "surrender" rather than "extradition" out of concern that States may invoke domestic legal provisions that prohibit "extradition" of their own nationals.[86] Any interpretation of the *Statute* allowing States to refuse to extradite their own nationals would have devastating consequences for the effectiveness of the Court.

Conclusion

The *Statute* will come into force upon its ratification by sixty States. Estimates vary considerably about how long this may take, from a few years to as long as a decade or more. Some argue, as well, that as long as big States such as India, China and the United States of America stay outside the system, the Court can never be really effective. But there are good reasons to remain optimistic about an early entry into force of the *Statute* and a dynamic and vigorous role for the Court, even if important countries and even continents remain somewhat aloof.

In the final vote on the *Statute*, 120 of the delegations voted in its favour. This is an impressive critical mass of States, many of them quite small and quite underdeveloped, for whom the creation of the Court is an important development. For example, with a few exceptions, sub-Saharan Africa voted strongly for the Court and supported the work of the Diplomatic Conference. This is an area plagued by armed conflict where many States are desperately searching for mechanisms to reduce and to prevent further disorder. The International Criminal Court offers them one element towards some solutions. States that have experienced armed conflict involving foreign military forces should also have no difficulty appreciating the interest of the Court. Ratification of the *Statute* will bring the international institution to bear on all atrocities committed within their own borders, even by foreign soldiers.

In the end, most States will ratify the *Statute* for the same reasons that they have ratified international human rights instruments. All of the major human rights treaties have ratification rates that now go well beyond 100. The *Geneva Conventions* have been ratified by virtually every State in the world. Why should there be any less enthusiasm to ratify the *Statute*? The history of human rights and humanitarian instruments demonstrates that narrow self-interest has little to do with why States decide to participate in such regimes rather than stay aloof. From this perspective, sixty ratifications should be attainable and in a relatively short time.

The promise of the Court is that it will help to reduce human rights violations. This is often presented as a question of general deterrence. The end of impunity and the threat of punishment, it is said, will discourage others from committing similar offences. The premise is difficult to prove or to disprove, but it is certainly questionable. Is it realistic to conclude that Hitler, Goering, Eichmann, Pol Pot, Karadzic and Bagosora would have been deterred by the threat of punishment? Although deterrence is certainly somewhere on the periphery of international justice, the core of the International Criminal Court may well have more to do with the establishment of the truth of major atrocities in circumstances where domestic courts are unable or unwilling to act. For example, the principal contribution of the Nuremberg judgment may well be its clarification of the facts of the Nazi atrocities. Nuremberg puts the truth of the Holocaust beyond question, something that continues to elude "historians." The Hague is doing the same for Bosnia, and Arusha for Rwanda. The *Rome Statute* confirms the valuable accomplishments of the tribunals at Nuremberg, Tokyo, The Hague and Arusha, and ensures that their legacies will continue. It is an historic step in the international protection of human rights. ■

Notes

1. Robert K. Woetzel, *The Nuremberg Trials in International Law*, London: Stevens & Sons, 1962, at pp. 19–20.
2. *Treaty of Peace between the Allied and Associated Powers and Germany* ("Treaty of Versailles"), 1919 T.S. 4.
3. Ibid., art. 228.
4. Although most of the trials were rather perfunctory, two important precedents that continue to be cited to this day addressed the question of the defence of superior orders: *Empire* v. *Dithmar and Boldt* (Hospital Ship "Llandovery Castle"), (1921) 21 I.L.R. 437, 16 *A.J.I.L.* 708, *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd. 1450, London: H.M.S.O., 1921, pp. 56–57; *Empire* v. *Neumann* (Hospital Ship "Dover Castle"), (1921) 21 I.L.R. 430, 16 *A.J.I.L.* 704, *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd. 1450, London: H.M.S.O., 1921, pp. 12–13. The two decisions are considered by the Supreme Court of Canada in *R.* v. *Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513, 150 N.R. 370.
5. *Convention for the Creation of an International Penal Court*, Geneva, November 16, 1937, in Benjamin Ferencz, *An International Criminal Court: A Step Towards World Peace—A Documentary History and Analysis*, Dobbs Ferry, N.Y.: Oceana, 1980.
6. "Draft Convention for the Establishment of a United Nations War Crimes Court," United Nations War Crimes Commission, Doc. C.50(1), September 30, 1944, in Benjamin Ferencz, *An International Criminal Court: A Step Towards World Peace—A Documentary History and Analysis*, Dobbs Ferry, N.Y.: Oceana, 1980.
7. *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, (1951) 82 U.N.T.S. 279.
8. *France et al.* v. *Goering* et al., (1946) 23 *Trial of the Major War Criminals before the International Military Tribunal*, 13 I.L.R. 203, 41 *A.J.I.L.* 172.
9. *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 4 Bevans 20, as amended, 4 Bevans 27 ("Charter of the Tokyo Tribunal").
10. *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, Official Gazette Control Council for Germany. Canada only held a handful of such trials, showing a distaste for war crimes prosecutions that has continued to this day: Patrick Brode, *Casual Slaughters and Accidental Judgments, Canadian War Crimes Prosecutions, 1944–1948*, Toronto: University of Toronto Press, 1997.
11. *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 U.N.T.S. 277, [1949] C.T.S.27.
12. "Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide," U.N. Doc. A/362, Annex.
13. G.A. Res. 489(V).
14. G.A. Res. 898(IX); G.A. Res. 1187(XII).
15. G.A. Res. 44/39.
16. "Draft Statute for an International Criminal Court," Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I.5; and U.N. Doc. A/49/355. See: James Crawford, "The ILC's Draft Statute of an International Tribunal," (1994) 88 *A.J.I.L.* 140.
17. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, Annex.
18. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, Annex.
19. G.A. Res. 49/53.
20. "Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court," Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22).
21. G.A. Res. 50/46.
22. U.N. Doc. A/CONF.183/2/Add.1. See: Christopher Keith Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court," (1997) 91 *A.J.I.L.* 177; Christopher Keith Hall,, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court," (1997) 92 *A.J.I.L.* 124.
23. *Rome Statute of the International Criminal Court*, A/CONF.183/9.
24. For example: *Optional Protocol to the International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47, art. 5(1)b).
25. *Rome Statute, supra* note 23, art. 20.
26. For example, *Criminal Code*, R.S.C. (1985), c. C-46, art. 7(3.71). See: Charles B. Wagner, "The Passing of legislation allowing for trial of those accused of war crimes and crimes against humanity," (1984) 4 *Windsor Yearbook of Access to Justice* 143.
27. See: Adolphus G. Karibi-Whyte, "The Twin *ad hoc* Tribunals and Primacy Over National Courts," (1998) 9 *Criminal Law Forum* (forthcoming).
28. *Prosecutor* v. *Dusko Tadic aka Dule* (IT-94-1-AR72), August 10, 1995.
29. See: William A. Schabas, "Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems," (1997) 7 *Criminal Law Forum* 523.
30. *Rome Statute, supra* note 23, art. 5.
31. Ibid., art. 6.
32. *Supra* note 11, art. II.
33. Frank Chalk, "Toward a Generic Definition of Genocide," in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994).
34. *Supra* note 7, annex, art. 6(c).
35. *Supra* note 17, art. 5.
36. *Prosecutor* v. *Tadic* (Case No. IT-94-1-AR72), Judgment of the Appeals Chamber, October 2, 1995.
37. *Rome Statute, supra* note 23, art. 7. See: David Donat-Cattin, "Crimes against Humanity," in Lattanzi, Flavia, ed., *The International Criminal Court, Comments on the Draft Statute*, Naples: Editoriale Scientifica, 1998, pp. 49–78.
38. Ibid., art. 7(3).
39. Ibid., art. 8(1).
40. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1950) 75 U.N.T.S. 31, [1965] C.T.S. 20; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, (1950) 75 U.N.T.S. 85, [1965] C.T.S. 20; *Geneva Convention Relative to the Treatment of Prisoners of War*, (1950) 75 U.N.T.S. 135, [1965] C.T.S. 20; *Geneva Convention Relative to the Protection of Civilians*, (1950) 75 U.N.T.S. 287, [1965] C.T.S. 20.
41. *Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3, [1991] C.T.S. 2.
42. *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 3, [1991] C.T.S. 2.
43. *Rome Statute, supra* note 23, art. 8(2)(b)(xxvi).
44. Ibid., art. 8(2)(b)(viii).
45. Ibid., art. 8(2)(b)(xviii).
46. Ibid., art. 8(2)(b)(xix).
47. Ibid., art. 8(2)(b)(xx). See: Roger S. Clark, "Methods of Warfare that Cause Unnecessary Suffering are Inherently Indiscriminate," (1998) 28 *California Western Int'l L. J.* 379.

