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Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World by Michael J. Bazylar

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Abstract

LAW IS COMMONLY THOUGHT OF as an antidote to genocide rather than its facilitator. In *Holocaust, Genocide, and the Law*, Professor Michael Bazyler of Chapman University's Fowler School of Law refutes the notion that the Holocaust was an extralegal event—instead, he isolates the law as the preferred instrument of wholesale murder and destruction. The book traces the long shadow that the Holocaust has cast on the contemporary corpus of international law and many legal systems across the world. While it tells the unfolding catastrophe of the Holocaust as a legal history, the book considers the legal triumphs that followed the catastrophe in their entire context. Specifically, the book explores the legal means that have been used in the last seventy years to redress historical wrongs, obtain justice for victims, and prevent future genocides. These legal means, which Bazyler labels as “Post-Holocaust law,” are shown to have developed in an organized fashion over time to become a discrete body of law. Between masterfully balancing the law's ability to ruin with its capacity to redress, Bazyler clearly asserts one point: Post-Holocaust law does not yet fit the Post-Holocaust world.

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Book Review

Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World by Michael J. Bazylar¹

IRINA SAMBORSKI²

LAW IS COMMONLY THOUGHT OF as an antidote to genocide rather than its facilitator. In *Holocaust, Genocide, and the Law*, Professor Michael Bazylar of Chapman University's Fowler School of Law refutes the notion that the Holocaust was an extralegal event—instead, he isolates the law as the preferred instrument of wholesale murder and destruction. The book traces the long shadow that the Holocaust has cast on the contemporary corpus of international law and many legal systems across the world. While it tells the unfolding catastrophe of the Holocaust as a legal history, the book considers the legal triumphs that followed the catastrophe in their entire context. Specifically, the book explores the legal means that have been used in the last seventy years to redress historical wrongs, obtain justice for victims, and prevent future genocides. These legal means, which Bazylar labels as “Post-Holocaust law,” are shown to have developed in an organized fashion over time to become a discrete body of law.³ Between masterfully balancing the law's ability to ruin with its capacity to redress, Bazylar clearly asserts one point: Post-Holocaust law does not yet fit the Post-Holocaust world.

Although the debate surrounding whether the Holocaust was a legal or extralegal event has been taken up before—the ‘legal’ view most famously

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1. Michael J Bazylar, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford University Press, 2016) [Bazylar, *Holocaust, Genocide, and the Law*].
 2. Hon BA (University of Toronto), JD (Osgoode Hall).
 3. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at xix.

presented by David Fraser in *Law After Auschwitz*,⁴ and the ‘extralegal’ view by Kristen Rundle in her article “The Impossibility of an Exterminatory Legality,”⁵ this book describes something new, making it different from other Holocaust books. The legal legacy of the Holocaust has also been studied—specifically, by the author himself. Bazylar explores the criminal litigation that followed the Holocaust in *Forgotten Trials of the Holocaust*,⁶ and the civil litigation in both *Holocaust Justice: The Battle for Restitution in America’s Courts*⁷ and *Holocaust Restitution: Perspective on the Litigation and its Legacy*.⁸ But here, Bazylar’s aim is twofold: first, to describe the Holocaust in specifically legal terms or “through the prism of law”, and second, to show how a great deal of contemporary law has developed in direct response to the Holocaust.⁹ Previous scholarship has rarely acknowledged this direct connection between various areas of law with the Holocaust, and it has never been the subject of a full-length academic text. Furthermore, despite Bazylar’s earlier works, this is the first book to consider the *entire* output of Holocaust litigation—both civil and criminal. This book, therefore, offers an original contribution by providing a comprehensive *legal* historiography of the Holocaust.

The book proceeds in three parts, with Part I examining the background of the Holocaust and genocide through the prism of law. This Part proceeds by first describing the Holocaust as a legal event, and subsequently reviewing the nomenclature of genocide and explaining how it has become known as the “crime of crimes” in both international law and popular discourse.¹⁰ Part II discusses a multitude of Holocaust-era and post-Holocaust legal topics. This discussion begins with an analysis of the criminal prosecution of the Nazis and their collaborators for Holocaust-era crimes. This Part goes on to review civil litigation for the restitution of assets stolen by the Nazis from the victims of the Holocaust, as well as the use of civil litigation as a model for recognizing financial crimes committed during other mass atrocities. Bazylar then assesses the laws

