

BOOK REVIEW ESSAY

MARK D. KIELSGARD, *RESPONDING TO MODERN GENOCIDE: AT THE CONFLUENCE OF LAW AND POLITICS*^{*}ROZA PATI^{**}

It is a disgrace for our highly developed and self-proclaimedly civilized 21st century society that genocide remains a front and center issue of our time, despite the robust countermeasures taken by the international community since the end of the Second World War. This “crime of crimes”¹ has lingered in our modern world, erupting now and then² with all the savagery that the worst part of human nature can ever deliver. It is thus by default that it requires constant exploration of ways and means to prevent its occurrence and solve this grievous societal problem. This is what the author of *Responding to Modern Genocide*, Professor Mark D.

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¹ WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2d ed. 2009).

² See *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights, Situation in Iraq in the Light of Abuses Committed by So-Called Islamic State of Iraq and the Levant and Associated Groups*, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015). See also, “Staggering” *Civilian Death Toll in Iraq—UN Report*, U.N. NEWS CENTRE (Jan. 19, 2016), http://www.un.org/apps/news/story.asp?NewsID=53037#.VqPVh_krLcs (referring to a joint report of by the UN Assistance Mission for Iraq and the Office of the High Commissioner for Human Rights, and quoting: “The so-called ‘Islamic State of Iraq and the Levant’ (ISIL) continues to commit systematic and widespread violence and abuses of international human rights law and humanitarian law. These acts may, in some instances, amount to war crimes, crimes against humanity, and possibly genocide.”).

262 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

Kielsgard of the City University of Hong Kong, undertakes to do so masterfully in this 255-page monograph. Starting from the ambitious premise that “genocide is political crime,” (p. ix), the author aims at overcoming the limitations of both the exclusively legal definitions and the broad social science approaches to the topic of mass atrocity that disregard the traditional elements of genocide. This book is the culmination of Kielsgard’s extensive work in the field for many years,³ and it is characteristic of his incorruptible approach calling a spade a spade when it comes to the politics of genocide. In particular, he sheds light like no one else before on the topic of prevention of genocide.

Focusing on the Holocaust and the Armenian and Rwandan genocides as quintessential examples of mass atrocities and associated problems, the author presents a holistic methodology to capture the political, economic and social factors that allow us to predict, and thus better prevent, as well as to remedy this crime. This book gathers, with appropriate appreciation, the prior path-breaking insights into the political and social impediments to eradicating genocide once and for all, while simultaneously inventing a laborious and scientifically grounded methodology necessary to properly “calibrate the warning signs of genocide” (p. ix) and open up timely prospects for international intervention. “Avowing genocide as politics,” as one scholar would opine, “a quality which law often disavows, Kielsgard sets the stage for political responses,”⁴ and it is exactly this kind of probing the problem—through the political lens, aided by comprehensive scientific analysis—that constitutes the book’s novel approach compared to other long-standing efforts to confront genocide. *Responding to Modern Genocide* joins the wealth of some of the most highly acclaimed works of scholarship on genocide, breathing fresh air into the inquiry into the causative

³ See, e.g., Mark D. Kielsgard, *Restorative Justice for the Armenians, Resolved: It’s the Least We Can Do*, 24 CONN. J. INT’L L. 1 (2008); MARK D. KIELSGARD, *RELUCTANT ENGAGEMENT: U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT* (2010).

⁴ MARK D. KIELSGARD, *RESPONDING TO MODERN GENOCIDE: AT THE CONFLUENCE OF LAW AND POLITICS* (2016) (inside cover comment by Professor Mark A. Drumbl).

factors conditioning the political enterprise of genocide.

The author starts with a valuable appraisal of the timeline of genocide, noting that, before the word was coined by Raphael Lemkin in 1943, “at all periods of history genocide has inflicted great losses on humanity,” although there was “virtually no international response until the 20th century” (p. 2). Prior victims notably included Muslims and Jews (p. 4). Exploring further the evolution of genocide in the context of colonialism, Kielsgard sees the subjugation of indigenous peoples as primarily an ethnocide, a full-scale attack on their culture, as the intent of the colonizers was in most cases not to destroy indigenous peoples as such; their “demographic collapse” was arguably “only incidental to [the colonizers’] development plans” (p. 5). In some cases, though, especially in cases of physical displacement, historians have seen evidence of physical genocidal intent (*id.*).

