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### 3 Lemkin's Unwanted Shortcomings and Some Theoretical Considerations about the Definition of "Genocide"

#### Introduction

I thought: genocide is so easy to commit  
because people don't want to believe it  
until after it happens.<sup>1</sup>

History cannot be separated from violence, and the annihilation of whole populations is "an age-old phenomenon"<sup>2</sup> usually tied to processes of territorial expansion or the consolidation of power. "Genocide," the term that describes violence applied to annihilate a certain group of people within a given economic, cultural, ethnic, gendered, geographical, political, religious, and/or social context,<sup>3</sup> was coined by the Polish lawyer Raphael Lemkin (1900–1959), who "succeeded in getting his 'crime of crimes' defined by the United Nations in an international convention," and ever since his terminology was applied in the UN's Genocide Convention (1948), "[e]very account of genocide pays lip-service to his achievements."<sup>4</sup> Never-

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1 Mark Levene, *Genocide in the Age of the Nation-State* (London: I.B. Tauris, 2005); Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press 2003); A. Dirk Moses, "Conceptual Blockages and Definitional Dilemmas in the 'Racial Century': Genocides of Indigenous Peoples and the Holocaust," *Patterns of Prejudice* 36 (2002): 7–36; Mark Mazower, *Hitler's Empire: How the Nazis Ruled Europe* (New York: Penguin, 2008); Shelley Baranowski, *Nazi Empire: German Colonialism and Imperialism from Bismarck to Hitler* (Cambridge/New York: Cambridge University Press 2011). For the rejection of the thesis see Birthe Kundrus, "Von den Herero zum Holocaust? Einige Bemerkungen zur aktuellen Debatte," *Mittelweg* 36, no. 4 (2005): 82–92; Robert Gerwarth and Stephan Malinowski, "Der Holocaust als 'kolonialer Genozid': Europäische Kolonialgewalt und nationalsozialistischer Vernichtungskrieg," *Geschichte und Gesellschaft* 33 (2007): 439–466.

2 Daniel Feierstein, *Genocide as Social Practice* (New Brunswick, NJ: Rutgers University Press, 2014), 3.

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

4 Martin Shaw, *What is Genocide?* 2nd ed. (Cambridge: Polity, 2015), 24. See also John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (London: Palgrave Macmillan, 2008); Linden A. Mander, "Review: Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, by Raphaël Lemkin," *The American Historical Review* 51, no. 1 (1945): 119.

theless, Lemkin “warned against a narrow interpretation of his new term,”<sup>5</sup> and a larger study project Lemkin had begun to work on was supposed to extend the definition of victim groups and motivations for genocidal violence.<sup>6</sup> The project, however, was never finished, and Lemkin’s early death prevented him from further remarks about a clarification of his thoughts on this matter. It was the experience of and the reports about the Second World War and the Holocaust that, in a way, triggered Lemkin’s endeavor to “document German war crimes. He came to the view that these crimes were so barbarous that they went beyond the acts that had been rendered criminal by the framers of the relevant international law.”<sup>7</sup> Lemkin had realized that the existent law was not suitable for crimes of such magnitude and cruelty, although he considered genocide “to be a generic concept because he believed that wars of national extermination had occurred throughout history” and therefore “treated . . . any systematic policy designed to undermine the way of life of a people [as genocide].”<sup>8</sup> Although the definition Lemkin proposed and its legal implementation into the UN Genocide Convention was an important success, and not just for the lawyer himself, who had relentlessly worked to achieve this goal, it has also been remarked that the terminology applied to describe genocide is somehow limited and insufficient. For instance, the Argentinian historian Daniel Feierstein argued that

the concept of genocide is essentially problematic. The term “genocide,” as coined by Lemkin, is a hybrid between the Greek root *genos* (family, tribe, or race) and the Latin suffix *-cide* (killing), but its exact meaning and translation into other languages remain controversial. Does *genos* refer to a common tribal origin, to genetic characteristics transmitted from generation to generation, or simply to certain features shared by a group? All these meanings are present in the Greek word *genos* and its Latin derivative *gens* denoting a family clan.<sup>9</sup>

If one considers the fact that “[h]umanity has always nurtured conceptions of social difference that generate a sense of in-group versus out-group, as well as hierarchies of good and evil, superior and inferior, desirable and undesirable,”<sup>10</sup> one has to think about the role of these different concepts of segregation and exclu-

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5 Shaw, *What is Genocide?*, 36.

6 Raphael Lemkin, Project Outline, n.d., Raphael Lemkin Papers, New York Public Library, Manuscript and Archives Division, \*ZL-273, Reel 2.

7 Michael Freeman, “Genocide, Civilization and Modernity,” *The British Journal of Sociology* 46, no. 2 (1995): 209.

8 *Ibid.*, 209 and 211.

9 Feierstein, *Genocide as Social Practice*, 12.

10 Adam Jones, *Genocide: A Comprehensive Introduction*, 3rd ed. (London/New York: Routledge, 2017), 6.

siveness when debating possible shortcoming of the concept of genocide as it was formulated politically in the late 1940s. Is it still up-to-date? Is it too broad – or is it broad enough? Should it be adjusted to better match the 21st century and the forms of “genocidal” violence we can observe but which do not fully comply with the definition in place?

