“Never Again”

The Holocaust, Trauma, and Its Effect on Constitutional and International Law

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I. Story

“Never again” is, first and foremost, a story. It’s a story about our collective fears, anxieties, and aspirations, those moments and events that we have promised ourselves that will never be repeated. “Never again” derives its power from the art of storytelling. There is a plot, spatial setting, characters, point of view, and tone. Some stories are written, while others are delivered orally. Some stories are based on facts, others are fiction, and a few fall in the gray area between fiction and non-fiction. Some stories are informative—explaining the actions of a group, while other stories are normative—creating moral and political messages that should guide a group’s actions, what is good or bad, just and unjust.

Historical traumas shape “never-again” stories. The Jewish story is interwoven with the Holocaust—the killing of six million Jews in Europe and the urgency of the re-establishment of a Jewish state to solve the problem of Jewish homelessness. It is rooted in a long history of persecuted people who formed an exiled diasporic group throughout most of its history. In referring to the American story, Jack Balkin likewise says: “We respect religious conscience because our Pilgrim forefathers left persecution in Europe. We guarantee racial equality because of Lincoln, the Civil War, [and] Martin Luther King … We guarantee rights of criminal defendants because of the actions of King George.”

The constitutional order that emerged after WWII and the Holocaust on the national, European and international levels was strongly informed by the overarching imperative of “Never Again!” Yet the constitutional and international meaning of “never again” depends on one’s position and point of view, and it changes over time. The chain reaction that began with the horrors of WWII continues to drive constitutional and international agendas. It is clear that “history talks,” but in which direction?

II. Concept

The Western version of “never again” relates to the more *universal* lessons from WWII—never again for bloody wars of aggression, fascism, and genocide. It finds expression, for example, in Article 26 of the German Basic Law prohibiting wars of aggression, and, also, more radically, in Article 9 of the Constitution of Japan: “The Japanese people forever renounce war … or use of force as means of settling international disputes … The right of belligerency of the state will not be recognized.” But then there is a *particular* version of “never again,” e.g., the Jewish one. It’s about the “never again” of the Holocaust of Jews and their slaughtering without the ability to protect themselves. But this is less clear than it may be at first sight. Is it “never again” being a victim? Or be persecuted? Are there lessons that go beyond the Jewish people, say, “never again” refugees be left unprojected or “never again” genocides?

The war on Gaza challenges the fuzzy concept of “never again.” Take Germany. On the one hand, as the German Foreign Office put it, “Germany’s historic responsibility for the Jewish and democratic State of Israel and its security is part of our *raison d’être*. Germany will always work … to ensure that Israel’s right to exist is never called into question.” On the other hand, claims have been raised on why “never again” does not apply to the Palestinians? Where is the “never again” for Gaza? Israel faces a dilemma, too. The terror attack of October 7 awakes the long traumatic Jewish history, and “never again” has meant

fighting back. But then, is "never again" reaching to cases in which Jews are a source for the sufferings of other peoples? All sides use the same slogan to argue different claims.

The cracks in the "never-again" story also relate to the war in Ukraine. Germany has approved a 100 billion EUR military revamp and is discussing the idea of bringing back conscription. Whereas "never again" has meant in the past that Germany supports and integrates itself into supranational structures grounded in a commitment to international law, gives up on the idea of an independent capacity to ensure territorial defense and does not deliver weapons into conflict zones (*si vis pacem para pacem*), it now means preparing for war and providing support for the right side (*si vis pacem para bellum*). The imperative on German authorities to preserve and support peace has thus been reinterpreted to require a different strategy. Or take the 2015 refugee/migrant crisis in Europe. It could mean "never again" leaving asylum refugees politically unprotected, but it could also mean being alert to the danger of creating the social and political conditions that might bring about populism and fascist movements.

The authors of the symposium show the evasive nature of "never again." *Joseph Weiler* asks, "Is it the 'Shoah' … Is it instead, the general WWII carnage, the 60 million not just the 6 million? Or perhaps also the years from 1933 to 1939 with the Nuremberg Laws which prepared the ground?" Eventually, "This very under-specificity offers a canopy under which practically everyone can find cover and use and misuse for their noble or nefarious agenda. After all, Putin, too, is a 'Never Againer' – as in 'We are fighting the Nazi Ukrainian State, Never Again!'" *David Abraham* claims that, for Jews, it's "Never Again–*to Us*," not "Never Again–*to Anyone*." But, for him, the Jewish and Western versions are both Eurocentric. There is a third, post-colonial version, "never again" to colonialism, a struggle in which Israel is at the front line. "[I]f it is too late to do anything serious about Australia or the U.S., for example, Israel, notwithstanding its UN birth certificate, is still within some implicit statute of limitations where it might legitimately be 'undone.'" There is a "never again" for All Seasons.

III. Influence

Vague as it may be, the "never again" slogan has tremendously influenced the post-WWII constitutional order. It led to the passage of several international conventions. The most known ones are the 1948 Genocide Convention, the 1951 Refugee Convention, and the 1961 Convention on the Reduction of Statelessness. These conventions were crafted in the spirit of the European "never again" experience. For instance, the very definition of what is Genocide or who is considered as Refugee, was tailored to the Holocaust of the Jews during WWII and the Jewish refugees before and during the War. These conventions meant to clearly say the obvious—"never again" for something like *that*.

