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A U.N. SOLUTION TO A *PROBLEM FROM HELL*

A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE.

By Samantha Power. New York: Basic Books, 2002, Pp. 610.

*Reviewed by Sherrie L. Russell-Brown**

Why has the *United States* been a bystander to genocide? That is the fundamental question that Samantha Power explores in her Pulitzer Prize winning book, *A Problem from Hell: America and the Age of Genocide*.¹ According to Power, the answers lie in the critical decisions, including decisions not to decide, made before, during, and after the various genocides she surveys.² This Review of Power's book expands on that question. Why has the *international community* been a bystander to genocide?³

An example of the international community's failure to respond in the face of genocide is Rwanda, almost ten years ago. On April 6, 1994, Major General Romeo Dallaire—Commander of the United Nations Assistance

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1. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* XVII (2002).

2. *Id.*

3. Recent events in the Democratic Republic of Congo (DRC) might prove that the international community will no longer be a bystander to genocide. On May 30, 2003, after reports that the "whole area is in a precarious situation," the U.N. Security Council "gave the green light for a heavily armed international force" which France would lead for three months in Bunia—the capital city of the Ituri province in the DRC. See AFX European Focus, *UN Authorises International Peacekeeping Force for DR Congo*, MONUC, May 30, 2003, available at <http://www.monuc.org/news.asp?table=news&language=0&id=689>; see also Samson Mulugeta, *UN Congo HQ Under Siege*, NEWSDAY, May 8, 2003, available at <http://www.newsday.com/news/nationworld/world/ny-congo0507,0,5527054.story?coll=ny-top-headlines>. France would provide half of the 1,400 soldiers to be deployed in Bunia. See AFX European Focus, *UN Authorises International Peacekeeping Force for DR Congo*, MONUC, Apr. 6, 2003, available at <http://www.monuc.org/news.asp?table=news&language=0&id=689>. On June 4, 2003, Kofi Annan said that a 3,800-strong U.N. peacekeeping force should replace the 1,400 French-led international force, which is expected to start arriving in Bunia later in the week. See Associated Press, *U.N. Chief Calls for More Troops in Congo*, MONUC, June 4, 2003, available at <http://www.monuc.org/news.asp?table=news&language=0&id=698>. Belgium, Sweden, Britain, Brazil, and South Africa have said that they will contribute to the international force, and Ethiopia is also likely to send troops. *Id.* But, as this Review develops, this type of response is unusual and its efficacy remains to be seen. In addition, it does not approach the formalized, structured response that this essay suggests should be pursued.

Mission for Rwanda (UNAMIR), a multinational force of approximately 2,548 “troops”⁴—predicted that the seeming peace between the Hutu and Tutsis could easily be shattered.⁵ On that same day, the Hutu President of Rwanda, Juvénal Habyarimana, was killed and before dawn on April 7, 1994, the genocide against the Tutsi (and those considered to be sympathetic to them) had begun.⁶ It continued up until July 18, 1994.⁷

Symbolic of America’s confusion about the nature of the events, Lieutenant General Wesley Clark, then Director of Strategic Plans and Policy for the Joint Chiefs of Staff at the Pentagon, recalled staff officers asking, upon learning of the crash of Habyarimana’s plane, “Is it Hutu and Tutsi or Tutu and Hutsi?”⁸ On April 7, 1994, just after dawn, Hutu soldiers rounded up fifteen of Dallaire’s peacekeeping forces. Five Ghanaian peacekeepers were led to safety, while ten Belgian peacekeepers were killed and savagely mutilated.⁹ On April 21, 1994, after some countries had already unilaterally withdrawn their own troops, the Security Council reduced Dallaire’s UNAMIR force from 2,548 to 270.¹⁰ Dallaire included the term “genocide” for the first time in his situation report during the last week in April 1994.¹¹ Dallaire warned, “Unless the international community acts, it may find it is unable to defend itself against accusations of doing nothing to stop genocide.”¹² Warren Christopher, then U.S. Secretary of State, did not give his diplomats permission to use the term “genocide” until May 21, 1994. By then, most of the Tutsi victims of the

4. On October 5, 1993, the U.N. Security Council established UNAMIR. *See* UNAMIR, available at http://www.un.org/Depts/dpko/dpko/co_mission/unamirFT.htm [hereinafter UNAMIR I]. Its mandate was, *inter alia*, to help implement and monitor the implementation of the Arusha Peace Agreement—a comprehensive peace agreement concluded on August 4, 1993 to end the fighting between the Hutu government soldiers and a Tutsi armed force called the Rwandese Patriotic Front (RPF). *Id.*; *see also* UNAMIR, available at http://www.un.org/Depts/dpko/dpko/co_mission/unamirS.htm [hereinafter UNAMIR II]. The Agreement “called for a democratically elected government and provided for the establishment of a broad-based transitional Government until the elections, in addition to repatriation of [Tutsi] refugees and integration of the armed forces of the two sides.” *Supra* UNAMIR I.

