PART I
Are there trends in controlling human rights violations?

To answer this question we first look at human history as a history of atrocities. Simultaneously we examine the conditions under which such atrocities would become considered "crimes" (Chapter 1). We then examine how out of these new conditions grew innovative interventions; a first overview of laws and institutions is provided (Chapter 2).

ONE

when are atrocities crimes?

Sketching human history as a history of atrocities, we see that atrocities were not always considered crimes, modern behavioral definitions and ideas of natural law notwithstanding. Yet, perpetrators of the twentieth century drew false lessons from this history when they believed they could act with impunity. New conditions had taken hold to pave the way for a new understanding of atrocities as crimes.

All human history, at least the history of state-organized societies, is also a history of atrocities, defined here as behaviors, through which government agents or others invited or tolerated by governments, impose immense cruelty upon segments of a population. An examination of numerous world regions throughout history reveals a multitude of institutional mechanisms through which people were gravely mistreated or murdered en masse; including slavery, infanticide, maltreatment and killing of prisoners of war, and colonial exploitation (see Rummel 1994: 45–75 on the following).

Early on, wherever ancient rulers dominated over vast empires, the lives of hundreds of thousands were at risk, especially in periods of conquest. The name of Genghis Khan appears frequently in historic accounts. During his 1219 capture of Bokhara and Samarkand he had tens of thousands of the cities' inhabitants killed. In 1220 he had 50,000 killed in Kazvin and 70,000 in Nessa. In 1221, the capture of the Persian city of Merv was followed by the slaughter of 1.3 million inhabitants during a 13 day-period. When he conquered Jayy, a city with 3,000 mosques, Genghis Khan initially spared the population. Yet,

after a rebellion broke out, he had 1.6 million inhabitants killed. His successors clearly sought to fill his shoes. In 1258, following the capture of Baghdad, Khulagu had 800,000 of its inhabitants slaughtered. And, Khubilai Khan, in his wars of conquest against China between 1252 and 1279, had more than 18 million Chinese killed. Altogether more than 30 million Persian, Arab, Hindu, European and Chinese men, women and children were murdered during a half a century alone.

Not all mass killers receive the attention they deserve. We will only mention two famous Sultans of the twelfth and thirteenth centuries, Kutb'd Aibak of Delhi who had his subjects slaughtered by the hundreds of thousands and Ahmed Shah who staged three-day celebrations whenever the number of Hindus killed reached 20,000 per day. Among the Ottoman Sultans, Mohamed II had thousands massacred after the conquest of Constantinople in 1452 and Sultan Abdul Hamid had some 100,000 Armenians killed between 1894 and 1896 (only to be vastly outdone by his successors in government during World War I). Altogether the Sultans of the Ottoman Empire are responsible for the killing of some two million Armenians, Bulgars, Serbs, Greeks and Turks. Across the Atlantic Ocean, enemies of major empires did not fare better. In 1487, the Aztecs had tens of thousands of adversaries ritually killed on one single occasion. A Western observer claims to have counted more than 100,000 skulls on a single rack outside the city walls.

Closer to home for Western readers, mass killings were motivated by religious and revolutionary fervor. The Revolutionary Councils of the French Revolution ordered the execution of some 20,000 members of the nobility, political opponents and alleged traitors. Earlier, the Duke of Alba, acting for the Spanish Crown, had some 18,000 Protestants murdered in the Low Countries between 1567 and 1573. Charles IX of France or his court had tens of thousands of Protestant Huguenots massacred in the infamous St. Bartholomew night of 1572. Yet earlier, in 1099, after the conquest of Jerusalem, Christian Crusaders butchered 40–70,000 of the city's Jewish and Muslim inhabitants.

A few decades later, Archbishop William of Tyre (1943), himself assumed to be of Frankish descent, and the most prominent chronicler of the events of the eleventh century, reports about that fateful 15 July 1099:

> It was impossible to look upon the vast numbers of the slain without horror; everywhere lay fragments of human bodies, and the very ground was covered with the blood of the slain. It was not alone the spectacle of headless bodies and mutilated limbs strewn in all directions that roused horror in all who look upon them. Still more dreadful it was to gaze upon the victors themselves, dripping with blood from head to foot, an ominous sight which brought terror to all who met them. It is reported that within the Temple enclosure alone about ten thousand infidels perished … (p.372).

On one occasion, hundreds of Jews were locked into a synagogue and burned alive, together with their house of worship. Later, during the plagues of the fourteenth century, Christians of the German countries used their Jewish neighbors as scapegoats. In the town of Mainz alone 6,000 Jews were killed. Few Jews were left in Germany after the campaigns had run their course, an outcome similar to that of twentieth century Nazi persecution. Further, the Catholic Church's treatment of heretics is well known: 32,000 were killed by fire, often through slow burning; another 125,000 are estimated to have died from miserable prison conditions and torture between 1480 and 1809. And Protestant witch hunts cost the lives of thousands of women (Jensen 2007).

