

Raphael Lemkin's Concept of Genocide

Fifty years later, the first conviction was handed down

by Anson Rabinbach



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Just a few years ago, the Polish-Jewish jurist Raphael Lemkin (1901-1959) could be described by the *New York Times* as a “largely forgotten immigrant from Poland who coined the word genocide and pushed a convention outlawing it through the General Assembly.” Only with the creation of the International Tribunal for Crimes in former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994, which secured the first-ever conviction for the crime of genocide, has Lemkin emerged from undeserved obscurity. Now Samantha Power’s Pulitzer Prize-winning book, *A Problem from Hell: America and the Age of Genocide*, offering an admiring portrait of Lemkin, calls the Genocide Convention “Lemkin’s law” and has won new and passionate advocates of his concept.

Historian Dirk Moses notes that among historians “recent research is returning to the Lemkian origins of the concept by stressing the links between the Holocaust and other instances of ethnically motivated mass murder and extermination.” Similarly, Omer Bartov writes that Lemkin has also found strong supporters for his powerful argument that there is a close interrelationship between war, genocide, and modern identity. Despite the relative neglect of his contribution, there has been more than a decade of intense discussion of the limits and weaknesses of the concept of genocide. Even among those scholars who implicitly or explicitly accept Lemkin’s definition, debate revolves around whether to expand or narrow his conception, depending on the circumstances. In his first attempt to define genocide in *Axis Rule in Occupied Europe* (1944) Lemkin included a broad array of techniques of destruction “to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.” However, as Lemkin later argued, the genocide convention deals more narrowly “with the monstrous crime of wholesale destruction of nations, races, and religious groups [and] requires the specific intent to wipe out all inhabitants of a country belonging to such groups in a manner that substantial parts of these groups are annihilated.” According to the Genocide Convention, adopted on December 9, 1948, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

Subsequently, Helen Fein and others would extend Lemkin's construction to include more diverse victim groups—political groups and classes—or expand his notion of perpetrators to include not merely states and individuals, but also “representatives” of the nation-state, including soldiers, settlers, and missionaries. Attempts to include, for example, mass bombardment, effects of occupation, depopulation, famine, disease, and gross negligence (Bhopal, Chernobyl) have led some scholars like Henry Huttenbach to propose either eliminating these actions entirely or distinguishing degrees of intent. The danger here is, of course, that the word can easily become emptied of meaning, degraded by excessive and needless repetition, finally reaching the stage of what Alain Finkielkraut called “verbal incontinence.” Eric D. Weitz and others would insist on a less elastic concept, closer to Lemkin's own, distinguishing more sharply, for example, between genocide and “ethnic cleansing” (forcible removal but not killing of populations) or wartime pogroms, massacres, deportations, or even mass killing by bombing, none of which “intend” to destroy “in whole or in part” (Lemkin's formulation) entire population groups.

In the American context there is a polarization between an “exclusive” notion of “uniqueness” represented by scholars like Steven Katz, who claims that “the concept of genocide applies only when there is an actualized intent to physically destroy an entire group (and refers only to the Holocaust) and “inclusivists” like David E. Stannard and Ward Churchill, who include disease and depredation, as well as enslavement and massacre of native Americans, in the term. Churchill goes still further, charging that uniqueness is itself “a form of “denial.” These debates, whose ferocity comes in no small degree from the competitive victimhood inherent in American multicultural politics, have generated more confusion than clarity.

Not only these historical controversies, but also public political debates over the occasion for military and humanitarian intervention, underscore the perpetual instability and ambiguity of Lemkin's concept. Does historical “genocide” sensitize or desensitize those who suffer from mass murder and ethnic cleansing? Does the obligation to act in cases of genocide make it more difficult for representatives of states, especially signatories of the convention, to publicly invoke the word “genocide?” Does the “rhetorical advantage” of invoking the word genocide as a polemical instrument paradoxically tend to support those who oppose rather than favor intervention? The chief difficulty that all theorists who ask these questions face is that with the attempt to find a single “generic concept” that would encompass the variety of historical genocides, past, present, and future, the definitional enterprise increasingly loses substance and clarity, becoming at once excessively elastic or excessively specific.

There is no doubt that the concept of genocide and the United Nations Genocide Convention are, as Lemkin believed they would be, milestones in the progress of international legislation and humanitarian rights. Whatever its basic conceptual flaws and lack of political efficacy, the Genocide Convention established for the first time a normative legal basis for the behavior of states toward their own people.