5. *See* POWER, *supra* note 1, at XVII.

6. *See* HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996) [hereinafter *Shattered Lives*]; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ch. 2, ¶¶ 107, 111 (Judgment, Int’l Crim. Trib. for Rwanda, Sept. 2, 1998), available at <http://www.ictor.org/wwwroot/English/cases/Akayesu/judgment/akay001.htm> [hereinafter *Akayesu Judgment*].

7. *See Akayesu Judgment*, 2, ¶¶ 107, 111.

8. *See* POWER, *supra* note 1, at 330.

9. *See id.* at 331-32.

10. *See* UNAMIR II, *supra* note 4.

11. *See* POWER, *supra* note 1, at 358.

12. *Id.*

genocide were already dead.¹³ On June 10, 1994, when questioned by Reuters correspondent Alan Elsner, State Department spokesperson Christine Shelly provided the following responses:¹⁴

Elsner: How would you describe the events taking place in Rwanda?

Shelly: Based on the evidence we have seen from observations on the ground, we have every reason to believe that acts of genocide have occurred in Rwanda.

Elsner: What's the difference between "acts of genocide" and "genocide?"

Shelly: Well, I think the—as you know, there's a legal definition of this Clearly not all of the killings, that have taken place in Rwanda are killings to which you might apply that label But as to the distinctions between the words, we're trying to call what we have seen so far as best as we can; and based, again, on the evidence, we have every reason to believe that acts of genocide have occurred.

Elsner: How many acts of genocide does it take to make genocide?

Shelly: Alan, that's just not a question that I'm in a position to answer.

Estimates of the number of victims slaughtered during the roughly 100 days of Rwanda's genocide vary from 500,000 to 1,000,000 or more—meaning that there were between 5,000 and 10,000 victims a day!¹⁵

Was the international community a bystander to the Rwandan genocide because of a lack of certainty that a "genocide" was taking place or because of a lack of political resolve? Was it a combination of both? Did political indecision about what to do in the face of the genocide drive decisions on whether and when the situation was defined to be "genocide?" I think it is the latter. When I began to puzzle through this problem, I wondered whether a possible antidote to denial and inaction would be the creation of a body—a "Genocide Committee"—under the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁶ which might aid in removing the genocide question from the

13. *Id.* at 361-62, 379.

14. *Id.* at 363-64.

15. See *Akayesu Judgment*, *supra* note 6, ch.2, ¶ 111.

16. 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The Genocide Convention provides:

political arena. Such a Committee could specifically be charged with identifying a potential genocide; formulating measures to prevent, intervene in, and stop genocide; and issuing the call to action once a genocide had commenced. Similar committees exist under other international human rights treaties.¹⁷

After researching the idea, I quickly discovered that eighteen years ago, the United Nations had conducted a study of the prevention and punishment of genocide, which proposed preventive and early warning mechanisms.¹⁸ The Study also proposed the creation of a Committee on Genocide.¹⁹ I examined the Study and determined that the United Nations had already provided the international community with a formula that addresses the flaw identified by Power: inaction in the face of sufficient

“genocide means any of the following acts committed with 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.”

Id. art. 2. According to Article 3 of the Genocide Convention, “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.” Article 4 of the Genocide Convention explains that “[p]ersons committing genocide or any of the acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

17. See *United Nations Documentation: Research Guide* (2003), available at <http://www.un.org/Depts/dhl/resguide/spechr.htm> (listing treaty committees).

18. Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. B. Whitaker, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-Eighth session, E/CN.4/Sub.2/1985/6 (July 2, 1985) [hereinafter, the U.N. Study] at 41-43. As part of the U.N. Study, Governments, specialized agencies and other U.N. organizations, regional organizations as well as non-governmental organizations were given a questionnaire asking them for suggestions

for more effective national measures for the prevention, control and punishment of genocide; [s]uggestions for more effective international measures to prevent perpetration of genocide including the possibility of further international action, in particular by the adoption of new international instruments; [c]omments and suggestions on the possibility of establishing an international body entrusted with carrying out investigations, considering allegations of genocide and taking steps necessary to halt at its outset the deliberate destruction of national, racial, religious or ethnic groups; [c]omments and suggestions on the possibility of preparing an additional protocol to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide [Genocide Convention], conferring upon the courts of countries other than those in whose territory the crime of genocide was committed, competence to deal with that crime; [c]omments and suggestions on the possibility of establishing an international criminal jurisdiction as proposed in article VI of the Genocide Convention.

Id. at 2-3, ¶ 9.

19. *Id.* at 43-45.

information that a genocide is taking place.

