Chapter 1

Aetiology of Evil in Armed Conflicts

‘War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust and pillage have been the inevitable by-products of man’s resort to force and arms.’

—Justice Murphy, *Yamashita v Styer*

The Evil of War

The average military professional may prefer to dispute the tendency of the general public to see war simply as ‘episodes of mindless slaughter and wanton destruction.’ The effects of war, however, must put beyond reasonable debate the proposition that wars and other manner of armed conflicts have proven, through the years, to be little more than morbid carnivals of variegated evils that make victims out of fellow human beings. That fact has now been recognised even by the legends of modern armed conflicts. General Norman Schwarzkopf of Desert Storm fame, for instance, reportedly remarked, ‘War is a profanity because, let’s face it, you’ve got two opposing sides trying to settle their differences by killing as many of each other as they can.’ In the same vein, Geoffrey Parker has observed that the ‘business of the military in war is killing people and breaking things.’ Beyond Robert McNamara’s observation that more than 160 million lives were lost in wars during the 20th Century, not counting the numbers maimed and wounded in body and mind, there is no denying that a host of what is generally accepted as evil conducts are unleashed with little or no compunction by human beings against their fellows during episodes of armed conflicts. In his lament of the ‘monstrous cruelty of war’ that does not limit its ravages to combatants only, J Glenn Gray (a World War II veteran) observed in his classic memoir *The Warriors*:

‘Modern wars are notorious for the destruction of nonparticipants and the razing of properties in lands that are accidentally in the path of combat armies and air forces. In World War II the number of civilians who lost their lives exceeded the number of soldiers killed in combat. ... Through folly or fear, nearly

1 David Chuter, *War Crimes: Confronting Atrocity in the Modern World* [Boulder, Colorado: Lynne Rienner, 2003] p 5.
2 Bob Woodward, *The Commanders* [New York: Simon & Schuster, 1991] p 313.
3 Geoffrey Parker, ‘Dynastic War: 1494–1660’ in Geoffrey Parker (ed), *Cambridge Illustrated History of Warfare* [Cambridge: Cambridge University Press, 1995] p 161.
4 Robert S McNamara et al, *Wilson’s Ghost: Reducing the Risk of Conflict, Killing, and Catastrophe in the 21st Century* [New York: Public Affairs, 2001], p xvi.
every officer has exposed his own men to needless destruction at one time or another. Add to this the unnumbered acts of injustice so omnipresent in war, which may not result in death but inevitably bring pain and grief, and the impartial observer may wonder how the participants in such deeds could ever smile again and be free of care.

The sober fact appears to be that the great majority of veterans, not to speak of those who helped to put the weapons and ammunitions in their hands, are able to free themselves of responsibility with ease after the event, and frequently while they are performing it. Many a pilot or artilleryman who has destroyed untold numbers of terrified noncombatants has never felt any need for repentance or regret. Many a general who has won his laurels at a terrible cost in human life and suffering among friend and foe can endure the review of his career with great inner satisfaction. So are we made, we human creatures!5

The sundry manner of this evil of life’s ruination includes conducts viewed as ‘necessary evil—authorised and promoted by responsible people in responsible command of their armed forces. Some of these ‘unnumbered acts of injustice so omnipresent in war’ are considered by some martial reactionaries as possessing ‘sound military justification.’6 Also perpetrated with great regularity are conducts universally condemnable as aberrant, evidently unauthorised and unnecessary evil—perpetrated by insufficiently controlled ‘rogue’ fighters who had been trained, armed and mobilised by responsible people in responsible command of the relevant armed forces. Also accounting for a proportion of the evil committed during armed conflicts are criminal acts done by other persons subscribing to the prevailing mayhem of armed conflicts; or simply exploiting the presented opportunity, to commit crimes.

There is, however, one phenomenon that unites the various scenarios. Evil. These are all evil—whether authorised and necessary or illicit and gratuitous. Whether they are committed by regular professional troops or by amateur freebooters. And they are evil inflicted by humans upon human beings: in the order of ‘man’s inhumanity to man,’ much worse than the virtual slave labour regime of Britain’s industrial revolution era that Robert Burns lamented as that which ‘makes countless thousands mourn.’7

In view of the recurrence of these carnivals of evil which armed conflicts have visited upon humanity with unabated regularity since time immemorial, some notable inquiries have been made in the spheres of history, philosophy, psychology and sociology, all aimed at understanding why. In the following sections, some of the theories offered to explain human-inflicted evil during armed conflicts will

5 J Glenn Gray, The Warriors: Reflections on Men in Battle [New York: Harcourt, Brace, 1959], pp 172§173.
6 Chuter, ibid, p 5. See also Prosecutor v Fofana and Kondewa, dated 2 August 2007 [Trial Chamber, Special Court for Sierra Leone, Dissenting Opinion of Judge Thompson.]
7 Robert Burns, ‘Man Was Made to Mourn’ (A Dirge) (1784).
be explored. As noted in the Introduction, the discussion will begin with a broad review of why human beings succumb to committing evil during armed conflicts: following that, we shall review some of the theories offered to explain the evil of sexual violence during armed conflicts.

The review is intended as an aid to a better understanding of how international law could more adequately serve its remit of containing (during an armed conflict) the general infliction of evil, as well as the infliction of the particular brand of evil done to women because of their gender. Before turning to the causes and explanations of the evil of sexual violence against women during armed conflicts, the review dwells at some length on the general typology of evil-doing found in armed conflicts. The reason is that an inquiry into the general brand of evil during armed conflicts affords a useful point of departure for the study of sexual violence as a particular sort of evil. It is not far-fetched to suggest, for instance, that a culture of conducts that permits the infliction of the general brand of evil may not be far removed from a culture of conducts that conditions perpetrators to commit—or moral accomplices to condone—sexual violence against women during an armed conflict. Thus, starting a review of the causes and explanations of the former may yield some useful insights into the nature of the latter. Will the official or military commander who superintended a homicidal enterprise with a personal moral detachment, simply because he had received the orders from his superiors, be readily seen to act differently if those orders were to permit sexual violence against the female victims of the homicidal enterprise? Will the sadist who tortured and killed his victims, and enjoyed doing so, be readily seen as a candidate of sudden epiphany of moral rectitude as regards sexual torture of a female victim?

As for the main object of this study—i.e. sexual violence against women committed during armed conflicts—it is readily appreciable that there is much work needed to be done in the area of international law, in spite of the existing rules within it, to fashion adequate responses to what is generally acknowledged to be a veritable scourge. It is felt that much inspiration will be drawn from a multi-disciplinary appreciation of the nature of the evil for which such remedy is needed.

A General Review of Human Capacity for Evil in Armed Conflicts

Some of the explanations offered for the human capacity for evil during armed conflicts will be found in the writings of Hannah Arendt, Zygmunt Bauman, Stanley Milgram, C Fred Alford, Jean-Paul Sartre, Michael Ignatieff, J Glenn Gray, Arne Johan Vetlesen, and many other scholars. The knowledge gleaned from these writings include theories that may broadly be described as the situational theory, the dispositional theory, the theory of narcissism, and the eclectic theory of evil. We shall review them next.
The Situational Theory of Evil

In the aetiology of mass atrocities one school of thought that has appeared irresistible since the 1960s is the school that holds, controversially, that evil-doing, even in the order of genocide, is not explained by the dispositional propensity of particular men and women genetically wired in a special way to behave in a wicked way. This was a counter-think to an earlier school, appearing in the first decade after the Holocaust, which had concentrated hypotheses on the dispositional character of mass evil-doers.8 The controversy generated by the situational theorists stems mostly from the tendency of their theories, if accepted as truth, to apply to everyone. Some of the principals of this school of thought include Hanna Arendt, Zigmunt Bauman, Stanley Milgram and Philip Zimbardo. We shall review their hypotheses next.

Hanna Arendt

In Stephen Daldry’s 2008 movie, *The Reader,*9 Hannah Schmitz (played by the Academy Award winner Kate Winslet) gives us a fictionalised glimpse into the banality of evil. The relevant scene is Schmitz’s testimony, at her own trial as an SS camp guard complicit in the Holocaust. She explains in a very matter-of-fact way her motive for knowingly allowing 300 Jewish victims, under her and fellow guards’ care, to die in an inferno at a church, during the death march that followed the evacuation of those victims from a concentration camp. The courtroom dialogue appears as follows:

*Presiding Judge:* Why didn’t you unlock the doors?

*Schmitz:* Obviously. For the obvious reason. We couldn’t.

*Presiding Judge:* Why couldn’t you?

*Schmitz:* We were guards. Our job was to guard the prisoners. We couldn’t just let them escape.

*Presiding Judge:* I see. If they escaped, you’d be blamed. You’d be charged. You might even be executed.

*Schmitz:* No.

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8 See Christopher Browning, ‘Introduction’ in Leonard S Newman (ed), *Understanding Genocide: The Social Psychology of the Holocaust* [Oxford: Oxford University Press, 2002], p 3.

9 This is a motion picture adaptation of the 1995 post-Holocaust novel of the same name by Berhnard Schlink translated into English by Carol Brown Janeway [Vintage Books, 1998].
Presiding Judge: Well, then?

Schmitz: If we'd opened the doors, there could have been chaos. How could we have restored order? ... We couldn't just let them escape. We couldn't. We were responsible for them. [Said with indignant emphasis; fist pounding the table.]

To Schmitz, then, her motivation for this atrocity was not even something as momentous as an external pressure to do evil by act or omission. It was simply a straight-forward and ‘obvious’ matter of doing one’s job well. It did not matter that such a steadfast adherence to one’s duties would result in misery and death to fellow human beings.

What is treated as a subtext in a sexually steamy fictional movie is a central subject of serious scholarship by renowned philosophers, in their attempt to explore evil. One such philosopher was Hannah Arendt. In the field of genocide research, Arendt is celebrated for her controversial early 1960s book *Eichmann in Jerusalem: A Report on the Banality of Evil.* A German-Jewish emigrant to the United States, who had fled Germany during the Nazi persecution of Jews, Arendt felt an obligation to attend the trial of Adolf Eichmann in Jerusalem in 1961, as a freelance reporter for the *New Yorker.* Primed by the prevailing dispositional theories of evil, she had expected to observe the monstrosity of evil personified in Eichmann in the dock. She had hoped that the trial would aid her in an understanding of Eichmann's mind, and to enable her explore ‘the totality of the moral collapse that the Nazis caused in respectable European society.’ Instead, she was confronted by the pathos that she famously came to describe as the ‘banality of evil’. By this, she meant that Eichmann was able to rise to the level of one of the worst criminals in history, in virtue of his personage as a faceless, uninspired and robotic bureaucrat who sat at his desk and did his job that was the extermination of European Jews.

In a view commonly shared by many other Holocaust scholars, Arendt opined that the Nazis had bureaucratised and legalised persecution of Jews and made the attendant levels of atrocity the new norm in Germany. The degree of perversion of the moral paradigm in Nazi Germany was such that evil lost the quality of that which confounded the mind; and the only phenomenon that held startling value was good. And good in those circumstances became a rare privilege experienced only by those with capacity for independent thought. According to

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10 See *The Reader* (2008) directed by Stephen Daldry: starring Kate Winslet, Ralph Fines, David Kross; at video counter 1:09:05 to 1:11:10.
11 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* [New York: Viking Press,1963].
12 *Ibid*, Introduction by Amos Elon, p xii.
13 According to Arendt: ‘[U]nder the conditions of the Third Reich only “exceptions” could be expected to react “normally,”’ in so far as ‘normal persons’ are expected to realise the criminal nature of their acts: Arendt, *supra*, p 26.
14 *Ibid*, p 295. Arendt’s conclusion in this regard coincide with those made by Dave
Arendt, Eichmann was lacking in such capacity.\textsuperscript{15} He was, in her view, a dull man that personified this banality of evil.\textsuperscript{16} He was not a ‘perverted sadist.’\textsuperscript{17} Nor did he even hate his victims.\textsuperscript{18} He was, among other things, a thought-deprived careerist doing his job in a system that had bureaucratised evil. To quote Arendt:

Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. ... He merely, to put the matter colloquially, \textit{never realised what he was doing}. It was precisely this lack of imagination that enabled him to sit for months on end facing a German Jew who was conducting the police interrogation, pouring out his heart to the man and explaining again and again how it was that he reached only the rank of lieutenant colonel in the SS and that it had not been his fault that he was not promoted. ... He was not stupid. It was sheer thoughtlessness—something by no means identical to stupidity—that predisposed him to become one of the greatest criminals in that period. ... That such remoteness from reality and such thoughtlessness can wreak more havoc than all the evil instincts taken together which, perhaps, are inherent in man—that was, in fact, the lesson one could learn [from Eichmann’s trial] in Jerusalem.\textsuperscript{19} [Emphasis received.]

In the circumstances, argued Arendt, the efforts of the Prosecutor to portray Eichmann as a sadistic monster was not borne out by the reality of who Eichmann really was in the grand scheme of things.\textsuperscript{20}

Arendt had attracted much criticism for these observations.\textsuperscript{21} Amos Elon, for instance, wondered if she had succumbed to the ‘fallacy of physiognomy ... . She ought to have known better. Hitler would not have cut a better figure under the circumstances,’ he chided. Elon considers that most tyrants and serial murderers, out of power, appear ‘pathetic or ordinary, harmless, or even pitiful, as Saddam Hussein did coming out of his rat hole with an unkempt beard.’\textsuperscript{22} Elon’s commentary is certainly interesting, but not necessarily beyond factual dispute, if his point was to displace Arendt’s observations of Eichmann and her attendant con-

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Grossman many years later when he wrote: ‘On rare occasions those who are commanded to execute human beings have the remarkable moral fibre necessary to stare directly into the face of the obedience-demanding authority and refuse to kill. These situations represent such a degree of moral courage that they sometimes become legendary’: Dave Grossman, \textit{On Killing: The Psychological Cost of Learning to Kill in War and Society} [New York: Little, Brown and Company, 1995], p 224.
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\textsuperscript{15} Arendt, \textit{supra}, pp 49, 287, etc.
\textsuperscript{16} \textit{Ibid}, pp 287–288.
\textsuperscript{17} \textit{Ibid}, p 276.
\textsuperscript{18} \textit{Ibid}, p 26.
\textsuperscript{19} \textit{Ibid}, pp 287–288.
\textsuperscript{20} \textit{Ibid}, p 54.
\textsuperscript{21} Arendt, \textit{supra}, ‘Introduction’ by Amos Elon, generally.
\textsuperscript{22} Arendt, \textit{supra}, ‘Introduction’ by Amos Elon, p xii.
clusions. Saddam Hussein might have appeared pathetic, ordinary, harmless or pitiful at the point of his capture, as Eichmann, too, probably was at the point of his own capture. There was, however, nothing at all banal or uninspiring about Saddam Hussein at the comparative point that Arendt had observed Eichmann—i.e. in the courtroom dock. Saddam Hussein had remained charismatic throughout, indulging regularly in displays of defiance towards the judges who were trying him; as well, even, as towards his executioners as he was being hanged. Similarly, other tyrants and strongmen on trial for genocide in contemporary memory did not all cut pitiful figures at their trials. Slobodan Milosevic, like Saddam Hussein, had proved irremissibly defiant during his own trial, even refusing to accept counsel assigned to defend him, at the International Criminal Tribunal for the former Yugoslavia. And at the International Criminal Tribunal for Rwanda, Théoneste Bagosora, whom this author had assisted in prosecuting, never appeared a pathetic or pitiful figure. Similarly, Charles Taylor, another former strongman whom this author assisted in prosecuting, did not appear banal in his own trial. One is thus forced to question the correctness of Elon’s attempts to extend to every evildoer, even the diabolically charismatic ones, Arendt’s specific observations in relation to Eichmann.23

As noted earlier, Arendt was not alone in observing in an evil-doer the impersonal phenomenon she recorded about Eichmann. Some years ahead of the publication of Arendt’s Eichmann in Jerusalem, another philosopher and a veteran of World War II had noted something similar. One particular episode which Gray observed appears in the story he tells as follows:

It happened in southern France shortly after our invasion. One day an attractive French girl appeared at our temporary headquarters and confessed that she had worked for a time with the local Gestapo and now feared the revenge of the Maquis. The French security officer with whom I was working interrogated her calmly at some length and soon found out that she had been in love with the Gestapo captain in charge of this district and had been persuaded to aid him on occasion in his repressive measures against the Resistance. Since our unit had to move on almost at once, the French officer wrote a report of his interrogation for the civil authorities of the liberated city—and closed it with his recommendation that the girl be shot! On the way to the city jail with the girl, he picked up

Another instance of that extension appears in the following observations of Elon: ‘Before Arendt, others had emphasised the discrepancy between the personal mediocrity of monsters like Hitler or Stalin and the horrendous evil they unleashed on the world. Nearly everybody who attended the trials of mass killers after the war, some of them respected doctors and pharmacists, came away with the disconcerting impression that the killers looked pretty much like you and me. The Israeli court psychiatrist who examined Eichmann found him a “completely normal man, more normal, at any rate, than I am after examining him,” the implication being that the coexistence of normality and bottomless cruelty explodes our ordinary conceptions and present the true enigma of the trial’: Arendt, supra, Introduction by Amos Elon, p.xv.
some pictures of his wife and children, which he had had developed in a local
photography shop during our brief stay. After showing them to me for my com-
ment and approval, he carried them to the girl in the car ahead. Ignorant of the
fate he had decreed for her (and which would almost certainly be carried out at
once under conditions at that time), the girl admired the family snapshots and
the two of them laughed and joked for many minutes. Passers-by might easily
have mistaken them for lovers.

There was little savagery or blood lust in this French officer. He did not
hate the girl, so far as I could tell, though he hated her deeds. He would, in fact,
have been quite willing to sleep with her the night before ordering her execution.
When I remonstrated with him about such callousness, he made clear to me that
he regarded himself as an army officer in a quite different way from himself as
a human being. The two personalities could succeed each other with lightning
rapidity, as I was to see on numerous occasions. As a human being, he was capa-
ble of kindness, even gentleness, and within limits he was just and honest. In his
capacity of functionary, he could be brutal beyond measure without ever losing
his outward amiability and poise. I observed precisely the same qualities in the
Fascist and Nazi politicians and police with whom it was my fate to deal.

After months of this sort of experience, I began to detect with a kind of
horror that I was becoming inured to cruelty and not above practicing it myself
on occasion.24

One readily sees striking similarities between Arendt’s observations of the banality
of evil in the character of Adolf Eichmann and Gray’s first-hand observations of
the predisposition of his French mate; complete with the same absence of hatred
for the victims, and the same the capacity for great brutality as a functionary per-
forming what he perceived as his duties. What is more, Gray himself admits that
he, too, had found that after months of exposure to that sort of environment he was
becoming accustomed to cruelty and not above perpetrating it himself.

Slightly ahead of Arendt’s Eichmann in Jerusalem, Raul Hilberg had reached
similar conclusions in his Holocaust magnum opus entitled Destruction of the
European Jews. Hilberg, who like Gray was also a World War II veteran turned
post-war scholar, had argued that the Holocaust was fundamentally an administra-
tive and bureaucratic process. According to him, the ‘bureaucrats who were drawn
into the destruction process were not different in their moral makeup from the rest
of the population. The German perpetrator was not a special kind of German. ...’
However one may wish to draw the line of active participation, the machinery of
destruction was a remarkable cross-section of the German population.25

Even more recently, the same phenomena were observed in the context
of post-apartheid proceedings of the South African Truth and Reconciliation
Commission. In a dispatch appearing in The New York Times, the reporter Susanne

24 Gray, supra, pp 7–9.
25 Raul Hilberg, The Destruction of the European Jews (revised and definitive edition)
[New York: Holmes and Meier, 1985] vol 3, p 1011.
Daley narrated how a torturer’s testimony gave South Africa a new lesson in the banality of evil. Her report concerned the testimony of a South African police officer named Jeffrey Benzien, described as ‘one of the many minor but effective functionaries who made apartheid work’ for South Africa’s white supremacist government.\footnote{Susanne Daley, ‘Torturer’s Testimony Gives South Africa a New Lesson in the Banality of Evil’, \textit{New York Times}, 9 November 1997. Available at <http://www.hartford-hwp.com/archives/37a/041.html>}

Benzien’s torture specialty was the technique called the ‘wet bag’, a variant of ‘water boarding’. The method involved covering the victim’s head with a wet cloth and repeatedly bringing him ‘to the terrifying brink of asphyxiation.’ Confessions were thus extracted within a matter of minutes. But Benzien apparently had more techniques in his bag of torture tricks. For he did not deny his victims’ allegations, although he could not recall, that he applied electrodes to their noses, their genitals and their recta; he shoved a broomstick up the rectum of at least one of his victims; he hung his victims up on the window bars of their prison cells for hours with handcuffs; he inserted both thumbs into the nostrils of at least one of his victims and kept pulling until blood oozed out.

But Benzien was a family man who went home to his wife and children at the end of the ‘work’ day. And his ‘job’ was exactly what he saw himself as doing—a true patriot good at his job. “I can sit here and tell you in all honesty that I was used by the then security branch”, he said. “When it came down to getting the job done, I was the person who did it. Maybe I was too patriotic, too naive or anything else that you want to call it.” There, one clearly sees Arendt’s banality of evil personified in Benzien, remarkably in the same manner as it does in Eichmann.

Given the manner of what Benzien did with his own hands, the description of ‘sadist’ will not be unanimously withheld from him. However, like Eichmann, he was very much a man recruited to do a job, saw what he was doing as such, took pride in doing that job, and brought creativity to bear. And, like Eichmann, he had no evident hatred towards his victims. It was nothing personal. It was all businesslike.

In 1999, two Frenchmen, Rony Brauman and Eyal Sivan, released an essay in celluloid on the Eichmann trial. They did this in their movie entitled \textit{The Specialist—Portrait of a Modern Criminal}. The movie comprised entirely of the actual audiovisual footage of Eichmann’s 350-hour (or over four-month) trial in 1961—compiled, arranged and edited down to a two-hour movie. The movie also features some special effects—such as melodramatic sounds, photo-play with the actual pictures, as well as cutting down and splicing of sequences. But these special effects do not impair the authenticity of the footage employed.

One great accomplishment of Brauman and Sivan with \textit{The Specialist} is their ability to have accurately presented the viewer with the perspective that Hannah Arendt had of the \textit{Eichmann} trial proceedings, from her seat in the public gallery. The movie does not diminish, just as Arendt had not done, the truism of the Holocaust as a modern historical event that remains unrivalled in the grotesqueness of the evil and the criminality that it represents. But what quickly occurs to
the viewer is the striking anti-climax between the grandeur of the evil and the
criminality that the Holocaust represents versus the compelling ordinariness of
the man put on trial, having deliberately been set up as the very personification of
that evil and criminality in all their grotesqueness.

The movie opens with an excerpt of the opening statement of the Attorney-
General of Israel at the time, Gideon Hausner, leading the prosecution. He was
a barrister of the more bombastic school of courtroom advocacy. In the movie,
we see him commence the trial with the following descriptions of Eichmann:
‘a destroyer of a people’; ‘an enemy of mankind’; ‘he committed atrocities so
unspeakable that he who is guilty of such crimes no longer deserves being called
human’; ‘His crimes go beyond what we consider human. They go beyond what
separates man from beast.’

Although it is not necessary to conduct genocide prosecutions with such big
emotive descriptions of an accused, the foregoing descriptions are, nevertheless,
arguably defensible, as a matter of logic and commonsense. They may permissi-
sibly apply to anyone guilty of complicity in a genocide. But, what proved more
forensically questionable for Mr Hausner was his tactic of escalating this spirited
description to the level of stereotyping Eichmann in the following way: ‘He was
born a human. But he lived like a beast in the jungle.’ Now, this raised the expec-
tations of the observer to expect to see palpable evidence that depicts the accused
as the super- or sub-human monster that the prosecution so described.

In the Eichmann trial, that high expectation was quickly dashed. From the
initial excitement roused by Mr Hausner’s opening statement, the trial settled
down to an inquiry—sometimes painfully humdrum as these forensic inquiries
tend to be—into questions such as (a) whether Eichmann was truly guilty of
complicity in the Holocaust, as charged, given the nature of his functions, and the
absence of evidence establishing beyond reasonable doubt that he actually killed
anyone or knowingly ordered anyone to be killed; (b) the technical details of his
complicity, limited only to his functions as an SS lieutenant-colonel who, first,
coordinated the emigration-turned-deportation programme, and later transpor-
tation of Jews to the death camps; and whether he was aware that certain death
awaited the deportees at the receiving end of his work product; (c) whether he
was only a subordinate executing orders that he received from his superiors to
coordinate, at various times, the emigration of Jews, their deportation and their

27 R Brauman and E Sivan, The Specialist–Portrait of a Modern Criminal (1999) (a
movie), video counter 00:03:30–00:04:13.

28 In fact, the Court acquitted Eichmann of the only allegation of direct perpetration
of crime—i.e. that he had personally, with his servant Slawik, beaten a Jewish boy
named Salomon to death in a cherry orchard at his home in Budapest (an allegation
which Eichmann had abjured): The Eichmann Judgment, para 118, available at <http://
www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eich-
mann.adolf/transcripts/Judgment/Judgment-037>.

