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## Secret Knowledge of Genocide: British Failure to Disclose the Killing of Jews in 1941

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# SECRET KNOWLEDGE OF GENOCIDE: BRITISH FAILURE TO DISCLOSE THE KILLING OF JEWS IN 1941

*Kent Greenawalt\**

## INTRODUCTION

In the late summer and early autumn of 1941, the British military intercepted coded German radio messages that revealed that German troops were killing large numbers of Jewish civilians in German-occupied parts of the Soviet Union. The British did not make this knowledge public at that time, nor did they use their still classified records during the war crimes trials after the end of World War II.

Commentators more expert than I have addressed themselves to the question of whether the British had a legal obligation to disclose the information from the coded messages.<sup>1</sup> These remarks concentrate on the possible moral responsibility of the British government, and they briefly address the responsibilities of modern governments whose intelligence services discover genocide.

One can hardly begin a serious moral evaluation of British behavior without some understanding of the facts. On that subject, I have learned from my fellow panelists, and our variant factual appraisals affected our judgments. Based upon my limited

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<sup>1</sup> I believe one should be cautious about various claims of legal responsibility. Although law is intertwined with morality, law is not identical with morality. Some immoral acts are not illegal in domestic law and do not violate international law. In 1941 it would have required a stretch of any liabilities under international law to say that a country has a duty to disclose information about an enemy's actions if the disclosure might seriously have risked its own war effort. The climate for such an argument is more favorable now, but the argument is still not easy. I found Rabbi Cohen's treatment of a duty to rescue to be sensitive and profound, and I agreed with much of what he said about our moral duty. See Rabbi Shear-Yashuv Cohen, *Breaking the Code: Was There a Moral or Legal Obligation to Warn?*, 20 CARDOZO L. REV. 543 (1998). But one cannot move from conclusions about Jewish law to the law of most states. In most states of the United States one has no duty, either criminal or civil, to rescue strangers even when one can rescue at no risk to oneself. I believe that such a law is misguided and in need of reform, but for the time being it is the law in those states. As far as British responsibility in 1941 is concerned, one would need to ask a similar question about how the best understanding of Jewish law would relate to international law.

reading, a great deal of importance remains unclear. One question is the extent to which speedy disclosure would have added to information about the massacre of Jews otherwise available within the months after the cables were intercepted.

Another question is whether the British should have inferred from the German butchery of Jewish civilians on the Russian Front that the Nazis had, or would soon develop, a systematic policy to liquidate all Jews—a policy not formally decided upon until January 1942. A third question is whether a broader awareness of Nazi intentions in the late summer and early autumn of 1941 might have enabled more European Jews to be saved. A final question is how much the British would have risked had they more fully revealed the coded information.

Certain facts are clear. The atrocities committed on the Russian Front against the Jews and other ethnic groups were horrible in their own right, whether or not they presaged the “Final Solution.” At a minimum, the atrocities were similar to the massacre of civilians during the Bosnian war (most frequently Bosnian Serbs killing Bosnian Muslims). England was engaged in an all-out war with Germany, and Germany had already conquered most of Western Europe. At that time, England was still seriously at risk of being invaded and overwhelmed, and the British rightly regarded Hitler as a monstrously evil force—a view only the coded German cables could confirm. Breaking the German code was immensely valuable for British intelligence. Had the British disclosed any information which would have hinted to the Germans that they had intercepted the code, it could have dealt a serious blow to the Allied war effort.<sup>2</sup> Finally, before the war, citizens and officials in countries that eventually fought against Germany were in countless ways insensitive to the growing Nazi threat to Jews. They refused to credit disturbing information and turned their backs on people in desperate need.<sup>3</sup> During the war, these governments did less than they could have to fight against the exter-

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<sup>2</sup> Anthony D’Amato eloquently summarizes in the symposium the story of the British allowing Coventry to be bombed without warning. See Anthony D’Amato, *Legal and Moral Dimensions of Churchill’s Failure to Warn*, 20 CARDOZO L. REV. 561 (1998). If that incident occurred as Mr. D’Amato argues, it certainly demonstrates the importance the British leaders placed on keeping their knowledge of the code secret, regardless of the wisdom of their restraint.