In *A Problem from Hell*, Power analyzes each genocide that she surveys in terms of four sub-topics: (1) Warning, (2) Recognition, (3) Response, and, (4) Aftermath.²⁰ Within these sub-topics, Power analyzes, *inter alia*, the following questions:²¹ What, if any, were the early warnings that mass killing was set to commence? How seriously were the warnings taken? By whom? What, if any, were the constraints that operated to impede diagnosis and how and when did U.S. officials recognize that genocide (and not merely war) was under way? Who inside or outside the U.S. government wanted to do what and who prevailed? And, finally, how were the U.S. responses, the genocides, and the Americans who urged intervention remembered later?

Power asks these questions because she is trying to understand where, in the evolution of a genocide, the breakdown occurred and therefore, what can be done. The U.N. Study engaged in a very similar endeavor but on the international plane. With respect to the Genocide Convention, the Study recognized that there was a problem with preventive and early warning measures as well as with getting States to act. The Study made proposals to address those problems. Perhaps because Power focuses on U.S. policy towards genocide, she does not fully explore the Study and how it could be instrumental in addressing the issues she raises.²² Indeed, the Study and its proposals, have not been fully explored in current international law literature. I hope to bring attention to a very important, yet largely ignored piece of work that provides mechanisms that address the issues Power raises. Until the international community has serious mechanisms to respond to genocide, the United States is not going to leap into the breach. Power's questions about the United States can be resolved only if there is a resolution of the same questions on the international level. Otherwise, her questions are mere hand-wringing.

In Part I of this Review, I discuss the genesis, thesis, and major findings of *A Problem from Hell*. In Part II, I discuss the U.N. Study, its findings and proposals, along with a subsequent U.N. report. I conclude that, armed with Power's book, which supports the findings and proposals of the U.N. Study, it is time for the international community to implement the Study's proposals.

20. See POWER, *supra* note 1, at XVII.

21. *Id.*

22. *Id.* at 154 (citing the Study in a footnote in reference to its statement that the Khmer Rouge committed genocide in Cambodia).

I.

A Problem from Hell was born of Power's experiences covering the genocide in Bosnia and watching the world's response to it. From 1993 until 1996, Power²³ covered the wars in the former Yugoslavia as a reporter for *U.S. News and World Report* and the *Economist*. Possibly as a result of her experience as a journalist, *A Problem from Hell* is a thoroughly researched, comprehensive, and accessible examination of U.S. foreign policy towards genocide in the twentieth century.

In her Preface, Power explains the genesis, thesis, and major findings of her book. Power recounts the story of Sidbela Zimic—a nine-year-old Sarajevan who was killed on June 25, 1995, when a Serb shell crashed into the playground where she and three of her friends were jumping rope.²⁴ According to Power, a year and a half before, in February 1994, a shell had landed in the main downtown market of Sarajevo, two blocks from Sidbela's home.²⁵ President Clinton and his NATO allies threatened massive air strikes against the Bosnian Serbs if they resumed their bombardment of Sarajevo and, in response, Sarajevans began to trickle outside.²⁶ However, as Power explains, U.S. resolve soon wilted and Serb nationalists "took their cue," understanding "that they were free to resume shelling Sarajevo and other Bosnian towns crammed with civilians."²⁷ America's promises brought Sarajevans a brief reprieve, but also raised expectations that they were safe to live again.²⁸ It was in that context that Sidbela was able to convince her normally cautious parents to let her play outside . . . for the last time.²⁹ Power also recounts the fall on July 6, 1995 of Srebrenica—a U.N. safe area—where an estimated 7,000 Muslim men were rounded up and executed by the Bosnian Serbs.³⁰

In part, as a result of her experiences, Power was motivated to explore "America's responses to previous cases of mass slaughter."³¹ As Power explains,

23. Lecturer in Public Policy and former Founding Executive Director of the Carr Center for Human Rights Policy at the Harvard University John F. Kennedy School of Government.

24. See POWER, *supra* note 1, at XIII.

25. *Id.* at XI.

26. *Id.* at XI, XII.

27. *Id.* at XII.

28. *Id.*

29. *Id.* at XII, XIII.

30. *Id.* at XIII, XIV.

31. *Id.* at XV.