29 See for instance, The Specialist, supra, at 00:13:40, 00:21:40, etc.
transportation to the concentration camps;\textsuperscript{30} (c) the significance of legitimising crime by law or State practice or both, and the practical limits of the individual's freedom of will and conscience to opt out, in terms of the wholesome or mitigated culpability of the individual obligated to comply;\textsuperscript{31} (d) the complicity of some highly placed Jews themselves (serving in the Jewish Council or the \textit{Judenrat}) in the realisation of the Holocaust committed against their own people;\textsuperscript{32} and, the

\textsuperscript{30} Not only did Eichmann hang on to this defence throughout his testimony, like a drowning man would hang on to a floating ball, but there were some corroborating evidence of this defence in the case for the prosecution. For instance, the former director of the Fund for Israel's Development, testified that during meetings at which members of the Jewish Council presented demands and grievances to Eichmann, he 'almost always said “I must ask my superiors”': \textit{ibid}, 00:08:12.

\textsuperscript{31} This question was surely engaged by Eichmann in his own defence: see, for instance, \textit{ibid}, at 01:39:35. Notably, Judge Halevi appeared to have recognised this idea in virtue of a proposition he had put Eichmann: 'At the time, it was very difficult ... for an individual to accept the consequences ... of refusing to obey orders': \textit{ibid}. Indeed, at least one prosecution witness had given testimony which resonates in this theory of the case for the defence. For instance, Prosecution Witness Abraham Gordon, an inmate at Auschwitz who had lost his entire family during the Holocaust, had testified: (a) that there 'were Christians who tried to hide Jews. But were hanged': \textit{ibid} at 00:20:40; and (b) that not all of the SS guards appeared to have been relishing the killing of Jews: 'The variety of their feelings was quite extensive, from one to another. Some [were] almost hysterical, some [were] close to nervous breakdown, some were just photographing the scene, and some were shooting and killing': \textit{ibid} at 00:20:43. These engaged the question whether Eichmann had a choice but to obey orders, and whether he was among those who were deeply troubled by the extermination (as he claimed at trial) or whether he was one of those relishing its accomplishment (as the Prosecution urged the Court to hold). In the movie \textit{The Specialist}, the viewer is presented with no evidence tending to show that he belonged to the latter camp. Much of what the viewer observes is his testimony to the effect that he was the trapped victim of circumstances from which he could not escape: see \textit{ibid} at 01:32:12 \textit{et seq}.

\textsuperscript{32} The testimony of Mr Freudiger (a former member of the Hungarian Jewish Council) was particularly telling in this regard. First, he made the disquieting admission that there was an understanding with the Nazis by which members of the Jewish Council and their close relatives would be spared from the ghettoisation programme: \textit{ibid} at 01:29:38. But it was his explanation of his failure to encourage Jews to flee that proved more unbearable for some of the survivors in the Courtroom's public gallery. According to him: 'By the time we knew, when we realised what Auschwitz was, the Jews from the east and the north-east of Hungary, 300,000 of them had already been deported. We informed them. They already knew what was in store for them. But what could we do? What could we do?': \textit{ibid} 01:30:04: This answer produced angry heckling from the public gallery. Requiring the Presiding Judge to intervene, by ordering the heckling man to be removed from the public gallery, in a bid to restore order in the Courtroom. In an evident attempt to improve upon this answer, the beleaguered Mr Freudiger painfully continued as follows: 'I beg your pardon, your Honour. With reference to what I said just now, before the incident, people
distraction of that question from the central question of the guilt of the accused person who had been portrayed as a monster; (e) the possible complicity of the German Red Cross Society in the Holocaust;\footnote{Witness Gedalia Ben-Zvi, was one of the young, male Jews used as slave labourers to assist with the work of the concentration camp at Birkenau. He was forced to help in unloading train wagons of inmates upon their arrival at Birkenau. He had testified that when Jews were brought by train to the Birkenau concentration camp, 'There was always a vehicle marked with a Red Cross in case of possible incidents. In case someone resisted or went mad, became violent or had a fit. To prevent panic or disorder, they put them inside the [Red Cross] vehicle to calm them down. … 'This was the same vehicle where the cans with the Zyklon B were loaded and later delivered to the gas chambers': \textit{ibid}, at 01:16:26.} and (f) the apportionment of blame to the victims for their fate, given the absence of mass resistance or revolt on their part,\footnote{See \textit{The Specialist}, at 01:16:26.} etc.

Against the foregoing background, one might find something instructive in the reaction of the Court to the protest of one witness, who had objected to any hint of blameworthiness arising from the question of why the would-be Nazi victims did not flee. The Presiding Judge (Moshe Landau) was thus prompted to admonish the Attorney-General for not conducting the case as he had set it up in his opening statement. Although the Court was later to, soothingly, describe the matter (in its Judgment) as ‘a slight deviation here and there from the narrow path which the Court saw as its duty to set,’\footnote{See \textit{ibid}, at 01:16:09.} the following dialogue in the course of the trial remains interesting:\footnote{See \textit{The Eichmann Judgment}, para 3 available at <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Judgment/Judgment-001>.}

\begin{quote}
\textit{Presiding Judge} \[addressing the Attorney-General\]: Mr Hausner, we have just heard profoundly distressing matters related in the language of a poet. But ... with this testimony, we are getting away from the object of this trial. I'm sorry to have to say this at the end of this testimony.

\textit{Mr Hausner}: No, it’s a pity ...
Presiding Judge: The Court has a certain conception of what this trial should be. The prosecution must therefore conduct its [case] in accordance with what the Court says.

Mr Hausner: This is what we are doing, Your Honour.

Presiding Judge: I must state that the line of this trial is not being followed in the way it should be.

Mr Hausner: Maybe that’s because you are not aware of all the elements ...

Presiding Judge: We heard your opening speech, which I believe outlines very well what you intend to demonstrate ....

It is not apparent what the Presiding Judge meant by his hint to the Attorney-General when he said: ‘I must state that the line of this trial is not being followed in the way it should be. … We heard your opening speech, which I believe outlines very well what you intend to demonstrate.’ Nevertheless, this should not preclude the struggle that the Attorney-General was experiencing in his task of actual demonstration, by the evidence, that Eichmann was the evil ‘beast in the jungle’ that the Attorney-General had described in his opening statement.

Particularly remarkable, as we see in The Specialist, is how empathetic and ordinary Eichmann actually appears during the course of the trial. Rather than appearing as a monster in a business suit, he is quite capable of being perceived credibly as the mild-mannered and quiet person that he describes himself to be— an underdog that is being relentlessly badgered by a most pugnacious Attorney-General (with a supporting battery of lawyers and police aides); while his Defence Counsel Dr Servatius sits quietly still, almost alone.

37 He had described himself as ‘not brusque’ in his manner of dealing with people; and that he simply obeyed orders and carried on quietly with his work: ibid, at 01:35:05 et seq. Indeed, Eichmann’s disposition in that regard was evidently on display during the trial. His attitude towards the court and counsel was always respectful and correct, even if his answers were unacceptably evasive when the questions appeared to zero in on his involvement in bad acts. There was never a hint of defiance in his attitude towards the judges, who represented authority in that Courtroom. Prominent-looking witnesses who were former members of the Jewish Council testified as to the respectful way that he treated them at their meetings during the Holocaust, when he was in office under the Nazi regime. The former director of the Fund for Israel’s Development, for example, testified that Eichmann referred to him as ‘Herr’; that when the Jewish Council went to him to present grievances and demands, Eichmann, ‘from time to time’ did something; and, that it was possible to reach an understanding with him: ibid, at 00:08:03–00:08:16. Eichmann also came across as a great sympathiser for the cause of a Jewish homeland, and had cooperated with every effort to realise that objective: ibid, at 00:14:36.
There is, of course, a world of difference between optics and substance in a criminal trial. To look banal, ordinary or even empathetic is not the same as to be innocent of the charges proffered against the accused. It is important, therefore, to emphasis that none of the foregoing observations could possibly diminish the grandeur of the evil that was the Holocaust. Nor, for that matter, do they excuse from criminal responsibility those who make (even) banal contributions to evils great and small. It is perhaps helpful, in this regard, to keep in mind the classic dictum of the International Military Tribunal at Nuremberg in their judgement, rendered 15 years ahead of the Eichmann trial, explaining the test of guilty participation in a joint criminal enterprise, even under dictatorial regimes. According to the Tribunal:

The argument that … common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime.38 [Emphasis added.]

The International Military Tribunal was speaking in the context of a common plan to wage aggressive war. There is, however, little doubt that the force of that reasoning fully applies to the question of participation of a bureaucrat, however lowly or banal, to a criminal enterprise to exterminate a people. It was thus wholly correct and appropriate that the District Court of Jerusalem rejected the argument that Eichmann’s individual criminal responsibility was diminished by the guilt of others. As the Court reasoned:

In fact, it is not disputed that in all his activities the Accused always acted together with others, and this is how he was charged in the indictment. We shall not see the complete picture if we place the responsibility for the entire extermination campaign upon the Accused alone. Above him, there were the men at the top, beginning with Hitler himself—those who were the initiators of the Final Solution, and who gave the basic orders which guided the Accused; and alongside the Accused and his Section, many others were active, all of them determined to carry out the Fuehrer’s order, each one of them in his own par-

38 The Göring Case (Judgment) 1 October 1946, Trial of Major War Criminals before the International Military Tribunal at Nuremberg [Nuremberg, 1947] 171 at p 226.
ticular field of action: The Ministries of the Interior and Justice, which laid the main formal groundwork for the persecution of the Jews, by drafting definitions which determined precisely who was a Jew, who was a descendant of mixed marriage and who was an Aryan, thereby setting up barriers which segregated the Jews from the rest of the population—by promulgating laws and regulations aimed at putting the Jews beyond the pale of the law; the Foreign Ministry, which laboured unceasingly to spread the poison of anti-Semitism all over the world, and to create conditions for the delivery of the Jews of other countries into German hands, in order to deport them to their slaughter; the Ministry of Finance and the Reichsbank, which took part in plundering the property of the victims; the Fuehrer’s Chancellery, which was active in the introduction of the method of killing by gas; and also the German Army Command, which tainted itself by acting in partnership with the SS in the extermination of the Jews in the East, in Greece, and in other countries. Not only these, but all the authorities of the Reich and of the National Socialist Party, whose sphere of activity touched upon Jewish affairs—they all competed with one another to excel in furthering the common end—the complete extermination of the Jews, the enemies of the Reich, by every means in their power, efficiently and speedily.

But all this does not detract from the fact that the Accused’s Section in the RSHA stood at the very centre of the Final Solution; and the guilt of the others does not lessen by one iota the personal guilt of the Accused.39

The two dicta set out above from both the International Military Tribunal and the Jerusalem District Court contain reasonable legal principles that properly frame the juridical picture of Eichmann as banal or ordinary. That is to say, his appearance as banal or ordinary is a red herring that was unfortunately introduced in the case by the Attorney-General himself when he set Eichmann up as a monster. His contrasting appearance as banal or ordinary has very little to do with the question of his guilt or innocence. In this connection, one must treat with care the reflections of Brauman and Sivan, in their mimeograph, *In Praise of Disobedience*, published as a companion to the movie *The Specialist*. According to them:

Our man is the type of person that power loves to have in its ranks. Certainly, with his generic model-employee look, his two pairs of horn-rimmed glasses, his slight stoop, his incipient baldness, he would never stand out in a crowd. Certainly, the behaviour of this excessively meticulous bureaucrat is more reminiscent of the world of Courteline than the world of Shakespeare. As for his imagination and his decision-making ability, experience has shown them to be in keeping with his appearance: he is not stupid, but he would not venture to take any initiative beyond the instructions he receives from his superiors—and even then, such instructions must be duly approved by those at the very top.

39 See *The Eichmann Judgment*, para 242 available at <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Judgment/Judgment-o69>.
It was definitely not for his charisma or his analytical abilities that he was hired and came to occupy, a few years later, a key position in the organisation he so admired. But this man had important qualities to offer his employers who saw them for what they were worth: a methodical organizer, a dedicated worker, he devoted himself to his job with tireless zeal and unfailing loyalty. He went even further: when he was assigned the task of processing an unfamiliar material which he knew only by name, he took it upon himself to study the specificities and properties of this new sector—and he did so at his own expense, for he was never able to get reimbursed for his pains. He even became a recognized specialist in this area and was asked to give lectures on the subject. Thus, the subaltern made his way up and found himself promoted, at the age of 32, to the post of Logistics and Operations Manager for all of Europe. And despite his ever-increasing workload and responsibilities, he remained undaunted. As long as his services were requested, he would put his talent and skills towards achieving the production goals of his company. And he proved, until the very end, to be extremely efficient.

For six years, from the height of his official position, he organised the collection, breakdown, evacuation and transportation to various destinations of the biological material under his responsibility. In doing so, he displayed great talent as a negotiator and organizer, never becoming discouraged by the innumerable material obstacles that stood in his way. Although the company strategy changed considerably during his career, he was able to adapt. Once the material was delivered, it underwent a ‘special processing’ of which he did not approve. But since he was not in charge of this part of the production chain—and he was very glad of this until the day he died—he felt it was not his place to judge. This engineer who worked for what was, in fact, a mass murder industry could not bear the sight of blood. He liked nothing more than paperwork, statistics, and seeing a job well done.

This man is the German SS Lieutenant-Colonel Adolf Eichmann, former head of Section IVB4 of the 3rd Reich’s Central Security Office. A ‘specialist on the Jewish question’, he was in charge of expelling Jews from the Reich from 1933 to 1941. From 1941 to 1945 he organised the European-wide deportation of Jews, as well as Poles, Slovenians and Gypsies, to the concentration and extermination camps. This ‘emigration expert’, chief logistician of the ‘final solution to the Jewish problem’ carried out his assignment with absolute loyalty until the very end. Captured in Buenos Aires by the Israeli Secret Service in 1960, he was tried in Jerusalem the following year and then hung.

In front of the Jerusalem court and the survivors of the death camps, the man whom the prosecutor presented as an incarnation of the devil had to answer for his role in the annihilation of several million people. ...
As noted earlier, portraits of Eichmann painted in this way should not obscure his individual criminal responsibility in the Holocaust. Indeed, the painstaking process of justice, as was ultimately done in the case, does not readily preclude Eichmann from criminal responsibility for the part he played in the Holocaust. A review of the judgment provides ample rational basis for his conviction. The central theme in the judgment was that he knowingly participated in the extermination of Jews, by continuing to deport them to the concentration camps that he knew had been designed for that purpose.41 Referring to this role, the Attorney-General had famously put the question thus to Eichmann in cross-examination: ‘It didn’t trouble you to be the big forwarding agent of death?’ Eichmann’s answer was notably: ‘It troubled me greatly, more than anyone could imagine. I repeatedly went to my superior to request a transfer to other duties.’42 But his explanation for continuing to act in that role is summed up in his response to Judge Halevi’s question: ‘One was living at a time where crime was legalised by the state. It was the responsibility of those who gave the orders.’43

It is ultimately immaterial that he might not have actually intended the extermination of his victims, when he was assisting that outcome. For this conclusion, it could suffice, of course, to leave things merely on the usual legal reasoning that an accomplice need not actually intend the crime but to knowingly lend substantial assistance.44 It needs to be said, however, that the luxury of the underlying technical inquiry into his intent (which could lead to reasonable doubt to the benefit of the accused) mocks the idea of justice, if that idea should also accommodate any concern for the victims who were killed in a genocide that the accused know-

41 See Eichmann Judgment paras 162 et seq available at <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Judgment/Judgment-052> et seq.
42 See The Specialist at video counter 01:32:12.
43 Ibid, 01:39:35.
44 For instance, the ICTR Appeals Chamber has stated that, for an aider and abetter of an international crime, the ‘corresponding intent, or mens rea, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act:’ Prosecutor v Kayishema and Ruzindana (Judgment) 1 June 2001, para 186. That is to say, the accused need not have actually intended the crime as such, as long as he knew that his actions would provide substantial assistance to the commission of the crime. See also Prosecutor v Tadić (Judgment), 15 July 1999, [ICTY Appeals Chamber], para 239(iv): ‘In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal’; Prosecutor v Kajelijeli (Judgment) 1 December 2003, [ICTR Trial Chamber] para 768; Prosecutor v Semanza (Judgment) 15 May 2003 [ICTR Trial Chamber] para 388; Prosecutor v Bagilishema (Judgment) 7 June 2001 [ICTR Trial Chamber] para 32; Prosecutor v Furundžija (Judgment) 10 December 1998 [ICTY Trial Chamber] paras 236, 243 and 245; Prosecutor v Delalić & Ors (Judgment) 16 November 1998 [ICTY Trial Chamber] para 326; A Cassese, International Criminal Law (Oxford: Oxford University Press, 2003), 188.
ingly assisted by his actions, although he may not have actually intended it. As his own life could not have been more objectively valuable than any one, let alone more, of the victims of that genocide, Eichmann should simply have done everything—including possibly mortally—to remove himself from assisting in that genocidal enterprise. To put it plainly, he could have resigned from his functions: if that were impossible, then he could have abandoned his post and gone into hiding; if that were impossible, he should have committed suicide, rather than help in the transportation of several Jews to their death—a fate he know as awaiting them as a direct product of his work.

Also as part of their reasoning in the case, the District Court correctly downplayed the distinction between the significance of Eichmann’s role in overseeing the deportation of Jews to the concentration camps and the question of his responsibility for what happened to them there. As the Court put it:

Has the Accused’s activity in the actual extermination operations, as distinct from his activities in rounding up Jews and deporting them to the places of extermination, been proved, and to what extent? In our view, this question is only of secondary importance, because the legal and moral responsibility of a person who delivers the victim to his death is, in our opinion, no less, and maybe even greater, than the liability of the one who does the victim to death.45

Although the Court did go on to provide a forensic synthesis of the evidence tending to show the role of the accused in the actual extermination enterprise, it would have been sufficient, for purposes of criminal responsibility, that all that Eichmann had done was assist in the deportation and transportation of victims to the concentration camps. In this regard, it is notable that even Eichmann himself was not entirely convinced of his own innocence. He had admitted that although he did not, ‘from the legal point of view’, see himself as guilty of complicity in the extermination of millions of Jews, he did, in his conscience, see himself as guilty ‘in human terms’, because he was guilty of organising the deportations.46

There was no question therefore of Eichmann’s innocence. The trouble with the Eichmann trial rather was that the prosecution made that elementary mistake of optically overstating their case in the opening statement, in terms of their description of Eichmann in the context of the evidence of the role that he played in the crime. The result of that miscalculation was the actual appearance of Eichmann, while on trial, as a fellow human being—and a particularly dull one: yet knowingly, even if unwillingly, participating in a horrendous joint criminal enterprise.

All told, the guilt of Eichmann is evident in a careful and painstaking collation and analysis of all the evidence in the case; and the resulting forensic com-

45 *The Eichmann Judgment* para 141 available at <http://www.nizkor.org/ftp.cgi/ people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/ Judgment/Judgment-045>.

46 See *The Specialist*, supra, at 01:55:35 et seq.
position of a picture of his criminal responsibility, as was done in the judgment of the District Court of Jerusalem. As one commentator summed up the trial in 1962:

The trial of Adolf Eichmann can be described as a trial by documents and circumstantial evidence. The survivors of the holocaust gave a blood-curdling testimony of atrocities and sufferings in order to build up a general picture of the ‘final solution’ rather than establish the personal guilt of the accused. It was only against this background, and in the light of documentary evidence, that the sinister figure of the accused assumed realistic features as one of the executors of the ‘final solution.’ Bearing in mind the psychological climate and the place of the trial it is quite impossible to judge objectively whether or not the rules of evidence governing hearsay and relevance were infringed. The proceedings came very close to an English trial, but the nature of the crimes involved and the role filled by one particular person in the running of the machinery of extermination must by necessity invoke doubts which emerge in all marginal cases. Yet the dignity and restraint of the court and the desire to do justice which dominated all stages of the proceedings must be put on record because these are uncommon features of show trials.47

Eichmann’s guilt does not then appear—certainly not in The Specialist—from grand statements made a priori to describe him as the Mephistopheles of the greatest modern evil known to humanity. It is in the sense that his guilt emerged rather from ‘documents and circumstantial evidence’ that it is eminently correct of Arendt to describe him as representing evil in its banal form.

Zygmunt Bauman, Stanley Milgram and Philip Zimbardo

Besides Arendt, other notable situational theorists of evil are Zygmunt Bauman, Stanley Milgram and Philip Zimbardo. In his book, Modernity and the Holocaust, Bauman offered the possibility of understanding the Holocaust as a by-product of modern society in which bureaucracy sapped a sense of personal responsibility out of its human operatives. Modernity achieves this feat by the simple process of roboticisation. Bauman is, in effect, warning of some of the great dangers that appear overlooked in modern society’s preoccupation with ‘rational, planned, scientifically informed, expert, efficiently managed, coordinated’ way of life.48 This preoccupation is characterised by the credo that modern institutions run most effectively when the sensory and mental attributes of the human being are kept at bay or eliminated altogether from the economic or bureaucratic process. The result is a certain pressure on human beings to operate and produce accordingly; failing which they are replaced by the very machines and computers which they have,

47 D Lasok, ‘The Eichmann Trial’, International and Comparative Law Quarterly [1962] vol 11, 355 at p 372.
48 Zygmunt Bauman, Modernity and the Holocaust [Ithaca, NY: Cornell University Press, 1989], p 89.
all along, been required to imitate. Bauman’s central message is that the human race can pay a catastrophic price for this attitude to modernity. He points to the Holocaust as proof of the danger.

Reminiscent of Arendt’s view of Eichmann as not a monster but a thought-bereft bureaucrat doing his job, Bauman argued that the Holocaust needs to be understood as a product of modernity and not as a momentary relapse into barbarism. As he put it: ‘The Holocaust was not an irrational outflow of the not-yet-fully-eradicated residues of pre-modern barbarity. It was a legitimate resident in the house of modernity …’. 49 In other words, the Holocaust was the by-product of soul-numbing efficiency in the advances of technological and organisational accomplishments of a highly modernised and bureaucratised society that lays great store on discipline and efficiency, to the detriment of personal moral responsibility. Consequently, functionaries in those bureaucracies are capable of committing astonishing manner of evils, given the resulting mental distance between the person and his conduct/victim. 50

Bauman also implicates modernity in a deleterious process of social separation, where successfully created. The key to such a successful process involves the displacement of proximity which has a direct correlation to moral responsibility. ‘Responsibility arises out of proximity of the other. Proximity means responsibility, and responsibility is proximity.’ The process of defusing responsibility, which consequently results in the neutralisation of moral urge, necessarily involves the displacement/replacement of proximity with physical or psychic separation, resulting in social distance. Thus, erosion of proximity results in the silencing of responsibility. The void created by the absence of proximity may eventually be filled with resentment for the victim, if (s)he is successfully transformed as ‘an Other’ in the mind of the actor. According to Bauman, it was this process of social separation that made the Holocaust possible—involving thousands of killers and millions watching the carnage without protest. ‘It was the technological and bureaucratic achievement of modern rational society that made such a separation possible.’ 51

Bauman recognised the patterns of the Holocaust, and he implicated modernity, in the now familiar pattern of evil-doing in which ‘moral inhibitions against violent atrocities tend to be eroded once three conditions are met, singly or together; the violence is authorised (by official orders coming from the legally entitled quarters), actions are routinised (by rule-governed practices and exact specification of roles), and the victims of the violence are dehumanised (by ideological definitions and indoctrinations).’ 52

Bauman’s conclusions appear amply supported in a more recent study on another genre of actors performing lethal functions: executioners in the prisons of the southern states of the US. In that study, Osofsky, Bandura and Zimbardo

49 Ibid, p 17.
50 Ibid, pp 13–29.
51 Ibid, p 184.
52 Ibid, p 21. See also Herbert Kelman, ‘Violence without Moral Restraint’, (1973) 29 Journal of Social Issues pp 29–61.
found that the executioners see themselves as doing society’s work as in any other job in an institutional service facility. Their focus is not so much on the meaning of their activity, but on performing their functions efficiently. Their response is typically ‘[We] had a job to do, that’s what we did. Our job was to execute this man and we were going to do it in a professional manner.’ With the routinisation of the lethal activities into separate sub-functions, members of the execution teams shift their minds from the morality of their activity to the operational details and efficiency of their specific tasks. The process of routinisation also helped to achieve desensitisation: ‘No matter what it is, it gets easier over time. The job just gets easier.’ The element of routinisation helps to promote a sense of duty and professionalism on the part of the executioner who would then say, ‘The process has become very routine and the next day is easy. … It is a duty of my job that has to be done.’ All this clearly points to a state of mind in which ‘agentic responsibility’ is displaced and diffused.