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4. David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005).
 5. Kristen Rundle, “The Impossibility of an Exterminatory Legality: Law and the Holocaust” (2009) 59 UTLJ 65.
 6. Michael J Bazylar & Frank M Tuerkheimer, *Forgotten Trials of the Holocaust* (NYU Press, 2014).
 7. Michael J Bazylar, *Holocaust Justice: The Battle for Restitution in America’s Courts* (NYU Press, 2005).
 8. Michael J Bazylar & Roger P Alford, eds, *Holocaust Restitution: Perspective on the Litigation and Its Legacy* (NYU Press, 2005).
 9. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at xx.
 10. *Ibid* at 37.

criminalizing the denial of the Holocaust and other genocides. Part II concludes with an examination of the impact that Nazi crimes have had on legal philosophy. Finally, Part III canvasses contemporary attempts to prosecute perpetrators for the crime of genocide. Notably, this Part explains how the Nuremburg trial process has been resurrected and used as a model for modern-day international justice in both national courts and international tribunals.

Three distinct themes emerge throughout the text: law is amorphous, legal institutions are malleable, and justice is political. Exceptionally, Bazylar ruminates on all three themes without a trace of cynicism or despair, balancing law's pitfalls against its potential. In the endeavor to tell the history of the Holocaust through a prism of the law, the first topic worthy of inspection presents a jurisprudential conundrum: everything done by lawyers, government officials, and judges in the Holocaust era was done in accordance with existing German law and procedure.¹¹ The evidence is as clear as it is incomprehensible. The Holocaust proceeded through four stages: "identification and definition" (1933–1935), 'expropriation and emigration' (1935–1939), 'concentration' or 'ghettoization' (1939–1941), and 'extermination' or 'annihilation' (1941–1945).¹² In the first three stages, the persecution of Jews was done through legal decrees, ordinances, and laws that were published publicly in law gazettes.¹³ Some of these were petty, such as a decree forbidding German judges from citing legal commentaries by Jewish authors.¹⁴ Others were notorious: for example, the 1935 Nuremburg Laws that excluded Jews from citizenship, civil and political rights, and marrying or having sex with non-Jews.¹⁵ Importantly, the book stresses that both the petty and the notorious laws were used to gradually increase the scale of persecutions and transform the status of Jews from citizens to noncitizens to *lebensunwertig* or "life unworthy of life."¹⁶

At the fourth stage of 'extermination' or 'annihilation,' Bazylar describes how Germany's best legal minds assumed key roles.¹⁷ The majority of generals in the *Einsatzgruppen* (Nazi paramilitary death squads responsible for mass killings) were lawyers or legally trained.¹⁸ At the 1942 Wannsee Conference, where fifteen men decided to implement the "Final Solution to the Jewish Question

11. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 221.

12. *Ibid* at 7.

13. *Ibid* at 30.

14. *Ibid* at 3.

15. *Ibid*. The Nuremburg Laws on Reich Citizenship were originally published in *Reichsgesetzblatt I*, 1935 (16 September 1935) 1146.

16. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 3, 21.

17. *Ibid* at 211.

18. *Ibid* at 23.

in Europe,” seven of those fifteen men had advanced law degrees.¹⁹ In response to these facts, Bazylar offers a grim observation: “Law degrees, especially, seemed to be the gateway ticket to genocide.” German law professor Arthur Kaufmann attests to this proliferation of law degree holders among the *genocidaires*,²⁰ stating: “It appears, and this is fatal, that a career in jurisprudence renders one incapable of recognizing and opposing injustice Jews and other ‘artfremde’ [aliens] were deprived of their rights, with the full cooperation of many legal minds.”²¹ Bazylar points out that these legal minds subscribed to either legal positivism or naturalism, which suggests that “no theory of law can inoculate” the legally trained “from doing evil.”²² In light of all this, it is difficult to posit that the law was being “misused” as opposed to just being “used.” As Bazylar correctly acknowledges: “law can expedite genocide”—and it did.²³

Nevertheless, law can also *prosecute* genocide. This is the book’s second major preoccupation after its analysis of the “legalized barbarism” described above.²⁴ The first major trial of Nazi war criminals and their collaborators took place between 1945 and 1946 in Nuremberg, Germany before the International Military Tribunal.²⁵ Lower-ranking Nazis were prosecuted in twelve subsequent trials before the American-staffed Nuremberg Military Tribunals between 1946 and 1949.²⁶ These infamous proceedings set out the legal underpinning for prosecuting notorious war criminals for violating international criminal law—an unprecedented task. Despite “covering a decade of time, a continent of space, and a million acts,” the prosecutors from the United States, Britain, France, and the Soviet Union strove to establish incredible events using credible documentary evidence.²⁷ Moreover, they managed to do so through the adversarial process that was restrained by the rules of proof.²⁸ Together, the International Military

19. *Ibid* at 29.