American response to the Bosnian genocide was in fact the most robust of the century. The United States had never in its history intervened to stop genocide and had in fact rarely even made a point of condemning it as it occurred.³²

According to Power, the Bosnian Serbs' eradication of the non-Serbs, the Ottoman slaughter of the Armenians, the Nazi Holocaust, Pol Pot's terror in Cambodia, Saddam Hussein's destruction of Kurds in northern Iraq, and the Rwandan Hutus' systematic extermination of the Tutsi, each met the definition of genocide set forth in the Genocide Convention.³³ But each met with a very similar U.S. policy response—effectively, no response.³⁴

Specifically, Power summarizes the major findings of her book as follows:³⁵

- Despite graphic media coverage, American policymakers, journalists, and citizens are extremely slow to muster the imagination needed to reckon with evil. Ahead of the killings, they assume rational actors will not inflict seemingly gratuitous violence. They trust in good-faith negotiations and traditional diplomacy. Once the killings start, they assume that civilians who keep their heads down will be left alone. They urge ceasefires and donate humanitarian aid.
- It is in the realm of domestic politics that the battle to stop genocide is lost. American political leaders interpret society-wide silence as an indicator of public indifference. They reason that they will incur no costs if the United States remains uninvolved but will face steep risks if they engage. Potential sources of influence – lawmakers on Capitol Hill, editorial boards, non-governmental groups, and ordinary constituents – do not generate political pressure sufficient to change the calculus of America's leaders.
- The U.S. government not only abstains from sending troops, but it takes very few steps along a continuum of intervention to deter genocide.

32. *Id.*

33. *Id.*

34. *Id.* at XVI.

35. *Id.* at XVII, XVIII.

- U.S. officials spin themselves (as well as the American public) about the nature of the violence in question and the likely impact of an American intervention. They render the bloodshed two-sided and inevitable, not genocidal. They insist that any proposed U.S. response will be futile. Indeed, it may even do more harm than good, bringing perverse consequences to the victims and jeopardizing other precious American moral or strategic interests. They brand as “emotional” those U.S. officials who urge intervention and who make moral arguments in a system that speaks principally in the cold language of interests. They avoid use of the word “genocide.” Thus, they can in good conscience favor stopping genocide in the abstract, while simultaneously opposing American involvement in the moment.

Power also explains in her Preface that *A Problem from Hell* deliberately spotlights the response of *American* policymakers and citizens for several reasons.³⁶

[T]he U.S. decisions to act or not to act have had a greater impact on the victims’ fortunes than those of any other major power;³⁷

- [S]ince World War II, the United States has had a tremendous capacity to curb genocide [and] . . . could have used its vast resources to do so without undermining U.S. security;³⁸
- [T]he United States has made an unusually pronounced commitment to Holocaust commemoration and education;³⁹
- [I]n recent years, American leaders steeped in a new culture of Holocaust awareness, have repeatedly committed themselves [in theory] to preventing the recurrence of genocide . . . [which] commitment proved hollow in the face of actual slaughter.⁴⁰

Power ends her Preface by noting that before she began exploring America’s relationship with genocide, she used to refer to U.S. policy

36. *Id.* at XX.

37. *Id.*

38. *Id.* at XX, XXI.

39. *Id.* at XXI.

40. *Id.*

toward Bosnia as a “failure,” but that she has since changed her mind.⁴¹ According to Power, the United States’

consistent policy of nonintervention in the face of genocide offers sad testimony not to a broken American political system but to one that is ruthlessly effective. The system, as it stands now, *is working*. No U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence. It is thus no coincidence that genocide rages on.⁴²

Between the Preface and the Conclusion, Power has a few chapters on Raphael Lemkin, the Polish Jewish man who coined the word “genocide” and fought tirelessly to have it recognized by the United Nations as a crime. Recognition finally came with the adoption of the United Nations’ first treaty, the Genocide Convention, on December 9, 1948. Additionally, there are chapters on Turkey and the Armenians, Cambodia, Iraq, Bosnia, Rwanda, Srebrenica, and Kosovo. Finally, there is a chapter that addresses the call for the establishment of international criminal tribunals in response to some of these genocides, the eventual establishment of the International Criminal Tribunals for Rwanda and Yugoslavia, as well as the recent creation of the International Criminal Court.

In her Conclusion, in addition to reiterating the findings she laid out in the Preface, Power suggests that a “mechanism for altering the calculus of U.S. leaders would be to make them publicly or professionally accountable for inaction.”⁴³ In terms of what the United States might do in any future case of genocide, Power believes that post-September 11th, the U.S. government is likely to argue that it cannot afford to put its resources into genocide suppression or prevention.⁴⁴ According to Power, that “would be a tragic and ultimately self-defeating mistake” for two reasons.⁴⁵ The first reason is moral: “[w]hen innocent life is being taken on such a scale and the United States has the power to stop the killing at reasonable risk, it has a duty to act.”⁴⁶ The second is enlightened self-interest: allowing genocide undermines regional and international stability, creates militarized refugees, and signals dictators that hate and murder are

41. *Id.*

42. *Id.*

43. *Id.* at 510.

44. *Id.* at 511-12.

45. *Id.* at 512.