There is also the question of whether we should further define genocide in accordance with the victimology or with a focus on the perpetrators and their motives instead, as Frank Chalk and Kurt Jonassohn have proposed.<sup>11</sup> There are, without any doubt, shortcomings or exceptions for all theoretical concepts, but the debate about genocide seems to be particularly important, as genocidal crimes and their commemoration as such have important implications for all aspects of human life and all involved parties. Should “gendercide” or “politicide,” to name just two categories for specific victim identities, be considered as different from genocide, with regard to the motivation upon which the violence of the perpetrators is based, or should they be considered a subcategory of genocide, even if violent crimes in these categories are often not perceived as genocide?<sup>12</sup> Lemkin might have struggled with similar questions, but in the end, the political map of the early Cold War prevented a broader definition of genocide, regardless of whether Lemkin might have hoped for one. Ultimately, he must have been happy to achieve what he could, but this does not mean that we have to keep his definitional groundwork untouched. This chapter will therefore take a closer look at Lemkin’s ambition and work before discussing some theoretical shortcomings of the UN Genocide Convention to show the extent to which the concept, like every other historical source, is related to its chronological context and therefore may no longer be proper enough to be kept unchanged.

## Lemkin’s Ambition

Raphael Lemkin “was not a trained social theorist or historian, but a lawyer, activist and independent researcher,” but his own experiences, during the Second

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<sup>11</sup> Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven, CT: Yale University Press, 1990), 29. They use a typology that separates different types of genocides based on the perpetrator’s motives or intentions: 1) a genocide to eliminate possible threats to the perpetrators, 2) a genocide that is supposed to spread terror among possible enemies, 3) a genocide to create financial gains for the perpetrators, and 4) a genocide tied to the wish to implement the perpetrators’ ideology.

<sup>12</sup> Elissa Bemporad and Joyce W. Warren, eds., *Women and Genocide: Survivors, Victims, Perpetrators* (Bloomington, IN: Indiana University Press, 2018); Adam Jones, ed., *Gendercide and Genocide* (Nashville, TN: Vanderbilt University Press, 2004); Mary Anne Warren, *Gendercide: The*

World War in particular, made him interested in finding a political and legal answer to the crimes of the recent past. Consequently, he provided “the basis of a powerful sociological concept,” and the “broader framework of his thinking reflected his relationship with the intellectual currents of his particular time.”<sup>13</sup> As a lawyer, Lemkin had tried earlier to adjust the existent law to match modern forms of crimes and their perception within or by society.<sup>14</sup> At the International Conference for Unification of Criminal Law in Madrid in 1933, he proposed to acknowledge two new forms of crime: 1) “barbarity, consisting in the extermination of racial, religious or social collectives” and 2) “vandalism, consisting in the destruction of cultural and artistic works of these groups.”<sup>15</sup> However, Lemkin’s work was soon interrupted by the rise of National Socialism in Germany and the invasion of Poland in September 1939, due to which “[t]he prosperous international lawyer suddenly became an internally displaced refugee.”<sup>16</sup>

His experiences after 1939 led Lemkin’s interest in a different direction. His famous book *Axis Rule in Occupied Europe* was published in 1944, and its first part was related to “‘genocide’ – a new term for the physical destruction of nations and ethnic groups.”<sup>17</sup> Lemkin introduced genocide as “a new term and new conception for the destruction of nations.”<sup>18</sup> With regard to the question of genocidal violence, however, which is the main topic of the present volume, one could ask if a nation can be destroyed without the physical destruction of its people. In particular, the concept of “identicide,” which is not solely limited to the violent annihilation of the physical bodies or cultural artifacts of an ethnic or national community but the identity of a people, e.g., by prohibiting and thereby destroy-

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*Implications of Sex Selection* (Totowa, NJ: Rowman & Allanheld, 1985); Barbara Harff and Ted Robert Gurr, “Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945,” *International Studies Quarterly* 32, no. 3 (1988): 359–371; David L. Nersessian, *Genocide and Political Groups* (New York: Oxford University Press, 2010).

<sup>13</sup> Shaw, *What is Genocide?*, 46.

<sup>14</sup> For a short biography, see Till Stumpf, “Raphael Lemkin,” in *Verfolgen und Aufklären: Die erste Generation der Holocaustforschung – Crimes Uncovered: The First Generation of Holocaust Researchers*, eds. Hans-Christian Jasch and Stephan Lehenstaedt (Berlin: Metropol, 2019), 132–135.

<sup>15</sup> Raphael Lemkin, “Genocide as a Crime under International Law,” *The American Journal of International Law* 41, no. 1 (1947): 146.

<sup>16</sup> Donna-Lee Frieze, “Introduction: The ‘Insistent Prophet’,” in Raphael Lemkin, *Totally Unofficial: The Autobiography*, ed. Donna-Lee Frieze (New Haven, CT: Yale University Press, 2013), xii.

<sup>17</sup> H.L., “Review: *Axis Rule in Occupied Europe* by Raphael Lemkin,” *The Cambridge Law Journal* 9, no. 1 (1945): 140.

<sup>18</sup> Lemkin, *Axis Rule*, 79–95.

ing a native language, would need to consider different forms of violence.<sup>19</sup> Not all of these would be physical or war-related, and some of the violent means for the genocidal destruction of identity would be applied by states, governments, and other individuals in their daily communication and acceptance of anti-minority-oriented practices.<sup>20</sup> For Lemkin, the coordination of genocidal violence or the means that made it possible was an essential point: "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."<sup>21</sup> The forced assimilation of people who through this process would lose their national identity, i.e., "identicide," would then naturally be counted as genocide and thereby increase the cases we would officially consider as such. "The objectives of such a plan," Lemkin continues in his evaluation, "would be the 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."<sup>22</sup> According to Lemkin, genocide would also first destroy existent nations to then replace them with the perpetrator's, a strategy Nazi Germany pursued with their violent actions, "[b]ecause the imposition of this policy of genocide is more destructive for a people than injuries suffered in actual fighting, the German people will be stronger than the subjugated peoples after the war even if the German army is defeated. In this respect genocide is a new technique of occupation aimed at winning the peace even though the war itself is lost."<sup>23</sup>

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19 For a survey of different forms of violence, see Peter Imbusch, *Moderne und Gewalt: Zivilisationstheoretische Perspektiven auf das 20. Jahrhundert* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005), 31–35.

