

Volume 35 | Issue 2

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2003

# Diplomacy and the G-Word

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## Recommended Citation

Jerry Fowler, *Diplomacy and the G-Word*, 35 Case W. Res. J. Int'l L. 213 (2003)  
Available at: <https://scholarlycommons.law.case.edu/jil/vol35/iss2/4>

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## DIPLOMACY AND “THE G-WORD”

*Jerry Fowler*<sup>†</sup>

Thank you very much and thanks to our host for organizing this Symposium. It is a tremendous privilege to be here and to share the program with so many people that I respect so much and who have been involved in these issues for much longer than I have.

After hearing Madeline Morris' presentation, I do have to say that I think there is a lot of overlap in the way we see things, but I would stop short of her argument that genocide should be dispensed with altogether as a separate category.<sup>1</sup> What I really want to focus on is the use of the word “genocide” and the concept that I call “pre-justice stage.” Michael was talking about “justice” and “anti-justice,”<sup>2</sup> but what I really want to talk about is *pre-justice* – the time involving prevention of genocide or responses to genocide. And I should just note what most of you probably know: on this whole question of using the terminology and the advantages of using the word genocide and trying to find appropriate alternatives, David Scheffer, in his article in the *Suffolk Transnational Law Review*, proposes the use of the term “atrocious crimes” as an alternative under certain circumstances.<sup>3</sup> I think that his proposition is something that deserves a lot of attention.

But I am actually going to make the argument that we should not jettison altogether the concept of genocide in the pre-justice phase, the response phase. Instead, we need to adopt an approach different from the one adopted in the past. Also, I want to talk a little bit at the very end about the way this concept has played into responses of the U.S. government to the ongoing situation in Sudan. I think a lot of times in these discussions, we, especially those of us who are lawyers, get focused on preventing the last genocide. This is just like what they say about generals, “They’re all ready to fight the last war, but the next war is never quite like the last one.” But the next genocide or genocidal situation is not going to be exactly like Rwanda or exactly like Bosnia, and we should not lose sight of that fact.

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<sup>1</sup> See Madeline Morris, *The Role of Justice in Building Peace*, 35 CASE W. RES. J. INT’L L. 205 (2003).

<sup>2</sup> Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT’L L. 161 (2003).

<sup>3</sup> David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT’L L. REV. 389, 410 (2002).

I want to begin by emphasizing the distinction between prevention and punishment. If you look at the UN Genocide Convention, you will see that it is called the Convention on the *Prevention* and Punishment of the Crime of Genocide.<sup>4</sup> But then again, the whole text is really talking about the *punishment* of genocide. It is very oblique on the question of prevention, and, in fact, there is only one article that directly addresses that question, and that article almost was not in the final version of the Convention.<sup>5</sup> At one point, it was dropped altogether. And then, if you look at the text of it, what it says is that parties to the Convention may – they do not have to, but they may – refer instances of genocide to “competent organs of the United Nations.”<sup>6</sup> It is very, very weak phraseology. One might conclude from looking at the Convention that when it uses the term prevention, what it really means is that if we punish genocide enough, that it will have a preventive effect, perhaps through deterrence. As Michael pointed out, all of us may have an instinctive feeling that eventually enough punishment will lead to deterrence, but there is certainly no empirical evidence of that.<sup>7</sup>

As a general matter, there is acceptance today of a more expansive view of prevention, that there really is some moral, if not legal, obligation to do something to stop genocide before it happens. Or, once genocide is in the making or once it does happen, there is an obligation that something needs to be done to stop it, even if this obligation is more honored in the breach. So, in spite of that fairly unpromising drafting history, this notion of prevention is still very much an issue with which governments have to deal.

But that leads us to a problem, and it is a problem that Madeline Morris referred to more in a justice phase than in a pre-justice phase – the problem of definitionism.<sup>8</sup> The definition of genocide in the UN Convention is a legal definition, indeed a legalistic definition.<sup>9</sup> Now that makes a lot of sense and is perfectly appropriate if you are trying to define a crime for which some tribunal is going to assess guilt or innocence.