46. *Id.*

permissible tools of statecraft. Power recognizes that because these threats to U.S. interests are long-term dangers and not immediately apparent, they rarely sway top U.S. policymakers.⁴⁷ But she ends her 600-page book with the following poignant plea:

George Bernard Shaw once wrote, “The reasonable man adapts himself to the world. The unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man.” After a century of doing so little to prevent, suppress, and punish genocide, Americans must join and thereby legitimate the ranks of the unreasonable.⁴⁸

A Problem from Hell is an extremely accessible, well-researched and well-documented book. In terms of its usefulness to the international legal community, the emphasis of this Review, it sounds a number of important themes. First, from an international humanitarian law perspective, the genocides Power discusses were “masked” by armed conflict, both in the sense that there was an inability to distinguish deaths and casualty that are common to war from a “genocide,” and also in the sense that armed conflict often served as a “mask” or an excuse to commit a genocide that had already been brewing. Second, from a U.S. foreign policy perspective, those committing the genocides assumed that the United States would not act if it did not serve U.S. interests and knew that casualties among foreigners—usually Westerners—would result in the international community’s withdrawal of its forces, allowing the genocide to proceed unimpeded. Finally, and most importantly, a theme throughout the book is the unwillingness and reluctance of the United States to define mass murders and massacres as “genocide” for fear that by doing so, obligations under international law might be triggered. Power’s book suggests that the problem may not be with lack of certitude or knowledge about the nature of the violence. The problem may lie with the critical decisions about what to do in the face of genocide.

The international legal community, therefore, needs to work on specifying the parameters of the obligations imposed on a State in the face of a genocide. If States understood specifically what they might be required to do in order to suppress or prevent genocide, this understanding would likely reduce the reluctance of States, like the United States, to acknowledge the commission of what later are deemed clear cases of

47. *Id.*

48. *Id.* at 516.

genocide. Power makes some suggestions as to what the *United States* should do in the face of a genocide.⁴⁹ According to Power, the United States

must respond to genocide with a sense of urgency, publicly identifying and threatening the perpetrators with prosecution, demanding the expulsion of representatives of genocidal regimes from international institutions such as the United Nations, closing the perpetrators' embassies in the United States, and calling upon countries aligned with the perpetrators to ask them to use their influence. When the dynamics on the ground warrant it, the United States should establish economic sanctions, freeze foreign assets, and use U.S. technical resources to deprive the killers of their means of propagating hate. With its allies, it should set up safe areas to house refugees and civilians, and protect them with well-armed and robustly mandated peacekeepers, airpower, or both. Given the affront genocide represents to America's most cherished values and to its interests, the United States must also be prepared to risk the lives of its soldiers in the service of stopping this monstrous crime.⁵⁰

Even more can be done. As explained above, the United Nations has already provided the international legal community with a model. The U.N. 1985 Study assumed that a genocide can be defined or identified, and focused on measures to *prevent* a genocide from occurring and on the actions that can be taken at the outset of or during a genocide in order to *stop* it. In 1994, months after the Rwandan genocide, the United Nations dusted off the 1985 Study and "requested" that States Parties to the Genocide Convention implement the Study's proposals for forming a Genocide Committee. The request went (and continues to go) unheeded. Although focused on *America's* responses to genocide, the facts that Power marshals and analyzes demand that the international community act and that the focus of international action should be on clarifying what, if any, are the obligations of States before, during and after a genocide. The U.N. Study is a start.

49. *Id.* at 514.

50. *Id.*

II.

In 1983, the United Nations Economic and Social Council requested that the Subcommission on Prevention of Discrimination and Protection of Minorities appoint a Special Rapporteur with the mandate to revise and update a study prepared in 1978 on the question of the prevention and punishment of the crime of genocide.⁵¹ The Subcommission appointed Mr. Benjamin Whitaker to undertake the revised and updated study.⁵² The Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide was presented at the 38th session of the Subcommission in 1985.⁵³

By 1985, as the Study noted,

[t]he Nazi aberration [was] unfortunately not . . . the only case of genocide in the twentieth century. Among other examples [of genocide] are the German massacre of Hereros in 1904, the Ottoman massacre of Armenians in 1915-1916, the Ukrainian pogrom of Jews in 1919, the Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Aché Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978, and the contemporary Iranian killings of Baha'is.⁵⁴

The purpose and hope of the Study was “to deter future violence by strengthening collective international responsibility and remedies.”⁵⁵ According to the Study,

it is difficult to conceive of a heavier responsibility for the international community and the Human Rights bodies of the United Nations than to undertake any effective steps possible to prevent and punish genocide in order to deter its recurrence. It has rightly been said that those people who do not learn from history, are condemned to repeat it. This belief underpins much of the Human Rights work of the United Nations. In order to prescribe the optimal remedies to prevent future genocide, *it can be of positive assistance to diagnose past cases in order to analyse their*

51. U.N. Study, *supra* note 31, at 1, ¶¶ 1-6.

52. *Id.* ¶ 1.

53. U.N. Study, *supra* note 31.

54. *Id.* at 8-10, ¶ 24.