48. G.A. Res. 3314(XXIX).
49. *Charter of the United Nations*, [1945] C.T.S. 7, art. 39.
50. *Rome Statute*, *supra* note 23, art. 5(2).
51. Ibid., art. 12(2).
52. Cambodia acceded to the *Genocide Convention* on October 14, 1950, Rwanda on April 16, 1975. Other oft-cited candidates for international justice are also long-time participants in the *Genocide Convention* including Yugoslavia (August 29, 1950), Iraq (January 20, 1959), Congo (May 31, 1962), Iran (August 14, 1956), Afghanistan (March 22, 1956), Algeria (October 31, 1963), and so on.
53. *Supra* note 12, art. 23(3).
54. *United States of America* v. *Yamashita*, (1948) 4 L.R.T.W.C. 1, 36-37; *In re* Yamashita, 327 U.S. 1 (1945); Canada v. *Meyer* ("Abbaye Ardenne Case"), (1948) 4 L.R.T.W.C. 97, 109. On the *Yamashita case*, see: A. M. Prévost, "Race and War Crimes: The 1945 War Crimes Trial of General Tomoyaki Yamashita," (1992) 14 *H.R.Q.* 303; B. Landrum, "The Yamashita War Crime Trial: Command Responsibility Then and Now," (1995) 149 *Mil. L. Rev.* 293. On the *Meyer* case, see Patrick Brode, *Casual Slaughters and Accidental Judgments*, Toronto: University of Toronto Press, 1997.
55. *Supra* note 23, art. 86(2).
56. Article 7(3) of the *Yugoslav Statute*, *supra* note 17; art. 6(3) of the *Rwanda Statute*, *supra* note 18.
57. *Rome Statute*, *supra* note 23, art. 28.
58. *Prosecutor* v. *Erdemovic* (Case No. IT-96-22-T), Judgment of the Appeals Chamber, October 7, 1997.
59. *Rome Statute*, *supra* note 23, art. 31(1)d).
60. *Supra* note 7, art. 8.
61. *Rome Statute*, *supra* note 23, art. 33.
62. Ibid., art. 31(3).
63. Ibid., art. 13.
64. Ibid., art. 53.
65. Ibid., art. 42.
66. Ibid., art. 36(8)(a)(iii).
67. Ibid., art. 38.
68. Ibid., art. 43.
69. Ibid., arts. 57–58.
70. Ibid., art. 54(1)(a).
71. Ibid., art. 65.
72. *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47.
73. Ibid., arts. 55(2)(b), 67(1)(g).
74. Ibid., art. 67(1)(a).
75. *Supra* note 72, art. 14(3)(a).
76. *Rome Statute*, *supra* note 23, art. 67(1)(h).
77. Ibid., art. 67(1)(i).
78. Ibid., art. 77.
79. Ibid., art. 103.
80. Ibid., art. 110.
81. William A. Schabas, "Sentencing and the International Tribunals: For a Human Rights Approach," (1997) 7 *Duke Journal of Comparative and International Law* 461–517.
82. David Donat-Cattin, "The Role of Victims in the ICC Proceedings," in Lattanzi, Flavia, ed., *The International Criminal Court, Comments on the Draft Statute*, Naples: Editoriale Scientifica, 1998, pp. 251–72.
83. Ibid., art. 79.
84. Ibid., art. 86.
85. Ibid., art. 59(1).
86. Ibid., arts. 89, 102. ❐

Analyse linguistique du droit applicable aux demandeurs d'asile: l'exemple de Mariama

Anne Triboulet

Précis

A travers l'étude comparative de deux décisions jurdictionnelles, cet article présente une analyse linguistique du droit applicable, en France, aux demandeurs d'asile. D'une part, l'auteur souligne l'importance du style littéraire utilisé dans la rédaction des jugements et démontre le rôle du «storytelling», la façon dont est présentée le demandeur d'asile, dans la décision prise quant au fond. D'autre part, elle analyse le «langage du droit» afin de mettre en mettre en relief la façon dont la structure de la pensée juridique s'écarte de la logique formelle et du bon sens et permet ainsi de justifier, juridiquement, des décisions prises a l'égard de demandeurs d'asile qui ne peuvent se justifier rationnellement.

Abstract

Through a comparative study of two court decisions, this article presents a linguistic analysis of the applicable rules to asylum applicants in France. First, the author underlines the importance of the literary style in the drafting of decisions on the merits. Second, she analyzes the "language of the law" to show how the structure of legal thought sometimes differs from formal logic and common sense, thus justifying legal decisions taken with regard to asylum applicants that could not be rationally justified.

Cet article a pour objectif de souligner l'importance du langage dans le droit applicable, en France, aux demandeurs d'asile. En effet, lors de l'examen de cas individuels, de nombreux facteurs extra-juridiques jouent un rôle important. Le langage est l'un d'entre eux et le choix des mots employés n'est jamais neutre. Dans le même temps, puisqu'il existe un langage du droit, l'analyse linguistique est un outil privilégié pour étudier la structure de la pensée juridique. Nous privilégierons pour cela l'analyse des tropes. Cette tournure de langage est, en effet, intéressante car les mots y prennent une signification différente de leur signification propre. Or, la logique juridique est fondée sur un détournement de la signification propre des mots, pour leur donner une signification juridique. Parmi les tropes analysés, nous accorderons une place privilégiée à la recherche des métaphores[1] et des métonymies[2], ainsi qu'aux raisonnements métaphoriques et métonymiques. Il s'agira de s'interroger sur la signification de leur emploi, sur ce qu'ils servent à mettre en lumière, et donc, ce qu'ils laissent dans l'ombre.

L'étude d'un cas particulier semble la manière la plus adéquate de mettre en évidence le rôle joué par le langage dans les procédures juridiques applicables aux demandeurs d'asile. Ainsi, nous présenterons tout d'abord l'histoire de Mariama et les deux décisions qui ont été prises à son égard. Puis, nous étudierons la qualification et l'interprétation des faits par les deux instances juridictionnelles et, leurs raisonnements juridiques. Enfin, nous nous intéresserons aux conséquences de ces décisions.

L'histoire juridique de Mariama[3]

Mariama est de nationalité guinéenne. Elle appartient à l'ethnie et à l'entourage de l'ancien président Sékou TOURE. A la mort de ce dernier, en 1984, la famille de Mariama a été victime de vengeances populaires. Mariama est alors allée en France où elle a demandé l'asile politique mais a été déboutée et reconduite en Guinée. De retour dans son village, la population, la reconnaissant, a tenté de la lyncher. Elle s'est alors réfugiée chez son oncle à Conakry mais a dû s'enfuir de nouveau car ce dernier projetait d'exciser sa fille. Ainsi, en 1995, Mariama a déposé une nouvelle demande de reconnaissance de la qualité de réfugiée en France basée sur ses craintes de persécution en raison de ses origines ethniques et familiales. Elle soutenait également que ses filles risquaient d'être persécutées en raison de leur appartenance «*au groupe social des femmes qui sont victimes de mutilations sexuelles et de pratique contraires à la dignité humaine, volontairement tolérées, au nom de la tradition, par les autorités publiques de son pays d'origine*»[4]. Se prononçant conformément à la Convention de 1951[5] et du Protocole de New York de 1967, l'Office Français pour la Protection des Réfugiés et des Apatrides (ci-après OFPRA), puis par la Commission des Recours des Réfugiés (ci-après CRR) rejetteront sa demande, n'estimant pas fondées ses craintes de persécutions.[6]

Parallèlement à cette première procédure, Mariama a fait l'objet d'une ordonnance d'interdiction du territoire prononcée par le tribunal correctionnel de Saint-Etienne pour avoir utilisé et tenté d'obtenir de faux documents administratifs. En exécution de cette ordonnance, le préfet de Loire a pris à son encontre un arrêté de reconduite à la frontière vers la Guinée. Le tribunal administratif de Lyon[7], suivant les conclusions du Commissaire du Gouvernement, a annulé cet arrêté au motif que Mariama «*ne serait pas en mesure de s'opposer à la volonté de sa belle-famille de procéder à l'excision de ses deux fillettes*». Or, l'excision est un traitement contraire à l'article 3 de la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*[8] et l'article 27 bis de l'ordonnance du 2 novembre 1945 interdit d'éloigner une personne à destina-

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tion d'un pays où elle est exposée à des traitements contraires à l'article 3 précité.

Une qualification et une interprétation des faits au service de raisonnements métonymiques

Durant l'entre deux guerres, l'auteur A. L. Goodhart insistait déjà sur le fait que

> facts are not constant but relative. [...] The same set of facts may look entirely different to two different persons. The judge founds his conclusions upon a group of facts selected by him as material, from among a larger mass of facts [...]. The judge, therefore, reaches a conclusion upon de facts as he sees them. It is on these facts that he bases his judgement, and not on any other. [...] A congeries of facts is presented to him ; he chooses those which he considers material and rejects those which are immaterial, and then bases his conclusions on the material ones. To ignore his choice is to miss the whole point of the case[9].

Tel est effectivement le processus par lequel la CRR et le tribunal administratif sont parvenus, à partir des mêmes faits, à des conclusions différentes.

Le principal raisonnement métonymique utilisé consiste à avoir statué sur l'ensemble du cas en ne se basant que sur certains éléments des faits présentés. En considérant «une partie pour le tout», ce procédé laisse nécessairement dans l'ombre une autre partie de la demande, tout aussi importante et qui aurait conduit à une autre conclusion si elle avait été également prise en compte.

Ainsi, bien que le Conseil d'Etat ait reconnu qu'en vertu du principe général de l'unité de la famille, un demandeur d'asile peut invoquer les risques de persécutions encourus par ses enfants[10], la décision de la CRR ne s'attarde que sur les faits qui concernent personnellement Mariama, et non sur la situation de ses filles. La technique utilisée par la CRR pour appuyer son choix est celle du «storytelling». En effet, La CRR présente Mariama d'une façon qui ne lui est pas favorable, insistant sur son lien de parenté avec l'ancien président Sékou TOURE et précisant qu'elle et sa famille ont «*joui*» des faveurs de son régime. Cette présentation conduit à la considérer comme «complice» du régime dictatorial de Sékou TOURE et suggère une certaine légitimité dans les agissements de la population guinéenne à son égard. Ainsi la CRR considérera «*qu'il n'est pas établi que les membres de l'ethnie Malinké proches de l'ancien président Sékou TOURE continueraient d'être victimes de menaces volontairement tolérées par les autorités publiques*», sans qu'elle ait à motiver cette affirmation car elle semble découler naturellement de la présentation des faits[11].

A l'inverse, la décision du tribunal administratif de Lyon offre une image beaucoup plus positive de Mariama, laissant de côté l'aspect politique de sa demande et la présentant comme une mère de famille qui cherche à protéger ses enfants des risques d'excision qu'elles encourent. De nouveau, la technique du «storytelling» est utilisée. Ainsi, le tribunal n'emploie pas les termes neutres de «filles» ou «enfants» de Mariama mais celui de «*fillettes*», plus attendrissant. Il renforce également le sentiment de proximité en personnalisant les «*fillettes*» en citant leurs prénoms, Sakahlé et Diankenba.

