Genocide

Key Themes

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Fit for Purpose?

The Concept of Genocide and Civilian Destruction

A. Dirk Moses

Introduction

The academic 'pioneers of genocide studies' rediscovered Raphael Lemkin in founding an academic field in the 1980s. The book in which he introduced the new notion of 'genocide', *Axis Rule in Occupied Europe* (1944), became the field's founding document. The Polish-Jewish émigré jurist, the pioneers thought, was the first to identify the destruction of nations as a recurrent historical pattern, and to propose an international law to criminalize this 'odious scourge'.[1] So they followed in his footsteps by redeeming his memory, honouring his achievement and, above all, trying to prevent genocide. In reconstructing the intellectual origins of his famous concept, they retold Lemkin's story. Written as an epic battle against cynical *realpolitik* and jealous rivals, their hagiographies celebrated Lemkin's triumph in the United Nations Convention on the Punishment and Prevention of Genocide in 1948. After the disappointment of the Nuremberg Trials, in which 'genocide' hardly figured, the Convention (UNCG) meant that Lemkin's neologism had vanquished the rival contenders of war

[1] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944); Steven Leonard Jacobs and Samuel Totten (eds.), *Pioneers of Genocide Studies* (New Brunswick, NJ: Transaction Publishers, 2002).

crimes, crimes against humanity, and crimes against peace as the 'crime of crimes'.[2]

With the UNGC, the field of Genocide Studies felt equipped to go forth and slay the 'Holocaust monster', as one of them put it.[3] That the monster continued to wreak havoc in numerous conflicts since 1948 has vexed and confounded the field. Its members have attributed this civilian destruction to the monstrous dictators of failed states, and to feckless Western leaders who have not prevented their genocidal designs. The field did not consider the proposition that the concept of genocide may not be fit for purpose, namely accounting for the sources of mass violence against civilians so that remedies can be devised.

This chapter explains not only why 'genocide' fails to satisfactorily name the varieties of violence against mass civilians but also how it enables them. For Lemkin and the UNGC criminalized the intentional destruction solely of national, ethnic, racial, and religious groups at the expense of other categories of civilians. While the latter are covered by various international crimes, only genocide towers above them as the supreme crime in international opinion. What is more, according to the UNGC, violence perpetrated in the name of national security and military necessity is not genocidal, which requires the targeting of the denoted groups 'as such', meaning on the grounds of their identity alone. Thus Genocide Studies omitted the Nigeria-Biafra War of 1967–70 and the US conduct in the Vietnam War from its canon, and never included the largest mass casualty event of the twentieth century, the famines of Mao's Great Leap Forward between 1958 and 1962 that killed up to 45 million Chinese citizens. Today, the Myanmar and Chinese governments

[2] Michael Ignatieff, 'The Hunger Artist: The Unsung Hero of Modern Humanitarianism', *The New Republic*, 16 September 2018, 46–51; Agnieszka Bieńczyk-Missala and Sławomir Dębski (eds.), *Rafał Lemkin: A Hero of Humankind* (Warsaw: Polish Institute of International Affairs, 2010); Samantha Power, *'A Problem from Hell': America and the Age of Genocide* (New York: Basic Books, 2002); William Korey, *An Epitaph for Raphael Lemkin* (New York: Blaustein Institute for the Advancement of Human Rights, 2002); John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Basingstoke: Palgrave Macmillan, 2008).

[3] Robert Melson, 'My Journey in the Study of Genocide', in Totten and Jacobs, *Pioneers of Genocide Studies*, 142.

contend that their expulsion of Rohingya and incarceration of Uighurs respectively are security measures, and it is likely that they succeed in doing so. For security and military violence are the bedrocks of national sovereignty, especially when state existence is question. The UNGC was designed to ensure that this right of self-preservation was not hindered by international law.

In accounting for these exclusions, this chapter first returns to Lemkin and his context to demonstrate how his intervention radically constricted fuller understanding of mass criminality. From the 1920s to the 1940s, international lawyers were debating civilian destruction in broad terms in relation to aerial warfare and blockades. Lemkin ignored these discussions in fixating on ethnic categories.

Secondly, this chapter shows how the new legal idea of genocide was shaped in their own interests by agents with actual power: nation-states. If international lawyers today tend to indict perpetrators for war crimes and crimes and humanity instead of genocide, it is because the latter is so difficult to prove. That is no accident.

Lemkin's Favoured Groups

This restricted outcome was not implicit in Lemkin's claim that his basic premise was general civilian immunity. He began his justification of the genocide concept in promising terms when he declared that the distinction between civilians and combatants was elemental to the crime. Genocide was:

> the antithesis of the Rousseau-Portalis Doctrine, which may be regarded as implicit in the Hague Regulations. This doctrine holds that war is directed against sovereigns and armies, not against subjects and civilians. In its modern application in civilized society, the doctrine means that war is conducted against states and armed forces and not against populations.[4]

Here Lemkin declared that criminality was defined as warfare waged against populations rather than armies. Today, customary international humanitarian law refers to the 'principle of distinction'

[4] Lemkin, *Axis Rule in Occupied Europe*, 80.

(or discrimination).[5] But instead of following his premise about the civilian immunity, Lemkin fixated on ethnic or national groups as victims of massive hate crimes. Consequently, he did not develop a framework that also included the targeting of entire peoples as military objectives in armed conflict despite the fact that his predecessors and mentors were already thinking about prosecuting war criminals, defending minorities, and restricting aerial bombardment of civilians. They posed the questions and provided answers that he distorted for his new term.

The denouement of the First World War set the interwar international legal agenda. The victorious Allies' Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, established in 1919 to investigate Central Powers' breaches of international law identified two major transgressions: provoking the war and violating 'the laws and customs of war and the laws of humanity', namely German 'systematic terrorism' against civilians and of course the Ottoman massacres and deportation of Armenians.[6] The concern for civilians continued in international conversations about the novel technology of the imprecise bombing from aircraft in the Hague Draft Rules on Air Warfare of 1923. Article 22 prohibited 'Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants'.[7]

[5] International Committee of the Red Cross, 'Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians'. Customary IHL, 'Rule 1. The Principle of Distinction between Civilians and Combatants', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1.

[6] 'Report of the Commission on Responsibility of the Authors of the War and Enforcement of Penalties', in *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*, Conference of Paris, 1919 (Oxford: Clarendon Press, 1919).

[7] Hague Rules of Air Warfare *American Journal of International Law* 17, supplement (1923); Heinz Markus Hanke, 'The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack', *International Review of the Red Cross* 33:292 (1993), 17.

Prominent jurists also invoked what they called 'racial massacres' in general and 'the Armenian massacres' in particular. These crimes were so grave as to justify violating the principle of state sovereignty in the interests of 'restoring the moral order which must reign in the whole of humanity', as the Romanian jurist Vespasian V. Pella (1897–1952) put it in 1925 in purporting to declare a *jus cogens* legal principle.[8] The French judge Henri Donnedieu de Vabres (1880–1952) wrote about 'attacks on humanity that might be perpetrated in a country under the influence of race hatred', while his Spanish colleague Quintiliano Saldaña (1878–1938) referred to 'acts of savagery, such as major political or racial massacres' regarding 'the massacres of Christian-Armenians and Russian Jews'.[9] Lemkin's mentor and collaborator in the late 1920s and early 1930s, the Polish vice president of the International Association of Penal Law, Emil Stanisław Rappaport (1877–1965), suggested that propaganda inciting warfare be categorized as 'a new international crime' to protect 'a *new international good—of the safety of culture and the world civilization*'. Such a law 'imposes itself on the public conscience'.[10]

These common nineteenth-century and early twentieth-century phrasings about religiously or racially motivated mass atrocities increased in circulation in the 1920s due to the Armenian experience during the war. The Russian émigré diplomat and jurist André Mandelstam (1869–1949) was a particularly prominent advocate for Armenians, eventually arguing for minority protection via the new term of 'human rights'.[11] The League of Nations minority protection regime comprised treaties between the victorious Allies and fourteen

[8] Vespasian V. Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir* (Bucarest: Imprimerie de l'État, 1925), 145–6.