20 For some considerations about identicide, which could, however, be extended, especially with regard to the role of language, see Sarah Jane Meharg, "Identicide and Cultural Cannibalism: Warfare's Appetite for Symbolic Place," *Peace Research* 33, no. 2 (2001): 89–98; Sarah Jane Meharg, "Identicide: Precursor to Genocide," *Centre for Security and Defense Studies Working Paper* 5 (2006): 1–19; Sarah Jane Meharg, "Identicide in Sarajevo: The Destruction of the National and University Library of Bosnia and Herzegovina," in *Modern Military Geography*, eds. Francis Galgano and Eugene J. Palka. (New York: Routledge, 2010), 341–357. In contrast to Meharg, I would not consider identicide to be a precursor to but a specific form of genocide.

21 Lemkin, *Axis Rule*, 79.

22 *Ibid.*

23 *Ibid.*, 81.

In the latter regard, Lemkin was partially wrong, especially since the rule of the Nazi regime had repercussions for German society as a whole and the Jewish community in particular that have lasted until today. He could not have predicted how the war would end in 1945, but he further systematized the way the Germans committed genocide in the occupied parts of Europe according to different forms of genocide, e.g., political or religious ones:

The above-described techniques of genocide represent an elaborate, almost scientific, system developed to an extent never before achieved by any nation. Hence the significance of genocide and the need to review international law in the light of the German practices of the present war. These practices have surpassed in their unscrupulous character any procedures or methods imagined a few decades ago by the framers of the Hague Regulations. Nobody at that time could conceive that an occupant would resort to the destruction of nations by barbarous practices reminiscent of the darkest pages of history.<sup>24</sup>

The sheer level of destruction and violence that could be observed in the territories Germany had invaded and occupied, especially the “destruction of the European Jews,”<sup>25</sup> forced Lemkin to engage with the German crimes to find a new legal category to describe what had been happening in Europe since 1939 – or, with regard to antisemitic violence, even since 1933 – under Nazi rule. His work brought attention to this problem, as it provided, as one reviewer remarked, “[n]ot a pleasant record . . . of how a tyranny under the guise of law engulfed substantially an entire continent.”<sup>26</sup> The importance of Lemkin’s study, as another reviewer noted, “lies in its being the first attempt to present a systematic picture of Axis government in occupied Europe”<sup>27</sup> while at the same time coining a new term for the German policy in relation to the mass killing of Europe’s Jewish population and other victim groups. His theoretical reflections about genocide were considered “[o]ne of the most original and important chapters of the book.”<sup>28</sup> This view was often shared, and Lemkin’s endeavor was praised and appreciated because, as one review put it, “his pioneering contribution in collecting the material and setting

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24 Ibid., 90.

25 Raul Hilberg, *The Destruction of the European Jews* (Chicago: Quadrangle Books, 1961). Hilberg, I would argue, shared a similar motivation to Lemkin for his work on the topic.

26 Arthur K. Kuhn, “Review: Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress by Raphael Lemkin and George A. Finch,” *The American Journal of International Law* 39, no. 2 (1945): 360.

27 John H. Herz, “Review: Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress by Raphael Lemkin,” *The American Political Science Review* 39, no. 2 (1945): 366.

28 Kuhn, “Review,” 361.

up a useful frame of reference for the future exploration of the Hitlerite system of management in occupied lands deserves full credit.”<sup>29</sup>

Lemkin's study, elsewhere described as a kind of “prosecutor's brief,”<sup>30</sup> was perceived as a valuable work for the Allies, who would have to deal with the legal prosecution of the leading Nazis after the war. The documents that Lemkin provided would be especially useful, as “the skeptical reader will find indisputably recorded the actual nature of the Axis military government which has been one monstrous crime against humanity.”<sup>31</sup> Arthur Leon Horniker, who reviewed Lemkin's book, agreed with the evaluation presented therein, namely that “the entire German people [were] responsible”<sup>32</sup> for the crime of genocide, as they allowed the Nazis to take over and control the country, even leading it into an aggressive war against other European nation-states. The book consequently had several implications with regard to the description, perception, and prosecution of the crimes committed by the Third Reich in the years of its existence. This information was valuable for the “peace-makers,”<sup>33</sup> who now had to use the provided material and gather more evidence against the National Socialist regime and its remaining representatives to prepare the latter's legal prosecution.

After the publication of *Axis Rule in Occupied Europe*, Lemkin did not rest but continued his quest to promote “genocide” as new terminology and a proper legal category for the recent events. “The last war,” he stated, “has focused our attention on the phenomenon of the destruction of whole populations – of national, racial and religious groups – both biologically and culturally.”<sup>34</sup> Two years after the publication of his book, Lemkin posed an important question that would determine his further activities until the UN Genocide Convention was signed in December 1948:

Genocide is the crime of destroying national, racial or religious groups. The problem now arises as to whether it is a crime of only national importance, or a crime in which international society as such should be vitally interested. Many reasons speak for the second alternative. It would be impractical to treat genocide as a national crime, since by its very nature it is committed by the state or by powerful groups which have the backing of the

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<sup>29</sup> Melchior Palyi, “Review: Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, by Raphael Lemkin,” in “Human Behavior in Military Society,” special issue, *American Journal of Sociology* 51, no. 5 (1946): 496.

<sup>30</sup> *Ibid.*

<sup>31</sup> Arthur Leon Horniker, “Review: Axis Rule in Occupied Europe, by Raphael Lemkin,” *Military Affairs* 9, no. 1 (1945): 70.