The first international law responses to moral outrages before the 20th century were the prohibitions against piracy and slavery. The author demonstrates his interdisciplinary bent by detailing the reasons why these behaviors or institutions were outlawed, taking into account, in the case of piracy, economies of scale and geopolitics (pp. 8-9), and in the case of slavery, a combination of economic and humanitarian factors (pp. 9-10). The subsequent prohibition of war crimes was mostly based on humanitarian factors (p. 11). In the 19th century, excessive nationalism, xenophobia, militarism and jingoism laid the basis for early 20th century fascism and the philosophy of social Darwinism (pp. 13-15). The author then proceeds with a detailed analysis of the 1915 Armenian genocide, illustrating the international law scenery “before” international jurisdiction with teeth for international crimes was instituted (pp. 24 *et seq.*). In particular, he recounts, based on extensive research, how history, geopolitics and considerations of cost and benefit moved the greater powers to abstain from intervening (pp. 39 *et seq.*).

The true birthplace of international criminal law was Nuremberg with its International Military Tribunal sanctioning the most heinous crime of the Holocaust (p. 46). The prosecution of the main perpetrators was followed by the Genocide Convention and, after a long hiatus, by the International Criminal Tribunals for the

former Yugoslavia and for Rwanda in the 1990s, culminating, in 1998, in the Statute of Rome instituting the International Criminal Court.

The author points out that the Genocide Convention, as *jus cogens*, requires not only the punishment of offenders, but also the prevention of the act of genocide (Article I). These are affirmative duties. While punishment looks backward at the act, prevention looks forward, the author explains. It is the “greatest challenge,” as it requires a broader perspective needing the marshalling of help from many social sciences allowing for accurate prediction of such social conflagration (p. 56). To develop this broader perspective, Kielsgard presents his Chapter 2 on the “Politics of Prevention,” which I highly recommend for careful analysis by the reader who is looking to see issues from a new vantage point, seeking a pragmatic approach different from the usual beaten path of the analysis of legal responses to genocide. In this chapter, the author opens up a new horizon for the reader as he contemplates a “rigorous model for prediction” (p. 57). His analysis probes deeply into the root causes of genocide and calls for proactive measures of, *inter alia*, inclusion, equality and tolerance in order to “extinguish the seed of genocide before it germinates” (*id*).

International intervention, Kielsgard maintains, is a “largely unrecognized goal” in the duty to prevent genocide (p. 59). On the other hand, he shares the good insight that such intervention often generates accusations of aggression, neocolonialism and denial of self-determination.

The author analyzes the indicia that the international community failed to regard before and during the genocide—elements that had they been noted properly and acted upon could have prevented or arrested genocide. He does that through case studies. His first in-depth case study is on the Holocaust. He chronicles all the steps that could have served as warning signs for outside powers to intervene, from the spread and inculcation of Nazi ideology to the 1935 Nuremberg Laws and other measures that stripped German Jews of German nationality and imposed other draconian measures of isolation and discrimination, to the Kristallnacht of 1938 with its concerted, mass attacks on Jews and

their property, and to the 1942 Wannsee Conference and its plan of the “final solution” of the physical extermination of the then 11 million Jews in Europe, which was executed in three phases (pp. 61-71). His point is to outline what could have been done by the Allies, along this timeline of events, to stop the Holocaust in its tracks (p. 74), including the bombing of Auschwitz and the 12 measures suggested by historian David S. Wyman “to assuage” the Holocaust (pp. 74-75).

From this case study, Kielsingard proceeds to present attempts by others to collate common warning signs of genocide. Genocide Watch, for example, suggested a matrix of 10 stages of the process of a genocide in the making (p. 77), ranging from classification (division of groups into “us” and “them”), symbolization (*e.g.*, Jewish yellow star), discrimination (*e.g.*, Nuremberg Laws), dehumanization (hate speech), organization (*e.g.*, militias), polarization (targeting moderates, activists), preparation (ethnic cleansing, etc.), persecution (victims identified, property taken and transportation into concentration camps), to extermination (mass killings), and denial (covering up evidence, etc.) (pp.77 *et seq.*). The author discusses these stages to identify at-risk communities in detail and sees their helpfulness, but comes to the conclusion that the stages as applied are too general to make a sufficient case for international intervention in an individual situation (p. 87), his major operational goal. He also draws attention to a 2009 UNHCHR report on warning signs (p. 88) as well as the Secretary General’s Action Plan in the field (p.93). Again, Kielsingard observes that warning signs such as hate speech, group identification or formation of militias may not make a case, politically, for intervention, but may do so combined with massive human rights violations, murder, etc. (p. 91). The Action Plan’s “elemental” approach, focusing on elements of the genocide definition, may, the author concludes, impose criteria impossible to fulfill (p. 96).