[9] Cited in John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot: Ashgate, 2006), 3. Quintiliano Saldaña, 'La Justice pénale internationale', *Recueil des cours* 10 (1925), 369; Saldaña, 'La Défense Sociale Universelle', *Revue Internationale de Sociologie* (March–April 1925), 145–74.

[10] E. S. Rappaport, 'Presente au sujet de le propaganda de la guerre d'agression', in *Conférence internationale d'unification du droit pénal (Varsovie, 1er–5 novembre 1927)* (Paris: Recueil Sirey, 1929), 40. Emphasis in original.

[11] André Mandelstam, *Le Sort de l'Empire Ottoman* (Lausanne and Paris: Librarie Payot et Cie, 1917), ix–xi; André Mandelstam, *Das Armenische Problem im Lichte des Völker-und Menschenrechts* (Berlin: Stilke, 1931); André Mandelstam, 'Der

states either established after the war or ones rewarded with new territory—though not Italy, France, and Germany—thereby acquiring large minority populations, like Greece. Although the treaties empowered the League to supervise the provisions, little was done for minorities, which could send petitions to the League but not place complaints on the official agenda. Nonetheless, their existence rankled the elites of the affected states, which blamed minorities for conspiring with international enemies to compromise their hard-won sovereignty and territorial integrity.[12] In 1929, Mandelstam drafted a 'declaration on the international rights of man', adapted by the *Institute de droit international*, whose six articles ascribed to states the duty to protect various individual rights, including those mentioned in the minorities treaties, like the freedom of religion and to use one's language in public instruction.[13] To their regret, the League of Nations declined to adopt this initiative when it was put its assembly in the early 1930s.[14]

A number of other issues concerned the League and leading international lawyers like Rappaport, Pella, and de Vabres: establishing an international criminal court and universal jurisdiction, outlawing inter-state aggression and incitement to war, defining and criminalizing terrorism, and instituting the category of 'international crimes'. Pella and de Vabres were giants in the field, drafting the first version of the UN Genocide Convention with Lemkin in 1947, while de Vabres served as a Nuremberg judge. Lemkin became involved in the

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internationale Schutz der Menschenrechte und die New-Yorker Erklärung des Instituts für Völkerrecht', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2 (1931), 335–77.

[12] Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938* (Cambridge: Cambridge University Press, 2004). Poland eventually renounced its treaty in 1934.

[13] Andre Mandelstam, 'La protection des minorites', *Recueil des Cours de Academie de droit international* 1 (1923), 368–519; Mandelstam, *Le Sort de l'Empire Ottoman*, 444.

[14] Paul Gordon Lauren, *The Evolution of International Human Rights Visions Seen*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2003), 130–1; Helmut Philipp Aust, 'From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights', *European Journal of International Law* 25:4 (2015), 1105–21.

International Association of Penal Law via Rappaport, and he read and cited Pella's work. Neither man is mentioned in his autobiography.

At its 1927 meeting, the International Association of Penal Law resolved to contrive the category of 'international crimes (*delictum juris gentium*)' that presented a 'common danger' to all states, like piracy, slavery, pornography, the drugs trade, counterfeiting money, disrupting international communication, and spreading diseases.[15] Two years later, Pella mentioned the categories of 'savagery' and 'vandalism' during the League of Nations deliberations about an anti-counterfeiting convention, distinguishing them from the non-violent but equally terroristic effect of forging currency.[16] Having placed international crimes on the agenda in 1927, the association spent subsequent years deliberating about their definition and codification. The notion of 'terrorism' for such general dangers was discussed in the early 1930s. Lemkin argued at the 1931 meeting that the creation of a 'common danger' to human communications (postal, telegraphic, transport, etc.) was its salient attribute.[17] He continued this line of argument two years later in his well-known submissions to the association's Madrid conference.[18] Given rising antisemitism in Europe,

[15] For the construction of these as 'international crimes', see Paul Knepper, *The Invention of International Crime: A Global Issue in the Making, 1881–1914* (Basingstoke: Palgrave Macmillan, 2010).

[16] League of Nations, Proceedings of the International Conference for the Adoption of a Convention for the Suppression of Counterfeiting Currency, Geneva, 9th April to 20th April 1929 (Series of League of Nations Publications, II: Economic and Financial, 1929), 53; Lewis, *The Birth of the New Justice*, 188.

[17] 'Rapport de M. Lemkin', in *Actes de la IV Conférence pour l'Unification du Droit Penal* (Paris: A. Pedone, 1933), 65; Claudia Kraft, 'Völkermord als *delictum iuris gentium*: Raphael Lemkins Vorarbeiten für eine Genozidkonvention in der Zwischenkriegszeit', *Simon Dubnow Institute Yearbook* 4 (2005), 79–98; Daniel Marc Segesser and Miriam Gessler, 'Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)', *Journal of Genocide Research* 7:4 (2005), 453–68; Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2014), 123.

[18] His supplementary report, discussed below, is the more quoted text because it elaborates his insertion of barbarism and vandalism into the list of international crimes. The original is Raphael Lemkin, 'Rapport et projet de textes' (sometimes titled 'Terrorisme' or 'Le terorisme') in Luis Jimenez de Asua, Vespasien Pella, and

including Poland, it is no surprise that Lemkin combined the common vocabulary used by Pella with Rappaport's new 'international good' to protect minorities threatened by fascist regimes. In his 1933 formulation, Lemkin defined vandalism as 'the evil destruction of works of art and culture', that is, 'great' art of international significance.[19] 'Acts of barbarism' effectively reprised the violations listed in the 1919 Commission on Responsibility: 'massacres, pogroms, collective cruelties against women and children, treatment of people that violates their dignity and humiliates them'.[20] If there was little new in this proposal, it also offered no explanation for state excesses other than 'hatred', a force he presumably identified with antisemitism and Pan-Germanism. He said very little about the former after a public controversy with a Polish writer in the late 1920s, however, likely not wanting to draw attention to the Jewish sources of his thought and motivation in a pervasive antisemitic environment.[21]

Neither were his legal proposals as original as commonly supposed. Lemkin took the notions of barbarism, vandalism, the protection of culture, and international crimes from his contemporaries. Before them, the Commission on Responsibility report, like the Hague Draft Rules on Air Warfare, also referred to terrorizing civilians. Lemkin was adapting—and simplifying and racializing—familiar themes.

What is more, Lemkin's ethnic ontology of the human (see below) and related preoccupation with racial hatred led him to ignore other

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Manuel Lopez-Rey Arroyo (eds.), *Acte de la V-me Conférence pour l'Unification du Droit Penal (Madrid, 19–20 October 1933)* (Paris: A. Pedone, 1935), 48–56. The supplement is called *'Les actes constituant un danger general (interétatique) consideres comme delites des droit des gens': Expilications additionelles au Rapport spécial présentè à la V-me Conférence pour l'Unification du Droit Penal à Madrid (14–20.X.1933)* (Paris: A. Pedone, 1935). The English translation by James T. Fussell, 'Acts Constituting a General (Transnational) Danger considered as Crimes under International Law', appears at http://www.preventgenocide.org/lemkin/madrid1933-english.htm.

[19] Lemkin, 'Rapport et projet de textes', 54.

[20] Ibid., 55.