<sup>32</sup> *Ibid.*, 71.

<sup>33</sup> Merle Fainsod, “Review: Axis Rule in Occupied Europe, by Raphaël Lemkin,” *Harvard Law Review* 58, no. 5 (1945): 744.

<sup>34</sup> Raphael Lemkin, “Genocide,” *American Scholar* 15, no. 2 (1946): 227–230.

state. A state would never prosecute a crime instigated or backed by itself. By its very legal, moral and humanitarian nature, it must be considered an *international crime*.<sup>35</sup>

He therefore tried to link the prevention of possible future genocides to the Charter of the United Nations Organization, which “also provides for the international protection of human rights, indicating that the denial of such rights by any state is a matter of concern to all mankind.”<sup>36</sup> Genocide needed to be something that, if it could not be prevented in the first place, could at least be prosecuted and would not be confined by national borders, behind which perpetrators might be able to hide. Lemkin consequently proposed “that the United Nations as they are now organized, together with other invited nations, enter into an international treaty which would formulate genocide as an international crime, providing for its prevention and punishment in time of peace and war.”<sup>37</sup>

He also made a statement about the responsibility for genocidal violence and its use, arguing that “[t]he liability for genocide should rest on those who gave and executed the orders, as well as on those who incited to the commission of the crime by whatever means, including formulation and teaching of the criminal philosophy of genocide. Members of government and political bodies which organized or tolerated genocide will be equally responsible.”<sup>38</sup> Lemkin thereby marked genocide as a crime that was committed not only by those who used violence against the victims but also by those who made the crime possible through the legitimization and provision of operational and contextual means. Views on genocidal violence therefore needed to be broadened far beyond the direct victim-perpetrator relationship and the actual violent act. The criminal nature of the action needed an expansion of the perspective legislators and prosecutors would usually apply in such cases.

Though the experience of the Third Reich and the Holocaust changed Lemkin’s view, they needed to change the law as well because, as Lemkin emphasized, “[t]he realities of European life in the years 1933–45 called for the creation of such a term and for the formulation of a legal concept of destruction of human groups.”<sup>39</sup> The extant legal instruments no longer sufficed to prosecute and judge those who had used violence that was not only destructive but also genocidal. For Lemkin,

[T]he terms previously used to describe an attack upon nationhood were not adequate. Mass murder or extermination wouldn’t apply in the case of sterilization because the vic-

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35 Ibid. My emphasis.

36 Ibid.

37 Ibid.

38 Ibid.

39 Lemkin, “Genocide as a Crime under International Law,” 147.



tims of sterilizations were not murdered, rather a people was killed through delayed action by stopping propagation. Moreover mass murder does not convey the scientific losses of civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.<sup>40</sup>

The Nuremberg Trials showed that categories on which the prosecutors could formerly rely were no longer sufficient when facing crimes of a new level. From Lemkin's perspective, the experience of these trials against the remaining Nazi elite "gave full support to the concept of genocide."<sup>41</sup> The new concept also allowed prosecutors to punish the preparation of genocidal violence in the years before the actual act of destruction took place, and Lemkin – and not only in this regard – considered "Germany [as] the classical country of genocide practices."<sup>42</sup> The Polish lawyer consequently turned into an agent for his new concept in the years after the Second World War and tried to persuade international policy-makers that genocide needed to be sanctioned by international law.

## Working for Justice

There was also a personal reason for Lemkin's ambition: "the ghosts of his parents and the genocide victims Lemkin could not save lived deep within him and spurred him to fight for the Genocide Convention."<sup>43</sup> It took him years to advertise and campaign for his concept before it became a legally accepted one that would have an impact on the future, although not so much by preventing acts of genocide but by providing the world community with the means to prosecute such crimes. While he was actively looking for support, Lemkin recalled,

I started to devour books on the persecution of religious, racial, or other minority groups. I was startled by the description of the destruction of the Christians by Nero. . . . I realized, vividly, that if a Christian could have called a policeman to help he would not have received any protection. Here was a group of people collectively sentenced to death for no reason except that they believed in Christ. And nobody could help them. I became so fascinated with this story that I looked up all the similar instances in history.<sup>44</sup>

In his later project to refine the concept of genocide, which will be discussed in more detail later in this chapter, Lemkin included many different historical cases

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 149.

<sup>43</sup> Frieze, "Introduction," xix.

<sup>44</sup> Lemkin, *Totally Unofficial*, 1.

that he would classify according to his definition of genocide. However, beyond his theoretical interest to look at all these historical case studies, I believe, was a deeper wish to save humanity from itself by pointing out its wrongs in the past. Lemkin wrote the following in this regard: “I realized that such persecution cannot go on endlessly. Those who destroy others also destroy themselves – if not bodily, then in their souls.”<sup>45</sup>

When Lemkin worked for the Board of Economic Warfare in Washington in 1942, he was surprised to learn that the Allied Powers had received messages about the events in Europe and detailed reports about the mass destruction of Jewish lives there. He was puzzled about why there seemed to be no direct response from the Allies to this news and the Germans’ policy in the occupied countries.<sup>46</sup> He later recalled the situation as follows:

In my agency I found complete unawareness that the Axis planned destruction of the peoples under their control. My first attempts to educate my colleagues were discouraging. They were only politely interested. They were absorbed by their own assignments and were masters at switching the discussion to their personal problems. The issue I tried to bring up seemed too theoretical and even fantastic to them.<sup>47</sup>

It was hard for Lemkin to attract attention to his ideas, which were based on everything he had heard and read about the European war theater and the mass killings taking place there. Eventually, he was able to generate some attention and was invited to send a short memo to the US President, although this situation in itself created numerous problems for Lemkin. His memories of this incident will be cited here in some detail, as they show the dilemma the Polish lawyer faced at a time when he could probably have had an impact on US policy.