Authoritative studies have also implicated the same factors as enabling soldiers to kill during armed conflicts. In his book *On Killing*, Lt Col Grossman posits that the demands of authority, routinisation, and dehumanisation are all implicated in the anatomy of killing and other atrocities committed by soldiers during warfare. Indeed, there is a haunting similarity between military ethos and the aspects of modern bureaucracy which Bauman implicates in the Holocaust. For instance, regarding modern bureaucracy, Bauman wrote: ‘The first principle most obviously relevant to our query is that of organisational discipline; more precisely, the demand to obey commands of the superiors to the exclusion of all other stimuli for action, to put the devotion to the welfare of the organisation, as defined in the commands of the superiors, above all other devotions and commitments.’

Making virtually the same point, Lt Col Grossman writes: ‘Someone who has not studied the matter would underestimate the influence of leadership in enabling killing on the battlefield, but those who have been there know better.’

Bauman also identified the social distance created between the bureaucrat’s action and the evil effect on the victim as correlative of the degree to which the victims have been made more psychologically or physically invisible to the perpetrator. Here, Bauman draws a direct link to the increase in human casualties during modern warfare. In the fashion of Bette Midler, Grossman sings his agreement

53 Michael J Osofsky, Albert Bandura and Philip G Zimbardo, ‘The Role of Disengagement in the Execution Process’ (2005) 29 Law and Human Behavior pp 385–386.
54 Ibid, p 386.
55 Grossman, supra, pp 141–148.
56 Ibid, pp 177–179.
57 Ibid, pp 156–170.
58 Bauman, supra, p 21.
59 Grossman, supra, pp 141–148, esp p 143.
60 Bauman, supra, p 25.
in the section he entitled: ‘Killing and Physical Distance: From a Distance, You Don’t Look Anything Like a Friend.’\textsuperscript{61} Part of this phenomenon of invisibility of the victim in modern warfare is achieved by the military through routinisation of the killing process. In this connection, Grossman writes: ‘Traditional marksman-ship training has been transformed into a combat simulator. ... [S]oldiers who have conducted this kind of simulator training “often report, after they have met a real life emergency, that they just carried out the correct drill and completed it before they realised that they were not in the simulator.” Vietnam veterans have repeatedly reported similar experiences.’\textsuperscript{62}

Another way in which the invisibility of the victim is achieved, hence making evil capable of pervasive perpetration, as was seen in the Holocaust (and the Rwandan Genocide), was the tactic of removing the victim from the perpetrator’s ‘universe of obligation’.\textsuperscript{63} This universe delineates the perimeters of the social territory in which the perpetrator’s moral urge is permitted sway. Hence, to ‘render the humanity of victims invisible, one needs merely to evict them from the universe of obligation.’\textsuperscript{64} In the Holocaust, this was achieved not only by depriving Jews of membership in the German nation, but also by associating them with other dehumanising objects, traits and notions: such as in the connection made between ‘Jews and lice’, by transforming the propaganda from the self-defence rhetoric of the ‘Jewish question’ to the Aryan rhetoric of ‘self-cleansing’ and ‘political hygiene’, ‘the typhus-warning posters on the walls of the [Jewish] ghettos, and finally the commissioning of the chemicals for the last act from the Deutsche Gesellschaft für Schädlingsbekämpfung—the German Fumigation Company.’\textsuperscript{65}

Although Bauman does not deal with the Rwandan Genocide and did not bring that event into his analysis in this regard, since his writing predated that Genocide, the similarity of the Jewish experience in Nazi Germany appears to have afforded a certain template for the Rwandan Genocide. For in the Rwandan Genocide, precisely the same brain-washing strategy was employed. Extremist Hutus first denied Tutsis membership in Rwandan nationality. Many Tutsis were literally forced into exile. As the exiles organised to return, first by negotiation and then by force, they and other Tutsis were generally branded as \textit{inyenzi} (cockroaches), among other undesirable creatures, requiring a project of national fumigation or extermination.

Once more, Grossman concurs on the uses of the dehumanising propaganda in the killing enterprise during warfare: ‘It is so much easier to kill someone if they

\begin{itemize}
\item \textsuperscript{61} Grossman, \textit{supra}, pp 97–137.
\item \textsuperscript{62} \textit{Ibid}, pp 177–178.
\item \textsuperscript{63} This was a term that Bauman borrowed from Helen Fein, defined as ‘the circle of people with reciprocal obligations to protect each other whose bonds arise from their relation to a deity or sacred source of authority’: Bauman, \textit{supra}, p 26. See also Helen Fein, \textit{Accounting for Genocide: National Response and Jewish Victimisation during the Holocaust} [New York: Free Press, 1979] p 4.
\item \textsuperscript{64} Bauman, \textit{supra}, p 27.
\item \textsuperscript{65} \textit{Loc cit.}
\end{itemize}
look distinctly different from you. If your propaganda machine can convince your soldiers that their opponents are not really human but are “inferior forms of life,” then their natural resistance to killing their own species will be reduced. Often the enemy’s humanity is denied by referring to him as a “gook,” “Kraut,” or “Nip.” In Vietnam this process was assisted by the “body count” mentality, in which we referred to and thought of the enemy as numbers. One Vietnam vet told me that this permitted him to think that killing the NVA and VC was like “stepping on ants.”

Indeed, this displacement of moral responsibility is the central thesis of Stanley Milgram’s famous 1961 study, which forms a theoretical pillar of Bauman’s analysis. The basic design of Milgram’s experiment is as follows. Two people—one designated a ‘teacher’ the other a ‘learner’—come to a psychology laboratory to take part in a study on memory and learning. The experimenter, a stark authority figure, explains that the study is concerned with the effects of punishment on learning. The ‘learner’ is conducted into a room, apparently seated on an electric chair. His arms strapped down to prevent excessive movement. An electrode is attached to his wrist. The experimenter explains that he will read a list of simple word pairs to the ‘learner’, to test his ability to remember the second word of a pair when the first word is read to him again. It is explained that whenever the ‘learner’ errs, the ‘teacher’ will deliver electric shocks to the ‘learner’ in increasing intensity.

The real subject of the experiment is the unsuspecting ‘teacher’: both the ‘learner’ and the experimenter are accomplices in the ruse on the ‘teacher’. The ‘teacher’ is seated before an impressive electric shock generator, as he watches the ‘learner’ being strapped into place in the ‘electric chair’. The instrument panel in front of the ‘teacher’ consists of 30 lever switches, each clearly labelled with voltage designation ranging from 15 to 450 volts. The lever switches are arranged in groups progressively marked as: ‘Slight Shock’, ‘Moderate Shock’, ‘Strong Shock’, ‘Very Strong Shock’, ‘Intense Shock’, ‘Extreme Intense Shock’, ‘Danger’ and ‘Severe Shock.’

The purpose of the experiment is to see how far the subject—the ‘teacher’—will proceed in the progression of shocks, to a victim screaming in agony, before refusing to comply with the experimenter’s instructions to continue inflicting the pain. In Milgram’s original experiment at Yale University, 26 out of the 40 subjects (i.e. approximately 60 percent) administered the highest shocks on the

66 Grossman, supra, p 161.
67 Stanley Milgram, ‘Behavioral Study of Obedience’, (1961) 67 Journal of Abnormal Social Psychology pp 371–8; and Stanley Milgram, Obedience to Authority [New York: Harper & Row, 1974].
68 Milgram, Obedience to Authority, supra, p 3.
69 Milgram, Obedience to Authority, supra, p 20, 28–29.
70 Ibid, p 3.
generator, upon the experimenter’s instructions. Some subjects were noted to have continued, upon instructions, to deliver the 450-volt shocks even when there was no further response from the ‘learner’, suggesting that he was either dead or unconscious.

The first experiment involved Yale undergraduates as subjects. But the results were similar in subsequent experiments, involving people from every stratum of society in New Haven, Connecticut. Indeed, higher levels of obedience were observed in experiments repeated in Princeton; as they were in Germany, Italy, South Africa and Australia. One scientist in Munich found an obedience level of 85 percent. In the control experiment, different results were recorded when the subject was left with complete discretion as to the escalation of the shock levels. The great majority of the subjects delivered very low shocks at levels that were usually harmless.

The primary lesson of the Milgram experiment is this. Ordinary people, simply doing their jobs, and without any particular hostility animating them, ‘can become agents in a terrible destructive process’. Furthermore, even when the harmful effects of what they consider their ‘work’ become quite clear, relatively few people have the courage needed to resist authority when they are asked to carry out actions that are incompatible with basic standards of morality, or, it might be added, their own personal sense of morality. As Milgram concluded:

With numbing regularity good people were seen to knuckle under the demands of authority and perform actions that were callous and severe. Men who are in everyday life responsible and decent were seduced by the trappings of authority, by the control of their perceptions, and by the uncritical acceptance of the experimenter’s definition of the situation, into performing harsh acts.

In an interview with Morley Safer of CBS News 60 Minutes, Milgram said as follows:

Safer: Are you suggesting that—that it could happen here?

Milgram: I would say, on the basis of having observed a thousand people in the experiment and having my own intuition shaped and informed by these experiments, that if a system of death camps were set up in the United States of the sort

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71 Ibid, pp 5 and 33.
72 Stanley Milgram, ‘The Perils of Obedience’, Harper’s Magazine [1974] at <http://home.swebell.net/revscat/perilsOfObedience.html>
73 Milgram, Obedience to Authority, supra, p 6.
74 Loc cit. See also Milgram, ‘The Perils of Obedience’, supra.
75 Stanley Milgram, ‘Some Conditions of Obedience and Disobedience to Authority’, (1965) 18(1) Human Relations, 57 at 74.
we had seen in Nazi Germany, one would be able to find sufficient personnel for those camps in any medium-sized American town.76

Another conclusion which Bauman and Milgram before him drew from that experiment is that the presence of an authority figure who commanded the perpetration of evil, thus displacing the perpetrator’s sense of responsibility for his conduct, made it easier for the average bureaucrat to commit disturbing acts of evil once ordered to do so. Succumbing to the impulsion of obedience, the perpetrator sees himself as a mere instrument or agent for carrying out another person’s wishes: hence absolving himself of personal responsibility for his own actions.77 But, according to Milgram, morality does not disappear altogether. Rather, ‘it acquires a radically different focus: the subordinate person feels shame or pride depending on how adequately he has performed the actions called for by authority.’78

Direct links have been made between the Milgram experiment and the Holocaust.79 In his own study of the implementation of the Nazi Final Solution in Poland, Christopher Browning characterised one particular incident of massacre of 1,500 Jews in the Polish village of Józefów by the German Reserve Police Battalion 101 constituting ‘graphic confirmation’ of many of Milgram’s insights.80 He further observed that, as in the Milgram experiment, ‘without direct surveillance, many policemen did not comply with orders when not directly supervised; they mitigated their behaviour when they could do so without personal risk but were unable to refuse participation in the battalion’s killing operations openly.’81

An important element in the theory of evil advanced by Bauman and Milgram is the role of division of labour. Milgram’s experiments led him to conclude that any intervening force or event placed or appearing between the subject and the action-on-victim dampens moral strain on the subject. In Milgram’s summation, this is described as the fragmentation of responsibility that results from the professionalised and depersonalised modern society.82 Accepting John Lachs’s characterisation of the same idea as ‘mediation of action’,83 Bauman wrote in terms of

76 CBS News, *Sixty Minutes*, 31 March 1979, excerpted in Thomas Blass (ed), *Obedience to Authority: Current Perspectives on the Milgram Paradigm* [Mahwah, NJ: Lawrence Erlbaum Associates, 2000], pp 35–36.
77 Milgram, *Obedience to Authority*, supra, pp 7–8. See also Bauman, supra, p 22.
78 Milgram, *Obedience to Authority*, supra, p 8. Milgram, ‘The Perils of Obedience’, *supra*.
79 Milgram, *Obedience to Authority*, supra, pp 1–2 and 5–6.
80 Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* [New York: Harper Perennial, 1993], see generally pp 172–189, especially at pp 174.
81 *Ibid*, p 176.
82 Milgram, *Obedience to Authority*, supra, pp 10–11. See also Arne Johan Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* [Cambridge: University Press, 2003], p 18.
83 See John Lachs, *Responsibility of the Individual in Modern Society* [Brighton:
one’s action being performed for one by someone else, by an intermediate person, who stands between one and his action, thereby making it impossible for one to experience directly the action and its consequences.84 Indeed, as the actual footages of Eichmann under cross-examination reveals in the movie The Specialist, Eichmann did not feel any personal responsibility for his role as the ‘great forwarding agent of death’, although he knew that those he was deporting to the concentration camps were being exterminated at their points of destination. ‘I had orders,’ he declared, ‘Whether people were killed or not, orders had to be executed in accordance with administrative procedure.’85 In a dialogue with Judge Halevi, Eichmann elaborated as follows:86

Judge Halevi: Did you never experience ... a conflict ... what one could call a conflict of conscience? Between your duty and your conscience?

Eichmann: One could call it a state of being split ...

Judge Halevi: Being split?

Eichmann: A conscious split state, where one could flee from one side to the other.

Judge Halevi: It was necessary to abandon one’s personal conscience?

Eichmann: Yes, one could say that. Because one could not control or regulate it oneself.

Judge Halevi: Except if one accepted the personal consequences.

Eichmann: One could have said: “I refuse to do this.” But I don’t know what would have happened then.

Harvester, 1981], pp 12–13, 58.

84 Bauman, supra, p 24. See also Vetlesen, supra, pp 18–19. Other theorists have described the same phenomenon: ‘Responsibility can be diffused in three ways, by division of labor in which each of the subdivided tasks seem harmless in themselves, by group decision-making which absolves any individual from feeling personally responsible, and also by engaging in collective action which provides some degree of personal anonymity while minimizing individual accountability: Osofsky et al, p 373, citing H C Kelman, and V L Hamilton, Crimes of obedience: Toward a social psychology of authority and responsibility [New Haven, CT: Yale University Press, 1989] and P G Zimbardo, ‘The psychology of evil: situationist perspective on recruiting good people to engage in anti-social acts’, (1995) 11 Research in Social Psychology, pp 125–133.

85 The Specialist, supra, at 00:22:18.

86 Ibid, at 01:37:21 et seq.
Judge Halevi: If there had been more civil courage, things would have been different. Don't you think so?

Eichmann: Of course, if this civil courage had been hierarchically organised.

Judge Halevi: Then it wasn't fate ... an inevitable fate?

Eichmann: It's a question of human behaviour. That's how it happened, it was wartime, everyone thought: “It’s useless to fight against it ... it’s only a drop in the ocean, what use is it? There's no point in it, it will do neither good nor harm.” It was also connected with the times, I think, with the era, with ideological education, rigid discipline, and all that kind of thing.

Judge Halevi: At the time, it was very difficult ... for an individual to accept the consequences ... of refusing to obey orders.

Eichmann: One was living at a time where crime was legalised by the state. It was the responsibility of those who gave the orders. [Emphasis added.]

Notably, during his trial, Eichmann testified that he was at the Wannsee Conference where methods of ‘killing’ and ‘extermination’ were discussed in blunt terms, ‘without circumlocution’. He testified that ‘prominent figures of the Reich’ spoke at the Conference. They included Secretaries of State. He was to prepare the minutes of the conference. He was told by his superiors Heydrich and Müller on what the minutes should say, and to be excluded from the minutes were the discussions about the methods of extermination. At the end of it, they enjoyed a celebratory glass or two or three of Cognac. Although he realised the horror of the extermination plot discussed at Wannsee Conference, he ‘felt satisfied as to [his] personal self-examination.’ He felt ‘the kind of satisfaction Pontius Pilate must have felt because [he] felt devoid of any guilt.’ As he saw it, ‘The Popes had given their orders. I had to obey. I kept this in mind throughout the following years ...’

The elemental relationship with Arendt’s conclusions continues unabated. Evidently, there is no profound difference between Bauman’s theory and that of Arendt. Indeed, the contrary is the case. The chief difference would be that Bauman, being a sociologist, simply gave a sociological rendition to the phenomenon which Arendt had articulated from a perspective of contemporary philosophy. Milgram himself drew a direct link to Arendt’s analysis of the actions and personage of Eichmann. According to him, the experiment contradicted the popular expectation that those who would shock the victim at the most severe levels came only from the sadistic fringes of society. Indeed, contends Milgram, the experiment ‘is highly reminiscent of the issue that arose in connection with Hannah Arendt’s 1963 book, Eichmann in Jerusalem.” It is recalled that Bauman

87 See The Specialist, supra, at video counter 01:00:53–01:01:05.
88 Milgram, ‘The Perils of Obedience,’ supra.
had founded elements of his own conclusions on Milgram’s experiment and conclusions.\textsuperscript{89} Decades later, in December 2008, it was reported that the Milgram experiment was repeated by Jerry Burger at Santa Clara University in California. The conclusions remained the same as in the original Milgram experiment.\textsuperscript{90}

A related experiment was the Stanford Prison Experiment conducted in 1971 by Philip Zimbardo. As with Milgram’s experiment, Zimbardo’s was designed to test the idea that inherent personality traits were responsible for evil behaviour. Zimbardo’s chosen setting was a prison environment, in which prison guards exercised power, authority and control over prisoners. Participants were recruited and told that they would participate in a two-week ‘prison simulation.’ Of the 70 respondents, Zimbardo and his team selected the 24 male students of Stanford University who were deemed to be among the most psychologically stable and healthy. The simulated prison was in the basement of Stanford’s Psychology Department, which had been converted into a mock jail. Zimbardo played the role of prison superintendent. The participants were provided the usual prison paraphernalia: the ‘guards’ were fitted in khaki uniforms, reflective sunglasses to prevent eye contact, and armed with wooden batons; the ‘prisoners’ were fitted in loose-fitting smocks with no underwear, and stocking caps, to simulate shaven heads. Chains around the ankles reminded the ‘prisoners’ of their roles as such. Physical abuse was forbidden of the ‘guards’; but they were otherwise permitted to be creative in their methods of generating in the prisoners ‘feelings of boredom, a sense of fear to some degree, ... a notion of arbitrariness that their life is totally controlled by’ the prison guards and by the system. The objective was to create a sense of powerlessness in the prisoners. The participants who had been chosen to play the part of prisoners were ‘arrested’ at their homes and ‘charged’ with armed robbery. The local Palo Alto police department assisted Zimbardo with the arrests and conducted full booking procedures on the prisoners, which included fingerprinting and taking mug shots. They were transported to the mock prison where they were strip-searched and given their new identities. The first day of the experiment was relatively uneventful. But by the second day, the experiment had begun to take on a life of its own. The ‘guards’ had settled into their roles and increasingly became abusive in sadistic ways. The prisoners initially attempted to rebel, but were quickly put down by the guards. The ‘prisoners’ evidently started resigning themselves to their powerlessness and the humiliating treatment to which they were being subjected.

A false rumour spread that one of the prisoners, who asked to leave the experiment, would lead companions to free the rest of the prisoners. The guards were forced to dismantle the prison and move the inmates to another secure location. When no breakout attempt occurred, the guards were angry about having to rebuild the prison, so they took out their feelings on the prisoners.\textsuperscript{91} Several

\textsuperscript{89} Bauman, \textit{supra}, pp 151–168.

\textsuperscript{90} See ‘People “still willing to torture”’, BBC News, 19 December 2008. See <www.news.bbc.co.uk/2/hi/health/7791278.stm>.

\textsuperscript{91} ‘Stanford Prison Experiment’, \textit{Wikipedia Free Encyclopedia} available at <en.wikipedia.org/wiki/Stanford_prison_experiment>.
of the guards became progressively abusive. The abuses suffered by the ‘prison-
ers’ included verbal insults, sleep deprivation, simulated homosexual abuses. Zimbardo was compelled to terminate the experiment early when Christina Maslach, a former graduate student of his who was now his girlfriend, objected to the appalling conditions of the prison after she was introduced to the experiment to conduct interviews. Zimbardo noted that of more than 50 outsiders who had seen the prison, Maslach was the only one who questioned its morality. After only six days of a planned two weeks’ duration, the Stanford Prison experiment was shut down.92 Although the experiment was criticised as unethical by Ms Maslach (whom Zimbardo later married) and by many in the academic circles, Zimbardo (who also accepted the charges of ethical challenges to the experiment) insisted that it demonstrated the thesis advanced by Milgram that evil is capable of explanation by situational attributes, rather than the innate predisposition of the perpetrators. According to Zimbardo:

The Stanford prison experiment is but one of a host of studies in psychology that reveal the extent to which our behaviour can be transformed from its usual set point to deviate in unimaginable ways, even to readily accepting a dehumanized conception of others, as “animals”, and to accepting spurious rationales for why pain will be good for them. ... [A]s a great deal of social-psychological research before and since has confirmed, we humans exaggerate the extent to which our actions are voluntary and rationally chosen — or, put differently, we all understate the power of the situation.93

In the wake of Abu Ghraib prison abuse, the Stanford Prison Experiment has received renewed interest and has been cited, including in the report authored by James R Schlesinger, the former US Secretary of Defence, as holding important lessons that the US military ought to have learned in the management of prisoners of war.94

The Dispositional Theory of Evil

Daniel Goldhagen

Diametrically opposed to the axis of Arendt-Bauman-Milgram-Zimbardo common theories of evil as situational is the view that evil is very much a product of the perpetrator’s personal predisposition. Daniel Goldhagen is a particularly high profile figure in this camp. In his book *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust*, he delivered a furnace blast of opinion against ordinary

92 Philip Zimbardo, ‘Revisiting the Stanford Prison Experiment: a Lesson in the Power of Situation’, *Chronicle of Higher Education*, 30 March 2007 available at <www.lucifereffect.org/about_reviews_chronicle.htm>.

93 Ibid.

94 Ibid.
Germans. In his view, tens of thousands of ordinary Germans willingly participated in the Holocaust because of centuries old anti-Jewish conditioning that was particularly virulent in Germany more than anywhere else in Europe. As he put it: ‘Genocide was immanent in the conversation of German society. It was immanent in its language and emotion. It was immanent in the structure of cognition.’95 According to him, the Nazi regime merely removed the restraint that had hitherto prevented the German citizenry from indulging in the ‘eliminationist anti-Semitism’ to which they had been in thrall much earlier than the Nazi regime.96 The point appears quite stridently in his assertion that a ‘demonological anti-Semitism, of the virulent racial variety, was the common structure of the perpetrators’ cognition and of the German society in general. The German perpetrators ... were assenting mass executioners, men and women who, true to their own eliminationist antisemitic beliefs, faithful to their cultural antisemitic credo, considered the slaughter to be just.97

It would have been arguable that Goldhagen belongs in the camp of situational theorists, considering that social pollution of the mind through negative stereotyping of a people should qualify as an environmental, rather than dispositional, flaw. However, Goldhagen's conclusions were partly shaped by his view of the Holocaust as often accompanied by sadism: ‘gratuitous cruelty, such as beating, mocking, torturing Jews’ and there was no other use in the enterprise for such gratuitous cruelty other than the ‘satisfaction and pleasure of the perpetrators.’98

Goldhagen's book has attracted a fair amount of criticism,99 some of them just as scorching100 as his own commentary had been of the ordinary German living in Third Reich Germany. But a fuller discussion of the criticisms of his work is outside the limit of the present study, given the ad hominem focus of Goldhagen's work.