[21] See James Loeffler, 'The First Genocide: Antisemitism and Universalism in Raphael Lemkin's Thought', *Jewish Quarterly Review* 112:1 (2022).

sinister developments that threatened to terrorize civilians. By the mid-1930s, fears of rivals' capacity to deliver a 'knock-out blow' in pre-emptive bomber strikes on cities haunted military and civilian authorities.[22] Like Lemkin, the American jurist, John Bassett Moore (1860–1947), who chaired the Hague Commission in December 1922 considering international legal regulation of radio and aircraft, affirmed that, since the Middle Ages, civilization rested in part on distinguishing between combatants and civilians in warfare. Unlike Lemkin, he lamented that the Great War and advent of modern weapons had eroded this basic principle.[23] The reasons for this erosion were explicated and supported by the American lawyer and air force pilot, Frank Quindry, in 1931:

> Considering the economic structure of a nation during a modern war and the conscriptive systems which will probably be employed by all nations, it is difficult to determine whether the civilian who helps supply the fighting forces is any less dangerous to the success of the opposing army than the soldier who operates the mechanical instruments of destruction.[24]

For many military thinkers, civilians were dangerous 'offenders' and thus military objectives. However squeamish some leaders were about strategic bombing of cities, and thus civilians, because the civilized norm prohibited 'terrorizing the civilian population' as policy objective, the collective guilt argument would be too tempting to resist in the next world war.[25]

[22] Brett Holman, *The Next War in the Air: Britain's Fear of the Bomber, 1908–1941* (Farnham: Ashgate, 2014); James S. Corum, 'Airpower Thought in Continental Europe between the Wars', in Phillip S. Meilinger (ed.), *The Paths of Heaven: The Evolution of Airpower Theory* (Maxwell Air Force Base: Air University Press, 1997), 151–81.

[23] John Bassett Moore, *International Law and Some Current Illusions and Other Essays* (New York; Macmillan, 1924), viii–ix, 3–6, 200–1.

[24] Frank E. Quindry, 'Aerial Bombardment of Civilian and Military Objectives', *Journal of Air Law and Commerce* 2:4 (1931), 494–5.

[25] Article 22, The Hague Rules of Air Warfare, 1923, https://wwi.lib.byu.edu/index.php/The_Hague_Rules_of_Air_Warfare.

Unlike Lemkin, some international lawyers confronted this reasoning head on. Representative was James W. Garner (1871–1938), a prodigious commentator on legal issues pertaining to international armed conflict. Reflecting on the Hague Draft Rules on Air Warfare in 1924, he observed that the bombing of civilians, civilian infrastructure, private property, and historical monuments during the First World War 'aroused a feeling of horror against which the conscience of mankind everywhere revolted'.[26] Already then, he had discerned that 'terrorization of the civilian inhabitant' was strategic bombing's aim, and that, far from demoralizing the enemy, by 'their very barbarity is rather more likely to intensify the hatred of the people against whom they are directed'. Thus, while he recognized that workers in arms manufacture could be legitimately targeted, he feared the logic of escalating reprisal would 'cause war to degenerate into a struggle of reciprocal barbarism'.[27]

This important debate about civilian immunity, so portentous for the next world war and the nuclear age, bypassed Lemkin completely. He did not respond to the obvious implications of the practices of total war during the First World War—the bombing of cities and blockades that led to the starvation of hundreds of thousands—that military thinkers like German general, Erich Ludendorff (1865–1937) systematized.[28] During the next world war, 600,000 civilians would die from aerial bombing, and another million would be maimed, while European cities lay in ruins. Some 400,000 Japanese perished from US bombing.[29] Death by starvation due to sieges, like the German siege of Leningrad (September 1941 to January 1942), also resulted in hundreds of thousands more civilian deaths, and were not

[26] James W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare', *American Journal of International Law* 18:1 (1924), 64.

[27] Ibid., 65. See generally Thomas Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884–1939* (Cambridge: Cambridge University Press, 2013).

[28] Erich Ludendorff, *Der totale Krieg* (Munich: Ludendorrfs Verlag, 1935); Richard Overy, *The Bombing War: Europe, 1939–1945* (London: Penguin, 2013), i.

[29] Ian Patterson, *Guernica and Total War* (Cambridge, MA: Harvard University Press, 2007); Yuki Tanaka and Marilyn Young (eds.), *Bombing Civilians: A Twentieth-Century History* (New York: New Press, 2009).

regarded as war crimes by the American judges after the war because they did not violate the Hague Convention of 1907.[30]

Lemkin's ignoring of these developments is not surprising given that the British and French had vehemently resisted the efforts of neutral countries and the Red Cross in 1921 to limit the right of blockade that the British had used to great effect against Germany during the First World War. Like the airwar theorists, defenders of blockades argued that civilian starvation was more humane than trench warfare; if it led to an earlier cessation of hostilities, the price was worthwhile. They also argued that blockade was a legitimate sanction for the League of Nations to apply to recalcitrant states. It was thus an instrument of enforcing international law and agreements rather than representing a perfidious means of civilian destruction that should be criminalized.[31] The Western powers were thus happy to elide the distinction between combatants and civilians in enforcing international rules that suited them. On the eve of the Second World War, the future architect of the British welfare state, William Beveridge (1879–1963), pressed home this point in arguing that 'totalitarian warfare' implicated the entire population, which was thus targetable. Besides, he continued, any starvation was attributable to how the blockaded state distributed food rather than to the blockading state.[32]

Likewise, that the Hague Rules on Air War which Moore's commission proposed in 1923 were not ratified by states, especially Britain and the US, is a turning point in international law not mentioned in the same breath as the failure of League of Nations organizations to criminalize the destruction of their minorities: certainly not by

[30] United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals*, Vol. XII, *The German High Command Trials* (London: HMSO, 1949), 84, 563; David Marcus, 'Famine Crimes in International Law', *American Journal of International Law* 97:2 (2003), 245–81.

[31] Nicholas Mulder and Boyd van Dijk, 'Why Did Starvation Not Become the Paradigmatic War Crime in International Law?', in Kevin Jon Heller and Ingo Venzke (eds.), *Contingency and the Course of International Law* (Oxford: Oxford University Press, 2021), 370–90.

[32] William Beveridge, *Blockade and the Civilian Population* (Oxford: Clarendon Press, 1939), 26–7, 31. Thanks to Boyd van Dijk for drawing my attention to this book.

Lemkin.[33] He regarded these powers as progressive forces in history, and was thus blinded to the illiberal permanent security measures in which they enjoyed a comparative advantage: aerial warfare and naval blockades that were driven by the same logic of military necessity—killing enemy civilians until the enemy state surrendered. Defenders of this logic distinguished it from genocide by referring to the greater good of 'civilization' (or anti-totalitarianism).

Until *Axis Rule*, Lemkin also missed another signal development in illiberal permanent security: the fascist mode of conducting war in the 1930s: the Japanese invasion of China, the Italian invasion of Abyssinia in 1935, and the Spanish Civil War. These were effectively wars of extermination that targeted the enemy population as a whole with aerial bombing, murderous mistreatment of prisoners, and, in the Japanese and Italian cases, extensive settlement projects that aimed to replace the local populations by deportation and starvation measures. The Japanese forced resettlements in northern China cost the lives of 2.3 million locals, while up to 10 million Asian civilians died at the hands of Japanese imperial ambitions. The Italians built concentration camps, bombed villages, and used poison gas against civilians, killing or causing the death by starvation of over 10 per cent of the population of 800,000. German military elites carefully observed these campaigns in developing their own radical conception of annihilatory warfare that disregarded both international treaties and the Geneva and Hague Conventions. They were particularly interested in Italian fascist settlement projects in North Africa.[34]

Lemkin had nothing to say about these dramatic projects that were so devastating to civilians, but it was not as if others ignored them. When Germany invaded Poland in 1939, Roosevelt warned belligerents not to bombard 'from the air of civilian populations or of

[33] Hanke, 'The 1923 Hague Rules of Air Warfare'. Some states initially adhered to the Rules voluntarily, but this restraint soon disappeared as the Second World War dragged on.