55. *Id.* at 5, ¶ 16.

*causation together with such lessons as the international community may learn from the history of these events.*⁵⁶

The Study then went on to analyze and discuss the concept of genocide; the Genocide Convention itself; the necessary extent of the destruction of a group; the groups protected by the Genocide Convention, including a discussion of whether sexual groups “such as women, men, or homosexuals,” or political groups should be protected by the Convention; the definition of genocide to include cultural genocide or ethnocide and also ecocide, i.e., “the adverse alterations, chemical weapons, serious pollution and acid rain, or destruction of the rain forest, which threaten the existence of entire populations, whether deliberately or with criminal negligence;” the intent necessary under the Genocide Convention; the acts punishable; apartheid in relation to the Genocide Convention; propaganda in favor of genocide; culpability and superior orders; enforcement; the question of time limitation; and extradition.⁵⁷ At the end, the Study made proposals.⁵⁸

Aside from the proposal for an international human rights tribunal or court, which the international community has already created (the International Criminal Court),⁵⁹ the Study’s proposals related to prevention, early warning, and the creation of an international body to deal with genocide.

First, with respect to preventive measures, the Study acknowledged that punishment after a genocide did not prevent genocide.⁶⁰ The Study stated that, “[t]hose personalities who are psychologically prepared to commit genocide are not always likely to be deterred by retribution, at least in this world.”⁶¹ Yet, the Study conceded that the “most conspicuous weakness of the Genocide Convention is that it insufficiently formulates preventive measures.”⁶² The Study proposed the creation of a continuously updated data bank that could anticipate potential cases and compare the lessons, both positive and negative, of previous cases.⁶³ The Study suggested that experienced conciliators or mediators could be deployed to

56. *Id.* at 5, ¶¶ 14-15.

57. *Id.* at 5-35.

58. *Id.* at 41-45.

59. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998) reprinted in 37 I.L.M. 999 (1998), available at <http://www.un.org/law/icc/statute/romefra.htm>.

60. See U.N. Study, *supra* note 31, at 41, ¶ 78.

61. *Id.*

62. *Id.*

63. *Id.* ¶ 79.

defuse any tension.⁶⁴ The Study also suggested, in order to analyze the causes of genocide, investing time and research into the “psychological character and motivation of individuals and groups who commit genocide or racism, or the psychopathic dehumanizing of vulnerable minorities or scapegoats.”⁶⁵ According to the Study, the research could become part of educational programs, “starting at an early age in schools,” to mobilize public awareness and vigilance to guard against a recurrence of genocide.⁶⁶ As a further safeguard, the Study suggested that, “public awareness should be developed internationally to reinforce the individual’s responsibility, based on knowledge that it is illegal to obey a superior order or law that violates human rights.”⁶⁷

Second, on the issue of an effective early warning system, the Study acknowledged that any such system “requires an efficient co-ordinating network, maintained in a state of permanent readiness.” Such a network could watch for early indications of mass famine and exoduses of refugees.⁶⁸ Once an early warning alert is received, the Study suggested that the steps that could be taken include: investigating the allegations, activating different bodies of the United Nations, calling on States to get involved, seeking support of the international press to provide information on and to call public attention to the threat or actuality of genocidal massacre, asking various leaders to intercede, and arranging for the immediate involvement of suitable mediators and conciliators at the outset.⁶⁹ The Study also suggested sanctions by means of economic boycotts, the refusal to handle goods to or from the offending States, and selective exclusion from participation in international activities and events.⁷⁰

Finally, on the issue of an international body to deal with genocide, the Study described a possible formulation proposed by a non-governmental organization, the Baha’i International (Baha’i).⁷¹ According to Baha’i,

the most effective means of preventing and controlling genocide is through the establishment by the United Nations of a new international body dealing exclusively with genocide and charged

64. *Id.*

65. *Id.* at 41-42, ¶ 80.

66. *Id.* ¶ 81.

67. *Id.* ¶ 82.

68. *Id.* ¶ 83.

69. *Id.* at 42-43, ¶ 84.

70. *Id.*

71. *Id.* at 43, ¶ 85.

with responsibility for considering allegations of genocide, carrying out investigations in connection with those allegations of genocide and taking urgent steps to put a stop to genocide wherever it is known to be taking place.⁷²

Baha'i considered that

[s]ince secrecy is the greatest ally of any Government that seeks to engage in genocide, and international publicity and condemnation the greatest enemy, it might be expected that the opprobrium that would attach to any Government which was identified as a violator of the Convention by a high-level international body of known competence and impartiality would, on its own, act as a deterrent to that Government, quite apart from any action that the international body itself was able to generate.⁷³

Therefore, Baha'i suggested that the Genocide Convention be revised to add appropriate provisions for the creation of a "Committee on Genocide."⁷⁴