Le deuxième raisonnement métonymique auquel se sont livrés la CRR et le tribunal tient à l'interprétation de la condamnation de Mariama pour avoir fait usage de faux documents administratifs. En effet, en 1994, Mariama et son époux avaient tenté de faire établir la nationalité française de leurs enfants en démontrant que leur père était français car né dans une colonie française. Or l'époux de Mariama était né après l'indépendance de la Guinée. La CRR, bien que reconnaissant que Mariama ne savait ni lire ni écrire et qu'elle était victime de violences conjugales, met l'accent sur la conséquence de son acte, qualifié très négativement de tentative «*par des moyens frauduleux d'obtenir indûment la délivrance de documents administratifs*». En revanche, le Commissaire du Gouvernement insiste sur les causes des agissements de Mariama. Il met en effet en relief sa volonté de rester en France, qualifiant la fraude de «*forme particulière d'attachement à la France*». Il justifie également l'action de Mariama en insistant sur les nombreuses difficultés administratives et judiciaires qu'elle a rencontrées. Il insiste sur l'aspect laborieux des procédures et emploie le mot « *refus* » trois fois dans le même paragraphe de façon à traduire l'hostilité des autorités françaises (le refus de l'OFPRA, de la CRR et du préfet) qui a conduit Mariama à effectuer de nombreuses démarches «*en vain*». L'accent ainsi porté sur les causes des agissements de Mariama conduit à en atténuer les conséquences, à passer sous silence le caractère frauduleux de tels actes afin de les qualifier de tentative «*de faire établir la nationalité française de leurs enfants*».

Le raisonnement de la Commission des Recours des Réfugiés et du tribunal administratif

Les décisions quant au fond prises par les deux instances découlent directement de la façon dont les faits ont été présentés. Ainsi, la décision de la CRR se concentre principalement sur l'évaluation des craintes de persécutions de Mariama, alors que celle du tribunal administratif étudie exclusivement les risques d'excision encourus par les enfants de celle-ci.

La CRR a estimé que Mariama ne possédait pas de craintes fondées de persécutions. En effet, en demandant le renouvellement de son passeport, Mariama a bénéficié de la protection de son pays et ne peut donc plus prétendre à une protection internationale[12]. De plus, la CRR a estimé que les menaces de la part de la population et volontairement tolérées par les autorités publiques à l'encontre des proches de l'ancien président Sékou TOURE et des membres du groupe ethnique Malinké avaient cessés[13]. Cette décision reflète les principaux mécanismes métaphoriques et métonymiques généralement utilisés dans le cadre de l'examen des demandes d'asile. L'une des étapes nécessaires est la détermination des agents de persécutions, c'est-à-dire, la recherche des «sources» de persécutions. Cette métaphore évoque l'idée de transparence (il existe des «sources» identi-

fiées) et de garanties contre l'arbitraire (la décision possède un fondement et ne tient pas au bon vouloir du juge). L'aspect négatif de la procédure que la métaphore tend à laisser dans l'ombre est le raisonnement métonymique qui l'accompagne. En effet, identifier les sources de persécutions conduit à devoir en reconnaître certaines et en exclure d'autres. En France, sont généralement reconnues les persécutions qui sont le faits des autorités d'un pays ou le fait de groupes dont les actes sont volontairement tolérées par les autorités publiques ou pour lesquels ces autorités sont incapables d'offrir une protection. Il s'agit d'un raisonnement métonymique dans la mesure où une partie (les persécutions exercées par certains agents) est considérée comme le tout (l'ensemble des persécutions qu'un individu peut craindre et qui peuvent le conduire à fuir son pays). Or, dans de nombreux pays d'Afrique ayant connu un changement brutal de régime politique, les vengeances populaires à l'encontre des partisans du gouvernement précédent durent de nombreuses années, alors même que ces pays sont reconnus en voie de stabilisation par la communauté internationale. Le fait que Mariama ait pris contact avec son ambassade en France ne signifie donc pas, en soi, que l'Etat guinéen ait été en mesure de la protéger dans le pays des lynchages de la population, qui peuvent aboutir à de véritables persécutions.

D'autre part, la CRR a conclue que les craintes de Mariama de voir ses deux filles excisées en cas de retour en Guinée n'étaient pas fondées et «*que la position favorable à une telle mutilation qu'aurait antérieurement adoptée un oncle de l'intéressée n'est pas suffisante pour infirmer cette analyse*». Il est vrai que dans la société et la culture française, l'attitude et la volonté «d'un oncle», ne sont pas déterminantes. La rédaction tend donc à minimiser les risques d'excision[14]. Elle ne prend pas en compte la conception africaine traditionnelle de la famille au sein de laquelle l'autorité d'un oncle peut véritablement s'imposer, et ce d'autant plus que, dans le cas présent, cet oncle constituait la seule famille chez qui Mariama avait pu trouver refuge[15].

Les conclusions du Commissaire du Gouvernement et la décision du tribunal administratif ont, en revanche, été beaucoup plus favorables à Mariama. Qualifiant l'excision de traitement inhumain et dégradant, elles ont ainsi empêché que Mariama et ses filles soient reconduites en Guinée. Le langage utilisé a été spécialement étudié en vue d'appuyer cette qualification. En effet, en guise de synonyme de «excision» le Commissaire du Gouvernement emploie l'expression «mutilation génitale féminine», mettant l'accent sur le caractère mutilateur de cette pratique et passant sous silence son aspect culturel[16]. Le tribunal administratif conclue enfin que les filles de Mariama étaient réellement menacées d'excision en cas de retour en Guinée. En effet, contrairement à la CRR, il reconnaît l'existence de différentes sphères normatives (le droit étatique et les règles familiales) dans la société guinéenne, perméables les unes aux autres. Ainsi, le droit étatique guinéen a officiellement intégré la pratique de l'excision en ne prévoyant aucune répression contre elle. En dernier lieu, le tribunal récuse un raisonnement métonymique très largement utilisé dans la logique juridique. Il précise en effet que le fait que la Guinée ait signé et ratifié la *Convention relative aux droits de l'enfant*, la *Convention pour l'élimination de toutes les formes de discrimination à l'égard des femmes* et la *Charte Africaine*, ne signifie pas qu'elle applique ces accords. La ratification d'une convention (une partie de la mise en place de la protection des personnes) n'est pas équivalente à la protection effective de ces personnes (le tout).

Analyse des concepts structurants du droit applicable aux demandeurs d'asile

La mise en parallèle des deux dispositifs des décisions conduit à énoncer la conclusion suivante: d'une part, Mariama et ses filles n'ont pas de craintes fondées de persécutions et ne peuvent donc obtenir le statut de réfugiées, d'autre part, les enfants de Mariama risquent de subir un traitement inhumain et dégradant en cas de retour en Guinée et leur mère ne peut donc être expulsée en direction de la Guinée. Or, comment peut-on ne pas avoir raison de craindre des persécutions si l'on est menacée de traitements inhumains et dégradants? Ces conclusions mettent en relief la spécificité du raisonnement juridique et ce en quoi il s'écarte de la logique formelle et du bons sens.

En droit, il est possible d'accepter deux décisions affirmant que des craintes de persécutions ne sont pas fondées mais qu'un risque de traitement inhumain et dégradant existe car ce raisonnement repose sur un concept structurant du droit, sur une métaphore devenue conventionnelle, celle de «branches» du droit. Ce trope, issu de la métaphore plus vaste de «l'arborisation» du droit, implique à une différenciation entre les différents domaines du droit qui partent tous d'un tronc commun. La grande division, celle qui distingue le droit public du droit privé, possède de nombreuses ramifications. Ainsi, dans le domaine du droit public, on trouvera une branche «droit des réfugiés», une autre «droit administratif», elle-même ayant une ramification «contentieux administratif», etc. Cette métaphore est devenue un concept structurant du droit car les juristes ne la remarquent plus, l'acceptent comme une évidence et ne peuvent l'éviter. Elle est ainsi un élément incontournable de la façon dont on pense en droit, et c'est effectivement en fonction de ces différentes branches qu'a été déterminé le cas de Mariama.

A chaque branche du droit correspond certaines «sources» de droit et certaines procédures. Ainsi, le statut de réfugié politique est déterminé en fonction de la notion de «persécution» qui se rattache à la *Convention de Genève* de 1951 et une procédure devant l'OFPRA et la CRR. En revanche, l'appréciation du pays vers lequel une personne est expulsée se fait en fonction de la notion de «torture et peine ou traitement inhumain et dégradant» issue de la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales* et selon les règles du contentieux administratif. Ce processus de différencia-

tion permet donc d'affirmer, juridiquement, qu'une persécution n'est pas une torture, qui n'est non plus équivalente à un traitement inhumain et dégradant, etc. Il se crée donc une structure de pensée qui est rationnellement fausse, tout comme le sont les images issues de métaphores. En effet, rationnellement et humainement, l'excision est une pratique dangereuse, humiliante, qui provoque de très fortes souffrances et la personne qui en est victime la perçoit à la fois comme une torture, un mauvais traitement, une persécution. Ce décalage dans lequel se place la logique juridique est la source du manque de compréhension de nombreuses décisions de justice. En effet, la réaction naturelle d'une personne qui prend connaissance de l'histoire de Mariama est de se demander s'il est ou non dangereux pour elle et ses enfants de retourner en Guinée. La réponse apportée par les deux dispositifs ici analysés ne peut être satisfaisante à cet égard.

Il convient cependant d'aller au-delà de cette première analyse et de s'interroger sur les conséquences de cette différenciation. Ainsi, la notion de craintes de persécution est interprétée de façon plus restrictive que celle de traitement inhumain et dégradant. Le droit français peut ainsi s'affirmer respectueux des droits de l'homme car il autorise une interprétation très large de la notion de risques encourus dans le pays de retour. Mais cette interprétation libérale n'intervient qu'une fois qu'une personne a fait l'objet d'un arrêté de reconduite à la frontière, donc une fois qu'il est certain que, quelque soit le pays vers lequel elle sera expulsée, elle ne restera pas en France. En revanche, l'interprétation de la notion de persécution et les procédures devant l'OFPRA et la CRR sont plus restrictives car la conséquence de la reconnaissance d'un risque de persécution est l'octroi du statut de réfugié et le droit de rester en France. La métaphore des «branches» du droit permet donc à la France de restreindre le droit de rester sur le territoire par la reconnaissance du statut de réfugié, mais elle masque cette restriction en mettant en lumière le fait qu'elle n'expulse pas des personnes vers des pays où elles risqueraient de subir des traitements inhumains et dégradants. Ainsi, le droit applicable aux demandeurs d'asile est largement fonction de la politique d'immigration du pays.