[34] Sven Reichardt, 'National Socialist Assessments of Global Fascist Warfare (1935–1938)', and Amedeo Osti Guerrazzi, 'Cultures of Total Annihilation? The German, Italian, and Japanese Armies During the Second World War', in Miguel Alonso, Alan Kramer, and Javier Rodrigo (eds.), *Fascist Warfare, 1922–1945* (Basingstoke: Palgrave Macmillan, 2019), 51–72, 119–42.

unfortified cities', because such 'ruthless bombing' in the recent past was a 'form of barbarism' and had 'profoundly shocked the conscience of humanity'.[35] By contrast, Lemkin was more interested in intra-state violence against minorities and state terrorism. Why?

Zionism and Small Nations

Lemkin was raised in an Ashkenazi Jewish religious and cultural environment imbued with a deep, ritualized memory culture of collective persecution and physical destruction as a routine and ongoing threat to Jewish survival. This consciousness was likely impressed upon the young Lemkin who—he recounts in his autobiography—heard about nearby pogroms as a boy.[36] Lemkin's youthful Zionism thus should come as no surprise. James Loeffler's important research has uncovered Lemkin's articles in the Polish-Jewish press in the 1920s that indicate avid support for a Jewish state in Palestine, some even expressed with robust organic-blood metaphors, along with impassioned pleas for Zionist political unity. 'A state consists of three factors', he wrote in 1927: 'Land, people, and political sovereignty', entailing 'colonization work' in Palestine.[37]

Lemkin's conception of humanity as comprising distinct nationalities emerged from a broadly Herderian tradition of occidental thought. Herder also depicted nations as groups of people with unique blends of cultural characteristics and a corresponding *Volk*-'spirit'. In this regard, his thinking resembled that of the slightly older Lithuanian Zionist and lawyer, Jacob Robinson (1889–1977), made a case for Jewish national—not just religious—identity in terms of language and culture.[38] Robinson thought it necessary for Jews to de-assimilate by

[35] Quoted in Sahr Conway-Lanz, 'The Ethics of Bombing Civilians After World War II: The Persistence of Norms Against Targeting Civilians in the Korean War', *Asia-Pacific Journal* 12:1 (2014), 2.

[36] Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013), 17.

[37] James Loeffler, 'Becoming Cleopatra: The Forgotten Jewish Politics of Raphael Lemkin', *Journal of Genocide Research* 19:3 (2017), 340–60.

[38] Omry Kaplan-Feuereisen and Richard Mann, 'At the Service of the Jewish Nation: Jacob Robinson and International Law', *Osteuropa* 58:8–10 (2008), 157–70.

relinquishing the 'disease of multilingualism' and reviving the Hebrew language for national renewal. Again, far from advocating tribal particularism, he was echoing a common view that nations contributed to what he called 'universal human values'.[39] After their nationalization, Jews would contribute to the universal human values of world civilization which he conceived as a concatenation of national cultures: 'The Jewish Torah, Indian Buddhism, Greek philosophy and art, Roman law, Arabic Islam, Roman Catholic theocracy, Italian humanism, German Reformation, the French Revolution—all of these created universal human values from within particular boundaries though the power of nationhood'.[40] For Zionists like Robinson and Lemkin, Zionism was also a form of internationalism because it worked with the upholder of international law—the British Empire—to create a Jewish national home in Palestine that would allow Jews to re-enter history and contribute to human civilization.[41]

We do not know if Lemkin read Robinson in the 1920s, but he clearly imbibed the same message about 'national spirits' constituting the building blocks of humanity, as well as Robinson's hostility to multinational subjectivities.[42] Lemkin's conception of humanity as comprising distinct ethno-linguistic nationalities was, therefore, entirely consistent with his demonstrable Zionist commitment to the project of Jewish statehood in Palestine. He taught at a Jewish seminary in Warsaw during the 1930s and raised funds to support Zionist undertakings in Palestine. Like other Zionists at the time, he seems to have regarded the Zionist project in Palestine as a national redemption that would also offer a safe haven for Jews in an increasingly dangerous Europe.

These commitments are not apparent in his highly stylized autobiography, *Totally Unofficial*, which casts his life as an apolitical quest to

[39] Yaakov Robinzon, *Yediat amenu: Demografyah ve-natsiologyah* (Berlin, 1923), 133, quoted in James Loeffler, '"The Famous Trinity of 1917": Zionist Internationalism in Historical Perspective', *Simon Dubnow Yearbook* 15 (2016): 11.

[40] Ibid., 10–11.

[41] James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven: Yale University Press, 2018).

[42] Loeffler, 'Becoming Cleopatra', 343.

criminalize genocide in international law from his earliest days.[43] Lemkin also claimed his crusade was motivated by the impunity of genocidal perpetrators, whether in Russian pogroms against Jews or the Ottoman destruction of Ottoman Armenians during the First World War. In fact, he celebrated the killing of perpetrators by young Jewish and Armenian men in the late 1920s because of the purity of their victim-centric motives.[44] He downplayed his Zionism by implying that his Jewish engagement took an alternative form of Jewish politics, namely the non-nationalist Jewish autonomy movement popular in Poland and Lithuania, and the idiom of criminal and international law, which exemplified a common concern for small nations. Autonomism is associated with the Russian-Jewish historian Simon Dubnow (1860–1941), who summarized the project thus: 'protecting its [the Jewish nation's] national individuality and safeguarding its autonomous development in all states everywhere in the Diaspora'.[45] Lemkin claims he paid homage to Dubnow on his flight from Poland. Whether true or not, Lemkin may have mentioned the story to fashion a non-Zionist lineage for his ethno-national imaginary.

Lemkin hitched his cart to the ideal of 'small nations' expressed by Central European politicians and intellectuals. This ideal was consistent with his Zionism and with the more general conception of humanity as a tapestry of nations, preferably each with their own state. As a Pole and a Jew, Lemkin could sympathize with the Czechoslovak aversion to German aspirations in East-Central Europe. Lemkin traced Pan-Germanism's enduring imperative to dominate the land

[43] Lemkin, *Totally Unofficial*.

[44] Ibid., 19–22; Philippe Sands, *East-West Street: On the Origins of 'Crimes against Humanity' and 'Genocide'* (New York: Knopf, 2017), 149–52; Peter Balakian, 'Raphael Lemkin, Cultural Destruction, and the Armenian Genocide', *Holocaust and Genocide Studies* 27:1 (2013), 57–89. Rafail Lemkin, 'Dos gerikht far di "sheyne farbrekhens"' ['The Judgement of the "Beautiful Crime"'], *Haynt*, 28 October 1927, cited in Loeffler, 'Becoming Cleopatra', 347–8.

[45] Simon Dubnow, *Nationalism and History: Essays on Old and New Judaism*, ed. and intro. Koppel S. Pinson (Philadelphia: Jewish Publication Society of America, 1958), 97.

between Germany and Russia to medieval German colonization in the region. Germany was the 'classical country of genocide practices', he wrote in an unpublished world history of genocide after the Second World War.[46]

Mobilizing support for his new concept in international law required enlisting the representatives of small nations whose leaders understood themselves as cultural nations seeking to found or consolidate a new state. If genocide was the destruction of nations, and nations were cultural entities, then attacking bearers of culture and its symbols was genocide. That is why the cultural dimension of genocide included the intention to 'cripple' as well as to 'destroy' a people. This notion appeared in the form 'cultural genocide' in a draft convention in 1947 when UN committees were debating the definition of genocide.[47]

And yet, a biological assumption in Lemkin's thinking was there from the outset and flowed into his conception of nationhood. In 1934, he wrote about the biological propensity of criminals and the virtues of 'criminal biology' in relation to the 1932 Polish Penal Code, whose author was one of his former university teachers. To be sure, as a liberal, he also stressed the social factors causing criminality, and advocated that law seek the resocialization of offenders; on that basis, he criticized the Nazi criminal law reform for its deterrent rather than rehabilitative intent.[48] And yet, the shared belief in the biological-hereditary basis of anti-social conditions like 'work shyness' is impossible to overlook. Ten years later, he warned of the Nazi aim to change the 'balance of biological forces' between Germany and 'captive nations', and of the 'biological structure' of nations, while emphasizing how the Nazis (also) conceived of nations in biological terms.[49]

[46] Raphael Lemkin, 'Genocide as a Crime under International Law', *American Journal of International Law* 41:1 (1947), 151.