Slavery, slave trade and colonialism, and their immense cost in human lives, must not be left out. Between the sixteenth and nineteenth centuries, some 1.5 million to 2 million African slaves were killed by the deplorable conditions of their voyage across the ocean. Millions more perished during their transports to the Middle East and the Orient. Rummel (1994: 48) estimates the total death toll at somewhere between 17 and 65 million.

Finally, while some chapters of colonial cruelty are well known, many are forgotten. The 1904–7 German genocide against the Herero in today's Namibia, the first in the twentieth century, cost some 24,000 to 75,000 lives; 50 to 70 percent of the Herero population was murdered (Steinmetz 2007). Mass killings by the British are reported from today's Borneo in 1849. The Dutch colonizers orchestrated massacres of up to 80,000 Chinese in Jakarta (then Batavia) and similar campaigns in Java. In America, the Puritans killed some 500–600 Pequot Indians, the French about 1,000 Nanchez Indians in the lower Mississippi. Some 4,000 Cheyenne died during the infamous "trail of tears," during resettlement via death march, from their native Georgia to areas west of the

Mississippi River under President van Buren. The total population loss is estimated at eight to 110 million. The Native American population was reduced to one tenth of its original size in the course of European colonization.

This long history of state-committed or sponsored mass killings continued, as we know, into current times. The twentieth century, in fact, sought to outdo many of its predecessors. And, in the course of the twentieth century, warfare changed such that the percentage of civilian casualties increased from 14 in World War I to 67 in World War II and up to 90 in the century's final decades (Keegan 1976; Hagan and Rymond-Richmond 2009: 63f).

Have atrocities always been crimes?

No doubt, the behaviors sketched so far have brought immense suffering, pain, hunger, blood, death, tears, and mourning over humankind. But who specifically are the perpetrators? The killers who got their hands bloodied; middlemen who passed on directives; intellectuals who provided the ideological groundwork; or political and military leaders who thought out, motivated and ordered campaigns of destruction? Even if we can agree on whom to appropriately identify as perpetrators, historically they were not typically regarded as criminals. More commonly they were celebrated as heroes—and often they maintained these reputations throughout history. A couple of historical examples must suffice. Consider the robbery and abduction of the entire female population of the Sabine tribe. This horror brought over the Sabiners by the early Romans even became part of the founding myth of ancient Rome. Or, take note of the following statement from Homer's *Iliad*, where the Greek Prince Agamemnon of Mycenae challenges his brother, after the conquest of Troy:

> My dear Menelaus, why are you so chary of taking men's lives? Did the Trojans treat you as handsomely as that when they stayed in your house? No; we are not going to leave a single one of them alive, down to the babies in their mothers' wombs—not even they must live. The whole people

> must be wiped out of existence, and none be left to think of them and shed a tear (quoted after Rummel 1994: 45).

How is Agamemnon's frequent, although not unanimous, glorification as a hero throughout the millennia possible in light of such genocidal rhetoric? And further, why do even many contemporaries associate glory with the names of Genghis Khan or Charlemagne. No doubt, they built vast empires, but what about the atrocities for which they are responsible, the uncounted innocent civilians who perished under their command? Sociologist Bernhard Giesen (2004) shows how, historically, those on whom "heroes" imposed great sacrifices, "victims" in our contemporary understanding, were discounted or even perceived as evil or "polluted" (*victima* in Latin: those set aside to be sacrificed). Such understanding obviously complements the celebration of victimizers as heroes.

Some actors in modern times believed they could learn lessons from the past, to emerge as heroes from the course of history, no matter the sacrifices they imposed on others. Lenin and Mao Zedong are examples, and they may have partly succeeded. Yet, their reputations as heroes are at least challenged, and the cruelties they inspired are recorded in history books to taint their reputations (e.g., Chang and Halliday 2005). Others who thought they could act like "heroes" of past eras and carry away similar reputations erred radically. Adolf Hitler, for example, in a speech to leading members of his Nazi party proclaimed in August 1939:

> It was knowingly and lightheartedly that Genghis Khan sent thousands of women and children to their deaths. History sees in him only the founder of a state … The aim of war is not to reach definite lines but to annihilate the enemy physically. It is by this means that we shall obtain the vital living space that we need. Who *today still speaks of the massacre of the Armenians*? (quoted after Power 2002: 23).