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Still, the problem, perhaps the impossibility, of finding a heuristic definition that would encompass the wide variety of genocides that have taken place both during the 20th century and in the historical past is considerable. As Mark Osiel has argued, the legal and the historical often work at cross-purposes: the law aims at inclusivity and generalizability, history at distinctions and differentiations. Though not all genocides are equal, as a legal concept, the crime of genocide is premised on the historical “commensurability” of genocidal intentions, acts, events, and consequences. For example, if lawyers were to conclude from historical comparisons and juridical evidence that the events judged at the Nuremberg war crimes trials were “utterly incommensurable,” they would have to conclude that “the legal rules that emerged from the trial would be inapplicable to virtually all subsequent events, however similar. Courts, and more generally, legal concepts, therefore play down the elements of particularity and notoriously disavow “metaphysical concepts” like uniqueness. For that reason, Hannah Arendt could remark that the “the Nazi crimes, it seems to me, explode the limits of the law.” During the discussions of the Convention draft the Soviet delegation and its supporters in the East European “people’s republics” opposed including political groups in its coverage (since states have the right to suppress armed insurrection), while England and France balked at the inclusion of “cultural” genocide (which would judge colonial policies). Consequently, neither political nor cultural destruction would be included. As Power points out, if the perpetrator did not target a national, ethnic, or religious group as such, then killings would constitute mass homicide, but not genocide. Even after the United Nations Convention on Genocide adopted on December 9, 1948 removed from consideration “political” groups and “cultural” genocide from Lemkin’s original definition, other parameters were still left notably imprecise. The Convention specified that there must be intent to destroy (not eliminate) in whole or in part four types of victim group—“national, ethnical, racial or religious”—and included six acts that “in whole or in part” count as genocide—killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about destruction, imposing measures intended to prevent births, and the forcible transfer of children from the group.” In other words, the definition is excessively vague about the significance of “intent” versus “consequence,” “physical” versus “cultural” destruction, and of course, the degree or magnitude required for mass murder to rise to the level of “genocide.”

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Whether courts or juridical decisions can ever render justice in the face of crimes of history (rather than punish criminal behavior *per se*) is debatable; certainly to claim that law could do so exclusively is hubris. Lemkin believed that certain words “carry in themselves a moral judgment” and that they are “the reply of man to social need.” Not without irony, Lemkin’s admirers have marveled at his single-minded belief in the efficacy of both law and language to alter reality. In an age when the word Holocaust often attests to the inability of language to communicate the horror inflicted by the Nazis, Lemkin’s almost naïve belief that language translated into law could

not merely instantiate justice, but actually prevent mass murder, appears almost quaint. Legal decisions and legal thought are themselves part of the flux of historical memory, all the more so in Lemkin's case, despite his efforts to fix crimes juridically. Though Lemkin believed that the "great force of the genocide convention lies in the fact that it declares the crime of Genocide to be a non-political crime," his efforts to secure its acceptance and adoption demonstrate that issues of international law are no less political than those affecting domestic law. He firmly believed that genocide was a matter of natural right, no different in principle from homicide: "as in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed." The problem of the genocide concept, however, reveals the difficulties of translating supranational principles in a world where international law and sovereignty remained and remain intimately entwined. Even an early critic like the jurist Hans Kelsen concluded that "the new concept of 'genocide' is rather of political than of legal significance."

The ambiguity of "genocide" can in large part be attributed to Lemkin's universalization of the specific events of the destruction of European Jewry and the annihilation of the Polish "nation" (ethno-national murder) without adequately reflecting on its own historicity. Put another way, the concept of genocide has its historical origins in the last phase of World War II (1944) and implicitly affirms the victory of the moral norm of positive law against the "laws of nature" or "biology" practiced and reiterated by the Germans during the Nazification of Europe. More specifically, in his magisterial work *Axis Rule in Occupied Europe* (1944) Lemkin justified the concept of genocide by a strongly historical account of the events of 1939-43, in which the murder of the Jews was simultaneously assimilated to and distinguished from a narrative of the ethnic homogenization or "Germanization" of annexed Polish and

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Ukrainian (and also Western European) territory. Lemkin paradoxically acknowledged the "biological" dimension of the Judeocide and simultaneously emphasized that the Jewish catastrophe was only prior to and larger in scale than the planned destruction of the other "Slavic" peoples. In this respect Nazi genocide was, he maintained, analogous to earlier crimes committed against ethnic minorities like the Kazakhs in central Asia, the Armenians in Turkey, or the expulsion of the Greek Orthodox population from Asia Minor by the Turks in 1922. Lemkin recognized that the targeting of Jews as "one of the main objects of German genocide policy" made them distinctive, as Dan Diner suggests, but did not entirely separate the fate of the Jews from the fate of the Poles (for whom annihilation was, he believed, also prescribed) and other minorities left unprotected by the post-World War I treaties.