[47] Ibid., 147.

[48] Rafał Lemkin, 'O wprowadzenie ekspertyzy kriminalo-biologicznej do procesu karnego' ['On the Introduction of Criminal-Biological Expertise in the Criminal Trial'], *Glos Prawa Lwow* 11:3 (1934), 137–44; Lemkin, 'Reforma prawa karnego w Niemczech', *Wiadmości Literackie* 30 (1934), 7.

[49] Lemkin, *Axis Rule in Occupied Europe*, xi, 80–1.

Lemkin's Invention

By 1943, Lemkin was writing *Axis Rule* to intervene in the transatlantic discussion about international law and Nazis crimes. The debate centred on the Hague Conventions of 1899 and 1907, and whether it could cover the extent and radicality of the Nazi occupation of Europe. Lemkin proposed to augment this law with his 'generic notion' of genocide to denote the 'destruction of nations' by joining the ancient Greek word of *genos* (i.e. tribe, nation, or race) and the Latin *caedere* (to kill).[50] He did so by combining the aforementioned conception of discrete national cultures with the small nations ideology mobilized by the Allies against German expansionism in the First World War and now by exiled governments like the Poles and Czechoslovaks. Lemkin wrote:

> Among the basic features which have marked progress in civilization are respect for and appreciation of the national characteristics and qualities contributed to world culture by different nations—characteristics and qualities which, as illustrated in the contributions made by nations weak in defense and poor in economic resources, are not to be measured in terms of national power and wealth.[51]

In doing so in *Axis Rule*, Lemkin was simultaneously invoking the Fourth Hague Convention (1907) to show how the Nazis violated international law while arguing that this law was inadequate.[52] Genocide had not been foreseen by its formulators, he wrote: the Hague regime covered individuals rather than peoples. Thus, while Hague law pertained to many Nazi policies and practices, it did not anticipate the Nazis' 'various ingenious measures for weakening or destroying political, social, and cultural elements in national groups'. Accordingly, he wanted to intervene in the Allies' debate about

[50] Ibid., 79.

[51] Ibid., 91.

[52] Not for nothing does *Axis Rule* abound with references to the Hague Regulations and its Martens Clause. Referring to the SS, he wrote that 'Such crimes are directed not only against municipal law of the occupied countries, but also against international law and the laws of humanity': Ibid., 23.

prosecuting Axis war criminals by dealing with the 'entire problem of genocide . . . as a whole'.[53]

Axis Rule, then, aimed to supplement rather than replace existing law: that is why the book is generally about Axis violations of the laws of occupation: each chapter analyses a domain of occupation that violated Hague law.[54] And that is why it contains a *single chapter* introducing his proposed innovation to this law: genocide as a 'new technique of occupation'. Lemkin stressed that it was a new crime only by criminalizing practices of national destruction that were partially covered by current international law. A new law against genocide combined relevant dimensions of the Hague Regulations with new ones Lemkin identified—like 'subsidizing children begotten by members of the armed forces of the occupant and born of women nationals of the occupied area'. Genocide was thus 'a composite of different acts of persecution or destruction'.[55] Specifically, he suggested that the Hague Convention should be amended by adding the following kinds of measures:

> every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one such group to the prejudice or detriment of another.[56]

Lemkin imported the elements of the Axis genocidal plan from both Jewish and non-Jewish émigré sources. He adumbrated eight 'techniques' of destruction[57]:

> *Political* techniques refer to the cessation of self-government and local rule, and their replacement by that of the occupier. 'Every reminder of former national character was obliterated'.
>
> *Social* techniques entail attacking the intelligentsia, 'because this group largely provides the national leadership and organizes resistance against

[53] Ibid., 92.
[54] E.g. ibid., 12–14, 77.
[55] Ibid., 92.
[56] Ibid., 93.
[57] This discussion of the eight techniques is taken from ibid., 82–90.

> Nazification'. The point of such attacks is to 'weaken the national, spiritual resources'.
>
> *Cultural* techniques ban the use of native language in education, and inculcate youth with propaganda.
>
> *Economic* techniques shift economic resources from the occupied to the occupier. Peoples the Germans regarded as of 'related blood', like those of Luxembourg and Alsace-Lorraine, were given incentives to recognize this kinship.
>
> *Biological* techniques decrease the birth rate of occupied countries. 'Thus in incorporated Poland marriages between Poles are forbidden without special permission of the Governor . . . of the district; the latter, as a matter of principle, does not permit marriages between Poles'.
>
> *Physical* techniques mean the rationing of food, endangering of health, and mass killing in order to accomplish the 'physical debilitation and even annihilation of national groups in occupied countries'.
>
> *Religious* techniques try to disrupt the national and religious influences of the occupied people.
>
> *Moral* techniques are policies 'to weaken the spiritual resistance of the national group'. This technique of moral debasement entails diverting the 'mental energy of the group' from 'moral and national thinking' to 'base instincts'.

Genocidal techniques thus covered the gamut of occupation policies, ranging from 'aggrandizement of one such group to the prejudice or detriment of another' to mass murder. Lemkin's elaboration of his definition seemed ambiguous about the purpose of deportation: to expel or to destroy a population. 'Genocide has two phases', he wrote: 'one, destruction of the national pattern of the oppressed group: the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals.'[58] However, although biological survival was implied by this definition, it was undercut by his insistence that terms

[58] Ibid., 79.

like 'denationalization' or 'Germanization'—the imposition of the conqueror's 'national pattern' on the conquered people—were unsatisfactory because 'they treat mainly the cultural, economic, and social aspects of genocide, leaving out the biological aspects, such as causing the physical decline and even destruction of the population involved'.[59]

The 'biological essence of a nation' (or 'national-biological power'[60]) was elemental, because 'such a nation cannot rise again to resist an aggressor' if it is destroyed. Repeatedly, Lemkin stressed the demographic calculations of the Nazis: they 'aimed at winning the peace even though the war itself is lost' by destroying, disintegrating, and weakening an 'enemy nation'. In this way, the occupier was 'in a position to deal with . . . other peoples from the vantage point of biological superiority'.[61] Plainly, Lemkin thought biological attacks were an irreducible component of genocide, which was to resemble the Holocaust in this key respect.

The Genocide Convention

A month after the Nuremberg Trials finished in October 1946, the UN General Assembly (UNGA) passed a resolution calling for a genocide convention. It defined genocide as 'denial of existence of entire human groups', including political groups.[62] The UN then spent the next eighteen months in tortuous negotiations about a precise definition, particularly regarding political groups and 'cultural genocide'. Ultimately, the UN committees excluded both from the final definition, which was passed by the UNGA in December 1948.

[59] Ibid., 80.

[60] Raphael Lemkin, 'Genocide as a Crime under International Law', *American Journal of International Law* 41:1 (1947), 147.

[61] Lemkin, *Axis Rule in Occupied Europe*, 81, xi. 'The Germans hoped to control permanently a depopulated Europe, and ultimately, in partnership with Japan . . . to dominate the world. Thus genocide became a basic element of geopolitics': Raphael Lemkin, 'Genocide: A New International Crime—Punishment and Prevention', *Revue Internationale de Droit Pénal* 17 (1946): 364.