<sup>3</sup> As just one example, in Varian Fry’s account of efforts of the Emergency Refugee Committee to help refugees escape from Vichy France, the hostility of most American officials is chilling. See VARIAN FRY, *SURRENDER ON DEMAND* (Johnson Books 1997) (1945).

mination of the Jews. There is enough recent experience to know that a refusal to believe and an unwillingness to assist are common responses to genocidal acts. However, one cannot discount pervasive anti-Semitism as another reason why more was not done to aid European Jews. My comments are directed at the British failure in 1941 to reveal the information about genocide learned from the Germans' secret cables, not at other possible failures of concern.<sup>4</sup>

I do not believe a country has any moral obligation to reveal information unless it could be useful; nor does it have any moral reason to withhold useful information unless it could be risky. Therefore, I assume that, had the information been revealed, the British might reasonably have thought that it might: (1) encourage neutral countries like the United States to give more assistance to Jewish refugees in Continental Europe than they would otherwise have provided; (2) embarrass the Germans into moderating their slaughter of Jews (the Germans, after all, kept this information a secret and might not have wanted to appear to the world as setting out to kill Jewish civilians); or (3) lead to the warning of potential Jewish victims so that some of them could have saved themselves.<sup>5</sup> Revealing this information from the coded messages would also have provided the world with a fuller picture of what was happening than did other avenues of information and vague allusions by Winston Churchill and other British leaders.<sup>6</sup> Finally, such a revelation might have caused the Germans to suspect the British ability to intercept their coded messages. While I am not sure that these assumptions are "fair," if any is dropped the moral question

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<sup>4</sup> Unless their code-breaking techniques were still secret, I can perceive no good basis for the British to withhold their records from the war crimes tribunal if those records were needed.

<sup>5</sup> This is a point Malvina Halberstam emphasized at the conference. See Malvina Halberstam, *Framing the Issues*, 20 *CARDOZO L. REV.* 443 (1998). I believe that, by the summer of 1941, most Jews were aware that the Nazi government was treating Jews very badly and many had tried to escape from territory controlled by the Germans. Still, direct knowledge of the massive killing of Jews on the Russian Front might have given some Jews a greater sense of urgency or confirmed their worst fears. Among these Jews, most who lived in occupied territory would probably not have been able to escape or hide successfully, but some might have been able to do so.

<sup>6</sup> On August 24, 1941, Churchill said over the radio that, during Hitler's invasion of Russia, "whole districts are being eliminated. Scores of thousands—literally scores of thousands—of executions in cold blood are being perpetrated by the German police troops." William J. Vanden Heuvel, *The Holocaust Was No Secret*, N.Y. TIMES, Dec. 22, 1996, § 6 (Magazine), at 31, 31. On November 14, 1941, in his letter to *The Jewish Chronicle* Churchill said, "[n]one has suffered more cruelly than the Jew," and he wrote of a burden on Jews "that seemed beyond endurance." *Id.*

becomes easy. In thinking about responsibility for past events, it would be most convenient if the moral questions were easy; but if we want to consider how governments should act in the future, we need to face more difficult circumstances.

Recent newspaper articles make something of the question of whether one could have inferred from the reports of the killing of Jewish civilians on the Russian Front that the Nazis would move to a systematic policy of killing all Jews. The crucial issue is not that, but rather what benefit disclosing the information might have had. Paradoxically, if one thought that the Nazis had an irrevocable plan to kill all Jews, one might believe that disclosure would have less value than if one thought that either some German leaders were concerned enough about world public opinion to shift their intentions in light of broad disclosure, or that some responsible German generals might constrain their wilder commanders in the field.<sup>7</sup>