Lemkin repeated the story of the origins of the concept of genocide many times during his career, but with different emphases. He insisted that he first envisioned the concept in 1933 but only invented the term in 1943 while writing *Axis Rule in Occupied Europe* (published in 1944). This was no mere vanity on Lemkin's part. It set forth a narrative in which the con-

cept of “genocide” antedated and anticipated the murder of European Jewry—and of 49 members of his own family, including his parents. By dating the origin of the concept to the decade prior to the Holocaust, Lemkin could and often did disassociate the origin of the term from his personal experiences as a Jew and a Pole, situating it in the pre-Nazi (or early Nazi) era.

In some respects Lemkin’s 1933 formulation did anticipate the more comprehensive definition of genocide in *Axis Rule* a decade later (quoted in its entirety): “Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”

“Genocide” thus combined elements of what Lemkin had called “acts of barbarity” and “acts of vandalism” into a single “generic concept.” It also drew directly on the then recent fate of Poles and Jews to articulate a concept of group annihilation that was fundamentally different from other kinds of forcible assimilation (Germanization) and “denationalization.” As

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Lemkin explained: “The author believes, however, that this word is inadequate because: 1) it does not connote the destruction of the biological structure; 2) in connoting the destruction of one national pattern it does not connote the imposition of the national pattern of the oppressor; and 3) denationalization is used by some authors to mean only deprivation of citizenship.” It is evident that biological destruction is applied here to both Jews and Poles. Lemkin explicitly rejected such terms such as “denationalization” or “Germanization,” because such terms did not adequately underscore “the irreducible biological core of genocide “such as causing the physical decline and even destruction of the population involved.”

Elsewhere, however, Lemkin clearly distinguished between Nazi practices toward three groups: “people related by blood to the German people;” Jews, who are “to be destroyed completely;” and peoples “not related by blood” who are not deemed worthy of being Germanized, like the Poles. In this schema, genocide is directed against all three types of “nationhood,” but Poles are targeted for physical destruction (starvation, ethnic cleansing), while only Jews are targeted for biological destruction.

Lemkin’s “one generic notion” suffered from any number of other ambiguities, inconsistencies, and incoherencies that continue to plague its use right up to the present. At times Lemkin distinguished between cases of racial genocide and national genocide, regarding the fate of the Jews and gypsies as “racial” as opposed to “colonisatory,” a broader concept that would cover Poles, Serbs, Russians, and even the occupation of the French. While

Lemkin “did not yet fully comprehend the total planned annihilation of the Jewish people in Europe,” comments Yehuda Bauer, there is no doubt that he understood with great prescience and clarity that the “Jews were to be destroyed completely.” But Lemkin also noted that “The Nazi plan of Genocide was related to many peoples, races, and religions and it is only because Hitler succeeded in wiping out six million Jews, that it became known predominantly as a Jewish case.”

Another difficulty is that Lemkin frequently elided the distinction between genocide as a “modern” crime and as a universal feature of mankind throughout history. Furthermore, there is a considerable gap between the magnitude of Lemkin’s 1944 example and his frequent recourse to more culturally restricted cases,

where he argued for minority rights and the protection of minority cultures that he had foregrounded in 1933. Genocide, he argued, affects “the vital interests of all civilized people.” Since minorities exist in all countries, if their persecution is tolerated anywhere, the very moral and legal foundations of constitutional government may be shaken. Its toleration “is an admission of the principle that one national group has the right to attack another because of its supposed racial superiority.”

Finally, he asserted that there is a universal cultural obligation or moral imperative to prevent genocide: “cultural considerations speak for international protection of national, religious and cultural groups. Our whole heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Hus, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich. Is this merely Lemkin’s “eurocentrism,” as Michael Ignatieff has claimed? Is genocide only something that happens when civilized peoples destroy civilized peoples, a feature of Lemkin’s blinkered universalism?

In the late fall of 1939, after he reached neutral Vilnius and successfully applied for a Swedish passport, the young Polish lawyer and former state prosecutor of Warsaw Raphael Lemkin arrived in Riga to await passage to Stockholm and ultimately to the United States. In Riga he paid a visit to the Jewish historian Simon Dubnow at his home in Kaiserswald. Lemkin told him of his plan to “outlaw the destruction of peoples” and Dubnow agreed: “the most appalling part about this type of killing,” said Dubnow, “is that in the past it has ceased to be a crime when large numbers are involved and when all of them happen to belong to the same nationality, or race, or religion.... Let nations take their choice whether they want to belong to the civilized world community. I have always felt that history must sit in judgment.” Perhaps an apocryphal story, but not one that is as flattering to Lemkin as he might have thought. History, not courts (even if such a law were to exist), Dubnow reminded the young lawyer, sits in judgment. Had Lemkin been a historian and not a jurist, he might have wondered about the fate of his law in history.

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