The Concept of Genocide in International Criminal Law: Developments after Lemkin

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The Concept of Genocide in International Criminal Law

This book presents a review of historical and emerging legal issues that concern the interpretation of the international crime of genocide.

The Polish legal expert Raphael Lemkin formulated the concept of genocide during the Nazi occupation of Europe, and it was then incorporated into the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This volume looks at the issues that are raised both by the existing international law definition of genocide and by the possible developments that continue to emerge under international criminal law. The authors consider how the concept of genocide might be used in different contexts, and see whether the definition in the 1948 convention may need some revision, also in the light of the original ideas that were expressed by Lemkin. The book focuses on specific themes that allow the reader to understand some of the problems related to the legal definition of genocide, in the context of historical and recent developments.

As a valuable contribution to the debate on the significance, meaning and application of the crime of genocide the book will be essential reading for students and academics working in the areas of Legal History, International Criminal Law, Human Rights, and Genocide Studies.

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Developments after Lemkin

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Dedicated to Ola, Zosia, Jurek and my Mum – Piotr

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Contents

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Introduction

The idea to celebrate the 70th anniversary of the Genocide Convention seemed to be not only appropriate but also necessary for international lawyers from this part of the Europe. Krakow is located in proximity to Auschwitz – the tragic reminder and cause of Lemkin's concerns and legal endeavours. In addition, Jagiellonian University is located in Krakow, which is where his colleagues, professors, and even opponents were often educated. However, this book is also a tribute and contribution from many other persons and scholars. Ten years ago, Warsaw University organised a conference commemorating the 60th anniversary of the convention. We are extremely proud to continue the research that for many Polish lawyers is often intermingled with personal experiences. This book is the result of a conference marking the 70th anniversary of the Genocide Convention, which was organised in Krakow jointly by the Pedagogical University and Jagiellonian University.

The contributors to this book have been asked to address and discuss, whenever possible, the legacy and ideas that were introduced by Raphael Lemkin in relation to the concept of genocide. Born in Poland, Lemkin formulated the concept of genocide during the Nazi occupation of different countries in Europe before and during the Second World War. Following the end of the war, and while the atrocities committed against millions of civilians were coming to light, the United Nations committed itself to adopting a legal document that would define certain types of crimes that could be prevented and punished under international law. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide was the result of Lemkin's dedicated personal and intellectual efforts to provide a legal definition of the crime that he had already identified as an international crime in his writings. In many ways, it was the result of an almost one-person lobbying machine, including meetings with and letters sent to a variety of individuals, institutions, and politicians.

Lemkin's original definition of genocide – a word that he invented – included a variety of acts that would affect certain groups and that could lead to the destruction or annihilation of those targeted groups. Today, 70 years after the adoption of the Genocide Convention, there are still examples of massive violations of human rights that are directed against certain groups and sections of the population with the possible intention of exterminating them. The concept,

and the convention, are still living works and ideas. The nature of the media, which can be used for the incitement to genocide, as well as the issue of cultural genocide, are theoretical issues that are very much debated nowadays. On practical side, the scale of ISIS's brutality again shocked the world in its genocide of the Yazidi population.

This living document is also debated thanks to Philippe Sands' excellent book *East West Street*,[1] which still raises questions whether Lemkin's original formulation and understanding of the concept of genocidal acts and intentions were, possibly, the right ones. In the past 70 years there has been an increasing international focus on crimes that might fit within the Genocide Convention's definition – in particular as a consequence of the developments in international human rights and international criminal law and the decisions of international courts. The present book looks at the issues that are raised by both the existing international law definition of genocide and the possible developments that are emerging under international criminal law. It provides an updated review of both the historical and emerging legal issues that concern the interpretation of the international crime of genocide.

The contributions to this book are organised into three sections. The first part covers the theoretical and historical framework. Agnieszka Bieńczyk-Missala deals with Rafał Lemkin's concept of genocide vs that encompassed in the Genocide Convention. She goes back to Lemkin's early Madrid paper and the evolution of the concept of 'genocide'. Lemkin's understanding and knowledge about the Soviet policy in Ukraine during the Great Holodomor (great famine) also had a great influence on his writing, and he openly called the Holodomor genocide. Professor Olga Wasiuta examines and describes this Ukrainian experience of genocide in 1932–1933, while Hanna Schieve provides a revised consideration of the Rwandan genocide and its actors to complete this first section of the book.

The second part of the book addresses the international and national legal dimensions. The prohibition of genocide has a significant influence on the domestic legal orders, as it is important to include a definition of the crime in national criminal law that would provide the necessary characterisation and procedures to make it possible to prosecute individuals who are considered responsible for such a crime. Tamás Hoffmann looks at the crime of genocide in its (nearly) infinite domestic varieties to show how the international definition may be integrated into states' national and international practice. In connection with this aspect of national prosecution, Kamil Boczek considers in detail the responsibility of members of the government and other public officials in relation to the application of Article 4 of the Genocide Convention. This section of the book concludes with a chapter written by Łukasz Dawid Dąbrowski on the liability of transnational corporations for genocide, with specific attention paid

1 P. Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicholson, London, 2017).

to contemporary international law. The increasing role of corporations and their complicity in many very serious violations of international law and human rights raises important questions about their potential responsibility, including in the context of the crime of genocide.