I confided to a friend that I would like to approach President Roosevelt. The reply came quickly. I was asked to write a memorandum of one page. The president promised to give it his attention. For several days I worked on this one page. The first draft appeared good to me, but it sounded too flat, like a statement by an accountant. Clarity and fire were required, and it did not have enough of either. This one page for my idea was like the bed of Procrustes to me. How could I compress the pain of millions, the fear of nations, the hope for salvation from death onto one page? I suggested in this page the adoption of a treaty to make genocide a crime, the crime of crimes, that would have to be adopted by the nations

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<sup>45</sup> *Ibid.*, 2.

<sup>46</sup> The US government received various reports about the situation, such as Jan Karski’s, who had provided detailed insights into the Polish situation since 1939. Frank Jacob, “And the World Stood Aside – The Allied Reaction on Jan Karski’s ‘Report from Hell,’” Paper presented at the Jan Karski Conference at Loyola University, Chicago, September 20, 2014, accessed January 28, 2022, <https://tinyurl.com/4ydmjfb8>.

<sup>47</sup> Lemkin, *Totally Unofficial*, 113.

of the world. Such a treaty would take the life of nations out of the hands of politicians and give it the objective basis of law. A declaration, which would later be questioned as a mere expression of hope, did not seem sufficient to me. It would lack the solid foundation of an international commitment. I was urging speed. It was still possible to save at least a part of the people.<sup>48</sup>

Although President Roosevelt replied, he requested patience from Lemkin, as the current situation did not allow for actions the lawyer considered pressing. For the latter, such a statement was wholly inadequate for the events in Europe, and he perceived the position of many US politicians of the time as indifferent. Humanity was witnessing mass murder on a scale never seen before, but nobody seemed to care too much about intervening immediately, at least in any tangible way.<sup>49</sup> His book, with a discussion of his new concept of genocide, was therefore an attempt to awaken the masses and persuade them of the necessity not only to prosecute the current genocide but also to prevent similar ones in the future.

The Nuremberg Tribunal was ultimately also deficient from Lemkin's perspective due to the judges' and prosecutors' "refusal to establish a precedent against this type of international crime. The Allies decided their case against a past Hitler but refused to envisage future Hitlers."<sup>50</sup> While "genocide" had gained attention and importance as a term to describe the Nazis' crimes by 1945, it still lacked acceptance as a legal category.<sup>51</sup> Lemkin wanted more, and he stated his vision clearly in the same year when he demanded the following:

Genocide is directed against a national group as an entity and the attack on individuals is only secondary to the annihilation of the national group to which they belong. . . . The practices of genocide anywhere affect the vital interests of all civilized people. Its consequences can neither be isolated nor localized. Tolerating genocide is an admission of the principle that one national group has the right to attack another because of its supposed racial superiority. This principle invites an expansion of such practices beyond the borders of the offending state, and that means wars of aggression. . . . Genocide is too disastrous a phenomenon to be left to fragmentary regulation. There must be an adequate mechanism for international cooperation in the punishment of the offenders.<sup>52</sup>

The formation of the United Nations eventually allowed Lemkin to make his voice heard by those who would decide about the future of mankind. It is therefore no

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48 Ibid., 114.

49 Ibid., 115.

50 Ibid., 118.

51 The *Evening Star* had used the term to describe the German crimes, and the *Washington Post* also applied the term in an editorial. See *Evening Star* (Washington, DC), October 18, 1945, 2; *Washington Post*, December 3, 1945.

52 Raphael Lemkin, "Genocide – A Modern Crime," *Free World* 4 (1945): 39–43.

surprise that Lemkin was present when the world community began to forge its representative political organ; “armed with his new magnum opus,” he lobbied for the acceptance of genocide as a legal category to prosecute and judge future crimes accordingly.<sup>53</sup>

What was to be judged, and what has been a “fundamental point of agreement”<sup>54</sup> for the definition of genocide ever since the UN Genocide Convention of 1948, was the systematic element of the crime, i.e., the planning and structured commitment of violence to destroy a whole population or specific group as such. The Genocide Convention adopted important elements of Lemkin’s ideas and defined genocide as follows:

[G]enocide 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.<sup>55</sup>

However, the groups to be protected according to the Genocide Convention “were the result of political compromise but also a consequence of the jurisprudence of the Nuremberg Tribunal set up in 1945 to punish Nazi war criminals.”<sup>56</sup> Therefore, the Convention per se and its categorization and definitional considerations are limited in their original context and very much tied to the experience of the Second World War and the Holocaust. One restrictive consideration might have been the assumption that genocide must be tied to an aggressive war of expansion and was considered to not happen in times of peace. However, while wars create a particular window of opportunity for genocidal violence as well as other extreme forms of violence or mass killings,<sup>57</sup> genocides are not limited to these war-related contexts but can also happen in more peaceful periods.

The concept of genocide has numerous shortcomings, first and foremost its legal definition. The protections granted by the Genocide Convention appear to be unequal, as some group identities are more protected while others are not cov-

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53 Frieze, “Introduction,” xiv.