And yet, this was but one of Hitler's fundamental misinterpretations of history. In fact, his own actions advanced changes, long underway, that were to defeat his intent and reasoning. These changes, to which we will return below, contributed to the modern definition of atrocities as crimes and of those who executed them as perpetrators. Hitler could have known better. Even before he came to power, domestic orders and international relations had changed in ways that posed challenges— albeit ambivalent ones—to "heroes" of the old style.

What is the role of states vis-à-vis atrocities, and how did it change?

In Western history, beginning in the seventeenth century, government capacity to exert domestic control increased substantially (Bendix 1996). Trade expanded and allowed for the collection of taxes, the build-up of government administrations, standing armies, transportation infrastructure, police apparatuses, courts, prisons, and general education systems. Such increases in state capacity had primarily civilizing consequences where governments themselves were constrained by internal and external controls. Under such circumstances domestic government control contributed to a considerable reduction of violence among citizens. Homicide rates for Sweden, for example, declined from 33 (per 100,000 population) during the fifteenth through seventeenth centuries, through 16 during the first half of the eighteenth century to 1.5 in the nineteenth century, and—in the capital of Stockholm—down to 0.6 in the first half of the twentieth century (Johnson and Monkkonen 1996). The decline in interpersonal violence simultaneously increased the sensitivities of modern individuals toward the experience of violence, part of the long-term civilizing process (Elias 1978; Eisner 2001).

Given these new sensitivities toward violence, actors like Hitler should have understood that massive blood letting would no longer be disregarded in the judgment of history. In fact, the new sensitivities helped finally institutionalize Judeo-Christian traditions with their recognition of victims as innocent (see Christian beliefs in the sacrifice/ victimization of their God). Victimhood, no longer polluting, became a sacred status, independent of national, ethnic or religious membership, and past "heroes" were redefined as perpetrators (Giesen 2004).

Simultaneously, however, growing state capacity can have catastrophic consequences where domestic checks and balances and external controls are lacking. While the history of atrocities may support Thomas Hobbes' (originally Plautus') famous claim that "man is man's wolf," it suggests caution toward his conclusion that humans should delegate their rights to Leviathan, the mighty state so that he may protect them from each other. History shows with frightening clarity that Leviathan, while taking rights, at times becomes the killer himself. And this killer will deploy his

deadly tools on a much larger scale than individuals ever could. As law and society scholar Stanton Wheeler stated in his writings on corporate crime, organizations become effective weapons in the hands of criminals (Wheeler and Rothman 1982). What applies to corporations is even more valid for modern states (on the role of the modern state apparatus in the execution of genocide see Hilberg [1961] 2003; Bauman 1989; Horowitz 2002). Cooney (1997) identified a U-shaped relationship between state-building and deadly violence: consistent with Hobbes' expectations state formation in its early stages actually slows violence, but high levels of centralization of state power do cause high human death tolls. In the latter cases nothing may stand in the way of grave atrocities other than international control.

How did international relations change?

Just as changes in the domestic organization of states affected both the likelihood and definition of atrocities, so did international rela-tions. Here one historic event continues to set crucial parameters for the behavior of states toward their populations and for the ways in which we judge such behavior. This European event, the Thirty Years' War (1618–48) and its resolution, profoundly affected international relations into the present era, with massive—albeit ambivalent—conse-quences for human rights. A brief historical excursion is in place.

The Thirty Years' War began as a religious war between Catholic and Lutheran lands. In 1618, about a century after the Protestant Ref-ormation, the Bohemian population revolted against Ferdinand II of the House of Habsburg, their new and staunchly Catholic king and emperor of the Holy Roman Empire of German Nations. War erupted, and Spain under King Philip II, already 50 years into the "Eighty Years' War" against the Calvinist Republic of the Low Countries, supported the Catholic side. This was significant support, as Spain at the time was considered the world's most powerful nation. On the Protestant side, first Denmark, one of the mightiest kingdoms of Northern Europe, then Sweden under King Gustavus Adolphus intervened on behalf of the predominantly Protestant Northern German principalities. Finally,

Catholic France entered the war on behalf of the Protestant powers, as Louis XIII and Cardinal Richelieu, his head of government, sought to weaken the German nations to the North and Spain to its South. What had started as a religious war had become a plain power struggle among the major European powers.

The war mostly unfolded on German lands, and the toll was terrible. Estimates of population losses vary between 15 and 30 percent for the entire country and up to sixty percent for some regions. Germany's male population is estimated to have been decimated by half. The Swedish armies alone are said to have destroyed 18,000 villages and 1,500 towns. The treatment of the civilian population was no more humane on the Catholic side. For example, the Emperor's General Tilly had all 30,000 inhabitants of Magdeburg massacred when the city in Northern Germany fell after a long siege. Torture and killings by the military, mostly composed of mercenary soldiers, were supplemented by massive losses due to famines and diseases such as typhus and the plague.