95 Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* [New York: Vintage Books, 1997], p 449.
96 Ibid, Part VI generally.
97 Ibid, pp 392–393.
98 Ibid, pp 17, 188, 228, 236, 259, 386, 388, 389, 400, 457 and 480. See also Norman Finkelstein, ‘Daniel Jonah Goldhagen’s “Crazy” Thesis: A Critique of Hitler’s Willing Executioners’, (1997) *New Left Review* vol a Issue 224, p 68.
99 See for instance, Leonard Newman, ‘What is Social–Psychological Account of Perpetrator Behaviour? The Person versus the Situation in Goldhage’s Hitler’s Willing Executioners’ in Leonard Newman and Ralph Erber (ed), *Understanding Genocide: The Social Psychology of the Holocaust* [New York: Oxford University Press, 2002] p 43 et seq. See also Daniel Jonah Goldhagen, ‘A Reply to My Critics’, *The New Republic* 23 December 1996.
100 See Finkelstein, supra, p 39 et seq.
C Fred Alford

Of greater interest in the present study is the work of C Fred Alford, another dispositional theorist whose conclusion rests on sadism. His theory is less parochial than Goldhagen's limited focus on Germans. Alford conducted a psychological study on the meaning of evil at the Patuxent Institution—a maximum security prison in Maryland, USA, with an emphasis on the psychotherapeutic treatment of dangerous criminal offenders. His study involved interviews with prisoners over a 14-month period. His findings and conclusions are published in his book *What Evil Means to Us*.101

According to Alford, sadism is the route to understanding the evil of mass atrocities such as genocide. In this regard, he notably returns to the Milgram experiment.102 But he disputes Milgram's conclusions that the experiment has nothing to do with sadism but all about obedience—man's potential for slavish groupishness.103 Alford observes that the motion picture of Milgram's experiment reveals that a 'grotesque nervous laughter, the giggling fits at the shock generator' is a common reaction noticeable in the subjects of the experiments delivering the shocks. He contends that, contrary to Milgram's unsubstantiated dismissal of the idea, the giggling fits suggest 'embarrassed pleasure at being given permission to inflict great pain and suffering on an innocent vulnerable man.'104 According to Alford, 'permission' in this sense does not mean the comforting licence: 'Go ahead. It's okay.' It is rather a situation that protects the evil-doers from their own sadism while allowing them to express it. In Alford's words:

That is what they want, that is what they do, and that is what they get pleasure from—embarrassed pleasure, guilty pleasure, but it is still pleasure.105 ... In this light we should consider whether much of what passes as the result of leaders' orders is actually leaders granting permission to their followers to do what they want to do anyway but are too guilty or embarrassed to know it. Could it be the psychological function of leaders to provide plausible psychological deniability to their followers, as well as to shelter them from the consequences of their desires?106

Alford defines sadism as 'the joy of having taken control of the experience of victimhood by inflicting [the victimhood] upon another.' And, it is ultimately about control107—the control of the senses of vulnerability, anxiety, pain, suffer-

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101 C Fred Alford, *What Evil Means to Us* [Ithaca, NY: Cornell University Press, 1997].
102 Ibid, p 25.
103 Ibid, p 26.
104 Loc cit.
105 Loc cit.
106 Ibid, p 27.
107 Ibid, p 28.
ing and dread. The perpetrator conceives of these human encumbrances as reified burdens capable of both exorcism out of oneself and projection onto a fellow human within whom the perpetrator can control and manipulate the burdens at will. With these existential burdens thus controlled and manipulated in someone else, the perpetrator feels a sense of relief from their weight. Enacting the scenario from the perspective of the perpetrator and his attitude towards his victim, another commentator has recast Alford’s hypothesis in this way:

[N]ow that I have seen to it that all you feel is pain, all you are is suffering, I myself am (no longer, or—anyway—right now, as long as I make this last) nothing of the sort: by forcing you to be A, I liberate myself from everything to do with being A; that is, I effectively, psychologically, make myself not-A. You are the one who suffers, who has the origin of mortality in you; you are the very embodiment of vulnerability to suffering. By stark contrast, I, being the one who makes you suffer, exhibit my vitality, my capacity to negate mortality: me subject, you object; me alive, you sensing life dwindle; me controlling the whole process, you being controlled by it to the point of losing control over yourself altogether: you eventually merge with your pain, your body-in-pain, whereas I am wholly mind over body, activity over passivity, life over death ...108. [Emphasis received.]

Unlike his kindred theorists who view killing as the primary means of the control and manipulation indicated above,109 Alford’s primary concern is not with killing but ‘with the thousand ways evil aims to sacrifice the soul of another.”110 This will undoubtedly include the evil of sexual violence.

As Vetlesen correctly interprets Alford’s hypothesis, the mindset at issue is something more than intentional or deliberate infliction of evil upon another. It is the seizure of the perpetrator’s life force by a raptorial tenacity to inflict evil upon another human being.111 And it is the very fact of the victim’s humanity that makes him or her suitable to the perpetrator as the proper receptacle of the existential burdens which the perpetrator desires to control and manipulate in that alter receptacle, in order to achieve relief for himself; hence the proper recipient of the evil (thus inflicted).112

Vetlesen criticises Alford’s theory for perceived exclusive locus in the dispositional attribution, to the exclusion of the situational attribution, of behaviour. That is to say, Alford singularly focused on the individual perpetrator as an autonomous fountain of evil, ruling out his environment as alternative explanation for

108 Vetlesen, supra, pp 111–112.
109 Otto Rank, for instance, opined that the ‘death fear of the ego is lessened by the killing, the sacrifice, of the other; through the death of the other, one buys oneself free from the penalty, of being killed’: Otto Rank, Will Therapy and Truth and Reality, I vol d [New York: Knopf, 1945] p 130. See also Alford, supra, p 10.
110 Alford, supra, p 10.
111 See Vetlesen, supra, p 109.
112 See ibid, p 110.
his behaviour.\textsuperscript{113} Indeed, Alford’s prose in parts of What Evil Means to Us may lend his work to legitimate criticism of exclusive focus on sadism as the only explanation for evil. This is especially the case when he stakes his theory against those of Milgram and Zimbardo.\textsuperscript{114}

Another flaw in Alford’s theory is its tendency for over-generalisation in an apparent bid to simplify an understanding of evil. One notes the following passage, for example:

> Pleasure in evil may be complex, about the pleasure in avoiding one’s fate, and the joy that stems from the illusion of inflicting the fate on others. It is complex, but it is simple—something Milgram and Zimbardo have forgotten. Augustine holds that evil is chaos and confusion, whatever keeps us from seeing clearly. \textit{Let us mitigate evil by not eliminating the simplest and clearest explanation of evil of all. People like to hurt one another, obtaining great pleasure and satisfaction from doing so.}\textsuperscript{115} [Emphasis added.]

A related motivation for this generalisation appears to be terror in Alford’s mind resulting from an inability to pin evil down in a specific location. This terror appears in the following passage:

> It is too easy, separating the person from the act in a way that suggests that evil just happens. Evil, or at least a particular type of evil, happens because people do it. Where else could it come from? These people need not be totally or unredeemably evil, but separating the act from the person can only make evil even more terrifying, as we no longer know where it is located.\textsuperscript{116}

It is well nigh impossible to hope to persuade everyone that such a view holds universal application to all ‘people’, as implicated in Alford’s charge: ‘People like to hurt one another, obtaining great pleasure and satisfaction from doing so.’ Alford’s challenge in this regard comes not only in the form of emotional resistance of some of his audience to the idea that everyone is a sadist at heart, but also in the overwhelming evidence and hypotheses tending to support the situational attribution theories. Notable among these studies are the findings reported by

\textsuperscript{113} See Vetlesen, \textit{supra}, pp 129–130.

\textsuperscript{114} One notes, for instance, the following passage about the predisposition of executioners: ‘The state’s executioner follows public procedures to exact revenge; the man with the electric chair in his basement is a freelance predator. One subjects his sadism to the demands of the state; the other takes his sadism freelance. It is the difference between the subjects in the Milgram experiment and the criminal; it is the difference between civilization and chaos. But it is not the difference between sadism and obedience. Nor is it necessarily a difference in basic psychology’: Alford, \textit{What Evil Means to Us, supra}, p 30.

\textsuperscript{115} Alford, \textit{What Evil Means to Us, supra}, p 31.

\textsuperscript{116} \textit{Ibid}, p 33.
S L A Marshall in his book *Men Against Fire: The Problem of Battle Command in Future War*. Marshall was a Brigadier-General and US combat historian. He was commissioned to examine the firing rates among American GIs during World War II. He and his team of historians conducted extensive individual and group interviews of US soldiers immediately following close combat with Japanese and German forces. He startled the military world by reporting that only about 15 percent of soldiers—and no more that 25 percent in the most aggressive combat units—had been willing to fire their weapons at the enemy during combats. This was the case whether the battle in question was for just one day or spread over three days.\(^{117}\) And when the enemy troops grew careless and offered themselves as targets, the GIs were often known to say to themselves: ‘Let ’em go; we’ll get ’em some other time.’\(^{118}\) All these led Marshall reasonably to believe that the ‘average and healthy individual ... still has such an inner and usually unrealised resistance towards killing a fellow man that he will not of his own volition take life if it is possible to turn away from that responsibility.’\(^{119}\) Other notable modern military historians and military psychologists concur with this conclusion.\(^{120}\) With proper conditioning, however, as appears now to have been a central focus in military trainings since Marshall’s findings, the rate of fire has increased,\(^{121}\) no doubt partly explaining why the 20th century has ‘produced a bloodbath of war and destruction that dwarfed earlier periods, as approximately 160 million human beings were killed in violent conflict[s].’\(^{122}\)

Marshall had attributed the low rate of fire he observed during WWII to dispersion of troops in modern combat, as opposed to earlier wars in which troops amassed together in close formation during battle, and were thus able to observe each other’s effectiveness during fire fights. Although there have been some controversy about Marshall’s research methodology,\(^{123}\) it is still noteworthy that subsequent researches conducted into earlier wars suggested no higher rates of fire.\(^{124}\) Until this finding, it had been assumed, consistent with Alford’s view no doubt,
that the average soldier would readily kill in battle, especially if he had been ordered to do so and if he understood that his own life depended on it.

All this is not to obliterate all value from Alford’s sadistic theory of evil. It is, however, hardly an improvement in the cause of his anxiety to accept wholly Alford’s theory of evil as the ‘simplest and clearest explanation of evil of all’, if his aim is to resolve the opposite dilemma of ‘chaos and confusion [that according to Augustine] keeps us from seeing clearly.’ Nor is it less terrifying, as Alford worries, to embrace—in evident desperation—a single theory of evil, such as the commonality of the latent trait of sadism, to the exclusion of a different explanation in the appropriate case. Far better, it would seem, to accept that evil is capable of explanation in some instances by situational attributes, as are Alford’s dispositional theory of sadism. Hence, it is possible to recognise the usefulness of Alford’s theory as affording explanation for some instances of evil-doing, while situational factors might explain evil in other instances.125

But there is an ironic twist, ultimately, to Alford’s disagreement with the situational theorists. It is that at long last, his theory arrives at the same destination, albeit using a different route. The common ground is that perpetrators of evil are no different from the average person. This conclusion becomes inescapable on the basis of Milgram’s findings that over 60 percent of the subjects of his experiments were prepared to apply, upon instruction, the maximum electric shocks to the victims. Alford’s own conclusion extends the distribution of the propensity for evil even further: for according to him, everyone is a sadist.

Even more useful, perhaps, within the paradigm of understanding evil, in order to facilitate appropriate decisions, is the need to recognise what ought to be an obvious interplay between Alford’s dispositional attribution of evil with the dispositional theories championed by the likes of Arendt, Bauman, Milgram and Zimbardo. If people are indeed sadists at heart, but could go through life without acting it out in the manner that would produce a Holocaust, a Rwanda, a Mai Lai or an Abu Ghraib, then it should be something of critical interest to a decision maker whether a situation has been created in which the sadistic forces of human nature have been unleashed or encouraged to control the conduct of a given perpetrator. The range of evil’s expressions which the decision maker must contemplate and capture in the bid to fashion adequate responses may have to include, inter alia, ‘strong forces of moral distance, social distance, cultural distance, group absolution, close proximity, and obedience-demanding authority’ all of which may operate severally or jointly to compel the perpetrator to commit—or participate in—the evil act.126 We will return to this interplay later in our discussion of the usefulness of these theories of evil in the province of the law.

125 Indeed, it is possible to allow for that possibility in Alford’s theory; for before concluding that ‘People like to hurt one another, obtaining great pleasure and satisfaction from doing so,’ he had expressed the view that Milgram’s and Zimbardo’s experiments must not be taken as explaining every instance of evil: see, for instance, Alford, What Evil Means to Us, pp 26, 27 and 29.

126 See Grossman, supra, p 209.
The Narcissistic Theory of Evil

Jean-Paul Sartre offers another theory of appreciation of mass evil. Using the framework of genocide, he argues that there is no society that is protected by its structure from committing mass evil, such as genocide. According to him, every case of such mass evil ‘is a product of history and bears the stamp of the society which has given birth to it.’

Sartre’s historical frame of reference was the wars of aggression employed by colonial powers to subjugate their colonies both in order to gain the foreign territory and to stave off wars of liberation. Since the period of colonialism, he observes, ‘there has been countless acts of genocide outside Europe’, perpetrated by European powers.

Some of these wars reflected authoritarian political structures, while others were the product of internal structures of capitalist democracies. Colonial empires, he contended, resulted from the need to export imperial products and capitals. The colonies at the receiving end were acquired by acts of aggression. It was not necessary to use overwhelming force to achieve the initial conquest, in view of the disproportionately superior military might of the colonial power. Only expeditionary forces were required to achieve victory. However, since the naked aggression aroused deep hatred for the colonial occupation, the imperial forces would resort to terror—in the form of ‘perpetual massacres’—to maintain their authority. And according to Sartre, ‘these massacres were genocidal in character …’ When, later, the colonised peoples became emboldened to fight for independence, the imperial responses were total and thorough torture and genocide—‘it was no...

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127 Jean-Paul Sartre, ‘On Genocide’, in Richard Falk, et al (ed), Crimes of War: A Legal, Political-Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in Wars [New York: Random House, 1971], supra, 534.

128 Sartre, supra, p 535. This observation is not uniquely Sartre’s. Arendt had made similar observations. Commenting on the nature of the crime on which Eichmann stood trial, Arendt observed as follows: ‘[T]he concept of genocide, introduced explicitly to cover a crime unknown before, although applicable up to a point is not fully adequate, for the simple reason that massacres of whole peoples are not unprecedented. They were the order of the day in antiquity, and centuries of colonization and imperialism provide plenty of examples of more or less successful attempts of that sort’: Arendt, Eichmann in Jerusalem, supra, 288. Berkeley noted that the worst genocide recorded in African history was committed by the Belgians who killed between five and 10 million people in the Congo between 1885 and 1912: Bill Berkeley, The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa [New York: Perseus Publishing, 2001] p 9. See also Adam Hochschild, King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa [New York: Houghton Mifflin, 1999] generally, especially at p 281; Sven Lindqvist, “Exterminate All the Brutes”: One Man’s Odyssey into the Heart of Darkness and the Origins of European Genocide [New York: New Press, 1996]; A Dirk Moses and Dan Stone (eds), Colonialism and Genocide [New York: Routledge, 2006]; and A Dirk Moses (ed), Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History [New York: Bergham Books, 2008].

129 Ibid, pp 535–536.
longer a question of intimidating the populace, but rather of physically liquidating it.\textsuperscript{130} The colonial powers only gave up and conceded independence upon realising the futile, uneconomical and wasteful nature of protracted conflict.\textsuperscript{131} In the absence of such ‘infrastructural contradictions’, it was not unusual to see imperial powers employ the strategy of absolute genocide—either precipitously or by degrees—to deal with the wars of liberation confronting them.\textsuperscript{132}

Michael Ignatieff, for his part, updated this narcissistic theory of mass evil to the post-imperial era. His argument, however, is not identically founded upon the same premise, as Sartre’s, that the evil of mass atrocity resulting from imperialism was the product of internal structures of capitalist democracies. Ignatieff’s argument, rather, is that the evil of mass atrocity, enacted in acts and omissions that imperialism produced, resulted from the ‘moral disgust’ that ensued from the futile expectations of colonial powers to experience boundless gratitude from the colonised peoples. But what Ignatieff’s hypothesis shares with Sartre’s is the posit of frustration of (neo)imperialism’s self-regard as the point of descent into resultant large-scale atrocity.

In his thoroughly engaging essay \textit{The Seductiveness of Moral Disgust}, Ignatieff takes the moral of Joseph Conrad’s \textit{Heart of Darkness} as his point of departure. Conrad’s character Kurtz personifies the spirit of imperialism and the resulting genocidal evil about which Sartre had written. As Ignatieff puts it:

\begin{quote}
The ferocious rapacity of Kurtz’s search for ivory is ennobled in his own eyes by his plans to bring civilization to the savages. In the end, of course, this idea redeems nothing at all. When Marlow finds Kurtz, at the final bend of the river, all there is to show of Kurtz’s civilizing mission is a row of native heads stuck on spikes and the tattered remains of Kurtz’s concluding report to the International Society for the Suppression of Savage Customs, on the final page of which the delirious Kurtz had scribbled, ‘Exterminate all the Brutes!’\textsuperscript{133}
\end{quote}

Ignatieff’s theory of moral disgust takes straight aim at atrocities committed by modern day peace-keeping forces, led by Western Powers including under the aegis of even the United Nations. With three UN-sanctioned missions since 1989 on his mind—the Kurdish, the Somali and the Bosnian missions (the US led invasion of Iraq had not yet occurred when he wrote)—Ignatieff demonstrates how the allures of narcissistic good intentions are soon overtaken by the seductions of moral disgust. In his words:

\begin{quote}
The three key rescue missions undertaken since 1989—the Kurdish, Somali, and Bosnian operations—were understood as noble attempts to give substance to that
\end{quote}

\textsuperscript{130} Ibid, p 537.
\textsuperscript{131} Loc cit.
\textsuperscript{132} Ibid, p 538.
\textsuperscript{133} Michael Ignatieff, ‘The Seductiveness of Moral Disgust’, (1995) 62 Social Research 77.
formless yet blameless entity ‘the international conscience.’ Yet Conradian continuities continue to haunt these operations: the ironic interplay between noble intentions and bloody results, between fantasies of omnipotent benevolence and impotent practice, between initial self-regard and eventual self-disgust. Conrad himself could hardly have imagined a more terrible image of these ironies than the spectacle, on all our television screens, of the UN soldiers, mostly Pakistani, firing upon Somali crowds and killing the women and children they were mandated to protect. When Conrad encapsulated imperial impotence in the image of the gunboat in Heart of Darkness, moored off the African shore, lobbing useless shells into the unanswering jungle, the contemporary imagination leaps to the image of NATO warplanes lobbing shells into abandoned Serbian artillery dugouts. Past and present meet in a shared image of the futility of great power.134

Ignatieff directly contends that there was ‘a strong element of narcissism buried inside the more obvious motivations’ of Western powers to intervene. Those Western-led interventions were motivated as much by the need to salve the West’s image of itself as the bastion of civilisation as by the aspiration to protect humanity from misery.135 Tragically, therefore, the ghost of Kurtz haunts these humanitarian interventions.

Ignatieff does not argue, of course, that the remedy against the seduction of moral disgust is the disavowal of humanitarian interventions, out of concern for criticisms of narcissistic interloping. As he takes care to point out, ‘Conrad’s scepticism did not deny that there were universal decencies, sometimes though not always of European origin.’136 Ignatieff’s point rather is the recognition that the West is not an omnipotent force with unlimited power to do good; and that it often allows unconscionable means and motives to tarnish its own decent aspirations. The result often is lack of serious commitment to worthy ends—half-measures of cure that permit the transformation of initial good intentions into evil results, even in criminal proportions.137

Surely, Ignatieff’s theory of moral disgust may not always explain the commission of the sort of evil under contemplation. Is Kurtz’s predisposition for evil merely explained by his moral disgust, stemming from his lack of total commitment to his professed mission ‘to bring civilisation to the savages’? Or is he a virulent vector of hate, whose prejudice did not preclude a programme of pogrom at the slightest excuse? Why would it be too difficult to conceive of an image of Kurtz in the hood of the Ku Klux Klan? Are the conduct of those UN soldiers and civilian staff on peace-keeping missions who rape and sexually exploit their

134 Ignatieff, supra, p 78.
135 Ibid, p 80.
136 Ibid, p 81.
137 Ibid, pp 81–82.
138 Ibid, p 86.
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wards—even under-aged boys and girls—readily explained by their own moral disgust? The answers to these questions can respectively run as follows: not necessarily—possibly—it should not be—no.

Yet, as far as it goes, Ignatieff’s theory of moral disgust does carry much purchase. Although he does not refer to it in his essay, his theory is thoroughly validated in the failure of the UN to stop the Rwandan genocide in 1994, even with forces of the United Nations Assistance Mission in Rwanda (UNAMIR) on the ground. There was always the question of how seriously committed the UN had been in its peace-keeping mission in Rwanda just before and during the genocide. And the imagery of Kurtz, symbolising Ignatieff’s theory of the seduction of moral disgust, finds no better enactment than in Belgium’s withdrawal of its troops—the vertebral force of UNAMIR—from the UN peace-keeping mission in Rwanda. This was followed by Belgium’s spiteful lobbying for total UN withdrawal. All of this happened at the very height of the Rwandan genocide. And the reason for that quintessential show of moral disgust was that just 10 Belgian soldiers were killed in Rwanda by the same forces that were killing, in a genocidal orgy, hundreds of thousands of the innocent Rwandans that the UNAMIR were supposed to protect.

The Eclectic Theory of Evil

Another theory of evil that must be noted is that advocated by Arne Johan Vetlesen. His central thesis involves a critique of the severalty of explanations of evil variously offered by Arendt, Bauman, Milgram, and Alford as insufficient to explain collective evil in every case, such as the Holocaust, genocide and ethnic cleansing. His 2005 book, Evil and Human Agency—Understanding Collective Evildoing, is no bed-side reading for the distracted mind, but it has, for good reason, been well-received as an important contribution to the discourse on comparative theories of extreme malevolence.

He begins his discussion with what he admitted to be a commonsensical and minimalist definition of evil as the ‘[intentional infliction] of pain and suffering on another human being, against her will, and causing serious and foreseeable pain to her.” It is indeed an interesting definition of evil. One could readily see how some

139 In August 2000, for example, Staff Sergeant Frank Ronghi, 36, of the elite 82nd Airborne Division of the US Army, was sentenced to life imprisonment for sodomizing and murdering a Kosovar Albanian girl, Merita Sabiu, 11, the Kosovo peace-keeping mission: Wenona Giles et al (eds), Sites of Violence: Gender and Conflict Zones [Berkeley, California: University of California Press, 2004] pp 12–13.

140 See generally, United Nations, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, dated 16 December 1999, Doc No S/1999/1257. See also Organisation of African Unity, 'The Preventable Genocide’, the report of the International Panel of Eminent Persons to Investigate the 1994 Genocide in Rwanda, dated 7 July 2000.

141 Arne Johan Vetlesen, Evil and Human Agency: Understanding Collective Evildoing [Cambridge: University Press, 2005] p 2.
might view it as overly simplistic. What are the types of pain and suffering that are accepted as evil? Surely criminal conducts such as rape, murder, extermination and genocide would qualify. But what about state-sanctioned executions of convicted murderers; the imposition of prison sentences—for life or term of years—upon convicted persons; the termination of a romantic relationship characterised by a deeply unrequited love from the jilted; a parent’s forcible confinement of a teen-aged drug addict into a drug rehabilitation facility? Surely, all these would qualify as intentional infliction of pain and suffering on another human being, against her will, causing pain and suffering. But are they necessarily evil?

Nevertheless, with its shortcomings kept in mind, Vetlesen’s definition of evil is serviceable within its remit. It certainly captures both the necessary evil authorised and promoted by those in responsible command of the relevant armed forces, as well as the aberrant, evidently unauthorised and gratuitous evil, perpetrated by the insufficiently controlled rogue fighters trained, armed and mobilised by those in responsible command of the relevant armed forces.

What commends Veltesen’s book, however, is not his definition of evil, but rather his critique of other theories of evil and then his offering up of a new approach to the appreciation of evil. It is possible, though, to say that Vetlesen may have made too much out of the flaws he perceived in the works of Arendt, Bauman and Milgram. In their common situational theory of evil, none of these authors ever professed to be expounding a universal formula for the comprehension of evil and its human agency. Milgram, for instance, had clearly explained that the chief lesson of his experiments was that ordinary people ‘can become agents in a terrible destructive process’ [emphasis added]. He and his adherents must then not be understood as claiming that all agents of terrible destructive processes are ordinary people of the banal kind. Indeed, Milgram, was careful to report that left to their own discretion and personal codes of morality, the average subject of his experiment did not deliver the level of shock that simulated the evil conduct.

Similarly, Arendt’s commentary was limited to her observation of a single man on trial. Although she did observe that Eichmann ‘and the nature of his acts as well as the trial itself raise problems of a general nature,’ she never claimed that Eichmann’s predisposition explained the actions and mentality of other actors in the horrid enterprise of the Holocaust. Given her commentary on the levels of participation of other actors, chiefly Hitler, Arendt must be given some credit for recognising that Eichmann—the banal and uninspired bureaucrat, devoid of hate and imagination—would not readily displace the obvious dynamism and charisma of Hitler the ideologue and architect-in-chief of the Holocaust, who institutionalised evil in Eichmann’s Germany, to the level that bureaucrats saw genocide as their moribund duty to execute. It would be wrong then to foist

142 Arendt, supra, p 287.
143 See for instance ibid, pp 93-94, 135, 139-140, 144, 148, 149, 150, 153, 267, 273 and 283.
144 Arendt, supra, p 37.
145 See ibid, pp 153 and 283.
upon Arendt the speculation that she would have described Adolf Hitler and his particular brand of evil as ‘banal’, were he in the dock in Jerusalem instead of Adolf Eichmann. Indeed, she realised that ‘Eichmann was not Iago and not Macbeth ...’.\(^{146}\) She may then not be fairly taken to have supposed that either Iago or Macbeth was Eichmann.

It is to be noted that Arendt never claimed a loftier purpose for her book. In her own words she wrote as follows:

\[\text{[T]he book itself dealt with a sadly limited subject. The report of a trial can discuss only the matters which were treated in the course of the trial, or which in the interests of justice should have been treated. ... This book, then, does not deal with the history of the greatest disaster that ever befell the Jewish people ... nor is it, finally and the least of all, a theoretical treatise on the nature of evil. The focus of every trial is upon the person of the defendant, a man of flesh and blood with individual history, with an always unique set of qualities, peculiarities, behaviour patterns, and circumstances.}\(^{147}\)

It is against that limited province that Arendt’s pronouncements on the banality of evil must then be understood.