[62] The Crime of Genocide [1946] UNGA 66; A/RES/96 (I) (11 December 1946), http://www.worldlii.org/int/other/UNGA/1946/.

These debates were prefigured by key exclusions from two draft conventions. The first exclusion distinguished genocidal and military logics. The commentary of the Secretariat's Draft by the committee of experts that drafted it (Pella, Lemkin, and de Vabres) readily admitted that civilian populations were affected by modern warfare in 'more or less severe losses', but distinguished between such circumstances and genocide by arguing that in the latter 'one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives'. Military objectives, by contrast, aimed at imposing the victor's will on the loser, whose existence was not imperilled. In other words, killing masses of civilians was not illegal if motivated by military goals: victory, not destruction.[63] In this argument, collateral damage caused as part of war was legitimate even if as extensive as genocidal violence.

The Secretariat Draft of 1947 thus stated that acts that 'may result in the total or partial destruction of a group of human beings' are excluded if not intended to destroy 'a group of human beings'. Consequently, much Allied policy and practice in the recent war and postwar period were conveniently omitted from coverage: 'international or civil war, isolated acts of violence not aimed at the destruction of a group of human beings, the policy of compulsory assimilation of a national element, mass displacements of population'.[64]

In the second exclusion, the Secretariat Draft also took 'mass displacements of populations' off the table. This exclusion was motivated less by the partitions of India and Palestine, whose massive population expulsions began in the second half of 1947, than by the expulsion of millions of Germans from Central and Eastern Europe that the Allies had countenanced towards the end of war. Real-time events inevitably impinged on the debate. Responding to the refugee crisis occasioned by the flight and expulsion of Palestinians from their towns and villages by Zionist forces in 1948, the Syrian representative moved an amendment to include 'Imposing measures intended to oblige members of a group to abandon their homes in order to escape

[63] Ibid.
[64] Ibid., 231.

the threat of subsequent ill-treatment'. Yugoslavia supported the move by referring to German demographic warfare: 'the Nazis had dispersed a Slav majority from a certain part of Yugoslavia in order to establish a German majority there. That action was tantamount to the deliberate destruction of a group. Genocide could be committed by forcing members of a group to abandon their homes'. This argument did not carry the day. Led by the Soviet representative, who was not motivated to draw attention to his state's expulsion of Germans, most members of the Sixth Committee voted down the amendment. 'Transfers of population did not necessarily mean the physical destruction of a group', declared the Belgian representative, stating the emerging consensus.[65]

Other exclusions were debated in UN committees. The partition of India made its way into the debate in relation to cultural genocide, which was in the draft. It had been included on Lemkin's insistence and immediately raised hackles. The British were vehemently opposed to the 1946 UNGA resolution and the Secretariat Draft, which they tried to side-track and thwart at every turn. An internal memo condemned the Secretariat Draft as a 'highly political and provocative document' that confused minority protection (despite the draft's own distinction between cultural genocide and minority protection as well as forced assimilation) and for going far beyond group destruction to the kinds of persecution Lemkin included in *Axis Rule*: 'subjection of individuals to conditions of life likely to result in debilitation; confiscation of property; prohibition of the use of a national language, and destruction of books or historical and religious monuments'.[66] Such measures were extraneous to genocide properly understood, and could threaten British interests: 'Were it adapted, it might well serve to re-open recent political issues solutions of which have been condoned on grounds of expediency as for instance the expulsion of Germans from Poland'. Regarding cultural genocide in particular, the memo continued, 'it might quite plausibly be argued that, were the Convention in force, His Majesty's Government would

[65] A/C.6/SR.81, in ibid., 1479, 1490, 1492, 1495.

[66] UK National Archives, Draft Cabinet Office brief for UK Delegation to the Sixth Session of the Economic and Social Council on Genocide (7 January 1948 for Cabinet on 12 January), 3.

be guilty of genocide in several cases, against e.g. Germans in the British Zone, the Jews in Palestine, or even perhaps certain colonial peoples'.[67]

The Americans did not seek to block the Convention negotiations, as they feared 'a loss of moral leadership on this question'.[68] Instead, they sought to restrict its definition as much as possible. Cultural genocide could not be included because, they argued, genocide was 'the heinous crime' of 'mass extermination', namely the 'physical elimination of the group'. It should not be confused with the protection of minorities.[69] So confident were Department of State officials of the Convention's restricted application that they were 'not particularly concerned about the question of lynchings'.[70]

Other countries saw it differently. Pakistan was worried about the remaining Muslim population in India who far-right Hindus denounced as a 'fifth column': 'In India, thirty-five million Muslims were currently living under conditions of terror. Their existence as a separate cultural group was threatened. Although the use of Urdu, a language of Muslim origin, had not been prohibited by law, it was under heavy attack. Muslim cultural and religous [sic] monuments had been burned down or destroyed'.[71] The extensive debate on cultural genocide played out along the same logic as that about population expulsion: it was not genocide if not physical destruction akin to the Holocaust. The notion was struck from the final convention text and is not a legal concept, although protections of heritage and other aspects of culture made their way into other legal instruments.

[67] Ibid., 4–5.

[68] National Archives Records Administration (NARA), Department of State telegram to John Maktos, 13 April 1948, RG 59, Box 2186.

[69] NARA, RG 59, Box 2186, 'US Commentary of the Secretariat Draft Convention on Genocide', 10 September 1947, 2; 'Position on Genocide Convention in ECSOC Drafting Committee,' 10 April 1948, 2, in ibid.; Durwald V. Sandifer memo to Ernest Gross, 'Trip to New York on Genocide', 14 April 1948, 2, in ibid.

[70] NARA, RG 59, Box 2189, Durwald V. Sandifer memo to Ernest Gross, 'Cultural Genocide', 22 April 1948, 1.

[71] A/C.6/SR.63, in Hirad Abtahi and Philippa Webb (eds.), *The Genocide Convention: The Travaux Préparatoires*, 2 Vols. (Leiden: Brill, 2009), 1298.

Genocide was also depoliticized. In the first place, state representatives followed their interwar predecessors in determining that terrorism was not a political offence: suspects could only be extraditable from another country if the crime was non-political. This reasoning was now transferred to genocide.[72] Second, after intense lobbying and debate, political groups were removed from the Convention. Third, political motivations suffered the same fate. Ultimately, genocide was defined narrowly to exclude the possibility that states could be be prosecuted for repressing domestic political opposition: anti-communists for communist states, and communists for most Latin American states in particular.

The question of political groups revealed the incipient cleavages of the Cold War and imperatives of state security that concerned all states. The inclusion of political groups in two draft conventions threatened to derail negotiations and the Convention itself. The Soviets were stung by accusations of genocide levelled by emigré Baltic organizations who complained about the takeover of their countries after the war.[73] Their proposition closely mirrored that of Lemkin and the World Jewish Congress (WJC), namely that genocide 'is organically bound up with fascism-nazism and other similar race theories which preach national and racial hatred, the domination of the so-called higher races and the extermination of the so-called lower races'. This was what the Soviet representative called the 'scientific definition of genocide'.[74] Conveniently, the Soviet attack on social groups, like Kulaks in the 1930s, would thereby not be classifiable as genocide. But not for love of the Soviet Union did the Uruguayan

[72] Article VII of the Convention on the Punishment and Prevention of Genocide holds that 'Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition'. For several US memos assenting to this proposition, see National Records Administration, Maryland, RG 353, Box 100, Committee on International Social Policy, 'Draft Convention for the Punishment and Prevention of Genocide, Commentary by the Government of the United States', 8 September 1947, 9.

[73] Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', *Yale Law Journal* 106 (1997), 2259–91; Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*, 58.