The master narrative of "never again" has influenced the post-WWII constitutional and international order. The German *Grundgesetz*, the Japanese Constitution, the Israeli Basic Laws—were all drafted to ensure the "never-again" promise. Doctrines of militant democracy, eternity clauses (those values and principles that cannot be constitutionally amended, like human dignity or a democratic regime), and the possibility to disqualify political parties that undermine democracy have been invoked to ensure "never again" to a totalitarian dictatorship. Limitations on the maintenance of armed forces, new institutional bodies, and constitutional designs have been put forward to ensure that "never again" the perpetrator would bring devastation to other nations. In Israel, whose Jewish majority was the victim, "never again" led to different directions, mostly, "never again" would the Jews be so helpless.

This symposium demonstrates the impact of "never again" on constitutional and international agendas. *Udo Knapp* presents how the German *Grundgesetz* entrenches this narrative and also raises concerns about whether the government does too little to ensure that "never again" democracy is not put at risk. *Uladzislau Belavusau* shows how "never again" traumas affected migration and citizenship law in

Israel, Portugal, and Germany. *Kim Lane Scheppele* reminds us of the impact of "never again" on international human rights law, from the 1948 Universal Declaration of Human Rights up to the law of genocide and war crimes. *Barak Medina* says that the trauma of Auschwitz in Israel creates "the grim memory of nations worldwide closing their doors to Jewish refugees." He shows how this influence touches different fields—the retroactive criminalization of Nazi actions, the commitment toward the Jews around the world, limitations on free speech in the context of Holocaust denial, and the adoption of the militant democracy doctrine to prevent Israel from turning into a fascist regime.

IV. Reassessment

Rather than reaching concrete conclusions, the symposium opens up new perspectives and raises further questions. The following is a sample of some central issues raised by different contributions.

First, how do historical traumas impact the constitutional agendas of perpetrator and victim groups? How is the imperative of "never again" concretely interpreted, what legal projects and policies does it give rise to, and what are the strategies used to engage and overcome traumas? How might constitutional and international law facilitate the reconciliation of political communities with their traumatic past and overcome it? Can historical traumas serve as a justification or excuse for deviations from otherwise applicable international law standards? What are the examples of "never again" imperatives effectively functioning to perpetuate trauma in a cycle of resentment and hostility towards third parties? For example, how does the Jewish "never again" affect the Israeli policies toward the Palestinians, and how do these policies impact the Palestinians, e.g., the type of "never again" traumas it creates for them? *Gilad Hirschberger* reminds us that a historical trauma "is not merely a faint memory, but a living process that shapes current emotions, behaviors and policies … the past is never dead." While Hirschberger and other social scientists have contributed to a better understanding of the influence of "never again" memories on the collective actions of groups, more research is essential.

Take the connection between a national calendar, collective memory, and constitutional agenda. In "Auschwitz or Sinai?", David Hartman claimed that while the Jewish people could never forget the Holocaust, it would be a mistake to turn it into a founding memory of the Jewish history. It would contribute to the creation of a constant collective state of mind of victimization, which, in turn, could lead to becoming an aggressor since any threat might seem like another Holocaust in the making. When the victim has exclusivity on the human suffering, it is harder to perceive itself as a perpetrator. Hartman offered instead to base the Jewish consciousness on the positive experience of Sinai, which marks a turn from slavery to freedom and the beginning of Jewish self-determination. Being stuck in a trauma cycle—many national holidays in Israel are about liberation or salvation from slavery or massacre or the remembrance of those—is a political *choice*. But what are the effects of that choice? Does it contribute to the creation of a sense of self-righteousness as no other nation has suffered like the Jews? Or does it leave a space for the Palestinian Nakba or the suffering of Palestinians in Gaza?

Second, while the "never again" imperative in the past decades has been focused on the perspectives of Israel and Germany as it relates to World War II and the Holocaust, the imperative comes in many flavors and accentuations, with differently situated political communities taking away quite different lessons, challenges, and questions for their legal and political practices. *Olga Ametistova* discusses the case of Russia and shifting interpretations of the meaning of the traumas of World War II. *Pratap Mehta* analyzes how reflections in India on fascism and the Holocaust, as a phenomenon connected to European Ethnonationalism and European Imperialism, influenced policies and debates, and how, confronted with the phenomenon of Hindu Nationalism in the present, raises the uncomfortable question of the link between any kind of Ethno-Nationalism and fascism. *Hualing Fu* discusses "never again" imperatives in China, connecting them to narratives of the "century of humiliation" and how

they shaped modern constitutional law in China. *Yaniv Roznai* discusses Mexico, whose "never again" constitutionalism relates to the need to protect the liberty of the press as "a direct response to the Inquisition censorship established during the *Ancien Régime*." And *Uladzislau Belavusau* reminds us that "never again" can also fairly apply to the Armenian genocide.

Third, the interpretation of the "Never Again" imperative is not only one that takes on different nuances in different political communities facing different histories and challenges but also one that shifts over time, changing nuance and focus or may gradually fade away. *David Abraham* presents how the post-WWII legal structure of "the traumas associated with the Holocaust and the 'Never Again' commitment" is slowly collapsing to produce "morbid symptoms—and tragedy." Similarly, *Joseph Weiler* concludes: "If we look unflinchingly in the mirror, what stares back at us is the terrifying realization that never again has morphed into an ever again, and again, and again. The historic pledge suddenly seems pretty hollow, does it not?" Even the minimal version of "never again," which pledges to secure democratic institutions and values, is on the verge of collapse. As the last WWII veterans and Holocaust survivors are dying, the traumas of that time become detached from personally lived experience and narration. New forms of tribalism and Ethnocentrisms combined with geopolitical and military ambition work together to produce a new drumbeat to war that makes invocations of "Never Again" seem increasingly hollow. But does this really mean that the "eternal" imperative of "never again" cannot survive the generation whose deeds and sufferings gave rise to it?

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