The third and final section of the book provides a discussion on topics and issues that show how the law on genocide remains a subject of both continuing interpretation and evolution, making the Genocide Convention a living instrument that could and should adapt to the evolving situations and events that threaten the survival of different groups of people. Ruth Amir argues in her chapter – entitled 'Probing the boundaries of the Genocide Convention: children as a protected group' – for an increased protection of children, especially in the context of forcible recruitment of child soldiers and forcible child transfers by non-state actors perpetrating genocide and mass atrocities. Michala Chadimová considers the interaction between genocide and the doctrine of superior responsibility. This is done by looking at the requirement of the 'special intent' for the crime of genocide and thus dealing with the very core of the Genocide Convention, while addressing the unique relationship between superior responsibility and the required special intent to commit the crime of genocide, which deserves a more complex analysis. Milena Ingelevič-Citak and Marcin Marcinko address the topic of the misinterpretation of religiously motivated terrorism in relation to the crime of genocide. They clarify that religiously motivated terrorism, although concerning a specific religious group, is guided by completely different assumptions based on the objective that terrorist groups intend to achieve.

Despite the International Criminal Tribunal for the Former Yugoslavia's decisions on the topic, 'ethnic cleansing' still lacks a clear and universally accepted legal definition. Tamas Vince Adany considers the possible interactions and distinctions between the crimes of ethnic cleansing and genocide, and argues that ethnic cleansing can be tantamount to genocide in certain cases.

Marco Odello considers some elements of the never-ending debate on cultural genocide. His chapter takes into consideration the evolution of the protection of culture, cultural heritage, and cultural goods, both material and immaterial, under the broader context of international law and international criminal law. He addresses the issue of whether there is a need for new forms of revised protection of different types of cultural expressions within the context of international criminal law, particularly in relation to genocide. This third section ends with Piotr Łubiński's chapter discussing the role of social media in the incitement to genocide, with a particular focus on the situation within countries that are parties to the European Convention on Human Rights. He analyses the extent to which the new media may serve as a platform for direct and public incitement to genocide.

In conclusion, the broad scope of this book should contribute to a revised consideration of a number of issues that raise concerns in relation to the crime of genocide, and that to some extent have been excluded, forgotten, or maybe even set aside on purpose, by those viewpoints that take a narrow interpretation

of the crime of genocide. It seems that narrow interpretations are sometimes supported by states whose actions and policies have shown little sympathy for the victims of genocide, and sometimes might become forms of collusion with regimes that led to genocidal actions and that are based on different political, economic, and ideological motivations.

Every year, many states commemorate the millions of victims of the Nazis' genocidal policies with events that often take the name of Holocaust Remembrance Day. It is very important that these events take place to avoid the oblivion of the past and remember that these crimes may occur even within the most refined societies. However, it would be also important that those same states take adequate actions when these types of crimes manifest themselves and, even more importantly, work more closely together to prevent the manifestation of genocide wherever it may occur.

We hope that this collective work will contribute to the debate on the definition and the meaning of the crime of genocide[2] in light of the broader developments that occurred in international law since the adoption of the 1948 Genocide Convention.

The aim is not only to test, but also to provide, some ideas that might be used in different legal and non-legal contexts and that could support an evolutionary and updated interpretation of the 'crime of crimes' more in line with the ideas, aims, and purposes that were originally conceived by Lemkin more than 70 years ago.

Marco Odello and Piotr Łubiński
Aberystwyth and Krakow, July 2020

2 See, among others: S. Totten and H.C. Theriault, *The United Nations Genocide Convention: An Introduction* (University of Toronto Press, 2020); J.S. Bachman, *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge, 2019); L. Whitt, A.W. Clarke, *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law* (CUP, 2019); S. Totten (ed), *Teaching about Genocide* (Rowman & Littlefield, 2018); B. Lang, *Genocide: The Act as Idea* (Pennsylvania Studies in Human Rights; University of Pennsylvania Press, 2017).

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Part I

Theoretical and historical framework

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1 Raphael Lemkin's legacy in international law

Agnieszka Bieńczyk-Missala

It took many years to restore the memory of Raphael Lemkin, who coined the term "genocide." Currently he is a well-known figure, especially among lawyers and historians, who appreciate his massive contribution to the concept of genocide and to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 which, taking into account his personal engagement and the influence on the treaty, is often called Lemkin's Convention.