Cet article s'est limité à l'analyse du langage utilisé par les juridictions. En conclusion, il convient cependant de mentionner le rôle joué par le langage, en amont, lors de l'élaboration de lois relatives au droit d'asile. En effet, lors des débats parlementaires ou dans les médias, les métaphores utilisées en matière de libre circulation des personnes mettent généralement l'accent sur l'idée de sécurité. Ainsi, une frontière devient un «verrou», l'Europe une «forteresse», etc. Or, par comparaison, il convient de remarquer que l'image fréquemment utilisée en matière de libre circulation des marchandises ou des capitaux est celle du «village planétaire» qui, de façon beaucoup plus positive, évoque la convivialité, l'échange, le partage. Ces tropes, sortes de messages subliminaux, sont importants car ils influencent l'adhésion de la population à l'égard des nouvelles lois et confortent ainsi l'un des concepts structurants métonymiques les plus important du droit français: «la loi est la volonté du peuple». ■

Notes

1. Trope «qui consiste dans un transfert de sens par substitution analogique» (Définition du *Petit Robert*).
2. Trope «par lequel on exprime un concept au moyen d'un terme désignant un autre concept qui lui est uni par une relation nécessaire (la cause pour l'effet, le contenant pour le contenu, le signe pour la chose signifiée)» (Définition du *Petit Robert*).
3. Je suis consciente que la présentation sommaire et partielle des faits telle que je la livre ici correspond précisément à la démarche que je vais tenter de dénoncer dans le paragraphe suivant. Il s'agit d'une lecture sélective des faits en fonction des éléments jugés importants par l'auteur selon ce qu'elle souhaite montrer. Cette contradiction est dû au fait que cet article ne doit pas excéder une certaine longueur. J'encourage vivement les lectrices et lecteurs à se rapporter aux décisions citées afin de donner tout leur sens aux commentaires qui vont suivre.
4. Commission des Recours des Réfugiés, 1er mars 1996, requête n° 295574.
5. Article 1er, paragraphe A: «Au terme de la présente Convention, le terme «réfugié» s'appliquera à toute personne 2° qui [...] craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de sont appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements ne peut ou, en raison de ladite crainte, ne veut y retourner». *Convention relative statut des réfugiés et des apatrides*, 28 juillet 1951, (1954) 189 R.T.N.U. 137.
6. CRR, 1er mars 1996, requête n° 295574.
7. Tribunal administratif de Lyon, 6è chambre, n° 9600127, 29 mai 1996.
8. Article 3: «Nul ne peut être soumis à des tortures ni à des peines ou traitement inhumains et dégradants» *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, 4 novembre 1950, S.T.E. 5, 213 R.T.N.U. 221.
9. A. L. Goodhart, *Essay in Jurisprudence and the Common Law*, Cambridge, The University Press, 1931, p. 8.
10. Cons. d'Etat, 2 décembre 1994, *Mme Agyepong*, (1994) *A.J.D.A.*, p. 915.
11. Les décisions de justice françaises sont généralement courtes et leur motivation brève. Cette technique permet de suggérer qu'aucun doute n'était possible quant à la décision à prendre, que celle-ci s'imposait.
12. La CRR a considéré que «postérieurement aux faits invoqués pour justifier son départ de Guinée, la requérante a obtenu, sans alléguer qu'elle y aurait été contrainte par une nécessité impérieuse, la prorogation de son passeport le 8 février 1995 auprès de l 'ambassade de Guinée à Paris; qu'en se plaçant ainsi sous la protection des autorités de son pays d'origine, elle ne peut plus être regardée comme étant au nombre des personnes visées par les stipulations précitées de la convention de Genève».
13. La CRR a considéré que «il n'est pas établi que les membres de l'ethnie malinké proches de l'ancien président Sékou TOURE continueraient d'être victimes de menaces volontairement tolérées par les autorités publiques».
14. La CRR a pourtant déjà reconnu que, dans certains cas, l'excision pouvait être qualifiée de persécution des femmes volontairement tolérée par les pouvoirs publiques de certains Etats africains (CRR, 17 juillet 1991, *Melle Aminata Diop*, requête n° 164. 078).

15. D'autres facteurs peuvent expliquer que la parole de Mariama n'ait pu être entendue. Ainsi est-il précisé dans la décision de la CRR que le français n'était pas la langue maternelle de Mariama. De plus, il peut exister des entraves institutionnelles à la libre expression d'une réfugiée. Par exemple, il peut être difficile de s'expliquer clairement et totalement sur des craintes intimes, devant plusieurs hommes, étrangers.
16. A l'inverse, certains auteurs emploieront l'expression «circoncision féminine» qui, faisant l'analogie avec la circoncision masculine, insiste sur l'aspect culturel de cette pratique. Cependant, elle n'insiste pas sur le fait que, pratiquée sur une fille, elle aboutit à une véritable mutilation. □

Ethical Challenges in Refugee Research: Troublesome Questions, Difficult Answers

Claudia Maria Vargas

Abstract

This paper articulates some of the more troublesome questions and ethical challenges that researchers conducting interviews with refugees and refugee service-providers face. The author suggests three ethical principles that must be considered when doing qualitative research: a) trust, confidentiality, honesty, responsibility, b) an active and positive approach to cultural differences, including gender issues, and c) respect for the emotional experiences of victims. By grounding the research process within this ethical practice a delicate balance between the goals of research and the interests of the respondent can be maintained.

Précis

Cet article articule quelques-unes des questions les plus troublantes et posant les défis éthiques les plus épineux auxquelles font face les chercheurs qui mènent des entrevues avec les réfugiés et les instances desservants les réfugiés. L'auteur propose la mise en place de trois grands principes éthiques lorsqu'il est procédé à une recherche qualitative: a) confiance, confidentialité, honnêteté, responsabilité, b) une approche active et positive des différences culturelles, incluant les questions de sexage, et c) le respect des expériences émotionnelles vécues par les victimes. En fondant le processus de recherche dans le cadre de la pratique éthique, le dosage subtil peut être obtenu entre les objectifs de la recherche et les intérêts des répondants.

While the decade of the 1980s saw a significant increase in the refugee studies literature, much remains to be done. Although the literature has focused on particular refugees by country of origin or specific services such as education, health care, or legal status, it is increasingly clear that many of the most important problems arise within point of contact agencies. These agencies must deal with the whole person and family, coordinating a package that may include counselling and provision of a broad spectrum of services (Coles 1990; de Girolamo 1994; Martin 1994; Struwe 1994; Ekblad et al. 994). The delicate condition of refugee families, whatever the country of origin, their tenuous legal status, the day-to-day discrimination many face, and limits on various forms of assistance, mean that service providers and scholars who study refugee service providers and refugees encounter a variety of thorny ethical dilemmas as they go about their respective tasks. While these two sets of ethical concerns—those used when researching refugee service providers, and those when researching refugees—overlap in many ways, the emphasis here is on the ethical challenges researchers face.

This article is based upon two related sets of research, participant observation and interviews of providers and refugees[1] as part of a larger study in progress on refugee services administration. The participant/observer experience is based on counselling of refugees at a clinic providing psychological services. The other data comes from qualitative research consisting of numerous open-ended interviews with service providers—social workers, health workers, psychotherapists, teachers, principals, attorneys, and community workers—in different parts of the United States, Belgium, Canada, Finland, and Sweden.

The discussion is in three parts. The first part sketches social service needs of refugees. The second considers the relationship between ethics and law. The third examines the ethical issues for refugee service providers as well as the ethical issues for the researcher when interviewing them. The last explores crosscutting ethical principles for the researcher interviewing refugees.

The thesis that emerges is that researchers must establish an ethical framework for addressing issues of:

1) confidentiality, trust, (Dobbert 1984; Punch 1994), honesty and responsibility (Dobbert 1984);
2) cultural sensitivity (Eth 1992; Denzin and Lincoln 1994; Richardson 1994; Stanfield II 1994; De Vault 1995; Baubock 1996); and
3) respect for the victimization experience of refugees (Yu and Liu 1986; Langer 1990; *International Migration Review* 1996).

What Do We Seek to Research and in What Context?: Refugees' Access to Essential Social Services

One of the driving forces for researchers who study refugees is the fact that access to social services by refugees in the United States is not only limited, but often inaccessible, particularly for those whose legal status is uncertain. The character of this problem shapes many of the ethical challenges found by researchers in the field. When refugees have not been formally granted asylum, for any number of reasons, they may lack access to health programs. They often have few, if any, funds. "Since 1980, U.S. policy has recognized that many refugees arrive in the United States without money, family, or ways of making a living" (National Research Council 1997, 38). In some cases, families are broken up in the process of flight from the country of origin or because of conditions in the host country. Given the unresolved dilemma of status and rights combined with the baggage inherent in displace-

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ment and exile, doing research with refugees and refugee service providers poses ethical challenges, whether it is the school or hospital or community clinic context.

The Distinction between Law and Ethics: A Critical Understanding for Researchers

Refugee researchers confront both legal and ethical forces that affect both the phenomena that are studied and create complexity for the ways researchers proceed, but law and ethics are not the same, hence the need to understand the distinction. Law is an external check, which seeks to control and constrain action. Ethics, on the other hand, is a set of internal checks derived from one's personal values, professional obligations, or cultural norms that determine behaviour (Cooper et al. 1998). In commentaries on ethics, legal and ethical issues are confused one for the other. In serving this particular group of clients, service providers face both legal and ethical issues. In some cases, legal and ethical norms are compatible, but in other situations doing that which seems ethically appropriate may put refugee workers, and even sometimes the researcher, at the edge of illegality. For example, service providers in California stated their intentions to refuse to follow the mandate of Proposition 187 to report children in the schools who do not have legal status in the United States. In anticipation of the implementation of the law, teachers chose to adhere to their ethical grounding as educators instead of obeying the new law.[2] Participants of the Sanctuary Movement in the United States, who protected victims of political oppression in Guatemala and El Salvador, anchored their actions on an ethic of justice. In spite of government reprisals, sanctuary movement supporters chose ethics over obeying laws, which denied asylum to victims of political persecution. Refugee workers, as well, are committed to an ethic of service. Immigration officers, legislators, and state or local officials who see themselves as protecting taxpayers against costs of services develop and implement laws with very different premises. Scholars are different from both sets of actors.