### I. SOME IMPORTANT DISTINCTIONS

When we undertake moral consideration of the actions of a government, we need to distinguish between various questions. Most of those concern the evaluation of individual actions, but some are peculiar to governments and other organized groups. We first should distinguish moral duties and obligations from what action would be best overall from a moral point of view. We may conclude that someone was not under a duty to do something, but that the person's doing it would be morally desirable. I should say in passing that I am assuming that some course of action by the British was morally desirable and that, in the face of such tragic situations, we should not simply conclude that any course of action was wrong.<sup>8</sup>

A second distinction concerns the informational base we ascribe to the actor. We can ask what the actor should have done given (1) our knowledge of all the facts as they subsequently developed; (2) a highly perceptive appraisal of facts then available to him; and (3) the facts as the actor then understood them. In judg-

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<sup>7</sup> However, had potential victims understood that there was a systematic policy of extermination, they would have realized that hoping for the best was a doomed strategy of survival.

<sup>8</sup> I do believe that individuals face some tragic choices in which any action feels wrong and is rightly followed by the kinds of emotions and responses that usually follow wrongful actions. But governments in wartime are often faced with terrible choices. We are interested here in what the British should have done, and what other governments in roughly similar circumstances should do.

ing the actor, it is not fair to rely on facts that the actor could not have known or assumed at the time. Any judgment about British behavior in 1941 must use as its starting point the state of information then available to the British government.<sup>9</sup>

Third, we can distinguish what an actor should have done from the actor's actual motivation. One might conclude that the British had some good reason not to disclose the precise facts involved in the Germans killing Jewish civilians on the Russian Front and that, in actuality, a large basis for their not doing so was their indifference to the fate of European Jews. In that event, their actual motives deserve our moral condemnation, but their behavior would be morally acceptable. While the distinction between motivation and behavior is straightforward, there are some complicated twists. If in passing judgment we strongly suspect someone's motives and we are uncertain about the underlying facts, we will be skeptical about an explanation that colors the perceived facts in a way that would justify the behavior. Malign motives affect an actor's original evaluation and create doubts about his subsequent sincerity.<sup>10</sup> Further, if the motives are deemed immoral, particular events are likely to fall within a course of action in which at least some behavior will be immoral as well. If the British and Americans were comparatively indifferent about Jewish lives, they undoubtedly made many choices over the years that did not adequately protect Jewish lives. This is true regardless of whether the narrow British choice not to disclose the intercepted codes in 1941 was defensible.<sup>11</sup>

Fourth, we need to separate what is required or valued by social morality—relevant conventions in one society or in the international community—from what we judge to be really right from a moral point of view.

Fifth, there is a question of how far governments are constrained by moral principles that apply to individuals. If one focuses on British decisions and international social morality, one

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<sup>9</sup> A corollary to this is also true. One can blame the British for action they should have taken in 1941 given the factual setting as it then appeared, even if hindsight indicates that what then appeared to be a harmful act turned out well. It is important to note, however, that one would need to know a great deal about circumstances in 1941 in order to evaluate exactly how all the possible benefits and risks of disclosure, some not borne out by subsequent events, should have looked at that time.

<sup>10</sup> Thus, if the British cared little about Jewish lives in 1941, this would probably have affected their factual judgment and would certainly render suspect any post hoc defense of their failure to disclose the coded information.

<sup>11</sup> Many of the comments made by my fellow panelists indicate that they viewed the British behavior both before and during the war in this manner.

needs to ask about what actions are expected of governments in the international community.

Finally, when dealing with governments, we must decide whose actions, level of knowledge, and motivation count as those of the government. I shall assume that it is those of the top officials who make the crucial decisions. In Britain, these include Winston Churchill. Nevertheless, we should be aware that the level of knowledge and motivation among officials may have varied.

## II. STRUGGLING TOWARD EVALUATION

Should the British have disclosed what they learned from the secret German cables, that German troops were executing thousands of Jewish civilians? We can begin by acknowledging that in wartime every government puts an extreme value on winning and on protecting its own citizens. This is especially true in a full-scale war of national survival with extremely powerful moral dimensions. If by disclosing this information the British would have risked revealing its code-breaking techniques, then they did not violate any standard governmental conventions about how to behave.