20. A term for “those who commit genocide” coined at the International Criminal Tribunal for Rwanda.

21. Arthur Kaufmann, “National Socialism and German Jurisprudence from 1933 to 1945” (1988) 9 *Cardozo L Rev* 1629 at 1633, 1641, quoted in Bazylar, *supra* note 1 at 211.

22. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 231.

23. *Ibid* at 211. For further discussion, see Scott Horton, “When Lawyers Are War Criminals” in Beth A Griech-Polelle, ed., *The Nuremberg War Crimes Trial and Its Policy Consequences Today* (Nomos, 2009) 167. See also Jens David Ohlin, “The Torture Lawyers” (2010) 51 *Harv Intl LJ* 193 at 245-55.

24. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 3.

25. *Ibid* at 69.

26. *Ibid*.

27. Justice Robert Jackson, International Military Tribunal Transcript, vol 3 (14 December 1945), quoted in Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 78.

28. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 78.

Tribunal and the Nuremberg Military Tribunals, according to legal scholar Mark Drumbl, created the “judicialization of World War II atrocities in Europe.”²⁹

Nuremberg’s process of “judicialization” became the model for numerous international and national war crime trials over the next seventy years. This model was improved upon most famously by the International Criminal Tribunals (ICTs) for the former Yugoslavia (ICTY) and Rwanda (ICTR). The ICTY was established by the United Nations Security Council in 1993 to prosecute perpetrators of mass atrocities following the breakup of Yugoslavia.³⁰ The ICTR was established a year later to adjudge individuals arrested for committing mass atrocities during the one hundred day genocide in Rwanda.³¹ As the book discusses, the establishment of the ICTY and the ICTR quickly led to the creation of additional mixed ad hoc courts for Sierra Leone, East Timor, and Cambodia.³² The momentum provided by these international judicial bodies brought about the adoption of the *Rome Statute* in 1998 and the creation of the permanent International Criminal Court (ICC).³³ As a whole, the tribunals and the courts fundamentally proved that international law is, in fact, *law*—and at that, it is law that can be directly applied to punish perpetrators of international crimes.

The book, however, is quick to provide a caveat: “the ICTs have shown that *some* perpetrators of international crimes in *some* instances will be punished for their actions.”³⁴ Bazzyler never shies away from expounding the frustrating way that global politics can cull law’s achievements. One difficult truth highlighted in the text is the fact that in 1958—thirteen years after the Nuremberg Trials—all of the 142 men convicted by the American-led court were released. This was done for two reasons. Firstly, a campaign took hold in Germany that called for sweeping amnesty for the convicted because, it argued: (1) the trials lacked legality since no war crimes were committed; (2) the trials applied *ex post facto* laws; (3) the trials were victor’s justice; and (4) the defendants were only following orders.³⁵ Secondly, the escalating Cold War made Germans the friends and allies of the Americans, and friends do not imprison friends.³⁶ Bazzyler quotes

29. Mark A Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007) at 48, quoted in Bazzyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 152.

30. Bazzyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 236.

31. *Ibid* at 237.

32. *Ibid*.

33. *Ibid*.

34. Bazzyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 256 [emphasis in original]. See also Julian Borger, *The Butcher’s Trail: How the Search for Balkan War Criminals Became the World’s Most Successful Manhunt* (Other Press, 2016) at 324.

35. Bazzyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 104.

36. *Ibid* at 103.

from Nuremberg Trial scholar Kevin Heller to summarize the disappointment felt when politics undercut legal progress: “[t]he history of the [Nuremberg] trials, in short, is the (early) history of the Cold War,” with justice being the first casualty.³⁷