It is always important to remember that eliciting or using potentially damaging information may put the researcher in jeopardy of having to disclose it. In 1993, a federal appeals court upheld a contempt of court charge against a doctoral student. They rejected his claim that researchers are protected from forced disclosure of information by "Scholar's Privilege" which the researcher claimed was covered by the First Amendment to the U.S. Constitution (*In re Scarce 1993*). The legal implications of this decision may place already vulnerable and victimized refugees further at risk.

Researchers must remember the distinction between law and ethics and evaluate behaviour, including their own, accordingly. Refugee researchers navigate turbulent waters as they try to acquire essential data and the real stories of asylum seekers emerge.

Ethical Challenges and Difficulties in Doing Research with Refugee Service Providers

The ethical concerns confronted by researchers in conducting interviews with refugee service providers in the areas of health, mental health, social work, and education will be explored in this section. When interviewing those serving refugees, the researcher needs to adhere to the following ethical principles, essential to delve to depths that will allow him or her to see the human face and hear the voices of the refugee experience and its complexity:

a) honesty, trust, and confidentiality;
b) a cross-cultural approach, including gender; and
c) respect for the experience of victimization suffered by refugees.

Honesty, Trust, and Confidentiality Issues

When working in a politically and fiscally volatile environment and, with a target group that inspires less compassion today, refugee service providers juggle compounded challenges. Among them is the need to serve a community that has survived perils but may still face threat of deportation. The researcher must be aware that protection of the identity of refugees becomes particularly significant, regardless of the area of service. In emotionally and legal volatile contexts, the researcher needs to be equally careful to protect the identity of the service providers. Clearly the issues of honesty, trust, and confidentiality are critical. Consider the challenges faced by refugees and their service providers from a researcher's point of view.

Health Professionals

In conducting interviews with nurses and doctors, the researcher has to be conscious of professional standards and professional models (e.g., the medical model) they follow. Because of the health provider's obligation of confidentiality, the researcher can often only work from composite pictures of medical needs and health issues pertinent to refugees or from generalized case studies described by respondents. Specific questions may be asked regarding subgroups, for example, health needs of women, children, men, or specific health issues of certain ethnic groups versus others. However, access to a patient's file, or to a patient, can only be granted with explicit consent. Moreover, health care providers are sometimes unwilling even to put researchers in touch with patients for fear that the refugees will come to doubt their physician's commitment to confidentiality. "Outsiders may be seen as potential threats or possible informants."[3] The researcher must not only decide how far to probe in these situations, but also how to evaluate responses that are themselves generalizations from particular cases by respondents.

Because health care providers are extraordinarily pressed, accessibility for interviews is often difficult competing for precious time to see patients. Clearly, then, respect for provider's and patients' time, and taking care to be prepared for interviews, will allow the researcher to obtain more useful information and avoid feeling as an intrusive or insensitive.

While the number of specific examples discussed in interviews may be limited, the researcher may still feel overcome by the obvious human tragedies involved and the overwhelming picture of medical need in the face of a clear inadequacy of available health services. Therefore, interviews based on discussions of cases may need to be interpreted in light of other more general data on the health needs of refugees, e.g., the gynaecological needs of women, men's somatization of trauma, children's bed-wetting as response to witnessing violence. Relevant and accurate information can be obtained if a trusting relationship is established between the researcher and the clinician and if the health care provider's own ethical standing in considering refugees can be accommodated and the concerns of the refugee understood.

Social Workers

When working in crisis intervention, as is the case in one Canadian group called Visible Minority Women Against Abuse,[4] social workers spend their time juggling emotionally charged issues. Committed to providing services to victims of violence, they must conceal their identities to avoid retaliation by victimizers. Simultaneously, they are entrusted with their clients' safety, complicated when both domestic violence factors and asylum legal decisions are at stake. In such contexts, researchers have to be alert to the need to maintain confidentiality, in some cases even as to the location of the agency.

Confidentiality, as an ethical principle, applies to research with social workers as well as for other professionals. Some work with refugees who are minors, in which case confidentiality is especially delicate in part because there are laws that protect a child's right to privacy and parental authorization is required prior to conducting any interviews. Once again, the researcher will often be obtaining a composite picture of problems encountered by refugees in the host country rather than case studies of named clients. However, the accuracy of the detailed brush strokes on this picture will depend upon the trust established between the social worker and the researcher based upon assured confidentiality of the identity of the respondent.

Trust is of the utmost importance for the researcher interviewing social workers who need to be assured that their privacy and identity as well as that of their clients will be protected. When this understanding seems to be assured, the respondents will decide whether and how much to reveal about themselves. This sense of trust is crucial because the respondent is aware that the only real protection he or she has from that point forward is the researcher's ethical commitment to use information prudently and to safeguard that which should remain confidential.

The researcher must also be sensitive to questions that may jeopardize the work of service providers. For example, during interviews with an agency serving abused refugee women, it became apparent that there were boundaries around issues like a recent suicide by one refugee woman and, in another case, threats to counsellors by victimizers. An effort to cross those boundaries appeared likely to fuel latent tensions within the group of service providers. It would also have placed the respondents in ethically dangerous territory.

The fact that social workers often regard themselves as advocates for their clients adds another dimension for the researcher. Torczyner (1991, 127) observes: "[W]hat social workers and human rights advocates generally do about social justice becomes the ultimate ethical standard," or what Dobbert (1984, 83) calls the "duty to protect the community interests." However, those interviewed say that they "take care not to press cases or argue for individual clients unless their claims are truly meritorious."[5] The credibility of workers and their organizations is very important and their "working relationship with the government as well as other organizations depends upon demonstrating good faith and responsible decision-making." Thus, service providers in California and Canada discussed the fine line they walk in helping refugees file asylum claims but discerning the legitimate cases to present to immigration officials. It behooves researchers to be alert to the ethical sensitivities these social workers feel as part of the research process. It is a kind of professional empathy that should be present in the relationship.

Educators

Similarly, educators who have refugee students face a variety of ethical concerns about which researchers must be sensitive. Although there are no specific guidelines or clearly defined principles for teachers dealing with refugee children, they still face ethical, and even legal, constraints. Because their clients are generally minors, educators are absolutely limited in what they can tell researchers or share with other professionals about their problems. United States federal law (known as the Buckley Amendment) prohibits disclosure of much information about students in the United States and other countries have similar restrictions.

Of course, educators are simultaneously under both legal and ethical mandates to spot and report problems such as potential child abuse. Knowing just how to reconcile these competing demands can be extremely difficult for teachers as well as for those who seek their response to research questions. A cultural canvas rich in colour and texture intensifies these challenges. One of the complicating factors is the educator's need to establish a level of communication adequate to ensure understanding and then be able to balance expectations and frustrations that arise. Language or cultural barriers compounds the problem. A teacher may respond to what appears to be a clear case of abuse based on legal mandates, but cultural considerations may make the situation far less clear than it seemed at first.

The actual impact of trauma and violence among children (Boothby 1994; Garbarino and Kostelny 1993) in the native country plus the complexities of resettlement are extraordinarily difficult to recognize and analyze. Was a fight in the school yard simply misbehaviour? According to respondents, that "some

fights arose because children came from rival ethnic groups in their country of origin" and, in some cases, because children had heard their parents assert that "the other person's group was responsible for the death of loved ones."[6] As one Canadian respondent noted,

> students may even act out against their family or friends from the home country because they feel they have to be more Canadian than Canadians in order to be accepted.[7]

Respecting confidentiality norms of professional standards test the researcher to draw a composite from different contexts, especially of minors. These examples draw attention to the intertwining of confidentiality and cultural modulations. Similarly, researchers working with teachers must possess a level of ethnocultural competence and communication skills to ask acceptable and appropriate questions as well as to interpret responses correctly.

Problems in Cross-Cultural Communication for Service Providers

It is not only ethically important for the service providers to operate from a cross-cultural paradigm, it is also for the researcher. The comment from one respondent was typical. "Unless you think in the culture of the people you are seeing, you can miss the boat."[8] When participating in interviews, service providers must be convinced of the interviewer's sensitivity to diverse cultural patterns. Further, the quality of the interview will be determined by the researcher's ability to relate to various ethnocultural and linguistic settings. One cannot expect respondents to both answer questions and also provide interpretative context for the researcher.

Awareness, flexibility, and adaptability are the researcher's keys. Thus, one organization studied in the present research was heavily involved in serving African and Eastern European refugees. The next set of interviews was done with a group that has a strong focus on Ethiopia and Eritrea, though they serve a wide range of refugees. The next organization was predominantly involved in service to Central American refugees. This cultural mosaic becomes particularly significant for researchers. As the social workers interviewed stated plainly: "the dominant paradigm [from which we must work] is Anglo." On the other hand, two respondents noted quickly when discussing this issue that "it is not true that one must be from a particular country or ethnicity to be trusted as culturally sensitive."[9] The researcher has the same challenge and an ethical obligation of empathy to be prepared to engage these service providers as well as their clients.

Health Care Providers

The few sprinkled clinics, principally NGOs that work with scarce human and financial resources, and sometimes community hospital emergency room facilities that provide primary health care for them, regularly encounter culturally complex ethical situations that emerge in conversations with researchers. The cultural dimension plays a significant role both in the doctor-patient relationship and the curative process. It also affects the researcher's understanding of refugee health care. In order to provide effective treatment, health providers have acknowledged "the need to acquire some knowledge of the language and culture as well as an appreciation for the refugee's traditional medicine from the country of origin."[10] In this effort, doctors in some regions of the country have embarked in language training with a comprehensive cultural component, including traditional medicine practices, religious beliefs, and dialogues with traditional medicine practitioners.[11] However, in some cases professional ethics may be in conflict with traditional cultural practices.