Whatever international moral conventions were at that time, and are now, should the British have felt under a moral duty to disclose? We cannot reasonably answer this question without entering the realm of probabilities. If the information could have been disclosed in a way that would have made the risk to the code-breaking slight, and if there appeared to be a fair chance of saving large numbers of Jews by doing so, the British should have disclosed and probably should have regarded themselves as under a duty to do so. That was the view of most of my fellow panelists, and they may be right, but I find myself with serious doubts.

One argument, emphasized by Professor D'Amato,<sup>12</sup> is that the British could have pretended to get the information from an innocent source. That argument seems highly plausible. Since the killings were being done by ordinary German soldiers, they, as well as many surviving Russian civilians and soldiers, knew what was taking place. It is possible that the British could have learned from other sources a good deal of what the cables revealed. Further, given the blunders of various intelligence services over the past half century, we certainly cannot confidently assume that

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<sup>12</sup> See D'Amato, *supra* note 2.

every judgment about the need for secrecy was well-founded.

On the other hand, we should be hesitant to embrace appealing accounts of how the whole dilemma could have been cleverly avoided without listening to those with experience in intelligence work. We do know that the issue was not whether the Germans would realize that their code had been broken, but rather whether they would seriously suspect that it had happened. A serious suspicion would have been for the Germans to alter the code. Governments will abandon an existing code long before they think that its breaking by the enemy has become more probable than not. If alternate sources of information regarding German behavior on the Russian Front were full enough and credible enough on their own, the British would not have needed to rely at all on the intercepted cables. In a sense then, the dilemma about whether to disclose what they had learned from the cables would have disappeared. But, I think we need to suppose that the cables gave the British a certainty and degree of detail not otherwise available to them. Further, since wartime enemies often accuse each other of horrible crimes, British disclosures camouflaged to appear as if based on other sources might have carried less force than disclosures more evidently connected to the intercepted cables.

Some of the panelists relied strongly on the British behavior prior to and throughout the war. Although many of the prior and subsequent decisions made by the British were subject to criticism and may cast doubt on the full basis for the decision in 1941 not to disclose, I still believe that we can view the particular decision not to disclose the intercepted codes as a difficult one in its own right, not itself rendered starkly indefensible because of other choices they made, or because they lacked sufficient sympathy for the Jewish victims.

One's sense of how many victims might have been saved is influenced by whether one focuses on the 1941 decision alone, or the entire course of Allied behavior from the mid-1930s until the end of the war. Conceivably, had countries been much more willing to accept refugees before the war, and had Britain and the United States made stopping the Nazis a major focus of the war effort, millions of Jews might have been saved. But one cannot reasonably suppose that the disclosure of the codes in 1941 alone would have had that same effect. The number of Jews that could have been saved by that single act is much smaller. It, in fact, proved to be true, as the British might have supposed in 1941, that winning the war itself saved the lives of some Jews who would have been

killed had the war continued or been won by the Germans. If disclosing the information in 1941 would have seriously risked the war effort by creating suspicion that the code had been broken, one could not have been certain whether disclosure or silence would save more Jewish lives over the long run. If no one could then do much to save the vast number of Jews who were in jeopardy and the risk to code-breaking—and therefore to the entire war effort—was substantial, the British had no duty to disclose in 1941, and they may have been right in not doing so. On these factual assumptions, the British failure to disclose is not properly subject to moral condemnation, whether one focuses on prevailing moral assumptions about governments or on how governments really should act, and whether one focuses on moral duty or what action is morally preferable overall.

### III. OUTSIDER LIVES

I want to touch on two troubling complexities that may color any evaluation: what I call a possible “deontological duty to disclose” and the subtle, largely unconscious evaluation of the lives of “outsiders.” I shall deal with the first, highly complex subject very briefly. Moral philosophers often suppose that one should not directly kill one innocent person, even if that would save the lives of more than one innocent person. One should, the thought goes, not participate in an evil even if it appears that doing so will prevent more evil. Thus, if remaining silent when one can speak is a kind of participation, perhaps the British should have spoken the truth to help save some lives even if they reasonably estimated that more people would die as an indirect result.