Similarly, the book deals with the hard fact that, to date, the hundreds of international prosecutions have not stopped genocides or other mass atrocities from happening. Many examples of this failure of deterrence come to mind: the prosecution of Sudanese president Omar al-Bashir for the “slow motion genocide” in Darfur since 2003 has been stalled at the ICC;³⁸ and no arrest warrants have been issued for the self-appointed caliphs of ISIS or its *genocidaires*—all while ISIS followers continue to commit mass brutalities in Iraq and Syria against Yazidis, Christians, Shi’a Muslims, Turkmen, Shabaks, and other religious groups.³⁹ Bazylar’s response that international judicial bodies are tasked with pursuing justice, not preventing injustice, is unsatisfying yet accurate.⁴⁰ There is hope that by bringing perpetrators of mass atrocities to face justice, international courts will *eventually* influence the attitudes of both future perpetrators and targeted victim populations.⁴¹ In the meantime, however, Bazylar suggests that prevention remains the specialty of “[D]iplomacy, economic sanctions, and military action.”⁴² The book makes an interesting addition to that list, contending that non-governmental organizations (NGOs)—who provide early warnings of ethnic violence within states—also have an important role to play.⁴³ Nevertheless, perhaps the most chilling example provided in the book is the situation of the Rohingya, the Muslim minority in the Buddhist-majority nation of Myanmar.⁴⁴ Despite numerous NGOs identifying Myanmar “as the country most susceptible to the start of a new episode of state-led mass killing,” we now know that the early

37. Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) at 5, quoted in Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 105.

38. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 269.

39. *Ibid* at 255, 288.

40. *Ibid* at 255.

41. *Ibid*.

42. David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2011) at 28-29, quoted in Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 255.

43. Bazylar, *Holocaust, Genocide, and the Law*, *supra* note 1 at 286-89. Some examples of organizations that devised early warning systems for mass killing and genocide are: Fortify Rights, International Alert, Early Warning Project of the US Holocaust Memorial Museum (“USHMM”), and Genocide Watch. *Ibid*.

44. *Ibid* at 287.

warnings fell on deaf ears.⁴⁵ Since late 2016, following the publication of this book, tens of thousands of Rohingya people have been internally displaced and subjected to intense persecution and mass violence.⁴⁶ It is difficult to take solace in the contention that international justice will deal with these atrocities *eventually*.

Holocaust, Genocide, and the Law carefully weaves together profound doctrinal, philosophical, and historical themes into a powerful thesis: law can expedite genocide as readily as it can punish genocide. Bazyler succeeds in telling the tale of the Holocaust through the prism of law and showcasing how “Post-Holocaust law” developed to become a discrete body of law in the Post-Holocaust world. Through a litany of incriminating evidence, the book depicts the Holocaust as a legal event that occurred *within* the law, not in its absence. In the last seventy years, judicial reckoning with the Holocaust has guided the global community to establish international judicial bodies that steadily brought perpetrators of mass atrocities to face justice. Bazyler uses these courts and tribunals to illuminate the liberating possibilities of the law, while making it clear that the law alone cannot address contemporary state-sponsored atrocities across the globe. In the end, the uncomfortable truth remains: “There are too many graves containing the bones of all ethnicities for international justice to cope with.”⁴⁷ The book’s lasting message, however, is that the pursuit of justice demands that we never resign ourselves to “man’s endless capacity for cruelty.”⁴⁸ It is this lasting message that makes this book an indispensable source for anyone interested in building a legal world that combats mass atrocity and genocide in our time.

45. USHMM Early Warning Project, “Which Countries Are Most Likely to Suffer Onsets of State-Led Mass Killing in 2015? A Statistical Risk Assessment” (21 September 2015), online: <www.earlywarningproject.com/2015/09/18/2015-statistical-risk-assessment>, quoted in Bazyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 287.

46. For information on the Rohingya Refugee Crisis, see Eleanor Albert, “The Rohingya Crisis” (February 2018), online: Council on Foreign Relations <www.cfr.org/background/rohingya-crisis>; BBC, “Myanmar Rohingya: What you need to know about the crisis” (24 April 2018), online: <www.bbc.com/news/world-asia-41566561>; Katie Hunt, “Rohingya crisis: How we got here” (12 November 2017), online: <www.cnn.com/2017/11/12/asia/rohingya-crisis-timeline/index.html>.

47. Borger, *supra* note 34 at 324, quoted in Bazyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 256.

48. Sarah Sewall, “Preventing Mass Atrocities: Progress in Addressing an Enduring Challenge” (30 March 2015), online: US Department of State: Diplomacy in Action <<https://2009-2017.state.gov/j/remarks/239968.htm>>, quoted in Bazyler, *Holocaust, Genocide, and the Law*, *supra* note 1 at 293.