One of Vetlesen’s quarrels with Bauman involves the charge that Milgram’s experiments, upon which Bauman relies, ‘are poorly suited to throw light on the behavioural mechanisms which—supposedly—were operative to such disastrous effects in the case of the Nazi extermination of the Jews.’\(^{148}\) This charge is anchored on the essential distinction that, in Milgram’s experiment, the victim was notionally anonymous—in the sense of not known to the subject (the ‘teacher’). In the Holocaust, on the other hand, the victim had, in bad faith, been over-familiarised to the genocidaire, through the mechanism of Nazi propaganda that dehumanised Jews. It is this negative propaganda, argues Vetlesen, and not the anonymity of the victims (as in Milgram’s experiment) that made the Holocaust easy for the perpetrators.

Vetlesen is surely right to draw a causal link between the virulent anti-Jewish propaganda and the Holocaust. A similar link notoriously existed between an anti-Tutsi propaganda and the Rwandan genocide.\(^{149}\) Other psychological studies

\(^{146}\) Arendt, supra, p 37.
\(^{147}\) Ibid, p 285.
\(^{148}\) Vetlesen, supra, p 25.
\(^{149}\) In the Akayesu case, a Trial Chamber of the International Criminal for Rwanda found that there had been a ‘psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media with the RTLM [Radio-télévision libre des milles collines] at the forefront’: Prosecutor v Akayesu (Judgment) 2 September 1998 [ICTR Trial Chamber] para 126. Similarly, in the Media case, the ICTR noted ‘the striking indifference to these massacres evident in the broadcast, and the dehumanisation of the victims’: Prosecutor v Nahimana et al (Judgment) 3 December 2003 [ICTR Trial Chamber] para 416. Note, however, that
have led to similar conclusions. It is, however, interesting to note that judges of the Appeals Chamber of the International Criminal Tribunal for Rwanda are not persuaded that propaganda alone must necessarily explain every killing during a genocide. In their reasoning, notwithstanding the presence of an anti-group propaganda somewhere along the continuum of time, it is possible for other factors to be responsible for the commission of a genocide against the group. According to this reasoning, ‘the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it.’

The Appeals Chamber is not to be understood, of course, as denying a causal link between negative propaganda and a genocide against a group. The Appeals Chamber’s pronouncement merely stresses the need for evidence of causal link between propaganda and the resulting genocide, rather than an exclusive reliance upon the mere presumption that it did. It merely refuses to accept one theory of causation. That is to say, a negative propaganda may or may not contribute to the genocide. But, the more specific the evidence of the causal link, the greater the likelihood of persuasion beyond reasonable doubt that the propaganda resulted in the genocide. In the absence of such evidence, a court of law is not likely to convict upon the mere possibility of a particular cause, where other causes are also possible.

Without precise evidence of the temporal proximity of particular items of the anti-Jewish propaganda and occurrences of specific killings during the genocide, the reasoning of the ICTR Appeals Chamber would then subtract from Vetlesen’s protest against the value of the Milgram experiments in helping to illuminate the Holocaust. That is to say, both Milgram’s experiment and anti-Jewish propaganda can help in an understanding of the Holocaust. If one applied the Appeals Chamber’s reasoning to Vetlesen’s observations, the result would be that propa-

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150 Having reviewed a number of disengagement mechanisms that enable people to do harm to others, Osofsky et al observed as follows: ‘The final set of disengagement mechanisms operates at the locus of the recipients or objects of detrimental acts through dehumanisation and attribution of blame. Self-censure for injurious conduct can be disengaged or blunted by divesting people of human qualities, or by attributing demonic and bestial qualities to them .... Blaming the recipients of injurious treatment for bringing suffering on themselves also serves self-exonerating purposes. In this process of “blaming the victim,” perpetrators see themselves as driven to injurious conduct by compelling circumstances or the foe’s appalling inhumanities rather than by their personal decisions: Osofsky, Bandura and Zimbardo, supra, p 373.

151 Prosecutor v Nahimana et al (Judgment), supra, [ICTR Appeals Chamber] para 513.
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Equally unconvincing is another of Vetlesen’s criticisms of the Milgram experiment as poorly suited to explain the Holocaust. Taking aim at Milgram’s hypothesis that obedience to authority can explain evil-doing, Vetlesen’s attempt at refutation is that obedience in those circumstances does not simply result from the subject’s view of himself as a mere ‘instrument of carrying out another person’s wishes.’ But that such obedience carries a strong ideological component; it comes from “accepting the fundamental ideas that guide that authority and wishing to help realise them in practice.” To drive home his point, Vetlesen insists that it must be realised that ‘both the authority and those who obey it “share the same prejudices, the same view of the world, the same fundamental perception of reality.”’

This may be a criticism taken much too far. It is accepted that there will be subjects who obey their superiors out of shared prejudice and outlook on life. But that will not always be the case. As Milgram’s control experiments indicated, only a minority of the subjects continued to apply the electric shocks past the perceived point of severe pain, when they were left to their own discretion. A great majority did not.153 Browning makes the same observation in the context of the massacre of Jews in the Polish village of Józefów by Reserve Police Battalion 101.154 Since the majority of subjects in Milgram’s experiment had applied the high voltage shocks when ordered to do so, and since ‘many policemen did not comply with the orders [to massacre Jews in Józefów] when not directly supervised’, it becomes difficult to sustain the case that those who did must necessarily share the order-giver’s outlook on life.

Another notable criticism from Vetlesen is his ultimate categorical rejection of Bauman’s warning against the dangers of modernism. As Vetlesen put it: ‘I conclude that Bauman is wrong to think that the modern bureaucratic institution is pregnant with the sort of immorality exhibited in the Holocaust. Only by hijacking pre-existing bureaucratic structures, by altering and exploiting them ruthlessly for their own highly ideological objectives, could the Nazis turn the German state apparatus into a smooth vehicle of mass destruction.’155 Vetlesen’s attempted dismissal of Bauman is intrinsically self-contradictory. The contradiction appears in the very passage quoted above, among others of his conclusions.156

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152 Vetlesen, supra, pp 25–26.
153 Stanley Milgram, ‘The Perils of Obedience’, Harper’s Magazine [1974] at <http://home.swebell.net/revscat/perilsOfObedience.html>
154 Browning, supra, pp 175–176.
155 Vetlesen, supra, p 50.
156 One also notes Vetlesen’s criticism of C Fred Alford’s theory of individual sadistic bent as being too focused on the individual at the risk of ignoring environmental influences upon evil-doing. In Vetlesen’s own words: ‘Alford risks eternalising evil inasmuch as he views it sub specie aeternitatis, as a feature of the human condition as such, thereby ignoring the structural and situational conditions of specific instances of evil (especially collective evil) where in-group pressure and the request for obed-
It lies in Vetlesen’s quarrel with the suggestion that the modern bureaucratic institution is ‘pregnant’ with the sort of malignancy that leads to evil at the scale of the Holocaust. Yet, he contends that Nazis were able to hijack and manipulate ‘pre-existing bureaucratic structures’, and were thus able to deploy the grotesque evil now known as the Holocaust. But this, in fact, makes Bauman’s very point. How were the Nazi’s able to hijack and manipulate German bureaucracy and achieve their evil ends in such catastrophic proportions had the ‘pre-existing’ bureaucratic institutions not been ‘pregnant’ with a potential towards such manipulation? It is the proneness of modern bureaucratic institutions to such wicked manipulations that is the very danger that Bauman warns about. The dispute may indeed relate to the degree of modern bureaucracy’s pregnancy with evil potentials, but Bauman is certainly right to sound his warning. In the end, it is hard to quarrel with Bauman’s central thesis that it is modernity that enabled the Einsatzgruppen to kill, by shooting, approximately 1.5m Jews, before Himmler ordered their killing methods to be replaced by the more efficient and impersonal methods of the death camps; it is modernity that enabled those more efficient and less messy methods, the gas chambers and crematoria, to be built at Auschwitz, Belsen, Dachau, etc, in order to maximize the macabre productivity of the Holocaust enterprise against European Jewry; it is modernity that enabled US military pilots to fly great distances and drop atomic bombs on Hiroshima and Nagasaki from great heights and without a view of the innocent humanity being decimated below; it is modernity that vectored to many Rwandan Hutu peasants, through small transistor radios, the infectious genocidal propaganda that their Tutsi neighbours were repulsive ‘cockroaches’ and cruel demons deserving of extermination. Thus, Bauman is not so easily to be dismissed in his ultimate thesis that modernity offers patterns in which ‘we can hope to uncover the possibility so dramatically revealed in the times of the Holocaust.’

Vetlesen’s method of dwelling upon a criticism of his forerunners before offering his own theory of evil is no doubt a legitimate method of scholarly disputation. It is, however, fraught with the danger of appearing more concerned with the flaws he perceived in those earlier works than offering his own. The average reader in a hurry in a high-paced world may then not tarry long enough to get

ence, control, and predictability often necessitate a neutralisation of the individual-existential twist to partaking in evil that Alford takes as his principal focus: ibid, p 141. The environmental conditions of which Vetlesen writes as also accounting for evil surely include the environmental expressions of modernity, such as is found in modern bureaucratic institutions of the sort that resulted in the widespread realisation of the Holocaust.

To be noted in this regard is Bauman’s declaration that the ‘truth is that every “ingredient” of the Holocaust—all those things that render it possible—was normal; “normal” not in the sense of the familiar … but in the sense of being fully in keeping with everything we know about civilization, its guiding spirit, its priorities, its immanent vision of the world’: Bauman, supra, p 8. [Emphasis added.]

Bauman, supra, p 19.
to the real point of Vetlesen’s otherwise valuable book: which really is that evil is better appreciated from the multi-dimensional perspectives of the personalities and characters, the prevailing circumstances and the structure of the society concerned. That is to say, the impetus for evil, just as with its human agents, comes in different guises. Vetlesen’s approach in this regard is captured in the following quotes:

Due to the heterogeneous nature of the phenomenon—evildoing—different theoretical approaches are called for, one illuminating what another ignores.\(^{159}\) ... [E]vil is such a manifold and heterogeneous phenomenon in social life as to frustrate various theoretical attempts ... to let one ‘form’ or one feature speak for all. Indeed, even such established category of collective evil as genocide may come in many—quite distinct—forms.\(^{160}\)

In *The Graves Are Not Yet Full*, dealing with the Rwandan Genocide of 1994, Bill Berkeley, too, aptly captured the essence of the inquiry into evil through his question about the participation of François in the killings: ‘What malignant blend of bigotry and fear, coercion or cowardice, history, politics, poverty and ignorance, envy, opportunism, unquestioning obedience, peer pressure perhaps—what brought out the shark in this man?’\(^{161}\) Berkeley is quite right to seek to capture such a variegated ‘blend’ of factors that may result in a genocide: except that there need not be a *blend*; for these factors may *jointly* or *severally* account for a genocide. This multi-dimensional approach to the appreciation of evil would then comfortably accommodate the observations of Arendt, Milgram, Bauman, Zimbardo, Sartre, Ignatieff, Alford, Hilberg, Goldhagen and others. Vetlesen’s real criticism of his forerunners then becomes—and quite correctly—that it is neither possible nor helpful to approach the comprehension of evil during armed conflicts from a mono-causal perspective. There is no silver thread that explains all manner of evil which human beings have proven capable of inflicting upon one another, especially during armed conflicts.\(^{162}\) As will be seen below, this eclectic approach is entirely consistent with criminal law’s primary concern with the question of responsibility for the evils forbidden in its own realm.

Beyond Vetlesen’s multi-dimensional aetiology of evil, he does offer other very solid views of his own—notably in chapter four—that aid in an understanding of collective evil. Among his notable observations is the identification of similarities between ethnic-cleansing in the former Yugoslavia and the Holocaust, in the manner of the perpetrators’ claim of victimhood and self-defence to jus-

\(^{159}\) Vetlesen, supra, p 141.

\(^{160}\) Ibid, p 142.

\(^{161}\) Bill Berkeley, supra, p 3. Similarly, Dirk Moses has observed: ‘Genocide is to be explained as the outcome of complex processes rather than ascribable solely to the evil intentions of wicked men’: A Dirk Moses (ed), *Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History*, supra, p 7.

\(^{162}\) Vetlesen, supra, p 42.
tify their atrocities, citing ancient wrongs and present dangers from internal and external enemies. Serviceable here would be the Nazi grievance about the defeat of Germany in World War I and the humiliation of the Treaty of Versailles and the targeting of German Jews as internal enemies forever scheming to take over the German economy. The scenario is compared to the historical grievance of Serbs about their defeat in the battle of Kosovo Polje in 1389 and their paranoia that their heritage is in danger in the hands of Muslims who would mix and outnumber genuine Slavic peoples.¹⁶³

Although Vetlesen does not address the Rwandan Genocide in specific terms, his observations in this regard bear clear and direct application to that Genocide. Similar tactics were employed during the Rwandan Genocide. Hutu extremists regularly cited the ancient domination of the Rwandan society by the Tutsi, which domination was ended by the 1959 violent social overthrow of the Tutsi hegemony, (popularly referred to in Rwanda as the ‘1959 Revolution’), which drove a huge number of Tutsis into exile.¹⁶⁴ The refusal of repatriation rights to exiled Tutsis eventually led to a civil war in 1991, launched by the Rwandan Patriotic Front, the military wing of the exile movement.¹⁶⁵ The incidence of the ongoing civil war at the time, coupled with the traditional suspicion on the part of the Hutu, afforded fertile soil for anti-Tutsi propaganda, before and during the Genocide. In this propaganda, a constant theme of reference was the ancient domination of the Hutu by the Tutsi and the allegation that the objective of the civil war (in which the country was embroiled in 1994) was a reversal of the socio-political gains of the 1959 Revolution—and even the extermination of the Hutu who had been put on the driving seat of all aspects of the Rwandan society.¹⁶⁶

Hence, Vetlesen is amply borne out in his observation that all cases of genocide in the twentieth century have been typically cast as a matter of ‘self-defence’ by the perpetrator groups. ‘To the extent that aggression is exhibited, it is presented in the propaganda as but a mirror of the aggression once performed—or now about to be unleashed—by the chosen targeted group.’¹⁶⁷

Aetiology of Evil Viewed in the Context of the Law

Evil’s explanations by Vetlesen, Arendt, Sartre, Ignatieff, Milgram, Bauman, Alford, etc, were offered in the realms of philosophy, sociology and psychology. Quite clearly the theories in question have considerable value in the province of those disciplines as social sciences. But the question inevitably arises: what purchase do these theories have for decision making in international law? It is the answer to that question that gives these theories their proper context within the

¹⁶³ Vetlesen, supra, pp 149–151.
¹⁶⁴ See Prosecutor v Akayesu, supra, para 89 et seq.
¹⁶⁵ Ibid, para 95 et seq.
¹⁶⁶ Ibid, paras 99–100, 103 and 110.
¹⁶⁷ Vetlesen, supra, pp 150–151.
province of the law. As noted earlier, the task of ‘transforming’ evil may not be as obvious a matter for the law as is clearly the case with the task of ‘containing’ evil. In the more obvious task of containing evil, the theories of aetiology of evil as propounded in the fields of philosophy, sociology and psychology are very important as influences that fertilise the right sort of decisions urgently needed in international law to achieve the needed containment.

Happily, whether by coincidence of the law’s affinity (as a member of the humanities) or by deliberate design, international law in its responses to evil-doing appears more favourably disposed towards the recognition of these theories of evil-doing in their various shapes and guises. This conclusion is borne out by, among other things, the legislative and jurisprudential features of international criminal law. First, modern legislation in international criminal law casts the net of criminal responsibility sufficiently wide to capture as many actors as might have engaged in the criminal conduct substantively proscribed. The point was well captured by Jeremy Horder when he wrote: ‘while there is some pattern to the way in which the criminal law shapes conditions of culpability, no single theory of culpability unifies that pattern to the exclusion of all others.’ 168 In that view, Horder amply captures the way of international criminal law. For instance, article 6(1) of the Statute of the International Criminal Tribunal for Rwanda provides as follows: ‘A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution [of genocide, crime against humanity or war crime] shall be responsible for the crime.’169 That legislative language would permit no impunity for the directing mind, the commanding voice, the executing hand or agent; or even for the adherent latecomer who joined the criminal enterprise from the fringe. This dragnet of criminal responsibility allows no excuses for Arendt’s Eichmann, Milgram’s ‘teacher’ and apartheid’s Benzien, who might have been uninspired state employees proficiently carrying out their ghoulish jobs within ‘a businesslike and strictly impersonal framework,’170 with no apparent hatred toward their victims. It would also capture the genocidal archetypes of Kurtz and the sort of imperial soldier (and their superiors) depicted by Ignatieff and Sartre in their narcissistic theories of evil; as would it capture Alford’s sadist.

To underscore the legislative intent to cast wide the net of criminal responsibility, modern legislators of instruments of international law made sure to preclude in specific terms certain defences. One such precluded defence is that of respondeat superior. A classic statement of this preclusion may be found in article 6(4) of the Statute of the International Criminal Tribunal for Rwanda which provides: ‘The fact that an accused acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be

168 Jeremy Horder, ‘Criminal Culpability: the Possibility of a General Theory’, (May 1993) 12 Law and Philosophy p 193, at 194.
169 See also article 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia.
170 See Bauman, supra, p 20.
considered in mitigation of punishment if the International Tribunal for Rwanda
determines that justice so requires.’ Similar provisions abound in the Statute of
the International Criminal Tribunal for the former Yugoslavia171 and the Statute of
the International Criminal Court.172

Similarly, judicial pronouncements on the subject of responsibility in inter-
national criminal law have also been careful to maintain and supplement the wide
dragnet of criminal responsibility originally cast by the legislator. Those judicial
pronouncements include, but are not limited to, those on the principle of joint
criminal enterprise,173 on the defence of duress,174 on the place of policy as an ele-

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171 Article 7(4).
172 Article 33.
173 There are three forms of joint criminal enterprises—the basic form, the systemic form
and the extended form. The basic form of JCE entails a situation in which there is
a meeting of the minds on the part confederates in a crime to commit that crime,
although each of them play a separate part in it. The systemic form relates to an
organised system of criminal activity. As with the basic form, it may involve decen-
tralisation of roles on the parts of those involved. The difference, however, is that
there is no requirement of a meeting of minds as to the crime in the systemic form;
but there is a requirement of knowledge of the existence of the system of criminal
activity on the part of each member of the system. The classic example of a sys-
temic JCE is the Nazi concentration camps. Criminal responsibility arising from the
extended form of JCE involves a risk-based conception of criminal responsibility.
Here, the accused is held criminally responsibility for a crime which other confeder-
ates commit outside the strict confines of the common purpose of the confederates
in the crime, but which was a natural and foreseeable consequence of the common
criminal purpose. See Prosecutor v Tadić (Judgment) 15 July 1999 paras 195–226 [ICTY
Appeals Chamber]; Prosecutor v Ntakirutimana (Judgment) 13 December 2004 paras
463–465 [ICTR Appeals Chamber]; Prosecutor v Vasiljević (Judgment) 25 February
2004, paras 96–99 [ICTY Appeals Chamber].

174 According to the pronouncements of judges of the ad hoc international criminal tri-
butnals, duress does not afford a complete defence to a charge: Prosecutor v Erdenović
(Judgment) 7 October 1997 para 19 [ICTY Appeals Chamber] together with Joint
Separate Opinion of Judge McDonald and Judge Vohrah paras 55, 66, 72, 75 and 88.
It is to be noted, however, that duress is not excluded as a complete defence under
the Statute of the ICC. According to article 31(1)(d), ‘In addition to other grounds
for excluding criminal responsibility provided for in this Statute, a person shall not
be criminally responsible if, at the time of that person’s conduct: … The conduct
which is alleged to constitute a crime within the jurisdiction of the Court has been
caused by duress resulting from a threat of imminent death or of continuing or
imminent serious bodily harm against that person or another person, and the person
acts necessarily and reasonably to avoid this threat, provided that the person does
not intend to cause a greater harm than the one sought to be avoided. Such a threat
may either be: (i) Made by other persons; or (ii) Constituted by other circumstances
beyond that person’s control.’
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ment of crime against humanity, on the notion of aiding and abetting, on the encouraging presence during a crime, etc.

Closer then to what obtains in the realms of the law is Vetlesen's eclectic theory of evil which correctly affords equal opportunity for the recognition of all manner of impulses to commit collective atrocity. Hence, the law is once more seen in kinship with the other humanities as a system of complementary disciplines working together to forge and continually improve a post-Hobbesian social life.

**Intent as Limiting the Theories of Aetiology of Evil**

Notwithstanding the foregoing, it is, however, proper to offer a needed proviso to the law’s receptivity to the influences of the other humanities. It is notable that philosophy, sociology and psychology do often shine a bright light on the dark path of human life along which the law travels, in order to give it bearing along the way. But the law does not always follow that illumined path to its furthest reaches. There is a certain sense in which such is the case as regards the theories of evil previously reviewed. The law—more precisely, criminal law—does not always accord pride of place to the higher questions of morality in relation to criminal responsibility. Criminal law rather is primarily concerned with the intent of the perpetrator—not his morality. Morality is to be contrasted with intent, in that the former is concerned with the perpetrator’s sense of qualms, so to speak. Intent deals rather with the extent to which the perpetrator’s consciousness—not his conscience—directly or indirectly occasioned the forbidden outcome in question. In that sense, intent, for purposes of criminal law may be defined as the existence of consciousness of the mind in correlative proximity to the foreseeable results of

175 Notably, judges of the ad hoc tribunals have held that to constitute a crime against humanity, the conduct in question need not result from a preexisting criminal plan or policy: *Prosecutor v Kordić and Čerkez (Judgment)* 17 December 2004 [ICTY Appeals Chamber] para 98. See also *Prosecutor v Blaškić (Judgment)* 29 July 2004 [ICTY Appeals Chamber] para 120. However, ‘attack directed against any civilian population’, has been defined in article 7(2)(a) of the ICC Statute, for purposes of crimes against humanity, to mean ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’

176 An accused will have aided and abetted a crime if his actions gave practical assistance, encouragement or support, such as had a substantial effect on the commission of the crime: *Kayishema and Ruzindana (Judgment)* 1 June 2001 [ICTR Appeals Chamber] para 186. See also *Prosecutor v Tadić*, supra, para 229 and *Prosecutor v Blaškić*, supra, paras 46–48.

177 Presence at the scene of crime may amount to aiding and abetting a crime, if such presence had the effect of significantly encouraging the perpetrators to commit the crime in question: *Prosecutor v Kajelijeli (Judgment)* 1 December 2003 [ICTR Trial Chamber] para 769. See also *Prosecutor v Vasiljević (Judgment)* 29 November 2002 [ICTY Trial Chamber] para 70.
one’s action. By ‘correlative proximity’ is meant a proximity in which there is a connection between or among the proximate things.

For purposes of culpability then, the law tends not to agonise much over the questions whether Eichmann’s sense of qualms was dead or in deep coma at the time of his actions; nor with whether Bauman’s villain had inserted the widest physical or psychic separation between his own action and its outcome. Neither is the law concerned with the degree to which Kurtz’ sense of qualm had been provoked into auto-mutiny characterised by a sudden attack against its very own moorings. Those are considerations that go to the conscience of the perpetrator—his sense of qualms or this morality—they do not speak to the existence of consciousness as to the results of his actions.

Uses in the Post-Conflict Quest for Justice and Reconciliation

Ultimately, it is possible—indeed commendable—to look, from another angle, behind the construct of criminal responsibility, in search of profitable juristic uses of the theories of evil prevailing in the other humanities. The situational explanation of evil is particularly notable in this regard. It helps to resolve the dilemma often expressed in the wishes of the international community when they establish tribunals to prosecute mass atrocities committed in given societies. Those wishes often engage an apparent tension between punishing the perpetrators of the crime while permitting lasting reconciliation within the societies involved. Often, tension is perceived between the two goals. The situational theory of evil articulated by Arendt, Bauman, Milgram, Zimbardo and others points the way to doing both.

Their explanations of mass atrocities assist in fuller rationalisation of some of the law’s responses to evil-doing. In particular, it helps to rationalise the idea of criminal responsibility as spelled out in modern international criminal law instruments, such as in articles 6(1) of ICTR Statute and article 7(1) of ICTY Statute reviewed above. As noted in those provisions, criminal responsibility is attributed to those who plan, order, instigate, actually commit, or otherwise aid and abet the crimes proscribed substantively in those Statutes. Of particular note in this regard is the value of the Arendt-Bauman-Milgram theory, in relation to the doctrine

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178 This definition affords a sufficient basis for understanding the meaning of intent, notwithstanding that intent in criminal law has often been perceived as a notion too elusive to define satisfactorily. See Glanville Williams, *Textbook of Criminal Law* [London: Stevens & Sons, 1978] p 51.