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<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention or UN Convention].

<sup>5</sup> *Id.* at art. VIII.

<sup>6</sup> *Id.*

<sup>7</sup> Scharf, *supra* note 2, at 161.

<sup>8</sup> See generally Morris, *supra* note 1, at 205.

<sup>9</sup> Genocide Convention, *supra* note 4, art. II (stating “[i]n the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

However, the question of prevention is not a legal question, the question of prevention is a political question, and predicating political action on satisfaction of a legal definition is a recipe for inaction. And I agree with Michael Scharf's comments with regard to the actions of the United States government in Bosnia and also in Rwanda to some extent. I think it is true that it does not matter what definitions you are working with, if there is not "political will" to respond, there is not going to be a response.<sup>10</sup> And so, if you have a Secretary of State who is being told one set of facts and asserts in public testimony another set of facts, I do not know how you get around that.

But on the other hand, relying on a legalistic definition does provide the opportunity for endless debate about whether a situation is or is not genocide. And while those debates are going on, the situation is getting worse and people are dying. I think what we have to do is to find a way in the pre-justice phase, in the prevention phase, to break out of that definitionalism, to step away from the concern of whether something is genocide or is not genocide, without totally losing the moral force of the concept of genocide.

What we have done at the Holocaust Museum, where part of our mandate is to alert the national conscience to contemporary genocide, is to come up with a three-tier warning system: genocide watch, genocide warning, and genocide emergency.<sup>11</sup> The first level, "genocide watch," describes a situation where there is a serious potential for genocide.<sup>12</sup> "Genocide warning" is when organized violence is underway that threatens to become genocide.<sup>13</sup> And a "genocide emergency" is when genocide is occurring or is imminent.<sup>14</sup> There is nothing particularly scientific or precise about these levels; it is meant generally to describe a continuum building towards indisputable genocide. In these three levels, we do not have to wrestle with the question, "Is it or isn't it genocide?" We can say the situation is in a range where, as David Scheffer said with regard to Kosovo, "indicators of genocide" are present and for the pre-justice phase, for the political phase, that should be enough to justify action.<sup>15</sup> We can let a court later decide whether it actually was genocide in the legal sense, but first we have laid a basis for political action.

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<sup>10</sup> See generally Scharf, *supra* note 2.

<sup>11</sup> UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *About the Committee on Conscience*, at <http://www.ushm.org/conscience/about.php#agenda> (last visited Oct. 6, 2003).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> David Scheffer, Address at Case Western Reserve University School of Law War Crimes Research Symposium (Feb. 28, 2003).

And we have applied this scheme, for example, with regard to Sudan. The Holocaust Memorial Museum in October 2000 issued a genocide warning for Sudan, meaning we believed there to be a threat of genocide there.<sup>16</sup> Now there are a lot of people concerned about Sudan who say it is genocide, but there are also a lot of people concerned about Sudan, who say that maybe it is not, maybe it does not meet the legal definition. But resolving that dispute is not very conducive to focusing on what needs to be done. So, what we are trying to do, as I said, is to set that question aside to be dealt with later, to emphasize the moral stakes that are involved now, the severity of the violence. And I think that a lot of people can agree that there is a threat of genocide. For example, the U.S. Commission on International Religious Freedom issued a report and approached the question in much the same way.<sup>17</sup> They were not willing to say it was genocide, but they emphasized in the report that the values implicated by the Genocide Convention are definitely under assault in Sudan.<sup>18</sup>

Not just because of our actions, but especially because of President Bush's religious conservative constituencies who have been very involved in Sudan, the United States government has put a lot of emphasis on resolving the situation in Sudan. The Administration has adopted a policy of very aggressive diplomacy which has achieved some results. There is now a cessation of hostilities after eighteen years, which has dramatically reduced the level of violence. There has been, at least for the last few months, unimpeded humanitarian access. Before, one of the problems that had been ongoing for a long, long time was interference with and sometimes the cutoff of humanitarian access by the government of Sudan, and the use of food as a weapon. So this progress has been made through the use of aggressive U.S. diplomacy while advocates in the United States were using some variant on the term genocide – some saying it was genocide, others saying it was a threat of genocide. The Administration for its purposes has not focused on that. That has been a little disconnected from the diplomacy, which has allowed them to pursue the path that they want to pursue.