The war was resolved by one of the most remarkable events in the history of international diplomacy, the Peace Conference of Westphalia of 1643–48, named after the German region where it was conducted. The resulting Peace Treaty, signed in the city of Münster in 1648, reshaped Europe's political map. And, it created a new understanding of the nation state that was as revolutionary at the time as it was taken for granted until recently. In addition to the establishment of fixed territorial boundaries between states, it was agreed that a country's citizens submit primarily to the rules of their own government, rather than to neighboring religious or secular powers. Simultaneously, the *principle of national sovereignty* was established, outlawing a state's intervention into domestic affairs of other countries (http://www.yale.edu/lawweb/avalon/westphal.htm). The hope was to prevent international warfare; simultaneously, however, domestic populations were left to the mercy of their rulers.

Still at the outset of the twenty-first century, and despite strong countervailing trends, the principle of national sovereignty is firmly established—no matter international outrage about the behavior of national governments. Recent illustrations include Myanmar's military Junta refusing to allow international help workers into the Irrawaddy River delta where more than one million cyclone victims were lacking shelter, water, food, and medical treatment in 2008; or the international

community standing by almost helplessly as genocide unfolds before its eyes in the Darfur region of Sudan. Even the 1945 International Military Tribunal in Nuremberg had prosecuted leading Nazi perpetrators for offenses primarily committed in the course of war, not those committed domestically during their pre-war terror regime.

And yet, the consequences of Westphalia were ambiguous. Outlawing border-crossing intervention at least delegitimized border-crossing atrocities. Further, the principle of sovereignty had established a new kind of multi-lateral international diplomatic collaboration. This, combined with growing sensibilities toward physical violence, a redefinition of victimhood, and new nineteenth century humanitarian law, had one predictable result: Nazi Germany's atrocities would fuel the engine of post-World War II international cooperation and interventionism toward the control of grave violations of human rights. Hitler's hope for the forgetfulness of history proved false.

Is there an absolute understanding of atrocities as crimes?

While the evaluation of atrocities throughout history varies substantially, some will insist that we call atrocities "crimes" no matter if the perpetrators were regarded as heroes and the victims as polluted by their contemporaries. For support, they may cite Edwin Sutherland (1940, 1983), the "father" of American sociological criminology. In his groundbreaking work on "white-collar crime," Sutherland concedes that many forms of corporate wrongdoing constitute only administrative offenses, not crimes in the legal sense. Yet, Sutherland argues that such behaviors should be considered crimes, as what motivates them is no different from what motivates ordinary street crimes, while consequences may be manifold more harmful. The one major difference between street crime and white-collar offenses, Sutherland insists, is that corporate law breakers, those who manipulate markets and expose workers and consumers to great risk, are sufficiently powerful to prevent criminalization of their behaviors by the state. What applies to corporations is valid even more when states perpetrate.

This sociological argument to consider atrocities as crimes inde-pendently of their official definition is supported, in jurisprudence, by proponents of the natural law tradition. Rooted in ancient Greek thought, natural law proposes a notion of unalienable individual rights. No doubt, perpetrators of mass killings are law breakers and criminals from this perspective, no matter where in the world and when in human history they commit their offenses.

This author obviously agrees with the argument that atrocities (or corporate wrongdoing for that matter) have disastrous consequences, and may be driven by similar motives as other crimes; that they should be studied by scholars and rejected by ethicists and society at large, no matter if governments recognize them as crimes. Yet, I suggest that we call only those behaviors crime that governments and law have in fact criminalized. I further prefer to call only those behaviors HR violations that HR regimes have recognized as such. In line with the powerful labeling and constructivist traditions in criminology, I think it useful to distinguish between cruelties that are recognized as crimes and those that are not recognized as such (Becker 1963). They may be similar or identical in terms of motivation and consequences, but classical Chicago sociologist W.I. Thomas was right with his famous dictum that what humans define as real becomes real in its consequences.

In conclusion, atrocities are a mainstay of much of human history. Yet, it is only in recent history that conditions exist under which perpetrators should no longer expect to go down in history as heroes and under which victims can attain sacred status. Changes in the formation of states and in international relations, beginning around the seventeenth century, set the stage for the definition of atrocities as crimes, albeit ambiguously and via the detour of state sovereignty. The actual criminalization of atrocities took off in the course of the late nineteenth and twentieth centuries, under very specific cultural and political conditions, a development toward which we turn next.