179 For instance, in resolution 955 of 1994, introducing the ICTR Statute, the Security Council concurrently expressed a determination to ‘to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them’, and a conviction ‘that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace’. United Nations, Resolution 955 adopted by the Security Council at its 3454th meeting on 8 November 1994, Doc No S/RES/955 (1994) of 8 November 1994.
of joint criminal enterprise, which typically involves different people contributing different components of activity towards the commission of a crime. Hence, this dragnet of responsibility will capture everyone implicated in the circumstances that explain collective evil-doing according to the postulations of Arendt, Beauman and Milgram.

At the same time, the Arendt-Bauman-Milgram theory assists the spirit of post-conflict reconciliation by pointing out that the evil done was not necessarily borne out of personal hatred; and that given the ‘right’ conditions, the average person is capable of doing the same thing. Hence, a new interpretation attends a familiar biblical injunction: ‘You may cast the first stone of revenge if you are sure that you will not do the same thing in similar conditions.’ This then cuts out the primary tasks of post-conflict efforts as two-fold: (a) commit all efforts towards forgiveness and healing, rather than expend collective social energy on suspicion and mutual distrust; and (b) make every effort to guard against those ‘right’ or ‘similar’ conditions that made the evil possible for the average perpetrator. Taken to extremes, this might prove too simplistic and unrealistic. But it provides a useful starting point for national reconciliation in post conflict societies.

**Human Capacity for the Evil of Sexual Violence in Armed Conflicts**

Moving now from the wider perspective of evil, as a general phenomenon, during armed conflict, we will next turn our attention to the narrower dimension of the aetiology of the evil of sexual violence during armed conflicts. In the following section, it will be found that within the wider macro-inquiries into the human capacity for evil during armed conflicts snugly fits the narrower inquiry into the prevalence of sexual violence during armed conflicts.

It is no longer a matter for reasonable debate that a high frequency of sexual violence during armed conflicts is very much an integral part of the wider and regular waves of armed conflicts. This has led one commentator to observe that the ‘pervasiveness and carnivalesque nature of rape in wartime often gives the impression that military practices are inextricably entwined with sexual violence.’

The manner of sexual violence during armed conflicts include, but is not limited to, gang-rapes of women, even in their homes and in front of their family members; detention of women and their repeated rapes in detention centres or military barracks and billets for extended periods; systematic rape of women in forced ‘mar-

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180 Joanna Bourke, *Rape: Sex, Violence, History* [Berkeley, CA: Shoemaker & Hoard, 2007] p 359. Lt Col Dave Grossman makes a similar observation: ‘The linkage between sex and killing becomes unpleasantly apparent when we enter the realm of warfare. Many societies have long recognized the existence of this twisted region in which battle, like sex, is a milestone in adolescent masculinity. Yet the sexual aspects of killing continue beyond the region in which both are thought to be rites of manhood and into the area in which killing becomes like sex and sex like killing’: Grossman, *supra*, pp 135–136.
riages’; women being kept in captivity for purposes of forced labour (including such lethal activities as mine-sweeping) and forced sex; sexual mutilation and torture prior to being killed or being left to die from their injuries; other forms of sex-oriented humiliation.181

This link between war and violence against women on grounds of their sex has led some icons of feminism to assert a sinister nexus to the wider pattern of anti–woman sexism in society. As Susan Brownmiller observed:

War provides men with the perfect psychologic backdrop to give vent to their contempt for women. The very maleness of the military—the brute power of weaponry exclusive to their hands, the spiritual bonding of men at arms, the manly discipline of orders given and orders obeyed, the simple logic of the hierarchical command—confirms for men what they long suspect, that women are peripheral, irrelevant to the world that counts, passive spectators to the action in the centre ring.182

But this allegation does not come exclusively from famous feminists. Indeed, Brownmiller’s central thesis of the misogynistic subtexts of war in terms of sexual violence finds striking resonance in Lt Col Dave Grossman’s observations as follows:

Women have also been defiled, debased, and dehumanised for the aggrandisement of others. Throughout history women have been probably the greatest single group of victims of this empowerment process [the bonding among military officers and their soldiers]. Rape is a very important part of the process of dominating and dehumanising an enemy; and this process of mutual empowering and bonding at the expense of others is exactly what occurs during gang rapes. In war, empowerment and bonding through such gang rapes often occur on a national level. ... The thing to understand here is that the gang rapes and gang or cult killings in times of peace and war are not “senseless violence.” They are instead powerful acts of group bonding and criminal enabling that, quite often, have a hidden purpose of promoting the wealth, power, or vanity of a specific leader or cause ... at the expense of the innocent.183

Brownmiller and Grossman thus arrive at the same interpretation of the evidence of sexual violence against women during armed conflicts. Here, one observes that Brownmiller’s language of ‘psychologic backdrop’ can equally address what Grossman saw as ‘not “senseless violence”’; and the phenomenon that Brownmiller

181 United Nations, ‘Systematic Rape, Sexual Slavery and Slavery like Practices during Armed Conflict’: Final report submitted by Ms Gay J McDougall, Special Rapporteur, Doc E/CN.4/Sub.2/1998/13 of 22 June 1998, para 10.

182 Susan Brownmiller, Against Our Will: Men, Women and Rape [New York: Simon & Schuster, 1975], p 32.

183 Grossman, supra, pp 210–211.
described as a band of brothers enjoying prime, exclusive male action in the centre ring becomes interchangeable with Grossman’s conception of aggrandisement of leaders and peers in the promotion of wealth, power or vanity of a specific leader or cause.

Madeline Morris arrives very much at similar conclusions in her conception of the military as a ‘primary group’ akin to the family.\textsuperscript{184} She observes, notably, that ‘[h]eightened rape incidence is associated with certain primary groups.’\textsuperscript{185} This is explained at least in part by the groups’ social norms—and these ‘invariably include gender and sexual norms.’\textsuperscript{186} The sexual norms of some primary groups are conducive to rape.\textsuperscript{187} The underlying attitudes in this regard include attitudes towards masculinity, sexuality and women.\textsuperscript{188} Certain attitudes toward masculinity, in particular, ‘have been found to be related to heightened levels of rape propensity.’\textsuperscript{189} According to Morris:

\begin{quote}
Standards of masculinity that emphasize dominance, assertiveness, aggressiveness, independence, self-sufficiency, and willingness to take risks, and that reject characteristics such as compassion, understanding, and sensitivity have been found to be correlated with rape propensity. Several different measures for this construct of masculinity have been used in the studies that have identified this correlation. These measures include “negative masculinity,” meaning a posture of self-assertion and self-protection unalloyed with communion or concern with others; “hypermasculinity,” meaning stereotypic masculinity and interpersonal opportunism; and nonfeminine “sex-typing,” meaning personality or sex role constructs with minimal stereotypically feminine characteristics such as sensitivity or gentleness.\textsuperscript{190}
\end{quote}

Morris’s point is that there is a correlation between a heightened predisposition toward machismo and sexual violence. A similar point had been made earlier Donald Mosher and Ronald Anderson. In their own conclusion:

\begin{quote}
The socialisation of the macho man, if it does not directly produce a rapist, appears to produce calloused sex attitudes toward women and rape and propen-sities toward forceful and exploitative tactics to gain sexual access to reluctant women. The socialisation of the hypermasculine male may script him to over-value a definition of masculinity as tough and unfeeling, violent and exploitative.
\end{quote}

\textsuperscript{184} Madeline Morris, ‘By Force of Arms: Rape, War, and Military Culture’ (1996) 45 Duke Law Journal 651 at 691–692 and 698.
\textsuperscript{185} Ibid, p 698.
\textsuperscript{186} Ibid, p 699.
\textsuperscript{187} Ibid, p 700.
\textsuperscript{188} Ibid, p 701.
\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid.
of women, and as seeking the excitement of risking danger. This personality con-
stellation, in conjunction with a history of aggressive behaviour that elicits increasing
levels of positive affect and decreasing levels of negative affect, may provide
the disinhibition that transforms the rape fantasy into a brutal reality.\footnote{Donald Mosher and Ronald Anderson, ‘Macho Personality, Sexual Aggression, and 
Reactions to Guided Imagery of Realistic Rape,’ (1986) 20 Journal of Research in 
Personality 77 at p 91.}

Morris observes that these rape-conducive norms are present in military cul-
ture, although some militaries, are making efforts towards change.\footnote{Morris, supra, pp 706 st seq.} Hence, Brownmiller’s interpretation is not to be regarded, marginalised or dismissed as a
mere feminist interpretation of the matter at stake.

**A Legislative Fact Amply Proved**

It might help at this juncture to consider briefly a disturbing pattern of evidence.
The worrying trend is adequately captured by the phrase military ‘rape differential’
during armed conflict—a phrase employed by Morris in her comparative study
of rapes and other crimes among US military personnel during periods of peace
and armed conflicts. Her research ‘indicates that the peacetime rates of rape by
American military personnel are actually lower (controlling for age and gender)
than civilian rates. However, the data also indicate that peacetime military rape
rates are diminished from civilian rates far less than are military rates of othervio-
lent crimes. A similar phenomenon is also reflected in the wartime data collected:
Military rape rates in the combat theatre studied climbed to several times civilian
rates, while military rates of other violent crime were roughly equivalent to civilian
rates. Thus, in both the wartime and the peacetime contexts studied, a rape dif-
ferential exists: The ratio of military rape rates to civilian rape rates is substantially
larger than the ratio of military rates to civilian rates of other violent crime.\footnote{Ibid, p 653.}

Although her study focused on US military personnel, Morris anticipated that her
observations are generalisable, in part at least, to the armed forces of other coun-
tries.\footnote{Ibid, at p 659.} Available literature and other studies on the subject amply bear her out.
Besides the numerous synthesised accounts of the problem,\footnote{See for example Brownmiller, supra, pp 31–139; Christine Chinkin, ‘Rape and Sexual 
Abuse of Women in International Law’ (1994) 5 European Journal of International 
Law.} there is, assuredly, an over-abundance of authoritative evidence to establish the legislative fact of sexual
violence against women as a constant feature of armed conflicts all through his-
tory, all over the world and in all cultures. Some of the more topical examples, in
recent times, are the findings made in the Report of the International Commission
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of Inquiry on Darfur\textsuperscript{196} and the 2008 Amnesty International Report.\textsuperscript{197} Other evidence of this phenomenon would include those recounted next. In his Report to the Security Council on the Protection of Civilians in Armed Conflict, the UN Secretary-General observed as follows:

Complex emergencies have a different impact on women and men. While men account for the largest numbers of combatants, women and children are disproportionately represented among civilians affected by conflict. This usually leads to dramatic increases in the number of children and women heads of households, leading to abrupt changes in their roles and increases in their workloads. The breakdown of the social fabric and the disintegration of families during times of armed conflict often leave women and girls especially vulnerable to gender-based violence and sexual exploitation, including rape and forced prostitution...\textsuperscript{198}

In the Vienna Declaration and Programme of Action of 1993, the World Conference on Human Rights expressed ‘its dismay at massive violations of human rights especially in the form of genocide, “ethnic cleansing” and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons.’\textsuperscript{199} Although the declaration of the World Conference on Human Rights was motivated by the conflict in the former Yugoslavia, it is consistent with other findings recognising a pattern of violence against women, notably sexual violence, as a frequent feature of armed conflicts elsewhere.\textsuperscript{200}

\textsuperscript{196} See generally United Nations, ‘Report of the International Commission of Inquiry on Darfur to the Secretary-General of the United Nations’, pursuant to Security Council Resolution 1564 of 18 September 2004, dated 25 January 2005 (transmitted to the Security Council under the cover of the Secretary-General’s letter of 1 February 2005) Doc S/2005/60.

\textsuperscript{197} Amnesty International, ‘The State of the World’s Human Rights (2008),’ AI Index: POL 10/001/2008, pp 4, 7, 8, 9, 51, 54, 70, 71, 80, 81, 87, 90, 91, 112, 127, 129, 144, 145, 160, 162, 163, 205, 221, 236, 271, 308.

\textsuperscript{198} United Nations, ‘Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict,’ Doc S/1999/937 of 8 September 1999, para 18. See also United Nations, ‘Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict,’ Doc S/2002/1300 of 26 November 2002, para 31.

\textsuperscript{199} UNGA/CONF.157/23 of 12 July 1993, para 28.

\textsuperscript{200} United Nations, ‘Review and Appraisal of the Implementation of the Beijing Platform for Action: Report of the Secretary-General, Doc E/CN.6/2000/PC/2 of 19 January 2000, para 328; United Nations, ‘Report of the United Nations Development Fund for Women on the Elimination of Violence against Women’: Note by the Secretary-General, Doc E/CN.6/2004/8–E/CN.4/2004/117 of 19 January 2004, paras 6 and 17; United Nations, ‘Women’s Equal Participation in Conflict Prevention, Management and Conflict Resolution and in Post-Conflict Peace-Building’: Report of the Secretary-General, Doc E/CN.6/2004/10 of 22 December 2003, para 19; United Nations, ‘Systematic Rape, Sexual Slavery and
Judicial findings also exist in respect of this phenomenon. The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, among other international criminal courts, have found conclusively in many cases that acts of sexual violence were committed against women as part of the cataclysmic events that led to the establishment of those international tribunals in their respective domains. A sampling of the relevant judgments of these international courts are Akayesu,201 Musema,202 Semanza,203 Kajelijeli,204 Gacumbitsi205 and Muhimana206 at the ICTR; Čelebići,207 Furundžija,208 and Kunara209 at the ICTY; Brima at the Special Court for Sierra Leone.210

It might also be noted that in his memoir, War as I Knew It, General George Patton recalled a discussion he had with the Grand Vizier of Morocco during World War II. As the General put it: ‘I then told him that, in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have the details as early as possible so that the offenders could be properly hanged.’211 It is noted that not only did the General acknowledge rape of women as an incidence of war, but that this is ‘unquestionably’ the case.

Slavery like Practices during Armed Conflict: Report of the High Commissioner for Human Rights, Doc E/CN.4/Sub.2/2000/20 of 27 June 2000, generally, especially para 20; United Nations, ‘Systematic Rape, Sexual Slavery and Slavery like Practices during Armed Conflict’: Final report submitted by Ms Gay J McDougall, Special Rapporteur Doc E/CN.4/Sub.2/1998/13 of 22 June 1998, paras 7 and 9; United Nations, ‘Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference,’ Doc A/CONF.189/PC.3/5 of 27 July 2001, paras 4, 14, 15, 29 and 117 et seq; UNICEF, ‘Armed Conflict’, SOURCE: http://www.unicef.org/protection/index_armedconflict.html; Council of Europe (Parliamentary Assembly), Resolution 1212 (2000): Rape in Armed Conflict, para 7.

201 Prosecutor v Akayesu, supra.
202 Prosecutor v Musema (Judgment and Sentence) 27 January 2000 [ICTR Trial Chamber]. The conviction for rape was reversed on appeal on grounds of insufficient evidence of the personal involvement of the accused in the rape: Musema v Prosecutor (Judgment) 16 November 2001 [ICTR Appeals Chamber].
203 Prosecutor v Semanza (Judgment and Sentence) 15 May 2003 [ICTR Trial Chamber].
204 Prosecutor v Kajelijeli, supra.
205 Prosecutor v Gacumbitsi (Judgment and Sentence) 17 June 2004 [ICTR Trial Chamber].
206 Prosecutor v Muhimana (Judgment and Sentence) 28 April 2005 [ICTR Trial Chamber].
207 Prosecutor v Delalić & Ors (Judgment) 16 November 1998 [ICTY Trial Chamber].
208 Prosecutor v Furundžija (Judgment) 10 December 1998 [ICTY Trial Chamber].
209 Prosecutor v Kunara & Ors (Judgment) 22 February 2001 [ICTY Trial Chamber].
210 Prosecutor v Brima & Ors (Judgment) 20 June 2007 [SCSL Trial Chamber II]; and Prosecutor v Brima & Ors (Judgment) 22 February 2008, reasons issued on 3 March 2008 [SCSL Appeals Chamber].
211 George S Patton Jr, War as I Knew It (with an Introduction by Rick Atkinson) [Boston & New York: Houghton Mifflin Company, 1995] pp 23–24.
This fact of sexual violence during war, as a fact of life for women caught up in armed conflicts, is also virtually dramatised in another classic play on the military exploits of a legendary soldier of a much earlier period. In Shakespeare’s *Henry V*, the warrior king unleashes a torrent of threats to the inhabitants and mayor of Harfleur, in order to achieve the surrender of the city. King Henry thunders thus: ‘And the flesh’d soldier, rough and hard of heart,/ In liberty of bloody hand shall range/ With conscience wide as hell, mowing like grass/ Your fresh-fair virgins …/ …/ What is’t to me, when you yourselves are cause,/ If your pure maidens fall into the hand/ Of hot and forcing violation?’212

We are not told in the play that these threats are carried out in the end. But in this fearsome speech, King Henry, like General Patton centuries later, is clearly noting the propensity of soldiers not only to wreak death and destruction in their path, but to commit sexual violence against women as part of the universal mayhem unleashed by war. Against this, Henry warns the inhabitants of Harfleur that the only barrier standing between them and such tribulation is his ability to rein in his men—a condition better achieved by converting the prevailing lull in battle into a permanent armistice if there is a surrender of the city before he releases the pandemonium of war again. But what was rendered as an averted fate for the inhabitants of Harfleur in a drama had been a non-fiction for the inhabitants of Cremona. In what appears as one of the earliest accounts of atrocities in armed conflicts, Cornelius Tacitus recounts the horror of the Second Battle of Cremona in October 69 AD. As Tacitus described the events:

> [F]orty thousand soldiers burst into the town with a yet larger crowd of servants and sutlers, even more depraved than the soldiers in their readiness for cruelty and lust. Without any respect for age or for authority they added rape to murder and murder to rape. Aged men and decrepit old women, who were worthless as booty, were hustled off to make sport for them. If some grown girl or a handsome youth fell into their clutches, they would be torn to pieces in the struggle for possession, while the plunderers were left to cut each other’s throats. Whoever carried off money or any of the solid gold offerings in the temples was liable to be cut to pieces, if he met another stronger than himself. Some disdaining easy finds, hunted for hidden hoards, and dug out buried treasure, flogging and torturing the householders. They held torches in their hands and, having once secured their prize, would fling them wantonly into an empty house or some dismantled temple. Composed as the army was of citizens, allies, and foreign troops, differing widely in language and customs, the objects of the soldiers’ greed differed also. But while their views of what was right might vary, they all agreed in thinking nothing wrong.’213

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212 Shakespeare, *Henry V*, Act 3, Scene 3, 11–36.
213 Cornelius Tacitus, *The Histories* vol 2, translated by W Hamilton Fyfe [Oxford: Clarendon Press, 1912] pp 41–42.
As with men’s resistance to the exercise of women’s peacemaking role during conflicts (seen in Lysistrata), men’s subjection of women to sexual violence during conflict has remained a matter of grave concern in the annals of armed conflicts.

**Aetiology of the High Frequency of Sexual Violence during Armed Conflicts**

In addition to inquiries into explanations for the prevalence of evil during armed conflicts as a general inquiry, there have also been inquiries into the reasons for the prevalence and recurrence of sexual violence during armed conflicts. Some of the reasons discerned from research suggest that the prevalence of sexual violence during armed conflicts may be broadly explained as follows: that the sexual violence during armed conflicts is an automatic feature of the process; sexual violence is a crime of opportunity during wars; and that sexual violence can be a crime of deliberate policy.

**The Theory of Inevitability of Sexual Violence during Armed Conflicts**

Part of the explanations offered for the prevalence of sexual violence during armed conflicts is that armed conflicts do mysterious things to the psyche of male fighters, causing them to inflict sexual violence upon women. As noted earlier, in spite of his most diligent efforts, General Patton conceded that ‘there would unquestionably be some raping’ during World War II.\(^\text{214}\) The explanation is offered in comments such as, ‘You can’t stimulate and let loose the animal in man and then expect to be able to cage it up again at a moment’s notice’\(^\text{215}\) or that war triggers ‘the force in human nature which may make a soldier of any nationality bayonet an old man or rape a woman.’\(^\text{216}\) [Emphasis added.] Anthropological views exist to the effect that it is possible to predict the rate of sexual violence in a given society by reviewing their propensity for war.\(^\text{217}\)

J Glenn Gray observes that war ‘offers [soldiers] an opportunity to return to nature and to look upon every member of the opposite sex as a possible conquest, to be wooed or forced.’\(^\text{218}\) According to him, there is ‘enough of a rapist in every man to give him insight into the grossest manifestations of sexual passion. Hence, it is presumptuous of any of us to scorn the practitioners of this lowest kind of passion as beings with whom we have no kinship.’\(^\text{219}\) In his view, sex thus ‘wooed...
or forced\textsuperscript{220} is ‘intimately associated with the impersonal violence of war.’\textsuperscript{221} Gray’s ruminations on the subject take him scouring the realms of Greek mythology for serviceable analogy. In Gray’s hypothesis, there is an inevitable attraction between Ares and Aphrodite—the god of war and goddess of love, respectively—that explains why men rape. According to him, ‘[c]opulation under such circumstances is an act of aggression’ in which ‘the girl is the victim and her conquest the victor’s triumph. Preliminary resistance on her part always increases his satisfaction, since victory is more intoxicating the harder the winning may be.’\textsuperscript{222}

To make good his plea against scorn for the perpetrators of sexual predation, Gray contends that what is at play here is not animalistic behaviour but quite the opposite:

\begin{quote}
It seems hardly necessary to remark that such degradation is not possible for other than the human species. The animal cannot transform his mate into an object because it does not regard itself as a subject. A human being who thus deserts his humanity does not become like an animal, but, in the expressive German term, an Untier (an “unanimal”), in an exact sense, a creature without parallel in nature.\textsuperscript{223}
\end{quote}

It would have been possible to suggest that, according to this view, the man who rapes during war might be viewed as even worse than an animal. But that would be the wrong interpretation of Grey’s view, given his earlier rebuke of those inclined to dissociate themselves from the martial rapist.

Gray’s views, thus presented, require closer examination. For they compel a dissenting view. It is granted that, in terms of biological equipment, man is pre-disposed towards the sexual atavism of which Gray wrote. This is considering his possession of the phallus, the testosterone that powers its system, and a natural endowment of superior brute strength, as compared to woman. However, when a strong sexual desire is excited at actionable levels, what must separate behaviour of the modern man from the baser animal instinct—or worse—to take what can be taken immediately in satisfaction of a strong desire becomes the highly valued, civilised qualities of self-control and discipline. Hence, it is not correct of Gray to discourage scorn on those who succumb to the base animal instinct, the expression of which results in physical and emotional harm—‘evil’ as we know it—to

\textsuperscript{220} Gray, supra, p 63.
\textsuperscript{221} Ibid, p 66.
\textsuperscript{222} Loc cit.
\textsuperscript{223} Ibid, p 67.
others, just because the average human male is able to say, ‘But for the grace of God, there go I.’

Glenn Gray was not the average soldier. He was a doctor of philosophy when he was serving as an intelligence officer during World War II, having received his PhD from Columbia on the same day that he received his draft papers. One could see how his subtle soul would endeavour hard in good faith to cling to affinity with his coarser comrades-at-arms who abused the idea of sex in their language and behaviour. Gray’s _bona fides_, however, comes uncomfortably close to sophistry when he objects to the likening to an animal someone who has abandoned his humanity and behaved like an animal. His objection is merely grounded upon the fact that the human being in question is quite capable of exhibiting, at convenient moments, the cherished traits that are beyond the capacity of mere animals. But this objection is unpersuasive. The point is not to say with any degree of seriousness that the human being _is_ an animal, for that would diminish his culpable mind. The point rather is that in failing to bring to bear the faculties of control and discipline against his sexual urge in any carnal intercourse with a non-consenting woman, he did allow himself to behave _like_ an animal; thus, deserving of scorn. Interestingly, even Gray found it hard to remain consistent with his own objection. For, on the very next page, in his effort to liken war to sexual predation, Gray could not avoid describing the predatory male warrior as a ‘dangerous beast of prey’ outside of his humanity:

> It would be folly, I believe, to minimise the similarity between war and this gross form of love. Observations of others and being honest about our own sensations must convince us that sexual passion in isolation and the lust for battle are closely akin. Such sexual passion and war have been married from the beginning, and there is no cause to speak of an illicit relationship. To be sure, the sexual partner is not actually destroyed in the encounter, merely overthrown. And the psychological aftereffects of sexual lust are different from those of battle lusts. These differences, however, do not alter the fact that the passions have a common source and affect their victims in the same way while they are in their grip. We should not forget, either, that sometimes the consequences are not different, after all. Sexual lust often leads to murder, and in wartime, particularly, the same person often suffers rape and murder. Both reveal man as a berserker, outside of his humanity, a _dangerous beast of prey_.

224 _Ibid_, p 68.

Thus, any level of scorn is perfectly deserving of the man who stepped ‘outside his humanity’ to behave like ‘a dangerous beast of prey’ resulting in the evil of rape, let alone compounded by the murder, of his victim.