54 Feierstein, *Genocide as Social Practice*, 12.

55 Cited in *ibid.*, 13.

56 *Ibid.*

57 See, for example, Frank Jacob, *Genocide and Mass Violence in Asia: An Introductory Reader* (Berlin/Boston: De Gruyter, 2019).

ered by the convention at all.<sup>58</sup> This decision was made out of political necessity because Lemkin accepted a compromise “by arguing that political groups should be excluded because they lacked the cohesion or permanence of other groups. After arduous negotiations, it was finally decided that the protection of political and other excluded groups should be guaranteed . . . Thus, the United Nations defined genocide as a new legal typology . . . [b]ut by excluding political groups, the definition of genocide became arbitrarily restrictive.”<sup>59</sup>

In fact, it was political identities and the rivalries related to them that would determine many instances of genocidal violence, especially on the peripheries of the Cold War,<sup>60</sup> but the victims in these cases were not protected by the Genocide Convention as they were not considered to possess “suitable” victimologies. Consequently, only the cases of Rwanda in 1994 and the Srebrenica massacre in 1995 were legally recognized as genocide. Many other cases, like Cambodia, were not.<sup>61</sup> The necessity of having his concept accepted at all made Lemkin and the politicians involved agree to a foul compromise that remains problematic even today with regard to violence used for genocidal purposes, especially when its genocidal character is not accepted by the broader world community and international courts. While some academics have tried to refine the concept since Lemkin's original study in 1944, including Frank Chalk, Kurt Jonassohn, and Barbara Harff, among several others,<sup>62</sup> definitional shortcomings still exist. However, as the next part of the present chapter will show, these were not intended by Lemkin, whose later work attempted to refine his original concept using further studies and an extension of the cases considered for the establishment of the terminology of genocide.

## Unwanted Shortcomings

International human rights laws, including the UN Genocide Convention, were closely related to the crimes committed by the Nazis, as it was “[t]he horrors of Auschwitz, Dachau and Treblinka [that] set the context for the development of

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<sup>58</sup> Feierstein, *Genocide as Social Practice*, 13.

<sup>59</sup> *Ibid.*, 16.

<sup>60</sup> Frank Jacob, ed., *Peripheries of the Cold War* (Würzburg: K&N, 2015).

<sup>61</sup> Hurst Hannum, “International Law and Cambodian Genocide: The Sounds of Silence,” *Human Rights Quarterly* 11, no. 1 (1989): 82–138.

<sup>62</sup> For the definitions of their respective conceptual refinements, see Feierstein, *Genocide as Social Practice*, 39–45.

human rights law in the years following the Second World War.”<sup>63</sup> However, the Nuremberg Trials did not suffice, and the relevant indictment only mentioned the term “genocide” once. According to the verdict, the Nazis had “conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”<sup>64</sup> Nevertheless, for Lemkin, who followed the events closely, the Nuremberg Trials left a “legal gap to fill,”<sup>65</sup> especially since the concept of genocide as such had not yet been legally institutionalized. The Polish lawyer, as has been shown, “had been indefatigable in promoting his ideas”<sup>66</sup> since his book was published in 1944, and he had been lobbying for the legal adaptation of his concept ever since.

Regardless of the energy he invested, and due to a lack of source access and the impossibility of seeing the full scale of the Holocaust at that moment, Lemkin did not fully understand the dimensions of the violence the Nazis had used against all kinds of groups, and he only interpreted violence against certain national groups as genocidal, a consideration that limited the concept tremendously.<sup>67</sup> Although Lemkin was right in many regards, such as in realizing the necessity to “see killing and physical harm as elements of the broader process of social destruction” and “to stress the integrated, multi-dimensional nature of the attack,”<sup>68</sup> some elements in his theoretical considerations were not sufficient to pay tribute to the crime he wanted to address. The term “*genos*” he used for his concept was not unproblematic either. Lemkin chose a meaning that considered “the target of genocide as a social group constituted biologically, through common descent,” although, as Martin Shaw reminds us, “ethnicity is entirely socially and

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63 William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 642.

64 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1 (Nuremberg: n.p., 1947), 43–44.

65 Schabas, *Genocide in International Law*, 642.

66 Josef L. Kunz, “The United Nations Convention on Genocide,” *The American Journal of International Law* 43, no. 4 (1949): 738.

67 Shaw, *What is Genocide?*, 40–43. Some victim groups were thereby unfortunately marginalized again, e.g., the Sinti and Roma. This marginalization continued to have a negative impact on the lives of people who shared these groups’ identities. See Till Bastian, *Sinti und Roma im Dritten Reich: Geschichte einer Verfolgung* (Munich: Beck, 2001); Wolfgang Benz, *Sinti und Roma: Die unerwünschte Minderheit – Über das Vorurteil Antiziganismus* (Berlin: Metropol, 2014).

68 Shaw, *What is Genocide?*, 45.

culturally constructed.”<sup>69</sup> Biological aspects do not always seem to play the most significant role in genocidal acts, but Lemkin mainly focused on the National Socialist ideology when he defined his ideas in relation to possible victim groups. The crime of crimes was therefore already biased by the historical context of its most infamous example, and it is this in particular that makes it so unfitting for other cases.<sup>70</sup> Not all genocidal violence is based on the same assumptions about the victims, and not every perpetrator applies the same forms of legitimization for violent acts. Not all violence can be explained so easily because, sometimes, it can be used against people who are also falsely subsumed under a certain group identity. Ultimately, the closedness of the concept was a consequence of the circumstances of its creation and adaptation into international law.

The United Nations wanted to prevent genocides from happening in the future, but the political situation and the reservations of some nation-states to accept a broader concept due to reservations about considerations of “cultural” or “political genocide” made it impossible to overcome some of the shortcomings the Genocide Convention continues to demonstrate until today. However, it can still be described as “an unprecedented progressive step in the history of international law.”<sup>71</sup> While the term “genocide” had been used before, it was not legally binding, and in contrast to the Nuremberg Trials, the Tokyo Tribunal avoided its use, especially when discussing the so-called Rape of Nanking.<sup>72</sup> In particular, the violence used by the Japanese Army against civilians and women who were trafficked across Asia to be abused as sex slaves was not considered genocidal by many.<sup>73</sup> Roger Baldwin, one of the founders of the American Civil Liberties Union, answered a query in this regard as follows: “I do not think you will get very far with the subject of genocide in relation to the Japanese occupation of Korea. That followed the regular old pattern of imperialism except for the single

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<sup>69</sup> *Ibid.*, 46–48.