[74] A/C.6/215/Rev.1, in Abtahi and Webb, *The Genocide Convention*, 1969; A/C.6/SR.74 in Abtahi and Webb, *The Genocide Convention*, 1399.

representative support it when he agreed that 'The concept of genocide was, indeed, the outcome of the Nazi theories of race superiority which were at the basis of the Hitlerian ideology'.[75]

The exclusion of political groups from the list of protected groups would make it easier for unstable states to put down domestic dissent, as some of them plainly admitted. Venezuela said that states would not ratify a convention that included political groups:

> fearing the possibility of being called before an international tribunal to answer charges made against them, even if those charges were without foundation. Subversive elements might make use of the convention to weaken attempts of their own Government to suppress them. He realized that certain countries where civic spirit was highly developed and the political struggle fought through electoral laws, would favour the inclusion of political groups. But there were countries where the population was still developing and where political struggle was very violent.[76]

The Dominican Republic and Egypt agreed that the inclusion of political groups 'would bring the United Nations into the domestic political struggle of every country and would make it difficult for many countries to adhere to the convention'.[77] Brazil advanced the most self-serving argument, asserting that genocide:

> was unknown in the countries of Latin America, since in those countries there did not exist that deep-rooted hatred which in due course led to genocide. . . . In those countries political movements were always short-lived whereas the crime of genocide was by its very nature dependent on a profound concentration of racial or religious hatred. Such hatred could never grow out of the political movements current in Latin America.[78]

Like the Iranian representative, the Brazilian representative also equated genocide with racial hatred in order to depoliticize it. Racial destruction, the Iranian said echoing Lemkin, was 'more heinous in the light of the conscience of humanity, since it was directed against

[75] A/C.6/SR.74, in Abtahi and Webb, *The Genocide Convention*, 1401.
[76] A/C.6/SR.69, in ibid., 1356.
[77] Ibid.
[78] Ibid., 1353–4.

human beings whom chance alone had grouped together'. The Brazilian added that 'A crime committed for political motives did not contain a moral element, it was free from the intention of destroying the opposing group. Today's enemies became the friends of tomorrow'.[79] This improbable unanimity of communists and anti-communists was based on a shared desire to be able to destroy one another's domestic opponents with impunity.

The WJC also sought to remove the reference to political groups, now rejecting Lemkin's broad ideas about genocide that were reflected in the Secretariat Draft. Sensing that the Convention was in danger, and hopeful that it would help protect Jewish communities in Pakistan, the Middle East, and Eastern Europe, the Congress wrote to the UN Economic and Social Council in July 1947 to urge the deletion of the political groups clause:

> Throughout history most attacks were directed against racial, religious and national groups. Genocide as a crime is connected intimately with these victim-groups. The inclusion of the political groups might be a useful addition to civilized international life. However it acts already as an undue burden and it might keep governments from entering into the Convention. Governments will never be sincere in admitting that the inclusion of political groups is the main reason for their reluctance and they might use escapism and delay. As a people who suffered unbelievable losses we appeal to the governments of the world that the Genocide Convention should not be used for political fights among nations but rather for establishing civilized standards of international life.[80]

Lemkin communicated the same argument to US Department of State officials. In one conversation with them, he was reported as arguing 'that in the Latin American countries, there were many revolutions and that extermination of opposing groups was resorted to as a result thereof. The Latinos do not want to admit that publicly. However, they may vote against the Convention or attempt to prevent its approval by the General Assembly'.[81] In the event, Latin American states did publicly admit their security concerns. Political expediency

[79] Ibid., 1355.

[80] AJA/WJC, B84-06, Genocide 1947.

[81] NARA, RG 59, Box 2186, Department of State, Memorandum of Conversation, 16 July 1948, 1.

thus demanded jettisoning political groups. Exterminating 'opposing groups' would not be genocide, concluded Lemkin and the WJC.

In opposition, Ecuador and Bolivia supported the retention of political groups by the same logic, only reversing the signs in a prescient manner: 'if the convention did not extend its protection to political groups', they said, 'those who committed the crime of genocide might use the pretext of the political opinions of a racial or religious group to persecute and destroy it, without becoming liable to international sanctions'.[82] The American Catholic Association for International Peace went further in their representations to the US Department of State: political logics were not just a pretext for, but the driving force of all persecution: 'Practically all persecutions in the past had some, if not a total, political basis', they argued.[83] The American diplomats tended to concur, if only to squeeze the Soviets for its domestic repression. With the British, they argued that the Nazis and Spanish fascists had also tried to destroy social and political groups and that the Cold War temperature would increase ideological rather than racial tension.[84] But these counterarguments did not carry the day: the Sixth Committee voted to exclude political groups.

The dispute was as heated regarding the question of listing specific motives in addition to the basic intention to destroy groups 'on grounds of national or racial origin, religious belief or political opinion of its members', as the Ad Hoc Committee Draft put it. Again, the Soviet Union led the opposition, arguing that:

> Crimes committed for political motives belonged to a special type of crime and had nothing in common with crimes of genocide, the very name of which, derived as it was from the word *genus*—race, tribe, referred to the destruction of nations or races as such for reasons of racial or national persecution, and not for political opinions of those groups.[85]

[82] A/C.6/SR.74, in Abtahi and Webb, *The Genocide Convention*, 1393.

[83] NARA, RG 59, Box 2186, Statement of the Ethics and Juridical Institutions Committee, Catholic Association for International Peace, 'The Genocide Convention,' August 1948, 2.

[84] Cf. Kurt Glaser and Stefan T. Possony, *Victims of Politics: The State of Human Rights* (New York: Columbia University Press, 1979), 8–9.

[85] E/AC.25/SR.24, in Abtahi and Webb, *The Genocide Convention*, 1016.

The Soviet Union and its supporters were happy to list motives but to omit political ones for the obvious reasons. Besides, they disavowed censorship of free speech. As the Salvadorian representative put it, 'If the rebellious group were destroyed, it would be because of its activities, and not because of its political views'.[86]

The debate became mired in the question of extradition, because the custom was that those accused of political crimes were not liable to extradition. Thus Article 8 of the Secretariat Draft stated that 'genocide cannot be considered as a political crime and shall give cause for extradition'.[87] The Soviet representative expressed the emerging postwar consensus that depoliticized genocide by pointing to victims' lack of agency: 'genocide was the mass destruction of innocent groups and could never . . . be considered as a political crime'. In response, the British recognized that it 'was inherently political in that its commission could usually be traced to political motives'. For that reason, the convention text should 'state that, for purposes of extradition, it should be considered as nonpolitical'.[88]

The British also noted that listing motives would allow perpetrators 'to claim that they had not committed that crime "on grounds of" one of the motives listed in the article', an option that suited many countries. New Zealand's representative ended the debate when he pointed out that without listed motives 'bombing may be called a crime of genocide', because 'Modern war was total, and there might be bombing which might destroy whole groups'.[89] The British were quickly convinced and the deadlock broken by Venezuela's compromise suggestion to replace a list of motives with the simple phrase 'as such'. It was intended, and widely interpreted to include, motives without listing any in particular. Since political groups had been excluded from the definition, destroying groups 'as such' meant destroying its members simply by virtue of membership of them, in other words, because of their identity.[90]

[86] A/C.6/SR.77, in ibid., 1435.
[87] A/AC.10/42, in ibid., 118.
[88] A/C.6/SR.94, in ibid., 1630–1.
[89] A/C.6/SR.75, in ibid., 1415, 1418.
[90] Ibid., 1416–17, A/C.6/SR.76 in ibid., 1425–7, A/C.6/SR.77 in ibid., 1435. See, generally, A. W. Brian Simpson, 'Britain and the Genocide Convention', *British Yearbook of International Law* 73:1 (2002), 4–64.