While the seriousness of the subject matter under discussion does not commend reference to _Fantasia_ as a guiding authority, it is still possible to question Gray’s resort to Greek mythology, even at the level of the myth in question. Here, the case is easily made that Gray’s analogy to the legend of Ares and Aphrodite is...
quite simply flawed. Aphrodite was the swinging goddess of pleasure—‘a champion seducer in her own right’—who fornicated with practically half the gods on Mount Olympus, and mortal men, too; although she was married (albeit unhappily) to Hephaistos the crippled god of blacksmiths. Granted, the most famous of her lovers was Ares the warrior god, her one true love, whom she also drove to distraction with jealousy. It must then follow that her copulations with Ares were consensual on her part. She had an affair with him. Such consensual relationships between human soldiers of our own world and age are not unheard of—some women do feel attraction to male soldiers, even on the ‘enemy’ side. Even Gray recognises this in his compelling reflections. But what the story of Ares and Aphrodite may not readily bear out or legitimise in addition is the proposition that it is—or should be—an understandable norm, in terms of the natural order of things, that soldiers will rape women who say ‘No’ to sexual advances by soldiers.

On a more serious note, the theory that sexual violence is an ‘inevitable’ part of armed conflicts must not be permitted a foothold in the consciousness of the modern society, if the objective is to excuse or mitigate its essence and nature as evil. There is much more that can be said to discredit the proposition. It suffices, however, to point out that while there is a very high incidence of sexual violence during armed conflicts, not all soldiers rape—indeed there is no evidence to suggest that a majority of them do. That alone is enough to rebut the hypothesis of inevitability of sexual violence during armed conflicts.

**An Evolutionary Theory of Rape**

J Glenn Gray’s hypothesis that there is ‘enough of a rapist in every man to give him insight into the grossest manifestations of sexual passion’ has recently been given scientific validation. In their book, *A Natural History of Rape: Biological Bases of Sexual Coercion*, Randy Thornhill (a professor of biology at the University of New Mexico) and Craig Palmer (a professor of anthropology at the University of Colorado), offer a quite bold explanation of the phenomenon of rape, from the perspective of evolutionary psychology. According to them, the phenomenon of rape of women in modern society is ultimately a matter of sex differences between men and women, and the resultant different adaptations over many thousands of generations past.

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225 Brownmiller, supra, p 283.

226 See, for instance, Aaron J Atsma, Theoi Project: Greek Mythologies, ‘Aphrodite Loves 1’ at <www.theoi.com/Olympios/AphroditeLoves.html>

227 See Aaron J Atsma, Theoi Project: Greek Mythologies, ‘Aphrodite Loves 2’ at <www.theoi.com/Olympios/AphroditeLoves2.html>

228 See Gray, supra, pp 61–62 and 74–78.

229 R Thornhill and C T Palmer, *A Natural History of Rape: Biological Bases of Sexual Coercion* [Cambridge, Mass: MIT Press, 2000.]
An understanding of this theory begins perhaps with an understanding of the same Darwinian theory of natural selection that readily explains, as with most aspects of modern life, the differences in the morphology of men and women in the first place. The authors naturally invoke the authority of the renowned biologist, Theodosius Dobzhansky’s dictum: ‘Nothing in biology makes sense except in light of evolution.’

For instance, cite Thornhill and Palmer, the modern woman has functional breasts, compared to man, out of her evolved need to nurse her babies. Modern man has a stronger upper body out of his evolved need for physical competition with other men for sexual mate(s), and the physical protection of his mate(s) and offspring from other men and threats.

Thornhill and Palmer argue that although these evolutionary explanations of the physical differences indicated above are largely uncontroversial, what is not readily understood is that the differences also involve evolved behavioural differences between the sexes. The functional breasts, for instance, resulted from the predisposition of ancestral mothers to place their babies against the breasts and permit suckling. And the stronger upper body in men resulted from the development of the relevant muscles, due to the actions of pushing and shoving and grabbing, such as were entailed in the physical competition. Additionally, the evolution of these behavioural patterns implies both cognitive and emotional psychological adaptations that guided those behaviours. It is not scientifically tenable, then, to acknowledge the physical adaptation in these sex differences without acknowledging the attendant adaptation in behavioural and psychological differences.

Those are some of the points of departure for the evolutionary theory of rape. According to Thornhill and Palmer, ‘[e]volutionary theory applies to rape, as it does to other areas of human affairs, on both logical and evidential grounds. There is no legitimate scientific reason not to apply evolutionary or ultimate hypotheses to rape. The only scientific question concerns how to apply theoretical biology to a particular aspect of human endeavours. Evolutionary history would be applicable to human rape even if it were explicable only as a trait that exists as a result of evolutionarily novel circumstances faced by modern humans. And if such were the case, one would still want to know why men’s psychological adaptations are designed in a way that yields rape behaviour in the novel circumstances.’

The evolutionary theory of rape, as thus offered, rests on either of two competing and alternative hypotheses: rape as an evolutionary adaptation or rape as an evolutionary by-product of another evolutionary adaptation. Thornhill and Palmer variously favour the competing hypotheses, and do not agree with each other that the evidence conclusively supports the one over the other. More studies, they concede, will be required to determine which of the two hypotheses more

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230 Ibid, p 55. See also T Dobzhansky, et al, Evolution [San Francisco: W H Freeman, 1977].
231 Ibid, p 32.
232 Randy Thornhill and Craig T Palmer, ibid, p 55.
233 Ibid, pp 59–60.
accurately explains the phenomenon of rape in human society. What they do jointly insist upon is that ‘the ultimate causes of rape are clearly to be found in the distinctive evolution of male and female sexuality. The evidence demonstrates that rape has evolved as a response to the evolved psychological mechanisms regulating female sexuality, which enabled women to discriminate among potential sex partners.

The adaptation hypothesis is all about reproductive success and the primordial contest among men to prevail in it. Rape ‘may be an adaptation that was directly favoured by selection because it increased male reproductive success by way of increasing mate number. That is, there may be psychological mechanisms designed specifically to influence males to rape in ways that would have produced a net reproductive benefit in the past.’

The basic framework of the evolutionary theory of rape, particularly from the perspective of adaptation, is that men must compete among themselves, in order to be selected by the more discriminating women. The ability to prevail in this competition determines the relative reproductive success of men. There are many factors that determine which men are more successful in this competition to be chosen by women. They include resource control, social status, symmetry of physical features, genetic quality, etc. But victory in this competition to be chosen by women is not the only way to gain sexual access to females. And this is where rape enters the calculation. By raping, the men are able to circumvent the female choice. Rape was thus an evolutionary strategy adapted to overcome obstacles to individual reproductive success. This male dilemma is explained as follows:

In ancestral populations of many species, including humans, the difficulty of obtaining the parental investment of a choosy member of the other sex was a prominent obstacle to reproductive success for individuals of the sex with the lesser parental investment. That is, the difficulty of gaining sexual access to choosy females was a major obstacle to reproductive success for males. Owing to the significance of this obstacle throughout evolutionary history, there would have been strong and effective selection pressures favouring traits in males that increased their access to mates.

In their alternative hypothesis, the by-product hypothesis, Thornhill and Palmer contend that rape ‘may only be a product of other psychological adaptations, especially those that function to produce the sexual desires of males for multiple partners without commitment. In this case, there would not be any psychological

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234 Ibid, p 61.
235 Ibid, p 84.
236 Ibid, p 60.
237 Ibid, p 52.
238 Ibid, p 53.
mechanism designed specifically to influence males to rape in ways that would have produced a net reproductive benefit in the past.\textsuperscript{239}

The legendary American criminal lawyer, Clarence Darrow, had ventured a congruent supposition many years ago. According to him:

Nature, in her determination to preserve the species, has planted sex hunger very deep in the constitution of man. The fact that it is necessary for the preservation of life, and that Nature is always eliminating those whose sex hunger is not strong enough to preserve the race, has overweighted man and perhaps all animal life with this hunger. At least it has endowed many men with instincts too powerful for the conventions and the laws that hedge him about.\textsuperscript{240}

Darrow’s hypothesising ostensibly received a more sophisticated scientific treatment in the work of Thornhill and Palmer. Upon its publication in 2000, \textit{A Natural History of Rape} promptly provoked an avalanche of controversy, with critics\textsuperscript{241} and supporters\textsuperscript{242} aligned on both sides. The criticism provoked by Thornhill and Palmer is entirely understandable. Quite apart from the scientific merits of the theory, in view of the hypotheses offered and the evidence supporting them, the deterministic flavour of the evolutionary theory would offend some important constituencies that have tirelessly engaged in social engineering against rape. Two particular reasons for their resentment will be as follows. First, it undercuts, in a very direct way, the feminist-inspired argument that rape has little to do with sex but everything to do with men’s strategic domination, power and control over women. Thornhill and Palmer make no apology for this concern. Indeed, they flatly dismiss, as mere ideology, the theory of rape as a strategy calculated to dominate women.\textsuperscript{243} It is beyond the scope of the present work to engage in an assessment of the validity of the claim of either side to this particular debate.

As the chief aim of the present work is to explore the possibility of diminishing the incidence of sexual violence in armed conflicts—whatever its cause(s)—using the avenue of international law, it is eminently possible to explore that possibility, without engaging in the assessment of the relative merits of the debate as to whether or not sexual violence is an instrument of domination of women by men.

\textsuperscript{239} Ibid, p 60.
\textsuperscript{240} C S Darrow, \textit{Crime: Its Cause and Treatment} [New York: Kaplan Publishing, 2009; originally published: New York: Thomas Y Crowell, 1922], 77. See also Bourke, supra, p 99.
\textsuperscript{241} See, for instance, C B Travis (ed), \textit{Evolution, Gender and Rape} [Cambridge, Mass: MIT Press, 2003].
\textsuperscript{242} See, for instance, T K Shackelford and G J LeBlanc, ‘Courageous, Compassionate and Scholarly: An Evolutionary Analysis of Rape and Male Sexual Coercion’ in \textit{The Journal of Sex Research} vol 38 No 1 (2001), pp 81–83.
\textsuperscript{243} See Thornhill and Palmer, supra, generally at chapters 5 and 6.
The second cause for concern is the feared danger that the evolutionary theory of rape would provide a new legal defense to rapists,\(^{244}\) by giving legal legitimacy to the ‘boys-will-be-boys’ aphorism. Thornhill and Palmer do defend themselves against this concern. According to them, the concern is born out of what they dismiss as the twin concepts of ‘naturalistic fallacy’ and ‘myth of genetic determinism’, which they protest as corrupted understandings or representations of evolutionary theories. Genetic determinism is the assumption that behaviour is fixed by genes and cannot be altered except by altering the genes in question;\(^{245}\) while naturalistic fallacy is the view that every offensive behaviour is pardonable or tolerable if it is attributable to nature. Thornhill and Palmer do not accept these views.\(^{246}\) For instance, while they do not propose a specific programme for increasing the cost associated with rape; [they] simply suggest that social engineers who wish to get realistic about rape [should] pursue a programme of punishment that is informed by what is known about evolution.\(^{247}\) In the end, they left it to society to decide appropriate punishment for rape. As they put it:

> Voters must decide what is suitable punishment for rape. Science has nothing to say about what is right or wrong in the ethical sense. Biology provides understanding, not justification, of human behaviour. Biological knowledge is useful to a democratic society to the extent that it can be used to achieve goals that people decide are appropriate.\(^{248}\)

In fairness to Thornhill and Palmer, criminal law forbids much that is generally understood as conducts or impulses attributable to human nature or evolutionary conditioning. Homicide, for example, is not always excused by the fact that it was the instinct of self-preservation that caused the accused to kill the victim. Nor does the natural heat of passion provide adequate defence for the cuckold who murdered his wife or her lover.

In order to succeed as a defence, the evolutionary theory of rape would need to be juridically received within the realms of the defence of necessity; in the sense of the existence of an extreme pressure of circumstances that overwhelmed the will to resist the conduct in question. The difficulty of clearing this hurdle is perhaps illustrated by the fact that the defence of necessity was denied to defendants who were charged with possession of marijuana for purposes of pain management, on grounds that the choice facing the defendants was not (a) absence of pain upon consumption of marijuana or (b) severe pain without consumption of marijuana. Given the availability of other pain management medication, the

\(^{244}\) See, for instance, M Kimmel, ‘An Unnatural History of Rape,’ in C B Travis (ed), *Evolution, Gender and Rape* [Cambridge, Mass: MIT Press, 2003], 221 at p 232.

\(^{245}\) See Thornhill and Palmer, *supra*, pp 110–111.

\(^{246}\) *Ibid*, pp 107–110.

\(^{247}\) *Ibid*, p 165.

\(^{248}\) *Ibid*, p 199.
defendants’ choice rather was (a) absence of pain but presence of minimal side-effects upon consumption of marijuana or (b) absence of pain but presence of severe side-effects if marijuana was not consumed. In the circumstance, held the court, the defence of necessity was not available.249

It will thus be extremely hard to find the existence of an extreme pressure of circumstances that could reasonably be accepted as capable of overwhelming the will of a man to resist raping a woman, out of either an evolutionary impulse to have casual sex (according to the ‘by-product’ hypothesis of the evolutionary theory of rape) or reproductive sex (according to the ‘adaptation’ hypothesis). Hence, the criticism of Thornhill and Palmer may not be as troubling as first appears.

What then is the relevance of the evolutionary theory of rape to international criminal law? Some have argued that the logical connection is weak at best. One critic expressed this view in the following way:

The human sociobiological approach to war rape attests to logical difficulties of defining rape under all circumstances as related to reproductive success. The military leaders in charge of organized rape as an ‘entitlement’ for the soldiers are not concerned with the result of rapes, in terms of increasing the population under their control.250

This misses the point of the evolutionary theory of rape. An evolved trait is not a trait developed by an individual at the conscious level, but one that is shared among the species over hundreds of thousands of generations, with the individual having little choice in the matter. According to evolutionary theorists, women evolved, not chose, to have breasts. So, too, does the typical man have little choice in his possession of stronger upper body, compared to the average woman. Similarly, the evolved psychological predisposition is not a cognitive trait that drives the choice of the individual at all times.251 Hence, Thornhill and Palmer’s theory is not easily defeated by the fact that the military superior or subordinate implicated in war time rape may not have consciously made a decision to spread, increase or perpetuate his own gene pool in virtue of the conduct.

For my purposes, I find the evolutionary theory of rape as one that may not be easily ignored in any meaningful enterprise to construct a wholesome doctrine of superior responsibility for war-time rapes. It plays into the range of explanation for why sexual violence is committed so rampantly during wars. The evolutionary theory of rape commends close attention to Glenn Gray’s observation that war ‘offers [soldiers] an opportunity to return to nature and look upon every member

249 Quayle and Others v R; Attorney-General’s Reference (No 2 of 2004) [2005] EWCA Crim 1415 [Court of Appeal of England and Wales.]

250 E Tobach and R Reed, ‘Understanding Rape’, in C B Travis (ed), Evolution, Gender and Rape, supra, supra, at p 130.

251 See S Kanazawa and M Still, ‘Why Men Commit Crimes (And Why They Desist)’, Sociological Theory 18.3 (November 2000), p 440.
of the opposite sex as a possible conquest, to be wooed or forced.’ This is a view not to be dismissed lightly. The evolutionary theory of rape, from this perspective, does not exclude any of the other social-science based theories. As will be seen in Chapter 2, the evolutionary theory of rape should heighten, rather than diminish, the duty upon military hierarchies to put efficient systems in place to prevent rapes during war, having trained, armed and deployed men whom they ought to have known or suspected as having evolved to rape women at any available opportunity. Failure to put such systems in place should result in criminal responsibility on the part of superiors for the resulting rapes.

The Theory of Opportunism of Sexual Violence during Armed Conflicts

Another dominant explanation of the prevalence of sexual violence during armed conflicts is opportunism on the part of the individual soldier. The theory of individualistic opportunism proceeds, for its part, from the more modest premise that sexual violence is a crime of opportunity that is frequently committed, during conflict, by arms-bearing men, indulging their libidos, under the cover of the chaotic circumstances of armed conflict. As Brownmiller put the point, ‘the original impulse to rape does not need a sophisticated political motivation beyond a general disregard for the bodily integrity of women.’

Such prosaic explanations for sexual violence are borne out in the following excerpt in a BBC report about sexual violence in the Congolese armed conflict:

[Emmanuel] fought with the CNDP [Congrès national pour la défense du people] rebel group. [He] says that they raped to show their anger with the authorities for neglecting them:

‘Soldiers or rebels usually rape because we stay in isolated places and we don’t get our pay - even if it can come, it doesn’t come on time.
‘After living for a long time in the forest, you don’t see women and so if one woman shows up then all of us, we profit.’

This manner of sexual predation is not limited to rebel groups. For the same BBC report presents a similar scenario on the part of government troops.

A former government soldier who is serving 20 years in Goma Central Prison says he attacked the first woman he came across after sneaking away from his post:

‘I asked her to help me. I had this urge to have sex. She didn’t want to have sex with me. But I forced her. I felt that if I didn’t have sex then I would get sick.

252 Brownmiller, supra, p 37.
253 <http://news.bbc.co.uk/2/hi/africa/8677637.stm>.
‘She left without crying but as she was leaving she said she would denounce me. I regret it now because I am in prison.’

The power of military weapons of violence at their disposal, and, the superiority of their natural physical prowess or the specialised combat training they would have received enable these male military sexual predators to realize this carnal opportunity more easily. The opportunity itself is afforded when the fighting men are brought in close proximity with the civilian population.

Consistent with the theory of opportunism is the fact that the typology of victimisation is not limited to women on the opposing side of the gulf of belligerency or women in occupied territories. Women of the own-side also do fall victims. It has been suggested, notably, that one-third of US female military personnel suffer sexual violence in the hands of their male comrades, even in theatres of war abroad.

The theory of opportunism is further enhanced by the victimisation of neutral females, such as aid workers and humanitarian personnel. That is to say, female personnel of the United Nations and those of NGOs do also fall victims to the crime. For instance, in its Resolution of 2003, on safety and security of humanitarian personnel and protection of United Nations personnel, the UN General Assembly expressed grave concerns at the acts of violence in many parts of the world against humanitarian personnel and the United Nations and its associated personnel, in particular, deliberate attacks, which are in violation of international humanitarian law as well as other international law that may be applicable, …”. Following that expression of concern came a strong condemnation of acts of murder and other forms of violence, rape and sexual assault, intimidation, armed robbery, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed, as well as attacks on humanitarian convoys and acts of destruction and looting of their property.

254 Ibid.
255 See United Nations, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, supra.
256 See Bourke, supra, p 359.
257 See Col Ann Wright (rtd), ‘Sexual Assault in the Military: a DoD Cover-Up?, Common Dreams at www.commondreams.org/archive/2008/08/04/10786/; Jeffrey Smith, ‘Sexual Assaults in Army on Rise’, Washington Post at <www.washingtonpost.com/wp-dyn/articles/A10959-2004Jun2.html>; Michele Norris, ‘Reported Cases of Sexual Assault in Military Rise’, National Public Radio at www.npr.org/templates/story/story.php?storyId=15005484; Gloria Hillard, ‘Scars of War Run Deep for Female Vets’, National Public Radio at <www.npr.org/templates/story/story.php?storyId=15005484#14921214; ‘Sexual Assault in Military “jaw dropping”’, CNN at www.edition.cnn.com/2008/US/07/31/military.sexabuse/>.
258 Doc A/58/L.47 of 16 December 2003.
259 Ibid.
That these acts of sexual violence are not limited to such conducts committed against enemy females underscores the rampancy of these acts. All this evidence begs the question (the subject of this study) of how well international law is laid down and construed to protect women—or contain the evil of sexual violence—during armed conflicts.

The Theory of Deliberate Policy of Sexual Violence during Armed Conflicts

In addition to the theories of inevitability and opportunism of sexual violence during armed conflicts, is the far more sinister theory of policy as explaining the rampancy of sexual violence during armed conflicts. It has now been widely recognized that sexual violence during armed conflicts often results from a motive of deliberate policy. In the following section, a review will be conducted of the practices traditionally articulated as policy oriented sexual violence, as well as other policies not so often articulated clearly as such.

Sexual Violence Traditionally Articulated as Policy

A number of explanations have been offered to explain the incidence of sexual violence as a tactical weapon in armed conflicts. First, Radhika Coomaraswamy (formerly UN Special Rapporteur on Violence against Women) has observed that in many societies sexual violence is seen as a crime of honour committed against the victim's community and not the victim as such.260 It is thus a factor of humiliation to rape the womenfolk of the enemy State, ethnic group, community or faction. One poignant story related by Coomaraswamy involves an event that occurred during the India-Pakistan partition riots. It concerned the fate of a wealthy Hindu man and his family. He had six daughters. One day, his Muslim neighbours, with whom he had hitherto good relations, came to him. They asked him to give his daughters in marriage to their sons, for the sake of continued good relations and the safety of his family. In seeming agreement, he kept nodding as they spoke. That evening, he assembled all his family together and decapitated each of them with his sword—thirteen people in all. He then lit their funeral pyre and climbed onto the roof of his house and cried, ‘Bring on the marriage parties …’; following which he committed suicide.261 To the man, it was evidently an act of humiliation worse than death to live to see his beautiful daughters in sexual relations with people he considered as unworthy or as his enemies.

Second, this humiliation theory has an added angle, if sexual violence is conceived or perceived as an act of domination of the enemy. In her classic work, Against our Will: Men, Women and Rape, Brownmiller explores the effect of rape as

260 Radhika Coomaraswamy, ‘A Question of Honour: Women, Ethnicity and Armed Conflict’ (1999) mimeograph. Available at <http://www.sacw.net/Wmov/RCoomaraswamyOnHonour.html>

261 Ibid, citing K Bhasin and R Menon, Borders and Boundaries: Women in India’s Partition [New Brunswick, N J: Rutgers University Press, 1998] p 48.
a sexual *coup de grace* that ‘destroys all remaining illusions of power and property for the men of the defeated side.’ As such, sexual violence against the women of the group becomes the final act of emasculation and ultimate abasement of the men who are supposed to protect the women of their group. Hence, to violate the women is also to rape the souls of their men; in veritable ‘devastations of the soul’, as Hillis put it.

Third, in a phenomenon recorded during the conflict in the former Yugoslavia, Bosnian women were held captive by Serbs and repeatedly raped and forcibly impregnated. They were then kept in captivity until a point past a period of possible safe abortion, and then released. Some commentators have found absurd the sense behind the thinking that the population of a group could be negatively affected by the fact of outsiders forcibly impregnating the women of the group. Vetlesen, for instance, registered his scepticism in the following words:

> Unfortunately, as observed by Allen and other commentators who have been in contact with the rape victims, one of the most tragic results of this policy is that the victims, if they survive, often do so believing the Serb illogic. At some level, they begin to subscribe to the very reasoning that seeks to erase their cultural identity: they are convinced that the pregnancy they carry will result in the birth of a Chetnik, a Serb, a child who will bear none of his mother’s characteristics. It is as though the things told them by their rapists have borne fruit, have become a self-fulfilling prophecy—namely, that the raped woman would in future give birth to a Serb child.

Although charitably disposed towards the victims, the trouble with observations such as the foregoing is that their evident good intentions might get undone by an instinctual resistance to the very same paternalism that Vetlesen himself has eschewed elsewhere in his book. The apparent incredulity being decried might be readily explained by the shared cultural codes of the concerned groups. In a society in which the lineage of a child follows the biological father, such acts of sexual violence were clearly intended to force women to bear children that genetically belong to their enemies. Evidently, this was considered to be the case not only by the Serbian assailants but also by their Bosnian victims of the transgression in question. If this transgression reveals how they have arranged the codes that ordinarily guide their ways of life, then their continued interpretation and

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262 Brownmiller, *supra*, 38.
263 Newell Dwight Hillis, *German Atrocities: Their Nature and Philosophy* [New York: Fleming H Revell, 1918] p 26. See also Brownmiller, *supra*, p 45 together with pp 38–40.
264 Coomaraswamy, *supra*. See also Vetlesen, *supra*, pp 199–200.
265 See Vetlesen, *supra*, pp 201–202.
266 *Ibid*, p 29.
267 *Ibid*, pp 201–202.
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Application of those codes may not be so easily abjured, even in the abhorrent circumstances under consideration. An alternative explanation for the systematic forced impregnation might, of course, be the added factor of the enemy’s determination to brand humiliation, in an enduring way, into the social fabric and psyche of the subjugated group.

Fourth, another manner in which sexual violence gets used as a policy during armed conflicts is in the manner of an instrument of terror during armed conflicts. In this sense, it is used to intimidate belligerent opponents away from where they are not wanted, or to terrorise them into capitulation. In the context of some US soldiers aberrantly using raping and killing as a method of dissuading guerrilla fighters from American soldiers during the Vietnam war, particularly in the context of the My Lai, one US officer in 1969 described it as an ‘effective tactic.’ According to him, ‘If you scare people enough they will keep away from you’: although he did not say that he approved of it.268 During the conflict in the former Yugoslavia, Serbian forces did find a particular use for this tactic, as a method of ethnic cleansing. Bosnian women were raped in the presence of their relatives and communities, in order to force them to flee from their villages and towns and never to return.269 In a much earlier armed conflict, in 1746, King George’s troops led by the Duke of Cumberland effectively employed sundry brands of terror, including the rape of women, to tame Scottish Highlanders who ‘showed no enthusiasm for surrendering’ following the Battle of Culloden.270

Lt Col Grossman, a retired psychology professor at West Point, puts the matter quite simply thus: ‘There is a simple, horrifying, and obvious value in atrocity.’271 According to him, one of the most obvious and blatant benefits of atrocity is that it ‘quite simply scares the hell out of people. The raw horror and savagery of those who murder and abuse cause people to flee, hide, and defend themselves feebly, and often their victims respond with mute passivity.’ And this process, found to work well for criminals and outcasts, can work even better when institutionalized as policy by revolutionary organizations, armies, and governments.272 As will be seen in Chapter 5, sexual violence was a particular instrument of terror during the Sierra Leonean civil war.