I think it is highly doubtful whether the injunction against participating in evil rightly applies to a person who does not endorse or actively promote an evil, but who learns about it and remains silent because silence will save lives (in his reasonable judgment). In any event, whatever may be true about personal morality in ordinary circumstances, I think we expect governments in wartime to count lives, not to speak the truth if that will save few at the cost of many. Thus, I suppose that the proper approach to disclosure was some kind of calculation of harms and benefits over the long term.

Perhaps the most troubling moral question about the British failure to disclose the information learned from the codes in 1941 concerns what I shall call the “valuation of lives of outsiders.” Drawing from instances of British anti-Semitism and from their failure to help Jews before and during the war, some people have

concluded that the British did not care enough about the German murder of the Jews. They have judged that had the British cared they would have acted differently. Even if one believes that the failure to disclose the coded information may itself have been a morally defensible position, one must condemn the British if an element in their motivation in doing so was indifference to Jewish lives.

In their intuitive feelings, people tend to value lives differently; governments frequently do so in their actions. How far is action that reflects these differences appropriate?

Ordinary people care most about their own families and closest friends; they care with declining intensity about other people they know, strangers within their society with whom they identify, other strangers within their society, people who live in other societies to whom they feel an affinity, and people who live in other societies that seem remote.<sup>13</sup> The intensity of care about people in other societies is affected by such factors as distance, language, culture, race, religion, and political structures. If one imagines an earthquake in which one hundred people die, the intensity of feeling of most Americans will decline as one moves from Canada to England, to Hungary, to Egypt, to China, or to Zaire.

Most people will undertake more sacrifice to save people they know than strangers. They contribute to charity and approve government action partly in accord with the intensity of their emotional feelings. I became acutely conscious of this during the war in Bosnia. My late wife, Sanja, was the child of a Serbian father and Croatian mother. We knew many Serbs and Croats and some Bosnian Muslims. We spent summers together in a city of the former Yugoslavia that is in Croatia. Our three sons and I felt much more strongly about events in Bosnia than most Americans, and judging from polls, we supported American military intervention much earlier than they did.

Government action tends to reflect the idea that it too values lives differently. During wartime, governments care much more about the lives of their own citizens than the lives of citizens of the enemy—whether soldiers or civilians. They care more about the lives of their own citizens than the lives of innocent stranger victims of their enemies. Like their own citizens, governments tend

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<sup>13</sup> This brief litany omits many nuances. For example, many Americans were deeply affected by the death of Princess Diana, although she was not a member of our national society. However, my focus here is on the feelings of ordinary people about other ordinary people living in other countries.

to value, in part, the lives of outsiders in accord with their sense of nearness or remoteness.

Thus far, I have concentrated on a "description" of the most crude kind. I have said nothing about whether these sentiments are morally defensible. I believe it is morally appropriate for individuals to care more about (and make greater efforts to save) people they actually know than strangers, members of their own societies than outsiders. It is also appropriate for their charity to be based upon some personal affinities such as religious ones. However, it would be desirable for people to keep reminding themselves that human lives count equally and they should expect their governments to act on that premise.

Governments should act according to the principle that the loss of life by non-nationals, whether the victims are near or far, is equally unfortunate. This does not mean a government must always exert the same effort to save all lives. It may be easier to provide aid (or interfere) if the victims are close-at-hand. And when it comes to military intervention, all governments are, to a degree, constrained by what their citizens are willing to bear—although persuasion by leaders often affects what citizens are willing to bear. I believe national governments, representing their own citizens, appropriately protect the lives of those citizens more than they protect outsiders.<sup>14</sup>