Lemkin's concept arose in a difficult period for humanity, during which the slaughter of Armenians, the Great Famine in Ukraine, mass exterminations in the Soviet Union, the Holocaust, and mass crimes against the population of Central and Eastern European countries occupied by Fascist Germany all took place. However, there was no prohibition of mass killings in international law, as well as no comprehensive rules to protect minorities and other vulnerable groups. In addition, sovereignty was understood as the full power of the state over its territory and population, which resulted in the lack of reaction on the part of other governments to the suffering of the people.[1] The dominant practice of non-interference in relations between a state and its citizens put the international community in the role of a passive observer of the tragedies experienced by individuals and entire groups as a result of government actions.

Raphael Lemkin was one of those engaged lawyers who lived at a turning point in history and influenced the development of international law. Before World War II, only selective initiatives were implemented regarding the protection of human rights in international law. These were related to, among other issues, the prohibition of slavery, the protection of religious and national minorities, the rights of employees or the protection of persons during armed conflicts. The drama of the mass crimes of World War II finally revealed the need to take greater responsibility for the individual and his/her dignity and to protect entire groups exposed to a violation of their

1 See: J. Bodin, *Six Books on Commonwealth* (Basil Blackwell 1955); E. Andrew, "Jean Bodin on Sovereignty" (2011) 2(2) *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts.*

rights.[2] Raphael Lemkin was one of the first to notice the threats arising from the deficit of legal protection for entire social groups exposed to persecution and extermination. He made his first legal proposals even before the outbreak of war. However, it was the cruelty of mass crimes after 1939 that brought about a change in international consciousness and enabled the implementation of his ideas. The purpose of this chapter is to present Raphael Lemkin's legacy in international law.

Personal context

Raphael Lemkin was born on 24 June 1900, in a Jewish family in Bezwodne, near Volkovysk.[3] These lands, known as the Eastern Borderlands, belonged to Russia at the time of the partitions of the multinational Commonwealth at the end of the eighteenth century. He was the son of Bella and Josef. His father was a farmer, and his well-educated mother took care of her son's upbringing and education, exerting a great influence on him. He spent his childhood in an extremely ethnically diverse part of the country, where for centuries Poles, Ukrainians, Jews, Belarusians, Lithuanians, and Karaites lived side by side. He witnessed various situations, both good and peaceful cooperation and serious tensions between ethnic groups, including discrimination against Jews. He graduated from middle school in Volkovysk, and then studied law at the Jan Kazimierz University in Lviv – one of the most important academic centers in the Second Polish Republic. He attended the courses of many outstanding Polish lawyers there, including Juliusz Makarewicz, Ludwik Ehrlih, and Stanisław Starzyński.[4] Lemkin obtained a doctoral degree in law from the University of Lviv in 1926.

Multiethnic and multicultural Lviv strongly influenced him and was intellectually inspiring. Although Lemkin was interested in the suffering of minorities already in childhood – he read about the situation of Christians in ancient Rome in Henryk Sienkiewicz's *Quo Vadis* – it was only during his student years that he seriously analyzed the tragedy of mass crimes committed on religious and ethnic communities. He was especially interested in the case of the massacre

2 D. Shelton, *An Introduction to the History of International Human Rights Law* (George Washington University Law School, Working Paper No. 346, August 2007) 1–13; R. Kuźniar, *Prawa człowieka, prawo, instytucje, stosunki międzynarodowe* (Wydawnictwo Naukowe Scholar 2000) 29–33.

3 R. Szawłowski, "Raphael Lemkin's Life Journey: From Creative Legal Scholar and Well-to-do Lawyer in Warsaw until 1939 to Pinnacle of International Achievements during the 1940s in the States, Ending Penniless Crusader in New York in the 1950s" in A. Bieńczyk-Missala and S. Dębski (eds.), *Rafał Lemkin: A Hero of Humankind* (Polish Institute of International Affairs 2010) 31–57.

4 A. Redzik and I. Zeman, "Masters of Rafał Lemkin: Lwów School of Law" in A. Bieńczyk-Missala (ed.), *Civilians in Contemporary Armed Conflicts* (Warsaw University Press 2017) 235–240.

of the Armenians, which he discussed with his professors.[5] Lemkin's interest in mass crimes was particularly influenced by two events: the murder of Talaat Pasha, who was responsible for the pogroms of the Armenians in Turkey; and the assassination of Symon Petliura in retaliation for the pogroms against Jews by the Ukrainian People's Republic in 1919.[6] These events prompted him to ask questions about international justice and the legal responsibility of units for the crimes they committed.

He moved to Warsaw in 1926, where as a Doctor of Law he began his career. Lemkin became the secretary of the Appellate Court in Warsaw, and then worked as a prosecutor and a secretary in criminal law sections and sub-commissions of the Polish Codification Commission.