Fifth, policy is also implicated when rape is used as an instrument of torture during interrogation. In one such incident reported by Coomaraswamy, in her former capacity as the UN Special Rapporteur for Violence against Women, she recounted the story of ‘N’ of East Timor. Indonesian soldiers had taken her from her home to a military post. They began interrogating her about the whereabouts of her husband. On the 16th day, they began to use force. They undressed her. One of them raped her, while the others watched and laughed. When they

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268 Bourke, supra, p 362.
269 See Vetlesen, supra, pp 197–198.
270 Brownmiller, supra, p 38.
271 Grossman, supra, p 208.
272 Ibid, p 207.
were done raping her, they applied electric shocks to her ears, nose, breasts and vagina. Bourke also captures the theme of targeting the sexual organs of victims as a method of torture employed by some American interrogators in Vietnam. According to an unnamed member of the 1st Air Calvary Division in Vietnam, ‘If you are looking for information, you seek out the most sensitive areas of their body. If you are out in the field, you basically want to degrade them more. And attacking their sexual organs would be more degrading than their arms or legs.’ Although the story recounted was given in the context of interrogation of men, it is clear that sexual assault on women was very much a part of the arsenal of interrogation methods employed by some troops during the Vietnam War. As Bourke’s research revealed:

According to one veteran from Vietnam, infantry training for Marine Corps included a class on interrogating POWs and villagers about ‘where they hide things. They stress over and over that a woman has more available places to hide things like maps or anything than a male. So it took about twenty minutes to cover where to search a male suspect, and about an hour on a female.’

Still on the methods of interrogation, it was reported by some Vietnam veterans that their search methods of the women included the practice of male soldiers, in some instances, using ‘their penises to probe the women to make sure they didn’t have anything hidden anywhere; and this was raping but it was done as searching.’ Furthermore, some American soldiers had threatened rapes of their female detainees under interrogation, sometimes using the occasional black interrogator as the bogeyman potential rapist, in hopes that the female victims would provide the needed information in order to avoid being raped by the black interrogator.

Sexual Violence Not Often Articulated as Policy—Systematic Connivance or Condonation

Although not often articulated in terms of policy, systematic connivance or condonation, by military or political hierarchy, of sexual violence are other emanations of sexual violence that eminently deserve clear categorisation as policy during war. Systematic condonation of sexual violence occurs when the military or political hierarchy systematically turns a blind eye to its troops’ commission of sexual violence or systematically avoid prosecution, notwithstanding legal proscrip-

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273 Coomaraswamy, supra. See also United Nations–Special Rapporteur for Violence against Women, ‘Report on Mission to Indonesia and East Timor’ (1999) Doc No E/CN.4/1999/68/Add.3.
274 Bourke, supra, p 362.
275 Ibid, p 367.
276 Ibid, pp 367–368.
277 Ibid, p 368.
tions against sexual violence. Such attitudes from the hierarchy certainly have the effect of encouraging impunity in soldiers who would rape women during war. Systematic connivance in sexual violence means tacit encouragement of troops to commit sexual violence. It is sufficiently bad, and no less evil, that condonation or connivance occurs at all, and not at a systematic level: but the presence of such attitudes in systematic patterns is what converts the evil to one of policy. In *Rape, Sex, Violence, History*, for instance, Bourke retells the story related by one Ed Murphy, a riflemen in the infamous 198th Infantry Brigade, Americal Division. He is reported as recalling that his platoon leader was a morally upright Mormon minister when he arrived in Vietnam. However, the platoon leader quickly ended up ‘condoning everything that was going on because it was part of a policy. … He would condone rapes. Not that he would do them, but he would just turn his head to them because who was he in a mass military policy.’

Systematic connivance or condonation is evident in the following suggestions of behaviours and attitudes found in the antecedents of certain militaries, notably the American military. First, it appears to be part of military orthodoxy that rape is a safety-valve for ‘pent-up aggressive feelings’ or resentment induced by war; and, despite official proclamations to the contrary, that it is ‘more satisfactory to have fighters express such pent-up feelings in the manner of ‘forcible rape against a conquered people than to turn the same feelings towards their officers.’

Theories offered to explain these pent-up feelings would include the obsession of men-at-arms with thoughts of women and sex, or the negativity that encumbers the average fighter’s mind.

The obsession theory is clearly articulated by Gray. Part of that articulation appears as follows:

> Anyone entering military service for the first time can only be astonished by soldiers' concentration upon the subject of women and, more especially, upon the sexual act. The most common word in the mouths of American soldiers has been the vulgar expression for sexual intercourse. This word does duty as adjective, adverb, verb, noun, and in any other form it can possibly be used, however inappropriate or ridiculous in application. Many soldiers seem hardly able to utter a sentence without using it at least once. Apparently they derive a vague satisfaction by invoking the word itself, habitual and thoughtless as its employment becomes. It must serve to recall fleeting memories or fond desires. At all events, its overuse indicates clearly a predominant interest for nearly all military men in wartime.

Evidently, the soldiers’ obsession with thoughts of women and the sexual act is not limited to merely mindless *vocalisation* of the ‘f’ word and all its derivatives

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278 *Ibid*, p 369.
279 *Ibid*, p 365.
280 Gray, *supra*, p 61.
at every available opportunity. The oral fixation with the word is equally matched by an obsessive compulsive predisposition toward the act itself at every available opportunity—if not with the consent of the women concerned, then by force. As Gray observes: ‘If we are honest, most of us who were civilian soldiers in recent wars will confess that we spent incomparably more time in service of Eros during our military careers than ever before or again in our lives. When we were in uniform almost any girl who was faintly attractive had an erotic appeal to us.’281 In soldiers fighting a war, an ‘unmistakable similarity’ has been observed between ‘eating and drinking, a devouring of the woman as object. Even the appetite seemed to recur with the same regularity as do hunger and thirst. To these soldiers it did not matter who the woman was they used to satisfy themselves.’282 Doubtless, all this thirst and hunger for women and sex must be slaked and assuaged somehow. And herein enters the idea of government-issue brothels, intended to limit rapes as well as to ‘insure efficiency of soldiering’.283 Needless to say, however, that the high frequency of rapes during armed conflicts attests to the inadequacy of military brothels to limit rapes practically or conceptually. Rapes are not practically limited, since straight-forward rapes continue to occur at high rates. And rapes are not conceptually limited, as some of the ‘comfort women’ working in those brothels are often victims of sexual exploitation284 or pragmatic decoys who volunteer

281  Loc cit.

282  Ibid, p 65.

283  Loc cit.

284  In The Warriors, Gray recalls watching hungry Italian women and children during World War II, ‘standing in February rains, holding crude cans with wire handles to collect leftover food from our mess.’ Generous GIs were all too glad to oblige. But that must not have been enough, as the story implied that scavenging the military garbage was resorted to in supplement to donation of the leftovers. Eventually, however, ‘higher headquarters soon put out stern orders that all garbage was to be buried forthwith. Then began the hideous spectacle of unwilling soldiers forced to push back the women and children while garbage cans of food were dumped in freshly dug pits. ... More than once we saw the despairing children and women break through the lines and scab at the in the rain and mud to rescue dirty pieces of food before the soldiers could seize them and push them away’: Gray, supra, pp 6–7. It is obviously in conditions such as these that these women and children will succumb to sexual exploitation. Stories of sexual exploitation in those circumstances no doubt obtained in earlier wars, but an excellent recent chronicle of it is revealed in stories from the recent war in the Democratic Republic of Congo in which, in addition to more blatant forms of sexual violence, even some UN peacekeepers were known to give women and young girls as little as a cup of milk, a few eggs, peanut butter or one dollar in exchange for sex. See, for instance, Susan Notar, ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’ (2006) 14:2 Journal of Gender, Social Policy and Law 413 at p 417.
their own bodies to serve as ‘fire-breakers’ between the soldiers’ obsessive sexual preoccupations and the more vulnerable females in the victim population.\textsuperscript{285}

The psyche of negativity that explains the pent-up feeling of soldiers (which is considered as better channelled against the bodies of women than at the soldiers’ military commanders) apparently rests on the bedrock of what Grossman terms the ‘Wind of Hate.’ This is in the nature of the resentment on a slow boil inside the soldier for being forced into a situation of conflict: of enduring the military system’s reversal of his natural resistance to kill fellow human beings: of being put in situations in which other human beings, particularly the enemy population, regard him with contempt; hateful expressions from helpless geriatric citizens, women and children of the enemy population would include passive aggressive displays of contempt, and the able-bodied members of the enemy population would desire to kill him: of being put in a situation in which he must endure a constant feeling of insecurity to his own life.\textsuperscript{286} To that stewing cauldron one might add other factors of hate which the soldier must feel, such as ‘the marching orders and manipulations of a military headquarters’;\textsuperscript{287} frustration born of the tension between expectation and futility in the quest for victory in the given war such as was the case in Vietnam and Iraq;\textsuperscript{288} loss of freedom to do as he pleases, including terminate at will his involvement in the armed conflict, even when not a conscript; deployment away from loved ones, etc. The pathetic circumstances of soldiers have been aptly summarised by John Mueller as follows:

They must be able to live with and to commit intense violence, and they must also be able to endure long intervals—months at least, often years—of various kinds of deprivations. Among the problems: lice, maggots, leaches, and other vermin; debilitating and very often fatal battles with dysentery and other diseases; the absence of women; terrible, even inedible, food; germ-ridden water; stale cigarettes; bone-deep fatigue; syphilitic prostitutes; watered or even poisonous liquor; sleep deprivation; family separation and homesickness; absence of privacy; constant and often brutal and pointless harassment or physical abuse by superiors and by an incoherent system; exposure to extremes of weather; masturbatory fantasies that become decreasingly stimulating; boredom that can become cosmic, overwhelming, stupefying—an emotion, though only rarely remarked upon, that is far more common in war than the rush that comes with combat.\textsuperscript{289}

\textsuperscript{285} See Bourke, \textit{supra}, p 358.
\textsuperscript{286} Grossmann, \textit{supra}, pp 76–82.
\textsuperscript{287} See Gray, \textit{supra}, p 74.
\textsuperscript{288} See, for instance, Tritle, \textit{supra}, pp 3–4. In this regard, it was quite telling that President Barack Obama generated sustained applause from US marines at Camp Lejune, North Carolina, when he announced there on 27 February 2009: ‘Let me say this as plainly as I can. By August 31, 2010, our combat mission in Iraq will end’: CNN, ‘Obama: U S to withdraw most Iraq troops by August 2010’ at <www.cnn.com/2009/POLITICS/02/27/obama.troops/index.html>
\textsuperscript{289} John Mueller, \textit{The Remnants of War} [Ithaca: Cornell University Press, 2004] p 8.
This simmering resentment that must result from the foregoing has a potential to implode into loss of morale or explode into mutiny or both. The military hierarchy is thus put in the unenviable position of electing what they might view as the lesser of two evils: loss of morale/mutiny versus 'some raping' as an outlet for the resentment. Indeed, Zimbardo’s Stanford Prison Experiments did capture this instinct of the perpetrators to let out their resentment and frustrations on those over whom they exercise power and authority; as was evident in the incident where the ‘guards’ were forced by a rumour of imminent ‘prison escape’ to dismantle the prison and move the ‘prisoners’ to a safer location, only to realise later that the rumour had been false. They later took out their frustrations on the ‘prisoners.’

Presumably, Grossman’s ‘Wind of Hate’ theory is equally capable of embracing situations in which the armed fighter confronts the silent, yet searing, contempt that is often present in the eyes, attitudes and demeanours of unarmed and helpless civilians whose territory has come under domination or occupation—the passive resistance of the spirit of the violently dominated and or oppressed. In some cases, especially in modern wars, the occupying forces may make efforts to ‘win hearts and minds’ of the dominated. The alternative course is to break that resistant spirit—or even sheer frustration from the temerity of its mere existence. This alternative course might lead the armed fighter(s) to commit atrocities against unarmed civilians.

Second, there is an acceptance that rape may be necessary for effective combat performance. In addition to a felt need to allow raping as an escape valve for pent up feelings of resentment, a view of rape as necessary for combat performance also appears in the sense that a prize for victory in war becomes the licence to rape. Thus, fighting to secure women became equivalent to fighting to secure food in primitive societies. According to the Old Testament of the Bible, Hebrew men were permitted to keep female war captives as slaves and concubines. These

290 Soldiers everywhere are reminded of the deadly force of mutiny by February 2009 mutiny of the Bangladeshi Border Rifles which claimed the lives of at least 130 of their officers, including the Major-General who commanded them: see <http://en.wikipedia.org/wiki/2009_Bangladesh_Rifles_revolt>

291 The phrase ‘some raping’ is arguably a parapraxis on the part of General Patton as he recounted his discussion with the Grand Vizier of Morocco whom Patton told that ‘in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have some details as early as possible so that the offenders could be properly hanged’: Patton, supra, pp 23–24. Of greater interest in this regard is the attitude reported in Bourke’s book that when sexual violence does occur ‘the brass would say, “Well, look, cool it for a little while ... at least let it happen with little more time in between.” But we were never discouraged.’ This led Bourke to the sensible conclusion that military authorities officially disapproved of rape and pillage, but turned a blind eye to such antics: Bourke, supra, p 366.

292 Loc cit.

293 Brownmiller, supra, p 33.

294 The licence appears as follows in the Bible: ‘As for the women, the children, the livestock and everything else in the city, you may take these as plunder for yourselves.
historical roots and biblical precedent might explain why some modern day soldiers may still condone, or connive at, sexual violence by their troops. As will be seen later in Chapter 7 below, some fighting forces have formally adopted as a form of policy the practice of ‘forced marriage’ of women captured during war. It is reported that the subplot of German-Russian conflict within World War II saw evidence of this manner of mass rape of women. Soviet soldiers attacking Germany were reportedly told that German women were theirs by right. It is estimated that, in consequence, millions of rapes occurred, resulting in an estimate of a hundred thousand births in Berlin alone, after the war.295 An excellent recent example of this was the system of ‘bush wives’ formally and blatantly adopted by rebel forces during the Sierra Leone civil war of the 1990s.296 A further explanation might relate back to the not-too-distant past when women were regarded as mere property. As property, then, they were treated as spoils of war in the same way that other chattels captured in war would have been treated.297 Directly correlative to the prize theory of rape, is the practice of using the licence to rape as inducement to future recruits. For instance, there is evidence tending to show that the prospect of sexual violence was held out as ‘an inducement to encourage Marines to volunteer for Vietnam.’

And you may use the plunder the Lord your God gives you from your enemies’: Deuteronomy 20:14. In the same vein, the author of that thought continues: ‘When you go to war against your enemies and the Lord your God delivers them into your hands and you take captives, if you notice among the captives a beautiful woman and are attracted to her, you may take her as your wife. Bring her into your home and have her shave her head, trim her nails and put aside the clothes she was wearing when captured. After she has lived in your house and mourned her father and mother for a full month, then you may go to her and be her husband and she shall be your wife. If you are not pleased with her, let her go wherever she wishes. You must not sell her or treat her as a slave, since you have dishonoured her’: Deuteronomy 21:10–14. See also Brownmiller, supra, p 33.

295 See Grossman, supra, p 211.
296 During the Sierra Leone civil war, the regime of ‘forced marriage’ was indeed highly organized by the rebels under a hierarchy coordinated by Santigie Bobor Kanu, the third defendant, who was a high-ranking member of the rebel forces. A woman known as ‘Mammy Queen’ assisted Kanu in the administration of the forced marriage system. The system included the following: written disciplinary orders issued by Kanu to regulate the conduct of the abducted women; upon the abduction of women following a military operation, subordinate commanders were required to ‘sign for’ the abducted women; either party to the ‘forced marriage’ was required to notify Kanu of any problem between them, Kanu would in turn refer the matter to the ‘Mammy Queen’; if the ‘wife’ was adjudged guilty of misbehaviour, Kanu would order the imposition of a corporal punishment against her or a period of detention in a rice storage box. See Prosecutor v Brima, Kamara and Kanu (Judgment) 20 June 2007 [SCSL Trial Chamber], paras 233, 523–526. See also Prosecutor v Brima, Kamara and Kanu (Judgment) 3 March 2008 [SCSL Appeals Chamber] paras 190–191.
297 Brownmiller, supra, p 35.
298 Bourke, supra, p 367.
Yet another manner in which sexual assault may be viewed as necessary for effective combat performance is derived from the combat ruthlessness of fighters who have crossed the Rubicon of morality, as it were. These are fighters who, like Dr Faustus, have made a pact with the Devil for the power of the feeling and perception of deadly effectiveness in battle. This derives from the phenomenon which Grossman describes as ‘killing empowerment’.\(^{299}\) This source of empowerment comes from the moment when the perpetrator, faced with the stark choice between committing the atrocity or refraining, makes the choice that leads him to resolve within himself that he is justified in committing the atrocity. Grossman outlines the resolution of this dissonance in the following way:

The soldier who does kill must overcome that part of him that says that he is a murderer of women and children, a foul beast who has done the unforgiveable. He must deny the guilt within him, and he must assure himself that the world is not mad, that his victims are less than animals, that they are evil vermin, and that what his nation and leaders have told him to do is right.

He must believe that not only is this atrocity right, but that it is proof that he is morally, socially, and culturally superior to those whom he has killed. It is the ultimate act of denial of their humanity. It is the ultimate act of affirmation of his superiority. And the killer must violently suppress any dissonant thought that he has done anything wrong. Further, he must violently attack anyone or anything that would threaten his beliefs. His mental health is totally invested in believing that what he has done is good and right.

It is the blood of his victims that binds and empowers him to even greater heights of killing and slaughter.\(^{300}\) [Emphases received.]

Although the references in this explanation relate to killing, there is no doubt that it applies with greater force to the evil of sexual violence, especially when sanctioned in any way as policy.

Third, sexual violence against women has also been identified as a form of social glue that aids in the bonding process of esprit de corps of men-at-arms.\(^ {301}\) It is said to be commonly found in scientific studies that the ‘bonds combat soldiers form with one another are stronger than the bonds most men have with their wives.’\(^ {302}\) And among men who are thus so intensely bonded together, ‘there is a powerful process of peer pressure in which the individual cares so deeply about his comrades and what they think about him that he would rather die than let them down.’\(^ {303}\) Thus, it is extremely difficult for a man who is so bonded to break away and openly refuse to participate in what the group is doing, ‘even if it is killing

\(^{299}\) Grossman, supra, pp 208–210.
\(^{300}\) Ibid, pp 209–210.
\(^{301}\) Ibid, pp 210–211.
\(^{302}\) Ibid, p 149.
\(^{303}\) Ibid, p 150.
innocent women" or, of course, committing sexual assault against them. One sees an illustration of precisely this phenomenon in Chimamanda Ngozi Adichie’s novel *Half of a Yellow Sun*, an epic set in the Biafran civil war. In one incident, the lovable character Ugwu, now a conscript in the Biafran army, ultimately succumbs to the pressure to participate in the gang rape of a female victim, though he initially resists. These theories of deep bonding among men-at-arms are not lost in significance to the concept of systematic condonation of, or connivance in, sexual violence committed by one or more of them. Of particular significance is the view of the bonding as involving *deep caring* of the individual for his comrades at a level that may be stronger than the bond with his own wife. In some legal systems, spouses are not compellable witnesses against one another, in recognition of the need to preserve the bond of marriage between them. A similar instinct, expressed as ‘group absolution’, would readily explain why some militaries find it easier to condone systematically theatrocity of sexual violence committed by their troops.

A direct effect of all this, which shores up the perception of policy by participants and observers alike, is that soldiers were encouraged to not fear punishment for sexual violence and to consider sexual violence as ‘authorised transgression’.

References to the conduct of some renegade American soldiers in Vietnam, are by no means intended to denigrate that military establishment or to encourage smugness on the part of other nations’ soldiers. It rather strikes a chilling note on the issue of sexual violence against women during armed conflicts in the modern age. If the American military—with a reputation as some of the finest, the most professional and the most disciplined in the world—could number among it troops who are so frequently implicated in the evil of sexual violence during armed conflicts in the modern age, a most cautious eye must then be kept on the average fighter in less disciplined and professional militaries. It thus heightens the urgent need for increased vigilance and legal responses to the evil under consideration.

From these reviews one finds the reasons for sexual violence during armed conflicts fitting snugly within the pattern of the wider pathogen of evil during armed conflicts. That is to say: as with the wider pathogen of evils, the cocktail of sexual violence during armed conflicts includes conduct accepted as necessary evil authorised and promoted by those in responsible command of the relevant armed forces (such as in the case of sexual violence as incidents of policy); as well as conducts (such as opportunistic acts of sexual violence) viewed as aberrant and evidently unauthorised and unnecessary evil perpetrated by insufficiently controlled rogue fighters trained, armed and mobilised by those in responsible command of the relevant armed forces.

In view of the need to understand evil in order to design adequate response for it, very careful consideration must then be given to the need to review the
development of international criminal law in the area of jurisprudence relating to sexual violence. Of particular note in this connection is responsibility of the superior for sexual crimes committed by subordinates, as considered in Chapter 2 below. The need for this careful consideration is particularly critical given the new theory of connivance and condonation identified and articulated above.

**Conclusion**

In view of the foregoing, the question remains: how well has international law acquitted itself in the task of containing the evil of sexual violence, thus affording better protection for women caught up in armed conflicts?

From the outset, the point may be made that despite the constancy of the problem, there remains a yawning gap between the mischief and the responses to it in international law. To be clear, the charge here is not that international law does not prohibit sexual violence. Quite the contrary, there is an ‘impressive body of formal prohibition’. But the lesson to be drawn from the unabated regularity of sexual violence in armed conflicts is that there remains much to do on the part of those who make and apply international law, in order to address the problem from the perspective of prevention or containment.

Since the 1990s, however, there has been renewed interest in the subject, chiefly due to the efforts of women in international law. The catalyst—nay, opportunity for this renewed interest has principally been afforded by the work of the modern generation of international criminal courts. Their jurisprudence and constitutive instruments have afforded an opportunity for continued exploration of ways of making international law more responsive to the need for greater protection of women during armed conflicts. The present study is but one modest instance of such continued exploration.

This study will presently engage a review and analysis of recent developments in international criminal law from the perspective of sexual violence against

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308 Chinkin, *supra*. See also Theodor Meron, ‘Rape as a Crime under International Humanitarian Law’ (1993) 87 *American Journal of International Law* 424. Some of the provisions regarding rape are as follows: the obligation of special respect and protection for women, especially regarding rape and kindred abuses [art 27 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War and art 76 of the 1977 Additional Protocol I to the Geneva Conventions]; rape and kindred offences as forbidden acts and war crimes [art 8(2)(b)(xxii) and art 8(2) (e)(vi) of the International Criminal Court Statute (international armed conflicts), art 4(e) of the ICTR Statute, and art 4(2)(e) of the 1977 Additional Protocol II to the Geneva Convention]; rape and kindred offences as crimes against humanity, when committed as part of a widespread or systematic attack against a civilian population [art 7(i)(g) of the ICC Statute, art 3(g) of the ICTR Statute, and art 5(g) of the ICTY Statute.]

309 See Susana Sá Couto, ‘Advances and Missed Opportunities in the International Prosecution of Gender-based Crimes’ (2007) 15 *Michigan State Journal of International Law* 137 at 139.
women during armed conflicts, with the view to improving the ability of international law to protect women within the framework of modern international law.

Available literature, much of which have been reviewed in this discussion, canvasses a multitude of theories that seek to explain the reign of evil during armed conflicts—either from the perspective of general deviltry during armed conflicts or as a matter of sexual violence against women as a particular brand of evil prevalent in war. The understanding of evil that is facilitated by these theories will assist the framers of legal policy in the shaping of appropriate legal norms. It will also aid judges in the fashioning of appropriate sentences following convictions. But beyond all those positive values for these theories lies an elementary call. It is that international law must afford better protection for women against sexual violence during armed conflicts, notwithstanding the reasons for the violence. In order to achieve the required optimum scheme of protection, there is need for careful consideration of not only relevant aspects of substantive legal principles, but also procedural rules. The deficiencies discussed in this study include absence of rules; missed opportunities to adapt existing rules at all or sufficiently or to give them the desired scope; over-enthusiasm to stretch existing rules in ways that exacerbate the more fundamental problem of a lacuna in need of rectification by the international community.