Ironically, health care providers may even find themselves in an ethical problem without truly understanding it, though with the patient's well-being in mind, according to Western medical practice. A physician may pursue a treatment based on sound medical information, which may have overlooked the cultural significance that a course of action may trigger. Or, if a physician or patient lacks proficient language skills to communicate and depends on family members or culturally untrained translators, the recommended treatment may ultimately be altered or reversed. Thus, one respondent reported a tension that arose when one of her clients became upset when a doctor told her she was pregnant.

> It seems that she had had her husband translate for the doctor as he was counselling her about birth control. The husband, who wanted his wife to have more children, in part because of cultural beliefs, had simply switched the messages and misinformed both the woman and the physician.[12]

Thus, providers may or may not fully comprehend issues and understandings presented by their patients as was the case in this example. When conducting interviews, researchers need to explore cultural nuances that may be at play and consider how these may differ based upon the specific context whether or not the respondent actually proffers that perspective. The ethical obligation of empathy applies even in those settings in which, indeed particularly in those cases where respondents feel but may not articulate difficulties.

There are also questions about the responsibility that health providers have to understand cultural norms of their patients when disclosing diagnoses and prognoses or when consulting on treatment options. Muller and Desmond (1992) discuss ethical conflicts involved in a case of a Chinese woman who died from cancer. The doctors were careful to consult on the best medical treatment for the terminally-ill patient. However, operating from a Western medical paradigm, they focused on informing the patient of her terminal condition and offering her the option of a less than aggressive treatment. That was totally in contradiction with the ethnocultural beliefs and practices of the family. Because the patient was 49 years old, she was considered much too young to die particularly for a culture, which reveres old age as a sign of good fortune. Furthermore, informing the patient of her dire condition signified intensification of her suffering. It is

a Chinese tradition that when someone is ill he or she needs protection, including from bad news. In this case, several ethical issues were at play: disclosure of diagnosis and prognosis, and differing or conflicting medical practice with cultural values and norms (Muller and Desmond 1992, 327).

A researcher in such a case has two problems. The first is empathy for the practitioner and patient. The second has to do with what information the researcher might feel moved to offer to the service provider. The physicians may also face dilemmas if referral for consultation or treatment is indicated, since there are risks that the patient may fear disclosure of legal status and thus avoid treatment. One of the service tensions at play for the researcher in health care or in any other service area is how to manage information that touches on immigration status in law.

Indeed, even when the researcher and the practitioner have the best intentions and understand the cultural dimension of an issue, ethical dilemmas emerge that may have legal consequences. Since service providers operate from professional ethical standards as well as legal norms, traditions they encounter may challenge them in both arenas. Service providers may have to reckon with cultural traditions at odds with ethical and legal norms. Female genital mutilation, a practice of Muslim societies in the Middle East, Africa, and Asia, is now also perpetrated in Europe and the United States. Service providers, teachers, and social workers, are responsible for reporting it as child abuse while physicians are challenged by mothers who want their daughters excised or by patients with gynaecological complications as a result of infibulations. In some cases, physicians get requests from women who want to be sewn after delivery. Meanwhile, an Atlanta obstetrician "has been *quietly* performing what he calls 'female circumcision reversals,'" (Hansen and Scroggins 1992, 1) to avert possible cultural collision with community or family members still adhering to the tradition.

What is clear is that

> female circumcision—or what health experts prefer to call female genital mutilation—... is presenting medical, legal and ethical problems for American hospitals and courts. (Hansen and Scroggins 1992, 1)

Although acceptance of this practice is still debated as supporters claim respect for traditional cultures, the United Nations and others condemn it as a violation of a human right or a child's right. However, medical practitioners deal with the dilemma of a tradition in conflict with a medical practice. Since physicians operate from professional ethical standards, but on the margins of legal mandates, respecting traditions that are at odds with their ethical and legal responsibility may create conflict and no easy solutions. The obvious ethical tension for the researcher emerges in managing situations in which the professional or legal norms of the care giver are at odds with the patient's, particularly if the researcher speaks with both parties.

Mental Health Providers

There has been a movement in the last fifteen years to consider the cultural issues of psychotherapy in order to really understand the client, more so when the client is a refugee (Nguyen 1980; Martin-Baro 1988; Ramirez 1991; Wing Sue and Sue 1990; Farias 1990; Tseng and Hsu 1991; Lynch and Hanson 1992; Marsella et al. 1994). This approach has important impacts in this field in light of the fact that all refugees cannot be lumped into one ethnocultural group, but come from diverse backgrounds. In fact, there is a clear sense in which the researcher may face more than one constructed reality: the set of interpreted realities that therapist/respondents possess and the multiple constructed realities that may be present among a group of refugee/respondents, even if they are compatriots.

To this general principle of cultural understanding in counselling must be added other ethical issues that are critical when working with refugees in particular. First, trust is fundamental since many refugees have been tortured or persecuted and may suffer from Post-Traumatic Stress Disorder (PTSD) (Doerr-Zegers et al. 1992; Eth 1992; Kinzie and Boehnlein 1993). Second, as it is true with other types of providers, confidentiality needs to be assured, though there is a special situation when there are issues of suspected child abuse or when a client is a threat to himself or herself or others. "Trust and confidentiality are the most important aspects of the therapeutic alliance" (Kinzie and Boehnlein 1993, 101).

For refugee patients, their first encounter with a mental health provider may come only at the strong recommendation by a physician. "They may bring to this encounter cultural baggage that holds that mental health is only for those who are 'crazy.'"[13] A trusting environment through an empathic ear is needed to break down cultural barriers and open the door to subsequent visits for actual treatment. At this time care must be taken to assure refugees that any written information is strictly for the purpose of creating a clinical history record, and that strict confidentiality will be observed. In the case of Vietnamese people for whom saving face in front of their community, it is especially important for the service provider and for the researcher to establish trust and safeguard confidentiality.

Third, therapists and researchers who work with them must face extraordinary human tragedies due to trauma, torture, and dislocation of refugees that may press them to become social activists or at least to lose their clinical and analytic perspective. Over identification with human suffering may impede the therapist from maintaining the necessary distance and from facilitating the sharing of information by the refugee client. Thus,

> Continuing to feel therapeutically competent and ethically grounded, yet maintaining the personal strength and balance to treat traumatized patients, pose major challenges for therapists. (Kinzie and Boehnlein 1993, 102)

The same is true for researchers who conduct interviews with refugee service providers often feel compelled to be-

come advocates as they face the emotional strain of the numerous heart-wrenching stories, but who also need to maintain the distance necessary to do the analysis. There are those who seek to play both roles but these positions present different ethical framework; it is essential to be aware which ethical stance, activist or researcher, is appropriate in a given context (Denzin and Lincoln 1994).

As with physicians, researchers must be aware of the psychotherapist's concern with confidentiality in a cross-cultural context and be ethically comfortable with how to deal with it. Like physicians, the reaction of some mental-health care respondents is to provide the researcher with composite pictures of the traumas encountered by refugees. However, in order to get even that far, the researcher's credibility must be established. The therapist and the researcher must establish a level of trust. The clinician must be confident that the interviewer understands the enterprise and its cross-cultural aspects well enough not to press questions the therapist cannot answer or reveal information that might place the clinician or the client at risk. There is the confidentiality owed to the client, of course, but there is also the often unstated obligation contracted between the therapist and the researcher of informed empathy grounded in assured confidentiality.

In order for the therapist to develop that psychological contract with the researcher, he or she will seek signals that indicate cultural sensitivity in the investigator. Since cultural considerations are so critical to the therapist's work, failure to evidence such sensitivity makes it nearly impossible to have effective conversations. Those difficult few moments in interviews can be overcome by careful explanation of the project for which data are sought, introductions that ensure discussion of the experience of the researcher, and indications of other organizations and sites where research has already been done. Brief comments by the researcher may demonstrate understanding of some of the difficulties encountered by mental health providers. For example, sensitivity to the emotional scars of violence, war, and torture may signal the therapist that the researcher has an informed empathy to refugee-specific syndromes and experiences as well as signal commitment to confidentiality.

Educators

Ethical and legal norms pervade the school setting. However, although these two dimensions emerge simultaneously they are, for reasons discussed earlier, separate. Both sets of factors are rendered increasingly complex by different cultural tones and shades. The ethnic mosaics of some schools place demands on educators not to make uninformed assumptions about culturally-based behaviours or attitudes. Those factors also complicate the task of the researcher interviewing educators. As with other service agencies, information provided must be respectful of minors' rights, privacy protection laws, and professional ethics codes. And, as with others in the refugee service sector, the quality of information will be contingent upon the researcher's cross-cultural knowledge and the informed empathy of the educational enterprise. The following case intends to illustrate a dilemma between cultural practices and professional ethical and legal mandates.

In Canada, a respondent reported the case of a child who came to school with suspicious blue marks on his throat.

> The teacher was about to report the case when she remembered hearing in a multicultural workshop about the Chinese practice of "coining" as a home remedy against colds. Before calling the child protection authorities, she called the Multicultural Liaison Officer who contacted a Chinese doctor, who confirmed that, in fact, it was "coining" and not a case of child abuse.[14]

This particular case had a positive resolution, but respondents have noted less desirable outcomes in other instances. However, an ESL teacher in the United States shared a different experience: "We know it's coining. We tell the principal it is coining, but we still have to report it."[15] The principal in this context was operating from a legal framework as was the teacher mentioned earlier. However, the researcher in both cases needs to be respectful of the alternative course of action chosen in different settings. Clearly, a dilemma emerges when cultural interpretations may have to be subordinated to legal constraints.

A researcher in such a context should be sensitive to and respectful of various cultural healing practices. Because teachers operate under legal obligations, reporting cases of suspected child abuse becomes necessary. However, precipitous assessment by a researcher about this case could be both inaccurate and damaging. If such a case appears shocking to the researcher, asking the interviewees for an explanation and listening with empathy may be a sound course of action.