Lemkin also participated in the forensic seminar of Wacław Makowski at the University of Warsaw. In 1933, Lemkin became an assistant professor at the Law School of the Polish Open University in Warsaw, which was headed by Professor Emil Rappaport. He closely observed the contemporary tendencies in European criminal law, especially the legislation and new criminal law codifications in Fascist Italy and Soviet Russia. He published several papers in this field, including a translation of the Soviet Penal Code.[7] He also published several papers on the codification of Polish penal law.[8]

Lemkin was introduced to the International Bureau for the Unification of Penal Law in the 1930s. He became a permanent Polish delegate to numerous conferences and international congresses in the field of criminal law.[9] He prepared a famous lecture at the 5th International Conference for the Unification of Criminal Law in Madrid, in which he proposed new crimes against the law of nations – the crime of barbarity (exterminations by means of massacres, pogroms, or economic discrimination), and the crime of vandalism (the destruction of cultural and artistic works). His idea did not gain national or international support. At the beginning of 1934 Lemkin quit his service as a vice-prosecutor and joined the Bar of the District Chambers of Advocates in Warsaw.

After the outbreak of World War II on 1 September 1939 Lemkin made the decision, not understood by his immediate family, to escape from Poland. He

5 See: D.-L. Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press 2013).

6 M. Kornat, "Rafał Lemkin's Formative Years and the Beginning of his International Career in Inter-war Poland (1918–1939)" in Bieńczyk-Missala and Dębski (eds.), *Rafał Lemkin*, 61–62.

7 R. Lemkin, "Dzieje i charakter reformy prawa karnego we Włoszech" in *Kodeks karny faszystowski*, Warsaw 1929 7–89; *Kodeks Karny Republik Sowieckich* (1926) (R. Lemkin's translation in cooperation with T. Kochanowski); see also: *Kodeks karny Rosji Sowieckiej. 1927* (translation and introduction by R. Lemkin) (1928); R. Lemkin, *Ustawodawstwo karne Rosji Sowieckiej. Kodeks Karny. Procedura Karna* (1938).

8 For example, Lemkin edited the new Penal Code of the Republic of Poland in cooperation with J. Jamont and E.S. Rappaport: *Kodeks karny r. 1932 z dostosowanymi do kodeksu tezami z Orzeczeń Sądu Najwyższego* (1932).

9 A. Redzik, *Rafał Lemkin (1900–1959) Co-Creator of International Criminal Law* (Oficyna Allerhanda - Instytut Allerhanda 2017) 25–26.

went to Sweden through Lithuania, and as a polyglot he quickly began to give lectures in Swedish. Lemkin also cooperated with the Swedish government in collecting material on Nazi Germany's policy in Europe. After about a year, he was given the opportunity to go to the United States, where he taught law at Duke University.[10] His major life's work, entitled *Axis Rule in Occupied Europe*, was written there and published by the Carnegie Endowment for International Peace in 1944. This book was the first to explain the term "genocide."[11]

After World War II he served as an advisor on the staff of the chief prosecutor in the trials of Nazi war criminals in Nuremberg in 1946. He was disappointed that the term "genocide" was not included in the Nuremberg Charter and the final judgment.[12] It was also stated that murders committed before the war were not punishable offenses. Lemkin could not understand why governments' actions against their own citizens could not be the subject of international law.

While in Europe he visited the displaced persons' camps, met his friends, and found out that almost 50 members of his family were killed, including his parents.[13] He was shocked and depressed by how Europe was so affected by World War II. His personal experiences influenced his determination to propose the convention against genocide in the United Nations (UN), a new, universal organization founded in 1945. Lemkin devoted absolutely everything to the adoption of the convention. He gave up his scientific and professional work and he stopped writing and lecturing. He devoted his personal relations to the idea of outlawing genocide, and while lobbying for the convention was difficult and disruptive for him, still he succeeded. The Convention on the Prevention and the Punishment of the Crime of Genocide (Genocide Convention, or the Convention) was adopted by the General Assembly of the UN on 9 December 1945 and entered into force on 12 January 1951. Raphael Lemkin was personally involved in its ratification. He conducted hundreds of talks with diplomats and sent letters to politicians in which he urged the adoption of the Convention.[14]

Raphael Lemkin, who is called the father of the Genocide Convention, was nominated for the Nobel Peace Prize many times, although he never received it. He died in New York on 28 August 1959 in poverty and oblivion. The funeral was attended only by seven relatives and his closest friends. A few days after his death, a note appeared in the *New York Times*:

10 D.-L. Frieze (ed.), *Totally Unofficial* 60–78.

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

12 P. Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (W&N 2016) 186–189, 297–299.

13 Ibid. 358–360.

14 See also: J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave Macmillan 2008).

> This devoted man did more than any other individual to win formal acceptance of the principle that it is criminal to injure or destroy any national, ethnical, racial or religious group. Raphael Lemkin, once a successful lawyer in Warsaw, had suffered the loss of his family at the hands of the Nazis, except for one brother. He had a distinguished carrier as a teacher, lecturer, and a writer in Poland, but the burden of his final years was his crusade against slavery, degradation, and killing. It was a heavy burden, and it killed him at the age of 58.[15]