<sup>70</sup> *Ibid.*, 50–53.

<sup>71</sup> Matthew Lippman, “The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law,” in *The Genocide Convention: The Legacy of 60 Years*, eds. Harmen van der Wilt et al. (Leiden/Boston: Martinus Nijhoff, 2012), 16.

<sup>72</sup> For a detailed discussion of the violence used during the Rape of Nanking, see Frank Jacob, “Banzai! And the Others Die—Collective Violence in the Rape of Nanking,” in *Global Lynching and Collective Violence*, vol. 1: *Asia, Africa, and the Middle East*, ed. Michael Pfeifer (Urbana: University of Illinois Press, 2017), 78–102.

<sup>73</sup> Frank Jacob, *Japanese War Crimes during World War II: Atrocity and the Psychology of Collective Violence* (Santa Barbara, CA: Praeger, 2018), 67–93. On the history of and debates about the so-called “comfort women,” see also Pyong Gap Min, Thomas R. Chung, and Sejung Yim, eds., *Japanese Military Sexual Slavery: The Transnational Redress Movement for the Victims* (Berlin: De Gruyter, 2019).

feature that Korea was annexed as an integral part of Japan. . . . I doubt whether you will find anything properly relating to genocide in Korean experience. There was no attempt at exterminating a people on racial grounds.”<sup>74</sup> Baldwin’s statement emphasizes an already-mentioned dilemma, namely, that the definition of genocide remained too connected to the German context after the Second World War. In addition, the US soon needed Japan as an ally in the Cold War, and Douglas MacArthur’s occupation policy therefore seemed more interested in a secure cooperation than a severe punishment of Japanese war crimes.<sup>75</sup>

Work on the UN Genocide Convention was therefore bound by the context of the Holocaust; “statesmen felt as if they owed an apology to the world for the holocaust [sic], and for past follies, frustrations, and the many crimes committed.”<sup>76</sup> For many, it seemed to have presented the first and only real genocide in history, and due to the political landscape, in which a broader definition of genocidal violence would have caused intense debates and maybe jeopardized the entire process of establishing the Convention, Lemkin had to act strategically to get it accepted by the world community:

My plan was to combine the support of a Latin American republic with that of a nation in Asia, which would attract through its culture and world position many other nations of the East. I will make a “marriage” between the West and the East for the sake of this resolution. If it was possible to create such a combination, the European delegations could not refuse to follow, especially after the recent holocaust. The nations of Africa, on whom genocide was practiced, would be very receptive. The Allies of the recent war would have to say yes, because they could not afford to be led but must themselves lead. . . . I stressed that genocide had happened throughout history and inflicted great losses on mankind and culture. I thought the draft should not demand too much, so that the delegations might make it stronger. The main thing is not to frighten by too-bold demands.<sup>77</sup>

With Cuba, Panama, and India supporting Lemkin’s proposal, i.e., General Assembly Resolution 96(I), the process had begun, although the United States and the Soviet Union were against expanding the definition to the persecution of political groups. Nevertheless, a text would be prepared by a legal subcommittee chaired by Charles Fahy, a US delegate.<sup>78</sup> “The subcommittee,” Lemkin later recalled, “decided to include in the resolution a declaration that genocide is a crime under

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74 Roger Baldwin to Miss Miriam L. Milliren, New York July 7, 1947, Raphael Lemkin Papers, New York Public Library, Manuscript and Archives Division, \*ZL-273, Reel 1.

75 Frank Jacob, “MacArthur’s Legacy: Japan and the Early Years of the Cold War,” in *Peripheries of the Cold War*, ed. Frank Jacob (Würzburg: K&N, 2015), 207–227.

76 Lemkin, *Totally Unofficial*, 121.

77 *Ibid.*, 122.

78 *Ibid.*, 131; Lippman, “The Drafting and Development of the 1948 Convention on Genocide,” 18–20.



international law, a condemnation of this crime by all civilized nations, to prepare a convention on the prevention and punishment of the crime of genocide, and to present this resolution to the next Assembly.”<sup>79</sup> Regardless of this decision, much lobbying work needed to be done to secure its acceptance.<sup>80</sup>

Furthermore, the draft sought protection for more victim groups:

The draft convention states as its purpose the prevention of destruction of racial, national, linguistic, religious or political groups. Three types of genocide are defined. (1) Physical genocide: meaning killing or putting in such condition that death or loss of health is inevitable (concentration camps, starvation, torture and medical experiments on human beings are included in this category). (2) Biological genocide: consisting in actions tending to prevent life and to kill a human group through delayed action. (Sterilization, breaking up families, as was done in deportations for forced labor, and obstructions to marriages are termed biological genocides). (3) Cultural genocide: meaning the destruction of specific characteristics of a group, or obliteration of its spiritual life and culture.<sup>81</sup>

The draft therefore sought to cover a much broader definition of genocide than the actual Convention did. Regardless of this reduced scope, the latter “was supposed to usher humanity into a better future, forestalling horrors such as those inflicted by the Nazis.”<sup>82</sup> The Genocide Convention was eventually acceptable to all signatories,<sup>83</sup> and it became “one of the first major documents of international law negotiated within the pluralistic environment of the United Nations.”<sup>84</sup>

For Lemkin, however, genocide was more than a category to describe the Holocaust; it constituted violence applied by states and perpetrators to destroy other groups systematically, “[a]nd as he demonstrated throughout his comparative genocide research, there are many ways to destroy a group.”<sup>85</sup> When one takes a closer look at Lemkin’s later studies related to the topic, it is clear that the Genocide Convention was not the end of his endeavor but rather a first attempt. He intended to broaden his concept to more than European cases of genocide, and his unfinished project suggests that he really took a global and chronologically broad approach toward refining the concept:

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<sup>79</sup> Lemkin, *Totally Unofficial*, 131.