According to Baha'i, such a Committee "would concern itself primarily with questions of fact rather than with questions of law."⁷⁵ Baha'i envisioned that the Committee would hold a "watching brief" on genocide: "it would be the body to which any allegations of genocide were automatically referred and it would be responsible for investigating those allegations."⁷⁶ Under the proposed formulation of Baha'i:

[i]n order to enable [the Committee] to react effectively in cases where there were strong and reliable indications that genocide was, in fact, taking place, the Committee should . . . be empowered to (a) invite the State party concerned to submit its observations with regard to the allegations of genocide; and (b) if it decided that the situation warranted it, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently. In short, we envisage the Committee being given powers in this regard similar to those proposed for the Torture Committee in the Convention against torture and other cruel, inhuman or degrading treatment or punishment.⁷⁷

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 44, ¶ 85.

76. *Id.*

77. *Id.*

Baha'i envisioned that the Genocide Committee, like the other human rights treaty committees, would be empowered to bring any situations of urgency to the immediate attention of the Secretary-General of the United Nations.⁷⁸ Finally, Baha'i listed as the advantages of establishing a Genocide Committee:

(a) [the removal of] the subject of genocide as far as possible from the political arena; (b) [the attraction of] a high-calibre "independent expert" membership; (c) [the speeding up of] the international response to genocidal situations by obviating the necessity for cases of genocide to proceed through the hierarchical mechanisms of the United Nations human rights system; (d) [the provision of] high-profile, international focus for genocide that is currently lacking.⁷⁹

Again, the U.N. Study assumed that genocide could be identified and on prevented through early warning and affirmative actions taken to stop genocide. A subsequent U.N. report on Rwanda bears out that the obstacle to international action, be it prevention, early warning or steps to stop a genocide that is occurring, is not lack of certitude but a lack of clarity on what the international community is obligated to do in the face of genocide.

The report, dated *eight months* before the Rwandan genocide, was written by a Special Rapporteur who visited Rwanda one year before the genocide. It contained all of the information necessary to indicate that a genocide against the Tutsi was being organized.⁸⁰

According to the Report:

- People in Rwanda expressed a fear of refugee Tutsis returning to Rwanda and "reasserting" Tutsi domination;
- Some Hutus had been accused by Hutu extremists of being traitors to Rwanda in part because of willingness to enter into peace-talks and a dialogue with the FPR—a Tutsi armed force;

78. *Id.*

79. *Id.*

80. Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories, Extrajudicial, summary or arbitrary executions, Addendum, Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993, E/CN.4/1994/7/Add.1 (Aug. 11, 1993) [hereinafter U.N. Report].

- There were certain Hutu elite, who in order to hold onto power, fueled ethnic hatred against the Tutsi;
- Weapons were being distributed to civilians;
- There had been massacres of mainly Tutsi civilians and government officials were involved, either directly by encouraging, planning, directing or participating in the violence, or indirectly through incompetence, negligence or deliberate inaction;
- There was an endemic practice by government armed forces of raping Tutsi women, including twelve-year-olds who were raped because their young age was regarded as a protection against AIDS;
- Certain mayors had spread unfounded rumors exacerbating ethnic hatred and had encouraged the population to massacre Tutsi people;
- The Hutu political party, the National Revolutionary Movement for Democracy and Development (MRND), in order to avoid responsibility, had started to “privatize” the violence by channeling it through the youth wing of the MRND, which had been converted into a militia;
- These armed bands, trained by members of the Hutu government’s armed forces, were able to set up roadblocks and impose a reign of terror with complete impunity;
- The worst violence could be attributed to “out-of-control” mobs of Hutu peasants;
- Most of the massacres were the result of ethnic violence, said to be deliberately fomented by certain individuals allegedly close to those in power;
- A study of the phases preceding the outbreaks of violence among the population showed that such outbreaks of violence were planned and prepared, with targets being identified in speeches by representatives of the authorities, as well as in broadcasts on Rwandese radio and in leaflets;
- Local government officials were organizing and leading the massacres, evidenced by the co-extensiveness of the violence

with local boundaries, the simultaneousness of the violence, and the similarity of the rumors that preceded the violence;

- The violence, usually directed against the Tutsi, went unpunished and if any persons were arrested, they were released without being made to stand trial.⁸¹

As factors facilitating the violation of largely the Tutsis right to life, the Report identified, the absence of the rule of law, the tradition of impunity, the absence of any system for the protection of ethnic minorities, and injurious propaganda.⁸² The Report indicated that there were no real police in the over-populated rural areas, nor any effective warning system within reach of ethnic minorities themselves or their representatives, and that everything was left to the diligence of local government officials, who were often accomplices in the massacres or had even instigated them.⁸³ With respect to an incident of violence, the Report noted the fact that the region's telephone system had "suddenly" broken down at the time of the events and had "curiously" become operational again without any need for repairs.⁸⁴ With respect to "injurious propaganda," the Report stated that the

involvement of the media in spreading unfounded rumours and in exacerbating ethnic problems had been noted on repeated occasions. Radio Rwanda, which is the only source of information for the majority of a poorly educated population and which is still under the direct control of the President, has played a pernicious role in instigating several massacres. This is particularly true of certain broadcasts in Kinyarwanda which differ markedly in content from news programmes broadcast in French, which is understood only by a small part of the population.⁸⁵