Lemkin's concept of genocide and its penalization

Raphael Lemkin wrote – in the famous chapter 9 of *Axis Rule in Occupied Europe* – that "new conceptions require new terms." In his work he explained the concept of "genocide," which he created by combining the ancient Greek word *genos* (race, tribe) with the Latin *cide* (killing). He pointed out that wars were increasingly not waged against state sovereignty but against entire populations. By "genocide" he meant a coordinated plan of different actions directed at the destruction of a nation or of an ethnic group. He pointed to the disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, but also to the deprivation of individual lives, personal security, health, and property. The fact that his concern was about actions against individuals because of their belonging to a specific group, and not because of their individual capacity, was to distinguish genocide from human rights violations.[16] He wrote that:

> [A]s 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.[17]

Lemkin distinguished two stages of genocide: "One, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor."[18] This probably resulted from the experience imposed by the powers ruling over neighboring Poland, which, having been for over 100 years under partitions, experienced Germanization and Russification. He broadly presented genocidal techniques: political, social, cultural, economic, biological,

15 *New York Times* (31 August 1959) 20.
16 Lemkin, *Axis Rule* 79.
17 R. Lemkin, "Genocide" (1946) 15 *American Scholar* 227.
18 Lemkin, *Axis Rule* op.cit., www.preventgenocide.org/lemkin/AxisRule1944-1.htm [accessed 5 January 2020].

physical, religious, and moral ones, referring to German practices in occupied Europe.

Lemkin believed that genocide should be banned during both war and peace. He expressed disappointment by the fact that the Nuremberg Tribunal judged the crimes committed only after the outbreak of World War II. This fact motivated him to submit a draft convention prohibiting genocidal practices regardless of the times of their application. As we know, the scope of crimes against humanity has evolved in this direction.[19]

A part of Lemkin's concept was penalization of the crime. Because he perceived genocide as an affront to the whole of humanity, he formulated that it should be introduced into the penal legislation of all states, and because of the consequences of the crime for international relations he also advocated for universal criminal jurisdiction.[20] He argued that genocides are organized by states or groups supported by states; therefore, the states are not usually interested in punishing perpetrators.[21] These rules should be accompanied by provisions on the protection of national, racial, and religious minority groups placed in national constitutions and international law. As we now know, plans to adopt a universal convention on national, ethnic, religious, and racial minorities have failed to date, and countries have different approaches to their minorities. The UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities only on 18 December 1992.[22]

Lemkin's first implementation of the ban on genocide was the UN General Assembly resolution of 11 December 1946, approved unanimously, which stated that genocide is a crime under international law.[23] It called for genocide to be considered as a crime with universal jurisdiction under the domestic law of all member states. The resolution called for domestic cooperation of all states to coordinate the international prosecution of genocide.

Two years later, the definition of genocide was found in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in Paris on 9 December 1948. Article I of the Convention declares that states party to it confirmed that genocide, whether committed in a time of peace or in a time of war, is a crime under international law, which they undertake to prevent and to punish. The adopted definition of genocide corresponded to Lemkin's main

19 M.Ch. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011); N. Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press 2011); L.N. Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107 *American Journal of International Law* 334.

20 Lemkin, *Axis Rule* 93–94.

21 A.F. Vrdoljak, "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law" (2010) 20 *The European Journal of International Law* 1185.

22 UN General Assembly Resolution, No. 47/135.

23 UN General Assembly Resolution, 11 December 1946, A/RES/96-I.

assumptions,[24] although it was formulated in a slightly narrower way. According to it:

> 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.[25]

The above definition was the result of a negotiating process and reflected the compromise reached among the UN member states. In the end political groups were not included as protected groups, nor was the so-called "cultural genocide". The need to precisely distinguish genocide from the issue of protecting national and ethnic minorities, crimes against humanity, and human rights was not addressed. Political issues were also important. Serious doubts in this regard were raised by the major powers – the United States, France, and the Soviet Union. The Soviet Union and China sought to eliminate political groups from the concept as being difficult to define precisely. The goal of the USSR was to identify the crime of genocide as closely as possible with Nazi and racist policies. This policy was aimed at diverting attention from Soviet mass deportations, killings, and repression.[26] France feared the category of cultural genocide because of the possibility of its association with colonialism.

The issue of how to punish the crime of genocide was also controversial. The United States was skeptical about the idea of setting up an international criminal court, and France contested the proposal to criminalize genocide in national law. The argument of state sovereignty was invoked in both cases. The main

24 A.-D. Rotfeld, "Rafał Lemkin's Concept of Genocide" in A. Bieńczyk-Missala (ed.), *Civilians in Contemporary Armed Conflicts* 225–231.