The Professor of International Law at the University of Edinburgh, J. L. Brierly (1881–1955) immediately understood the implications of these restrictions. To the readers of a weekly BBC magazine in 1949, he wrote that the intended destruction of the listed groups 'as such' had a 'limiting effect': this qualification meant excluding 'many, probably most, of the famous massacres and persecutions of history'. In historical reality, the facts of perpetrator motives 'have been more obscure [than the Nazis'] and more mixed'. To qualify as genocide, the victim population would have to be targeted 'because they were Jews or Slavs, or members of some particular group of human beings whose elimination had been resolved on'—and not 'enemies in war or rebels against a government'. Accordingly, 'putting a whole enemy population, men, women, and children, to the sword' would not necessarily be genocide. The Convention, he concluded pessimistically, promised more than it delivered: 'nothing important has happened at all' with its passing by the UN.[91] In fact, repressing political opposition and destroying entire peoples in warfare was now all the easier because the genocide threshold increasingly functioned to screen out military necessity and liberal permanent security practices.

Conclusion

Genocide was defined as narrowly as possible to exclude the possibility that the states of the UN could be affected by the Convention in the treatment of domestic political opposition: anti-communists for communist states, and communists for most Latin American states in particular. Nor did they want the UN interfering in their attempts to assimilate ethnic minorities in the manner of the interwar minority treaties.[92] The thirteen Nuremberg Trials between 1945 and 1949 and UN debates showed that Germany was seen as the archetypal

[91] J. L. Brierly, 'The Genocide Convention', *The Listener*, 10 March 1949.

[92] Adam Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (Madison: University of Wisconsin Press, 2017). Israel's ambivalence about the Convention was characteristic of states generally. See Rotem Giladi, 'Not Our Salvation: Israel, the Genocide Convention, and the World Court 1950–1951', *Diplomacy & Statecraft* 26:3 (2015), 473–93.

genocidal society that had diverged from the healthy Western, and international, norm.[93] Case law on genocide by the Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia has continued this narrow understanding of genocide.

As a consequence of this threshold, genocide is extremely difficult to prosecute in international criminal proceedings. The attacks on civilians in Darfur in Sudan were held by a UN investigative committee of inquiry not to be genocidal although they closely resemble the Armenian genocide. Instead, the UN committee concluded that the Sudanese government was guilty of crimes against humanity and for racial persecution, which was greeted with sighs of relief in Khartoum and by African leaders.[94] Like the international community, they regarded genocide to be a graver transgression than crimes against humanity despite the report's disavowal of any such hierarchy. This *de facto* hierarchy of criminality, atop which sits a 'crime of crimes' against identity, a hate crime driven by non-political imperatives, lessens the significance of other catastrophic forms of mass violence like war crimes, crimes against humanity, and the 'collateral damage' of missile strikes.

A frank concession of the genocide keyword's limitations is the need to couple it with 'extermination' in a world history of human destruction 'from Sparta to Darfur' or abandoning it for 'political violence' and 'reigns of terror'.[95] To all intents and purposes, prominent advocates of humanitarian intervention have abandoned or supplemented the genocide concept because its impossibly high threshold of proof deters lawyers, while its stigma inhibits states from using the term lest

[93] Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (Oxford: Oxford University Press, 2016).

[94] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004 (Geneva, 25 January 2005).

[95] Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007); Donald Bloxham and Robert Gerwarth (eds.), *Political Violence in Twentieth- Century Europe* (Cambridge: Cambridge University Press, 2011); Patricia Marchak, *Reigns of Terror* (Montreal and Kingston: McGill-Queens University Press, 2003).

they be accused of genocide or compelled to prevent it.[96] Others propose 'demographic surgery' or simply 'mass killing' as broader, alternative concepts.[97] Sharing these reservations about genocide, some commentators propose 'atrocity crimes' to cover the infractions listed under genocide, crimes against humanity, and war crimes.[98] In doing so, they followed the Rome Statute of the International Criminal Court, which bundles genocide, war crimes, crimes against humanity, and crimes against peace under the rubric of 'most serious crimes of concern to the international community as a whole'.[99]

The United Nations Office of the Special Adviser on the Prevention of Genocide has effectively institutionalized this approach by stating its 'duty to prevent and halt genocide and mass atrocities'.[100] The Office's 'Framework of Analysis for Atrocity Crimes' released in 2014, elaborated this point by positing a new category of 'atrocity crime' to refer to genocide, crimes against humanity, war crimes, and ethnic cleansing. Because of the genocide concept's narrow national-ethnic-racial definition of a targeted group excludes so many other categories of people, the framework has atrocity crimes cover the more general 'protected groups, populations or individuals' included in crimes against humanity and war crimes. In doing so, the framework runs counter to the monumentalization of genocide in popular discourse:

> Atrocity crimes are considered to be the most serious crimes against humankind. Their status as international crimes is based on the belief that the acts associated with them affect the core dignity of human

[96] Gareth Evans, 'Crimes Against Humanity: Overcoming Indifference', *Journal of Genocide Research* 8:3 (2006), 325–39.

[97] Antonio Ferrara, 'Beyond Genocide and Ethnic Cleansing: Demographic Surgery as a New Way to Understand Mass Violence', *Journal of Genocide Research* 17:1 (2015), 1–20.

[98] David Scheffer, 'Genocide and Atrocity Crimes', *Genocide Studies and Prevention* 1:3 (2006), 229–50; William A. Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes', *Middle East Critique* 20:3 (2011), 253–69.

[99] Rome Statute of the International Criminal Court, Article 5(1), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[100] Office of The Special Adviser on The Prevention of Genocide, 'The Responsibility to Protect', https://www.un.org/en/genocideprevention/.

> beings, in particular the persons that should be most protected by States, both in times of peace and in times of war.[101]

This innovation by scholars and diplomats working at the coalface of international politics represents a major critique of the legal architecture to protect civilians and combatants that culminated in the UNGC and Four Geneva Conventions after the Second World War. It implies that the hierarchy of these various crimes is inimical to their prevention, and that large-scale atrocity is their common denominator. It raises the basic question: is the concept and law of genocide fit for purpose?

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This chapter draws on A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2021).

Select Bibliography

Clavero, Bartolomé, *Genocide or Ethnocide, 1933–2007: How to Mark, Unmake and Remake Law with Words* (Milan: Giuffrè Editore, 2008).

Irvin-Erickson, Douglas, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017).

Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944).

Lemkin, Raphael, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013).

Lewis, Mark A., *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2014).

Lingen, von Kerstin, *'Crimes Against Humanity': Eine Ideengeschichte der Zivilisierung von Gewalt 1864–1945* (Paderborn: Ferdinand Schöningh, 2019).

Loeffler, James, 'Becoming Cleopatra: The Forgotten Jewish Politics of Raphael Lemkin', *Journal of Genocide Research* 19:3 (2017), 340–60.

Loeffler, James, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven: Yale University Press, 2018).

[101] United Nations, Framework for Analysis of Atrocity Crimes, 2014, https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

Moses, A. Dirk, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2020).

Sands, Philippe, *East-West Street: On the Origins of 'Crimes against Humanity' and 'Genocide'* (New York: Knopf, 2017).

Schabas, William A., *Genocide in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2009).

Shaw, Martin, *What is Genocide?*, 2nd ed. (Cambridge: Polity, 2015).

Stiller, Alexa, 'The Mass Murder of the European Jews and the Concept of "Genocide" in the Nuremberg Trials: Reassessing Raphaël Lemkin's Impact', *Genocide Studies and Prevention* 13:1 (2019), 144–72, https://scholarcommons.usf.edu/gsp/vol13/iss1/14/.

Vrdoljak, Ana Filipa, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law', *European Journal of International Law* 20:4 (2010), 1163–94.