The Report recommended, *inter alia*, a mechanism for the protection of civilian populations against massacres, a National Reconciliation Campaign, the reform of the role and structure of the media, combating impunity, and the issuance of new identity cards which would not contain an ethnic reference.⁸⁶ On the question of whether the massacres of the

81. *Id.* ¶¶ 20, 22, 28, 33, 37, 40, 42.

82. *Id.* ¶¶ 44, 45, 55-58.

83. *Id.* ¶ 55.

84. *Id.*

85. *Id.* ¶ 56.

86. *Id.* ¶¶ 64-66, 68, 69-70, 75-76, 84.

largely Tutsi civilian population may be termed “genocide,” the Report stated that

[t]he cases of intercommunal violence brought to [the Special Rapporteur’s] attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason.⁸⁷

The Report stated that, therefore, Article II (a) and (b) and Article III of the Genocide Convention might be considered to apply to the violations of the right to life described in the report.⁸⁸

We know what happened one year after the Special Rapporteur’s visit to Rwanda. The Hutu President of Rwanda was murdered on his way back from attending a peace conference in Tanzania, most likely by extremist Hutu’s, as a pretext to start the genocide.⁸⁹ Roadblocks were set up that allowed the genocide to be perpetrated, in main part, by the *Interahamwe*—the youth movement of the MRND.⁹⁰ Identity cards were often used to identify a victim’s ethnicity before being killed.⁹¹ Local government officials, including mayors of communes, directly and indirectly participated in the genocide.⁹² The use of rape as an act of genocide against Tutsi women (or Hutu women married to Tutsi) was widespread.⁹³ Radio and speeches played a large role in inciting the genocide and in identifying potential victims.⁹⁴

In sum, it seems the United Nations had for a full year before the genocide actually occurred, an overwhelming amount of information explicitly indicating that the scene was set for a genocide against the Tutsi. Yet even after the genocide started, the United Nations’ primary response was to pull out its peacekeeping force.⁹⁵ That response raises in relation to the international community the question that Power asks in relation to the

87. *Id.* ¶ 79.

88. *Id.* ¶¶ 79-80.

89. See SHATTERED LIVES, *supra* note 6, at 13.

90. See *Akayesu Judgment*, *supra* note 6, ¶¶ 99, 107, 123, 151, 158, 173, 291.

91. *Id.* ¶¶ 116, 123, 161, 291; see also POWER, *supra* note 1, at 350.

92. See *Akayesu Judgment*, *supra* note 6, wherein Jean Paul Akayesu—at the time of the genocide, *bourgmestre* or mayor of the Taba commune in Rwanda—was found guilty of genocide, crimes against humanity (extermination, murder, torture, rape, and other inhumane acts), and direct and public incitement to commit genocide.

93. See Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 101 (2003).

94. See *Akayesu Judgment*, *supra* note 6, ¶¶ 100, 110, 116, 123, 149; see also POWER, *supra* note 1, at 333-34.

95. See POWER, *supra* note 1, at 352, 369.

United States: why was the United Nations, the international community, a bystander to the genocide in Rwanda? It is not lack of certitude or uncertainty that a genocide was occurring. The problem seemed to be in deciding what, if anything, was demanded of the international community in the face of the genocide in Rwanda. Perhaps, if there had been some clarity on that issue, the international community would have been quicker to respond.

Months *after* the Rwandan genocide, in August 1994, presumably in the light of the genocide, the United Nations, bearing in mind the U.N. Study, requested that States parties to the Genocide Convention encourage or even undertake, by virtue of the power granted them under Article 8 of the Convention,

the drafting and adoption of a control mechanism in the form of a treaty committee charged in particular with monitoring compliance of States parties with the commitments which they undertook in accordance with article V of the Convention, through the assessment of the reports submitted by the States parties and, on a preventive basis, to draw the attention of the High Commissioner for Human Rights to situations which may lead to genocide.⁹⁶

No such committee exists. Almost a decade later, now armed with Power's book, which provides further support for the findings and proposals of the U.N. Study, more is demanded of the United Nations than a "request" to act. The international community can, once again, dust off the eighteen-year-old U.N. Study, update it and revise it. But nothing will change unless and until the international community (or the United Nations) turn their words into action and effectively implement the Study's proposals.

96. Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (Oct. 28, 1994).