After an excellent case study of Rwanda (pp. 96 *et seq.*), which includes the relevant political, economic and social factors, the author poses the question as to whether causes of genocide can be seen as generic to all cultures and epochs in societies (p. 113). He puts himself to the task of reducing such causes into a “set of

cognizable phenomena with practical application and applying a rigorous methodology to create the most compelling case for intervention” (p. 113).

Ultimately, he presents his own “causative approach,” which includes factors common to all genocides (causation), and factors he calls “aggravating” (pp. 118-119). The common factors include “unambiguous exclusionary nationalism,” perceived impunity, a commonly perceived state of emergency threatening the life of the nation (p. 118). Aggravating factors may or may not be present in a given situation, and they include shifts in domestic power paradigms, a history of discrimination, armed conflict and factors of political economy (p. 119).

With many historical references, he then illustrates the factor of radical nationalism (pp. 123 *et seq.*), where the very existence of a victim group can be perceived as a “threat to the life of the nation,” to be isolated from mainstream society and excluded from participating in cultural, social, professional and political life (such as the Jews in Germany, or the Tutsis in Rwanda). He considers this factor an “indispensable component” of genocide (p. 126). The author further explains that fertile grounds for genocide are failed states (such as Somalia), outcast states (he mentions North Korea) and states with competing polarized ideologies and power ambitions (p. 129). Another common factor of much interest to notice is the perception of impunity for charismatic leaders, illustrated by reference to Hitler, Pol Pot, Enver Pasha, or Milosevic (p. 132); so is a situation of national emergency (p. 131). Aggravating factors may include the 10 stages identified by Genocide Watch; the author is well justified in his observation that generally, “societies trending toward greater polarization” are “suspect” (p. 133).

While the processual and elemental models discussed earlier are descriptive and tend to disregard countervailing developments, historical traditions and recent social, economic, legal and political changes, the author presents the interdisciplinary, problem-oriented approach of policy-oriented jurisprudence provided by the New Haven School as his guiding methodological light (pp. 140 *et seq.*). Its five steps of a masterfully designed intellectual framework, namely—delimitation of the problem; presentation of conflicting

claims, claimants, their perspectives, their identifications and their basis of power; past trends in decision and the respective conditioning factors; predicted future decisions based on changed and/ or changing conditioning factors; and appraisal of past and future decisions, invention of alternatives, and recommendation of solutions in the global common interest of a world order of human dignity⁵—lend themselves well to the analysis of a problem as grave and multifactorial as burgeoning genocide. As New Haven tailors its analysis to the problem at hand, it allows for the taking into account of cultural or regional differences, and provides vastly more of the relevant context, weighing the events rather than, as often practiced, simply listing anecdotal evidence. This approach results in a holistic, comprehensive analysis (p. 143). Kielsingard embarks on this analysis with a sophisticated pen, clearly evidencing his mastery of the New Haven School of jurisprudence and the well-deserved award, in 2013, of the prestigious Myres S. McDougal Prize by the Society of Policy Scientists.⁶

The author takes on the example of China, listed at level 6 in the 2012 Countries at Risk Report of Genocide Watch, which warrants the imposition of economic sanctions. This listing is due to the presence of at-risk communities such as the Tibetans, the Muslim Uyghurs, and Falun Gong. Pointing to the absence of an emergency situation threatening the life of the nation, and increasing recognition of human rights in the country, the author concludes that economic sanctions would be counterproductive, and have the opposite effect than the one intended (pp. 145-146). While the facts on the ground are subject to change, and to maybe different evaluation, the author is correct in assuming that New Haven allows for the tailoring of the methods of international intervention to the facts at hand; thus it

⁵ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316 (1999).

⁶ Professor Kielsingard earned this award for his article: *Critiquing Cultural Relativism: A Fresh View from the New Haven School of Jurisprudence*, 42 CUMBERLAND L. REV. 441 (2011).

provides the perfect tools to shape what are now called “smart sanctions.”