25 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf [accessed 5 January 2020]. See also: M. Shaw, *What is Genocide?* (Polity Press 2007); W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2003); A. Jones, *Genocide: A Comprehensive Introduction* (Routledge 2006); L. Kuper, *Genocide* (Yale University Press 1981); S.P. Rosenberg, "Genocide Is a Process, Not an Event" (2012) 7(1) *Genocide Studies and Prevention*, https://scholarcommons.usf.edu/gsp/vol7/iss1/4 [accessed 26 March 2020]; E. D. Weitz, *Century of Genocide: Critical Essays and Eyewitness Accounts* (Princeton University Press 2003); B. Valentino, *Final Solutions: Mass Killing and Genocide in the 20th Century* (Cornell University Press 2004).

26 A. Weiss-Wend, "The Soviet Union and the Genocide Convention: An Exercise in Cold War Politics" in Bieńczyk-Missala and Dębski (eds.), *Rafał Lemkin*, 179–194.

powers significantly contributed to narrowing the definition of genocide as well as the weakening of implementation mechanisms.

Given the limited utility of the Convention, especially during the Cold War, there were allegations that the conventional definition of genocide had many shortcomings. They referred mainly to the category of intent; the too-narrow scope of the groups mentioned in the definition; and the fact that the definition of genocide overlapped with the definition of crimes against humanity. It is easy to make such accusations from the perspective of the past decades and the evolution of the scope of crimes against humanity, especially their extension to times of peace. Raphael Lemkin was not satisfied with the Nuremberg trials and could not predict the evolution of international law.

Despite the difficulties in implementing the Genocide Convention, it was never decided to extend the scope of the crime. The same definition was included in the Rome Statute of the International Criminal Court (Article 6), and was also part of the jurisdiction of ad hoc and hybrid courts, including the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The Convention has been ratified by 152 states,[27] and the International Court of Justice (ICJ) has repeatedly stated that the Convention embodies principles that are part of general customary international law. The ICJ has also stated that the prohibition of genocide is a *ius cogens* norm of international law (peremptory norm) and that no derogation from it is allowed.

Prevention of genocide

Raphael Lemkin's goal was that genocide would never be repeated. He believed that banning the annihilation of groups of people in international law because of their race, national and ethnic character, and religion would have a preventive effect. The day on which the Convention was adopted was the happiest day in his life. Researchers of genocide and Lemkin's ideas rarely refer to the idea of prevention, which is part of the title of the Convention, focusing mainly on elements of the definition of genocide and the effectiveness of international criminal justice. Meanwhile, the concept has *never again* primarily included the idea of prevention.[28]

27 This is the number of ratifications as of 31 December 2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en [accessed 5 January 2020].

28 S. Power: "*A Problem from Hell": America and the Age of Genocide* (Basic Books 2013); W. Schabas, "Preventing the 'Odious Scourge': The United Nations and the Prevention of Genocide" (2007) 14(2) *International Journal on Minority and Group Rights* 379; L. Kuper, *The Prevention of Genocide* (Yale University Press 1985); S. McLoughlin, *The Structural Prevention of Mass Atrocities* (Routledge 2014); A.J. Bellamy and A. Lupin, *Why We Fail: Obstacles to the Effective Prevention of Mass Atrocities* (International Peace Institute June 2015); A. Bieńczyk-Missala, "Early Warning and the Prevention of Atrocity Crimes: The Role of the United Nations" in K. Bachmann and D. Heidrich (eds.), *The Legacy of Crimes and Crises: Transitional Justice, Domestic Change and the Role of the International Community* (Peter Lang Edition 2016) 199–207.

Raphael Lemkin saw the obligation to prevent genocide in broad terms.[29] First, he believed that international law itself fulfills a preventive function. When he wrote about the need to adopt legal rules regarding the prohibition of barbarism in the 1930s or genocide in the 1940s, he was convinced that any future convention in this area would ensure the protection of entire groups. Even during World War II he claimed that the swift adoption of the convention would prevent the further genocidal policy of Nazi Germany and the changes which Adolf Hitler sought in the national and ethnic structure in Europe.

Second, Lemkin was convinced that criminal law has a powerful preventive influence. He postulated that the need to punish criminals would lead to the introduction of parallel criminal mechanisms in both domestic and international law. He believed that punishment would stop other perpetrators from committing crimes of genocide.

Third, he believed in institutions. In *Axis Rule in Occupied Europe*, he called for the establishment of institutions that would allow effective control of occupation practices, and he believed that in addition to law the relevant institutions could play a preventive role.