How does this affect the subject of this Article? If the British reasonably judged that non-disclosure would, in the long run, protect more lives overall, then they acted properly. The serious dilemma would be if non-disclosure was the most prudent course of action to save British lives (and win the war), but at the cost of a greater number of lives of innocent victims. This setting would present a government with the kind of problem that Rabbi Cohen analyzed in depth, about an individual's duty to save an innocent victim at some risk or cost to him- or herself.<sup>15</sup> In settings like these, I believe the respective numbers should count. Britain should not have been expected to sacrifice a predicted 10,000 British lives to save 12,000 innocent victims; but it should have been willing to sacrifice 10,000 British lives to save 1,000,000 innocent victims. If British and American policies involved some devaluation of the lives of innocent Jewish victims of Nazi oppression, it may be hard to say why. It is a question of whether, and to

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<sup>14</sup> I am not addressing aliens living within a society. They deserve the same protection as that society's own citizens.

<sup>15</sup> See Cohen, *supra* note 1.

what extent, the explanation involved specifically anti-Jewish sentiment or the “ordinary” comparative devaluing of the lives of outsiders. Did the British and Americans care more about the lives of Christian villagers in the Soviet Union than they did about the lives of Jewish villagers? If the decision not to disclose the coded information was based upon devaluing the lives of outsiders *because* they were Jewish, that of course warrants moral condemnation. Whether their decision involved undue devaluing of outsider lives, whether Jewish or not, presents a much more troubling moral perplexity because we have so little sense of how far countries can, and perhaps should, prefer insider lives to outsider lives. These deep moral perplexities are especially close at hand if one thinks that the British decision not to disclose the coded information was the most prudent for its own survival, yet represented a self-conscious failure to save a very large number of Jews who might have been saved by such disclosure.

#### IV. LOOKING FORWARD

Briefly, I should like to go beyond this troubling historical instance to ask how we should look at such situations more generally. Although advances in technology make secret genocide much more difficult than it was in 1941, it remains true that a government may discover information about atrocities that is not generally available. A government may learn something that has not been publicly revealed at all or, by means such as satellite photographs, may acquire irrefutable confirmation of killing that has previously been only the subject of rumors. Confirmation of rumors can be every bit as important as discovering a completely new set of facts.

Genocide may be the very worst thing that a government can do. It violates the most basic human rights, constitutes a total denial of respect, and strikes at our common humanity. Governments should consider genocide to be a terrible crime; they should place a very high value on the lives of its prospective victims and try hard to prevent it. Governments should be willing to act more quickly in stopping genocide than they have in the past, even at the cost of some sacrifice of narrow national self-interest, including the loss of some of their own citizens' lives in the fight. By these standards, the failure of western governments to intervene with military force in Bosnia, long after the atrocities were undeniable, was more than lamentable—it was appalling.

Information about genocide and confirmation of such infor-

mation are extremely important. As I have said, governments use military force only when their citizens will accept it. People do not want to believe genocide is happening since it is very disturbing to contemplate. Governments should consider themselves under a duty to disclose information about genocide, unless doing so seriously risks the lives of their citizens or their own country's survival. While the condition of a threat to national survival might be met by small countries such as Israel and Jordan, it is unlikely to be met often by the United States and other large, stable countries. Providing information to citizens and the world at large is not only a matter of setting the stage for military intervention, it also encourages offending governments to exercise self-restraint. It may also lead to defensive measures by prospective victims, and to non-military involvement by other countries. Most governments care about how they are regarded in the international community. Disclosure may act as a deterrent, and if it does not, it may encourage other countries to withdraw from commerce with the offender. In some instances, when the victims of genocide face what is happening, they may be able to fight back or escape.

International law could well be strengthened in this respect. Governments should proceed beyond their general responsibilities imposed under existing conventions to prevent genocide. They should be under a specific responsibility to disclose instances of genocide when they are aware of them.

It is doubtful whether we shall ever come to a decisive answer about the morality of the British failure to disclose the slaughter of the Jews on the Russian Front in 1941. But thinking about that extremely painful topic can lead us to consider how the lives of outsiders should be valued and how countries should now act once they discover that other countries, or groups within countries, are engaging in genocide.