Gender Sensitivity

Considering issues specifically related to gender is vital when conducting research with refugees, given that more that 80 percent of the refugee population are women and children (Martin 1995; Brown et al. 1996). However, although women and girls have a significant representation, they have remained virtually invisible in terms of their specific issues and needs (Camus-Jacques 1990; Martin 1995). There is a dearth of research on refugee women, especially in the area of health, education and training, and employment. Victims of persecution, both physical and sexual abuse, women often also carry the burden of safeguarding their families, often at the expense of their own well being. A complicating factor is the reality that once in a host country, some refugee women remain withdrawn, silent, and virtually invisible. It is therefore difficult for researchers to address their situation and its importance. Their special vulnerability and sensitivity intensify the ethical commitments that researchers must bring to their tasks.

Among service providers, some embrace serving certain groups of refugees such as children or persons from particular ethnicities. Others choose to focus their efforts to help female victims of violence. When dealing with women,

gender issues and cross-cultural tensions can trigger issues of trust and confidentiality. Male researchers may be viewed with suspicion in an organization that, for example, serves abused women. A male researcher may thus have to gain their trust and confidence in the initial stage of the interview before relevant information is shared. This was certainly the case with a male in the research team when interviewing service providers in one of the Canadian groups. Once he communicated his trustworthiness, the female respondents relaxed during the interview as the interaction proceeded based on mutual "respect, noncoercion [or] manipulation" thus operating from a contextualized consequentialist model (House 1990; Smith 1990, in Denzen and Lincoln 1994, 21–22). A researcher, male or female, who demonstrates respect, sensitivity, empathy, and understanding of the volatile working climate, and sensitivity to gender issues can reduce suspicion and create a trusting and open environment (Fonow and Cook 1991; Collins 1991, in Denzen and Lincoln 1994). That is, the concept of informed empathy must be expanded to include the gender dimension.

Female researchers also face gender issues. They may have to deal with the risk of over identification with issues pertinent to women such as abuse, violence, and rape, risking clarity of her role as a researcher. That is true, notwithstanding feminist and critical research theory consideration of research as "activist research." Still, over identification with gender issues may lead to overlooking other relevant issues for refugees, including gender cultural nuances. For example, in interviewing refugee service providers, the depth of understanding of males may be underestimated. A male refugee service provider explained "refugees from cultures different from mine prefer to deal with me rather than others from their own culture, because they know they can trust me."[16] Transcending gender-based lines may be required to avoid compromising the necessary distance to understand and analyze the complexity of issues at work. At the very least, it is necessary to identify the ethical stance from which the researcher is operating beforehand, (Denzin 1989, 261-64, in Denzin and Lincoln 1994; Riessman 1987; Hertz 1996) "in order to produce less distorted accounts of the social world" (Hertz 1996, 5).

In operating from a cross-cultural model the researcher is challenged as he or she becomes what Renyi (1993, 204) calls a "border dweller," a person who can traverse frontiers dancing to the tunes of each and all of them while capturing the various perspectives. This calls on the researcher to interview a variety of different kinds of service providers to truly understand their experiences, to assure trustworthiness and transferability (Kincheloe and McLaren 1994). It also means a particular need to test evaluations of observations by being attentive and sensitive to the cultural dimension and the history of victimization of women and children under study (Leavitt and Fox 1993; Mareenn 1993; Marsella et al. 1994; Igoa 1996). Its kaleidoscopic nature requires the researcher to acquire an ample collection of culturally-tinted glasses obtained from various service providers prior to a final evaluation.

Refugees and Researchers: Ethics of Social Science Research

Beyond the field-specific issues raised earlier, the opportunity to interview refugees is unique in other ways. This section considers crosscutting issues and special problems. An essential point to maintain is to carefully evaluate how much personal information to seek. Since these are people who have experienced real terror, have been victimized, tortured, or persecuted, revealing their identity is a delicate issue. In addition, they have to feel as though they have a stable base on which to operate, and, thus, may be anxiety ridden about potential threats for their family or themselves in the host country or for those left behind in their country of origin. Thus, they must make an initial judgement about the researcher's promise as an ethical professional. There is an additional ethical dimension present, at least an implied aspect, because interviewers may be introduced or present themselves as authority figures, thus intensifying the pressure felt by refugees. Quite apart from whether the researcher is associated with an agency, respondents may fear that the work is sponsored or indirectly controlled by the authorities. Moreover, refugees from countries where university faculty hold great prestige and authority may be far more threatening than they know. Trust, therefore, plays an important role. It may be an even greater issue in the current political climate characterized by increased hostility toward refugees and immigrants generally.

A Different Cut at Trust and Confidentiality

Upon sharing the written interview with one of the respondents, a refugee service provider, who was herself a refugee, became most concerned about sharing in writing a tragic story that was so particular that it could be identified by the family of the victim. Ethically, to preserve the trusting relationship, it was essential to appreciate her concerns over confidentiality of the family as well as her own, although the researcher had assured her that her identity would not be revealed. She needed additional assurances that some of the unique details of the story would be altered to avoid revealing the location of the tragedy. Due to the intensity of the tragedy of her family, her anxiety was so intense that to allay her fears, the researcher invited her to make the necessary changes. To put her further at peace, the researcher asked her to generate a fictitious name with which she felt comfortable. They both worked together on different names until the refugee chose one.

The fact that research that may involve minors is particularly sensitive was mentioned earlier in connection with schools and teachers. However, there are additional dimensions to be considered that apply more generally. Obviously, confidentiality and parental consent becomes even thornier than with adults. First, parental consent can be a curious problem in dealing with refugees if the researcher does not speak

the parents' native language. Since children tend to learn the language of the host country faster than their parents, the parents often rely upon them as interpreters. Refugee services workers indicate that "children, particularly teenagers, use the language dependence as a power lever against parents." Thus, the ethical problem arises as to whether parents who are granting or denying consent fully understand the research and its intended uses.

Second, although there is an ebb and flow of child refugees, depending upon the political conflict in a country and the number of orphan children it generates, parental consent is even more complicated. When there are homeless refugee orphans, suffering from post-traumatic stress disorder, who have neither legal status or guardians, a problematic situation in safeguarding the minors' confidentiality in a context in which they lack legal status (Olivas 1991), is more complicated. The following cases may illuminate the point.

A Guatemalan 13 year old female had traversed through her war stricken country, Mexico, and the United States when, upon arrival in San Diego, California,

> some men picked her up and transported her blindfolded to a club somewhere in Los Angeles where she was forced to engage in prostitution. Although the men looked Hispanic, they spoke an entirely different language.[17]

The assumption made by the social worker was that "the girl had been kidnapped and sexually abused by men from a Middle Eastern country." For this young girl the sexual abuse committed in such circumstances and in a context where the language was foreign to her intensified the trauma triggering a deep depression. The array of issues presented to the researcher considering such a case is substantial, intense, and complex. Even so, failure to address such cases in order to avoid the dilemmas both undermine the methodological and conceptual integrity of the work and leaves critically important date unreported and unanalyzed.

The severity of the trauma experienced by refugee minors as an aspect of being orphaned can make it impossible to interview them. The social worker indicated that "the girl was in a severe depression and in a fragile emotional state," although in a temporary haven at a Los Angeles shelter for refugee children. Given the Catholic upbringing and stern Latin tradition regarding virginity, this case illustrates the complexity of trust, confidentiality as well as the need for cultural understanding. Although this girl's legal protection as a refugee minor was not defined, given that there was no legislation protecting minors who are refugees, the social worker was operating from an ethical standard, one that a researcher needs to respect. In such cases, the researcher must determine how to treat the second person report of the case in terms of its validity and with respect to possible disclosure of identity.

Other Aspects of the Cultural Sensitivity Requirement

While the importance of cultural sensitivity was noted earlier, there are some additional dimensions to consider. For one thing, special attention must be paid to avoid interpretative or analytic generalizations based on what may appear, on the surface, as an ethnoculturally homogeneous group because the refugees may come from the same country or neighbouring regions in the world. It is helpful to have knowledge not only of a language and of the various cultures represented among the interviewees but also of the sociopolitical situation from which they come. In the absence of that knowledge, the researcher requires not only linguistic translation but also cultural interpretation. Sensitivity on the part of the researcher to cultural modulations, and to different verbal and nonverbal communication may allow the interviewees to work through difficult topics or questions. In this manner, the researcher may avert a situation where interviewees close up or provide evasive responses. As Denzin and Lincoln (1994, 12) pose, "Any gaze is always filtered through the lenses of language, gender, social class, race, and ethnicity."

Moreover, the researcher who overlooks cultural differences may not ask questions that elicit information on the subjective experience of subgroups based on class, race, gender, or educational experience. In one group interviewed, for example, former military men asserted themselves as spokespersons for the group. Of course, this created a tense climate in which the researcher had to avert possible "political" conflict during the interview process. Another consequence may be that those who have been oppressed will once again assume a subservient or passive role. Thus, assuming that all refugees are having similar experiences, or that they are a cohesive group, presents possible misunderstandings with consequences even for future researchers (Yu and Liu 1986). Clearly, it is important to prepare one's cultural knowledge base in preparation for such interviews.

Often the intra-group differences are as diverse as the inter-group contrasts. For example, indigenous groups from Guatemala may speak one of the 22 Mayan languages and may have no knowledge of Spanish. Yet Mayan groups may be unable to communicate with each other in a common language. In other situations, for "*campesinos*" the political conflicts leading to the war in El Salvador may be totally foreign to them even though they had endured persecution and were ousted from their land. Notwithstanding their political naivete, they may be reticent to speak in the presence of others from their homeland because of possible retribution, even if they do not understand exactly why.