Lemkin's vision of prevention was largely included in the 1948 Convention. It acknowledged that genocide is a crime of international law and should be prevented. From the point of view of the use of UN organs, the most important provisions are contained in Article 8, which provides that any state party to the Convention may request the competent organs of the UN to take the measures provided for in the Charter which it deems appropriate to prevent and suppress acts of genocide or other acts mentioned in Article 3, such as collusion to commit genocide, direct and public incitement to commit crimes, complicity, and more.[30]

However, the Convention does not precisely set out the nature and extent of the prevention obligation. The focus was on the need to punish perpetrators. Thus, states were obliged to establish domestic law that would allow them to be found guilty of genocide, regardless of whether they are constitutionally responsible members of the government, public officials, or private individuals (Article 4).[31] It is not explained what other actions should be taken by states to prevent genocide.

This lack of precision also concerns the area of international cooperation. There were discussions about states, "competent" UN bodies, and "appropriate" instruments for preventing and suppressing genocide, and the source of these instruments was to be the UN Charter. It is not known in what exact situations a particular state was to turn, to which UN body, nor exactly what action should be taken. Nonetheless, this provision could prove sufficient in the event there is the political will to take an action.

29 Lemkin, *Axis Rule*, Chapter IX, ibid.

30 O. Ben-Naftali, "The Obligations to Prevent and to Punish Genocide" in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 36–44.

31 Ibid.

The high level of generality of records and the imprecise language have certainly contributed to the overall abandonment of greater efforts to prevent genocide after the adoption of the Convention. In the times of inter-national rivalry during the Cold War period, in principle genocide was not discussed. Works on the establishment of an international criminal tribunal were blocked, and states and experts focused rather on matters related to the creation of an international human rights protection system. After the turn of 1989, however, it turned out that the international community did not have an adequate response to the threat of genocide. Efforts were not sufficient to stop the massacres in the Balkans, Somalia, or Rwanda. What is more, the international community was unable to respond effectively, often compromising – as in Srebrenica in 1995, where the crime took place of killing over 8,000 Bosnian Muslims who were counting on effective shelter in the UN security zone. The events of the 1990s changed the thinking about the reality of international crimes, and the inhumane displacement in Kosovo in 1999[32] motivated experts and state representatives to seek new solutions in the sphere of preventing and responding to international crimes. An important role in this respect was played by the UN Secretary-General Kofi Annan, who argued that the twenty-first century must be the century of prevention,[33] and proclaimed the need to adopt a "culture of prevention" and to look through a "prevention lens" when undertaking development activities.[34]

A broader approach to the idea of prevention can be found in the concept of the responsibility to protect (R2P), presented in the report of the International Commission on Intervention and State Sovereignty of 2001.[35] It proposed a new approach to the issue of state sovereignty and the obligation to prevent and respond to situations of mass suffering of the population. The UN General Assembly, which accepted the idea of the responsibility of states and the international community for civil protection, adopted the concept in a limited, mainly preventive, scope in the Final Document of the jubilee UN summit in 2005. It announced the provision of preventive support to states for civil protection, including construction of their internal potential in this field. The need to develop early-warning capabilities and UN prevention instruments was also recognized.[36] These provisions have been adopted by consensus by all member countries of the UN. It is worth adding that

32 A. Bieńczyk-Missala, "Kosovo: The First War for Human Rights" in M. Madej (ed.), *Western Military Interventions After the Cold War: Evaluation of the Wars of the West* (Routledge 2019).

33 Address by Secretary-General Kofi Annan at the opening of the 54th session of the Commission on Human Rights, 18.03.1998, SG/SM/6487 HR/4355.

34 UN Secretary-General Report, *Prevention of Armed Conflict*, A/55/985–S/2001/574, 07.06.2001.

35 Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, 12.2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf [accessed 5 January 2020].

36 General Assembly, 2005 World Summit Outcome, par. 138–140, www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30 [accessed 5 January 2020].

regional organizations have also made efforts to build capacity in order to prevent mass crimes, including genocide. This applies especially to the African Union and the Economic Community of West African States, which have granted themselves the right to armed intervention in situations where there are threats of genocide. In 2006, the International Conference of the Great Lakes Region adopted the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination.[37]

In 2007, the obligation to prevent was confirmed by the ICJ. It considered Bosnia and Herzegovina's request for interim measures against Former Yugoslavia (FRY, today the Republic of Serbia). It had to answer the question whether FRY was obliged to take action to prevent the genocide in Srebrenica in June 1995. In 2007, the ICJ ruled that FRY had not complied with its obligation to prevent genocide and had not imposed a penalty on perpetrators as provided for in Article 1 of the Convention. The ICJ noted that the prevention obligation applies to all parties, is not territorially limited, and refers to immediate and effective action using all necessary funds.