Interestingly, at the end of last year the United States Congress passed a piece of legislation called the Sudan Peace Act, which included a congressional finding that the conduct of the Khartoum government

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<sup>16</sup> Press Release, Tom Cooney, United States Holocaust Memorial Museum, U.S. Holocaust Memorial Museum's Committee On Conscience Praises Appointment of Danforth As Sudan Envoy, (Sept. 6, 2001), at <http://www.ushmm.com/conscience/sudan/danfpr.php>.

<sup>17</sup> U.S. COMMISSION ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM 35 (2000), available at [http://www.uscirf.gov/reports/01May00Report\\_Index.php3](http://www.uscirf.gov/reports/01May00Report_Index.php3) (last visited Feb. 1, 2004).

<sup>18</sup> *Id.*

constituted genocide under the U.N. Genocide Convention.<sup>19</sup> President Bush signed this piece of legislation. So, on one hand you have a statement by the executive and legislative branches that genocide is happening in Sudan, but then when you talk to the State Department, the people who are actually conducting the policy, and ask whether this has affected their approach or their diplomacy, the answer is, "No, not really. We're still doing the same thing that we were. It is not an issue between us and Khartoum, at least at this point."

So this presents something of a paradox. Speaking in terms of genocide has helped focus a constituency in the United States on the problem. It is also been a factor in the President's concern. And I should emphasize that the effort that the Administration has put into this particular issue has been driven by the President's concern. I remember hearing one National Security Council official speak, not too long after President Bush came into office. She said that one of the first directives she got was to start working on Sudan. She responded, "Sudan? That's not ripe, we can't deal with that." But it came from the very top, and that has driven what the Administration has done.

So, invoking the concept of genocide has helped rivet attention, but on the other hand, it has not necessarily defined the diplomacy. The diplomacy has followed a separate track, which to this point appears to have been constructive. What that tells me, though, is that "genocide," the G-word, is still something that diplomats just cannot deal with. Lawyers can deal with it, in the context of legal proceedings. Politicians can deal with it, if there is a sufficiently strong constituency that is sufficiently motivated to insist that a situation is genocidal. But the diplomats cannot. The term describes conduct that is so extreme, so reprehensible, that diplomats simply have to keep it out of their vocabulary if they are to carry on with conventional diplomatic activity.

Finally, another question that is raised is if you look at the negotiations that are being undertaken to resolve the situation in Sudan, which are primarily between the government in Khartoum and the main rebel group, which is the Sudan People's Liberation Army ("SPLA"), justice is not on the table. They are talking about power sharing, they are talking about wealth sharing, they are talking about security, they are talking about the administration of certain marginalized areas. But justice is not on the table. In part, that can be attributed to the fact that although Khartoum is responsible for the vast majority of the abuses, and certainly the scope of their abuses has been much greater, the SPLA itself does not have clean hands and has been responsible for the deaths of many, many civilians in the South – civilians who ostensibly are the people they represent. So, they both have an interest in not putting justice on the table. And the question is,

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<sup>19</sup> Sudan Peace Act § 2(10), Pub. L. No. 107-245, 116 Stat. 1504 (codified as amended in 50 U.S.C. 1701)

can you have a just peace, can you have an enduring resolution without including justice as a part of that? And I think we will hear from Judge Sofaer and Paul Williams on that issue in the next panel.<sup>20</sup>

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<sup>20</sup> Hon. Abraham Sofaer, Address at Case Western Reserve University School of Law War Crimes Research Symposium (Feb. 28, 2003); Paul Williams, Address at Case Western Reserve University School of Law War Crimes Research Symposium (Feb. 28, 2003). *See also* Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement*, 35 CASE W. RES. J. INT'L L. 219 (2003).