When asking possibly threatening questions that may later lead to confrontation or retaliation from others, it is particularly critical for the researcher to be alert to cues from refugees. In such circumstances the researcher's knowledge of cross-cultural nonverbal communication is particularly useful. Furtive looks may suggest that a question is stepping on fragile ground. During an interview of Central American refugees, a silence prevailed along with compromising looks. Later, one of the

refugees explained to the researcher, "We could not talk because Juan (a fictitious name) was in the military in El Salvador and we are still afraid he may retaliate here in the United States."[18] Still, respondents who have been oppressed, can be given a voice through the proper interpretation of nonverbal communication and learning "as a scholar how to speak about aspects of [a] community which lacks a spoken language" (Wichroski 1996, in Hertz 1996, 8). In this case, the researcher would be wise to consider the politics of the historical period in El Salvador while also being in tune to the "plurality of cultures" (Quantz 1992, 483) among a group of refugees. Kincheloe and McLaren (1994, 152) support Louis Dumont's view that "cultural texts need to be viewed simultaneously from the inside and from the outside." Such a context demands from a researcher linguistic competence, knowledge of cross-cultural communication, and respect for the historicity of the respondents.

The researcher who keeps in mind the culturally assigned gender roles in particular cultures, even if in disaccord with the host culture or his or her own, may find that such awareness may enhance participation. For example, asking males about their homelessness may lead to embarrassment and pose a threat to their male self-image "because they are unable to provide for themselves or their families."[19] This was the case with the Central American males who revealed their lack of shelter in the interview context: "We live under the freeway overpass or abandoned downtown buildings."[20] Females, on the other hand, may be reluctant to speak at all or may consistently defer to males, but when a space is opened for them, are willing to share their struggle to have "teachers listen to our concerns for our children." Cumming and Gill (1991, 10) present a similar situation in Canada for immigrant mothers from India regarding "pressures to communicate with their children's teachers." Service providers interviewed for this research indicated, for instance, that some refugee women "would rather die"[21] than reveal discord in their family that led to abuse. Informed empathy can help the researcher pose specific questions while conveying an understanding of such experience. Similarly, in order to understand responses by refugees, the researcher must evidence sensitivity to these dimensions or risk shallow responses.

According to critical ethnography theory, one of its purpose is emancipation of the marginalized group through multivocality in which self-articulation can emerge (Quantz 1992). With this particular group, it was important to recognize the plurality of cultures as well as the struggle to make sense out of the homelessness experienced by males and the frustration of the mothers with the school. The issue of trustworthiness, regarding "the credibility of portrayals of constructed realities" (Kincheloe and McLaren 1994) and the similarity of contexts compared, is essential when dealing with highly vulnerable individuals.

Triggering Repressed Memories: Respecting Emotional Vulnerability

Vulnerable and oppressed respondents pose special challenges to the researcher. "How does the knowing subject come to know the Other? How can researchers respect the perspective of the Other and invite the Other to speak?" (Kincheloe and McLaren 1994, 152). Once refugee respondents or refugee service providers actually open up and begin to speak candidly, they may undergo a process of release. Although the best interview plans may go awry, it is essential to permit the commentary to unfold even though some of the information that emerges may be upsetting to the researcher, as when graphic stories of abuse emerge concerning family violence, in detailed descriptions of war atrocities, or in stories of abuse during flight to asylum. The interview plan must accommodate the nature of the pressures at work in the lives of respondents.

At the same time, such circumstances require the researcher to maintain an ethically supportable balance between empathy and analytic distance. He or she may be easily overwhelmed with the cathartic reaction triggered by the interview process with people who are so anxious to tell their stories. The agony of a silenced rape by a military officer may be anguishing a quiet young woman while a young man seeks to share his story of torture by the Salvadoran military: "I was tortured with electric shock on a metal mattress."[22] Empathy and silence by the researcher as a form of respect for that emotional experience may allow for validation and support from other refugees in the group as well as break the silence and alienation that may lead to self-understanding (Kincheloe and McLaren 1994).

The heart-wrenching stories, however, can easily co-opt the researcher. Social activism takes on a new meaning as the possibility of becoming an agent of change tempts the researcher to divert from pursuing research. At times like this, operating from a well-established ethical framework becomes really important. A helpful reminder for the researcher is the relevance of developing a theoretical point of view on refugee issues as opposed to becoming diffused and absorbed by the insurmountable needs of this group of people. Nonetheless, it is the ethical framework that allows the researcher to be more effective in documentation and interpretation of the stories, although it does not preclude being involved in refugee issues. However, it is essential to know which role one is taking at any given time and to not engage in activities that would damage one's credibility or analytic perspective as a researcher (Denzin and Lincoln 1994; Hertz 1996). In other words, defining one's role as a researcher or as a refugee advocate, a priori, is necessary in order to operate from the appropriate ethical framework, or as Hertz (1996, 5) articulates, "it is essential to understand the researcher's location of self." Notwithstanding, when operating from a critical research framework, it is assumed that both roles are intertwined, the research is "activist research" (Quantz 1992, 498) and therefore inherently transformative. However, a criticism is that it has been less emancipatory for the respondents, instead

benefiting the researchers with publications.[23]

Conclusion

The fine lines for the researcher in all of these issues that push and pull pose particular ethical challenges when conducting interviews with refugees and refugee service providers. The compelling sentiment to jump in and become an advocate must be balanced with the importance of critical analysis in order to sort out the multifaceted, complex, and kaleidoscopic refugee picture. Historicity, cross-cultural paradigms, trust, empathy, protection for the privacy and confidentiality of both refugees and refugee service providers, and respect for their human trauma must be integral parts of an ethical framework for the researcher. "Ethics do not exist in a vacuum but arise in a cultural, historic and personal context" (Kinzie and Boehnlein 1993, 101). Yet the need to understand the refugee situation better is vital, since it is becoming an increasingly serious contemporary problem. For the researcher, it is an attempt to take a photograph while walking on a tight rope, balancing between those that advocate an ethical frame of reference and those who adhere to a legal one. When interviewing service providers the focus is on the human story. A short distance away, immigration officers are concerned with enforcing the law, although they also face ethical dilemmas: "following the law or being flexible with victimized refugee women and children."[24] In interviewing, researchers have to be aware that service providers must abide both by their professional code of ethics and by the law.

When interviewing refugees, the researcher wants to zoom in to the human tragedy while reconciling values of indigenous cultures with ethical and legal norms. Focusing with a lens that captures cultural differences with sensitivity, empathy, and understanding is fundamental. Regardless of whom the researcher interviews, assurance of confidentiality is critical to all. Thus, qualitative research on refugees requires a delicate balance of three critical ethical pillars: confidentiality, understanding of cultural differences, including gender, and respect for the emotional experience of victims while engaged in "an ongoing 'critical' dialogue," (Quantz 1992, 450). ■

Notes

1. In the literature researchers make distinctions of the terms "refugees," "asylum seekers," "refugees in orbit," and displaced persons. For the purpose of this discussion, refugee will be used interchangeably, and not solely with regard to those designated convention refugees.
2. Proposition 187 was overwhelmingly approved by California voters in November 1995. However, its constitutionality is still being challenged in the courts. The lower courts and the California Supreme Court have ruled against the mandates of the Proposition. It is expected to go to the United States Supreme Court since Prop 187 violates the U.S. Supreme Court Case *Plyler v. Doe*, 1982 457 U.S. 202.
3. Clinica Monsenor Romero, Los Angeles, California; Central American Refugee Center (CARECEN), San Francisco and Washington, DC.
4. Visible Minority Women Against Abuse, interviews conducted with social workers, the Director, and the crisis intervention workers, Ottawa, Canada. The identity of the staff is not provided to protect their confidentiality.
5. OCISO, Ottawa, Canada and interview with attorney at CARECEN, San Francisco, California.
6. Principal, Regina Elementary School, Ottawa, Canada, 1994.
7. Multicultural Liaison Officer, Ottawa, Canada.
8. Multicultural Liaison Program Director, Ottawa, Canada.
9. Catholic Resettlement Center, Ottawa, Canada.
10. Clínica Monseñor Romero, Los Angeles, California.
11. For example, some health professionals in the Southern California area had training in cross-cultural communication as well as traditional medicine practices. As a result, they became sensitive to the importance of respecting patients who medals of saints on their hospital gowns, or had a crucifix or a figure of the Virgin Mary by their bedside.
12. Interview with Multicultural Liaison Officer, Ottawa, Canada.
13. Clinica Amanecer, Los Angeles, California; CARECEN, Washington, DC; OCISO, Ottawa, Canada.
14. Vietnamese Multicultural Liaison Officer, Ottawa, Canada, 1994.
15. English as a Second language teacher, Vermont, April 1997.
16. Interviews at Catholic Refugee Services, Ottawa, Canada, November 1993.
17. Ibid.
18. Interview of a group of Central American refugees, Catholic Immigration Service, Los Angeles, California, December 1990.
19. Interview of refugees from Central America, Catholic Refugee Services, Los Angeles, California, 1991.
20. Central American male refugee, Los Angeles, California.
21. Mental Health Worker, OCISO, Ottawa, Canada.
22. Salvadoran, male refugee, Los Angeles, California.
23. According to Critical theory methodology and Feminist theory methodology, the role of researcher and of advocate are one. The researcher, according to this perspective has a dual role, as a researcher and as an agent of change. Equally important is giving voice to a traditionally oppressed group is as important as giving "attention to the affective components [reflexivity and voice] of research" (Punch 1994, 85).

    Of course, such a perspective creates other ethical issues. First that the researcher must have commitment to the topic of research. Second, the researcher cannot walk away from the role of agent of change. However, if we use a clinical framework, such as the mental health or medical models, then a certain distance is needed to be analytical of the research and to be able to deal with the information in a critical manner. As important is for the researcher to be aware of what role he or she is playing, based on a relativist stance, and the ethical framework necessary for each, the activist or the researcher. When merging both, the ethical dilemmas that emerge need to be considered. This can prevent the total immersion in a subjective experience that may block the due analysis, although "The concept of the aloof researcher has been abandoned. More action-activist-oriented research is on the horizon as are more social criticism and social critique." (Denzin and Lincoln 1994, 11). But, as Hertz concludes, "tradition continues to exit alongside change." The concerns of both perspectives, according to her are valid, the first for "monitoring our actions toward respondents and the settings we study" and the second for offering the opportunity to "write about reflexivity and voice" (ibid., 9).
24. Department of Immigration, Ministry of Culture and Social Welfare, Helsinki, Finland, July 1994.

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