<sup>80</sup> *Ibid.*, 133–179. For a survey of the drafting process, see Kunz, “The United Nations Convention on Genocide,” 739–740; Schabas, *Genocide in International Law*, 59–116.

<sup>81</sup> Mariam L. Milliren, “The U.N. Convention on Genocide,” *World Affairs* 110, no. 4 (1947): 294.

<sup>82</sup> Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (Madison, WI: University of Wisconsin Press, 2017), 3.

<sup>83</sup> William C. Gordon, “International Law: Self-Executing Treaties: The Genocide Convention,” *Michigan Law Review* 48, no. 6 (1950): 860.

<sup>84</sup> Weiss-Wendt, *The Soviet Union*, 3.

<sup>85</sup> Frieze, “Introduction,” xvi.

I intend to write a book under the title “Introduction to the Study of Genocide.” This book will deal with international and comparative law aspects of this crime. Moreover, the particular acts of genocide will be illustrated by historical examples from Antiquity, the Middle Ages and Modern Times. These examples are necessary not only to prove that genocide always existed in history, but also to explain the practicability [sic] of the Genocide Convention which up to now has been ratified by the parliaments of 58 nations.<sup>86</sup>

Lemkin thereby wanted to develop a concept that could be applied to all kinds of genocide in different geographical regions of the world. He stated in this regard that his

method of research is based on the premise that genocide is an organic concept of multiple influences and consequences. Therefore, the examination of the problem is not limited to one branch of science, but claims the support of many. The formulation of the concept being new, it was necessary to examine it on a possibly large and varied basis of history and different civilizations. Although every period of history must be judged according to its own moral standards, it was necessary to use as a point of departure for objective research the definition of genocide provided for by the Genocide Convention, inasmuch as this definition is based on historical examples.<sup>87</sup>

Lemkin was convinced that “genocide followed humanity throughout history” and that “[o]ne of the basic reasons for genocide is a conflict of cultures,” for which “colonialism cannot be left without blame.”<sup>88</sup> Considering the context of the postwar world, such statements went far beyond anything achievable with the UN at that time, again highlighting that Lemkin had to make a compromise that remained insufficient compared to what he could have hoped for as a broader definition of genocide. To describe the “crimes of all crimes,” Lemkin reflected on cultural aspects that could trigger or stimulate genocidal violence as well:

The significance of genocide is also examined in relation to the development of civilization in a given area and time. The groups involved are: national, racial, ethnical and religious. These are and have been the basic groups of mankind which have contributed to world civilization through their own cultures. These contributions have been the cause of cultural conflicts in intolerant societies both in domestic and international dimensions. The destruction of these groups has caused irretrievable losses because culture by its very nature can be neither restored or duplicated.<sup>89</sup>

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<sup>86</sup> Raphael Lemkin, Description of the Project, Raphael Lemkin Papers, New York Public Library, Manuscript and Archives Division, \*ZL-273, Reel 2, 2.

<sup>87</sup> *Ibid.*, 3.

<sup>88</sup> *Ibid.*, 4.

<sup>89</sup> Raphael Lemkin, Project Outline, n.d., Raphael Lemkin Papers, New York Public Library, Manuscript and Archives Division, \*ZL-273, Reel 2, 1.

Taking Lemkin's notes for his book project into account, one can assume that he was not fully on board with the UN Genocide Convention but saw it as a necessary first step to be able to work on the concept of genocide further in the future. Unfortunately, he died before he could pursue this aim, and his concept still awaits the necessary changes, and the debate thereupon is still ongoing.

## Conclusion

The UN Genocide Convention must, without any doubt, be considered “a personal triumph”<sup>90</sup> for Lemkin, who spent the last two years of his life getting his autobiography published to record and provide critical insights into the drafting of the Convention and the ideas and experiences behind the theoretical and legal concept of genocide.<sup>91</sup> His role cannot be overemphasized when it comes to this history, but while Lemkin did not achieve all he wanted, he made concessions to achieve what he could at a given time. It was necessary for the world community to make amends, not only for the immense losses and suffering humanity had just witnessed, especially in Europe, hence also in other geographical contexts, but also for political problems that were not easy to circumvent for those interested in a broader definition of genocide either. Ultimately, the efforts of Lemkin and many others secured the acceptance and ratification of the Genocide Convention, but the process that had been started was not supposed to stop at this point. An examination of Lemkin's personal writings shows that he was eager to apply a much broader concept, one that would probably have been more fitting to the forms of genocide the world has witnessed since 1948 but which were not “suitable enough” to be categorized as such in Lemkin's day. It is therefore necessary to work with Lemkin's original concept further, to broaden it where necessary, even against politically motivated restrictions, to achieve a result that would be more appropriate for all kinds of genocidal violence, direct or indirect, that the Genocide Convention does not yet cover. It is, in a way, Lemkin's legacy that the unwanted shortcomings of his achievement still await to be adjusted to match the necessities of our time, a new era that faces genocidal violence in many different forms and contexts.

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<sup>90</sup> “Assembly Unanimously Votes to Outlaw Genocide,” *Evening Star* (Washington, DC), December 10, 1948, 2.

<sup>91</sup> Frieze, “Introduction,” ix.

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