Chapter 3 of the book offers a comprehensive analysis of the denial of genocide. It has been mentioned before as the last stage of Genocide Watch’s 10 stages of genocide. The author usefully distinguishes between denials during a conflict (*e.g.*, France’s stance during the Rwanda killings), denials immediately thereafter (by perpetrators in the Holocaust context), and denials later in time which amount to attempts to alter the historic record (*e.g.*, Turkey’s effort to deny the Armenian genocide) (pp. 155 *et seq.*). Novel and worthy of praise here are the author’s classifications of denial methodologies into incredulity arguments, politically based challenges, pseudo-science-based challenges, legal/definitional challenges, efforts to demonize victims and impeach their credibility, ultimately blaming the victims, and collateral consequences of military conflict (p. 153). These could constitute useful food for thought for scholarship to come on these issues. A detailed, original analysis follows in a case study of the prominent example of the denial of the Holocaust (pp. 168 *et seq.*). Incredulity arguments are debunked by the evidence, so is the collateral damage point. Another example amply and effectively discussed is the initial Japanese denial of the Rape of Nanjing (p. 179). The author further advances contemplations on issues related to pseudo-science (pp. 180 *et seq.*), and victim blaming (pp. 186 *et seq.*) to conclude with the politics of denial (p. 192) which maintains that victim-blaming is designed to move in the direction of bringing the matter back to square one: exclusionary politics that caused genocide in the first place, and by continuing victim-blaming for the group targeted, it perpetuates the group’s victimization in the future. No wonder the author sees victim-blaming as “the malevolent counterweight to productive measures designed to remediate the effects of genocide through transitional justice and other restorative initiatives” (*id.*).

Ultimate Chapter 4 addresses the topic of transformative remediation (pp. 193 *et seq.*). The author acknowledges the richness of the literature that has sprung up around the subject of transitional justice, dealing with issues such as international and domestic prosecutions, reparations, truth-seeking and establishment of an

accurate historical record, pluralism, transparency, as well as legal and institutional reforms (pp. 196-198). What he misses in these writings, however, is the formulation of, and guidance by, an overarching policy objective. It is invigorating to see the author suggesting to aim for the creation of a “landscape of human dignity” where all human beings have open and free access to all the values they desire, i.e. an “inclusive social order or a new solidarity amongst traditionally diverse groups” (p. 193). Beyond criminal justice initiatives or legal mechanisms, transitional justice has to “comprehensively address all aspects of social inequity that aggravate the causative elements of genocide. It must permeate social, economic, political and educational institutions in addition to legal structures with an eye toward reforming past inequities” (p. 211). It must build social solidarity to create a unified population, to remove polarizing discrimination, and provide diverse groups with a chance to access all things humans value (p. 212). Again, he refers to policy-oriented jurisprudence and its toolkit that comprises legal and other remedies and approaches tailored to serve the particular community involved (p. 214). He strongly argues for affirmative action as reparation for the prior indifference and the unjust enrichment by bystander populations received at the cost of victim groups (pp. 215 *et seq.*). Models are the Doha Document for Peace in Darfur (p. 220), the Inter-American Court of Human Rights’ judgment on the Maya-Achi massacre in Guatemala (p. 221), and the affirmative rights for women established in Rwanda (p. 222). In this regard, Kielsingard is to be applauded for his succinct but crystal-clear observations on the failures of the present affirmative action efforts and for his down-to-earth suggestions for future efforts (pp. 226-227).

Professor Kielsingard has written a much needed book filling the lacunae left by the traditional, copious literature in the field of response to genocide. He has focused the reader’s attention on the implementation of the legal duty to prevent genocide as much as to punish it and developed a holistic causative approach to more accurately appraise a gathering threat possibly needing international intervention. He gives analytical structure to the phenomenon of denial of genocide, and uses the guiding light of New Haven’s order

270 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

of human dignity to develop solutions for every conflict or post-conflict situation that would allow human beings to flourish and develop their full faculties. He has a clear eye for the empirical differences that distinguish crisis situations and draws the necessary conclusion that solutions must be tailored to the facts at hand. To arrive at these alternative regimes of truly transformative remediation, he uses the powerful methodological framework of policy-oriented jurisprudence – a bridge between lawyers and social scientists sorely needed in the ever more complex scenarios of a world in turmoil. *Responding to Modern Genocide* is an excellent resource for everyone who believes in “never again,” and who genuinely embarks in the journey of humanizing our society by tossing genocide to where it eventually belongs: the dustbin of history. May his voice be heard by those who make decisions, hopefully to the benefit of all human beings, groups and communities under their authority and control.