Sovereignty and humanitarian intervention

An important issue raised in the discussion about genocide and other mass crimes is the problem of admissible actions of the international community in situations of an oppressive policy by states towards their own population. In the past, discussions were held about a war of just, humanitarian intervention, until finally the concept of R2P was adopted.[38] Its creators proposed a new understanding of the sovereignty of the state as including a responsibility for civil protection,[39] and defined the responsibility of the international community in three dimensions – prevention, response, and reconstruction – understood as the restoration of a situation of respect for human rights.[40] This concept has evolved with its approval by UN General Assembly in its Summit Outcome Document in 2000[41]

37 See: A. Bieńczyk-Missala, *Zapobieganie masowym naruszeniom praw człowieka. Międzynarodowe instytucje i instrumenty* (WN Scholar 2018) 70–78.

38 A.J. Bellamy and T. Dunne, *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press 2016); W.A. Knight and F. Egerton, *The Routledge Handbook of the Responsibility to Protect* (Routledge 2014); J. Genser and I. Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time* (Oxford University Press 2012); R.H. Cooper and J. Voïnov Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan 2009).

39 L. Axworthy, "RtoP and the Evolution of State Sovereignty" in Genser and Cotler (eds.), *The Responsibility to Protect* 3–16.

40 Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, December 2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf [accessed 5 January 2020].

41 General Assembly, 2005 World Summit Outcome, par. 138–140, www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30 [accessed 5 January 2020].

as well as numerous reports of the UN Secretary-General. In the January 2009 Report Implementing the Responsibility to Protect, he proposed three dimensions of R2P, which included: responsibility of the state for civil protection; international assistance to states in carrying out their duties; and an international response.[42] At each stage of the discussion, armed intervention was indicated as the last possible international instrument, except that the right to use force has not changed since the adoption of the UN Charter of 1945. In light of international law therefore, only the Security Council can decide to intervene.[43]

Raphael Lemkin also referred to the issue of state sovereignty and humanitarian intervention. As a student, he asked professors why the community did not respond to the massacres of the Armenians. In reply he heard an anecdote about a farmer deciding to kill his own chickens.[44] However, he disagreed with the idea that the authorities could regulate their relations with citizens by resorting to inhumane instruments. He was an advocate of an innovative approach to the sovereignty of the state for those times, maintaining that it could not be a pass/excuse for criminal practices.

He also expressed a favorable attitude towards humanitarian intervention. He referred to it in his manuscript *The Introduction to the Study of Genocide*, written in the 1950s, in which he extensively referred to Professor of International Law Ellery C. Stowell[45] and his definition of a humanitarian intervention, according to which: "Justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice."[46]

Lemkin drew attention to the reluctance of states towards the concept of the legality of humanitarian interventions, and he advocated for its acceptance, citing the arguments of recognized philosophers and lawyers like Hugo Grotius, Johann Kaspar Bluntschli, Henry Wheaton, John Westlake, August Wilhelm Heffner, and Karl von Rotteck, as well as the American president Theodore Roosevelt. In light of Stowell's views, he questioned the belief that the independence of states and the principle of non-interference in internal affairs are "sacred" even in the event of serious violations of international law, when human life is at stake. He believed interventions to protect lives should be allowed.[47]

42 B. Ki-moon, Implementing the Responsibility to Protect, Report of the Secretary-General, A/63/677, 12 January 2009.

43 P. Grzebyk, "Miejsce interwencji zbrojnej w koncepcji odpowiedzialność za ochronę"(2015) 51 Stosunki Międzynarodowe. *International Relations* 61.

44 H. Yahraes, "He Gave a Name to the World's Most Horrible Crime" (3 March 1951) *Collier's*, www.unz.com/print/Colliers-1951mar03-00028 [accessed 5 January 2020]; Sands, *East West Street* 146–149; Frieze (ed.), *Totally Unofficial* 20.

45 E.C. Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (Henry Holt 1931).

46 S.L. Jacobs (ed.), *Lemkin on Genocide* (Lexington Books 2012) 47–48.

47 S.L. Jacobs, "The Human, the Humane, and the Humanitarian: Their Implications and Consequences in Raphael Lemkin's Work on Genocide" in Bieńczyk-Missala and Dębski (eds.), *Rafał Lemkin* 153–164.

The problem of interventions undertaken for humanitarian reasons remains one of the most controversial issues, and history has proven – especially in the interventions in Somalia in 1993, Kosovo in 1999, and Libya in 2011 – that there are no simple solutions to the complicated situations of genocide and other mass crimes. Lemkin's interest in the limits of state sovereignty and the idea of humanitarian intervention demonstrate that he, believing in the power of international law, did not limit his concepts to definitions and legal standards. He believed that the international community must have instruments for implementing the law and be able to provide practical assistance to victims. He believed that international law is an expression of moral feelings,[48] must have a social and human meaning, and must be a real instrument for human progress and justice, and certainly not an obstacle to them.[49]

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Raphael Lemkin belonged to that small group of lawyers who were extremely involved in building a new international legal order after World War II, aimed at improving the situation of individuals and entire groups. Lemkin's greatest success was that despite the numerous difficulties, including a lack of understanding, a huge personal tragedy, and a struggle with the political will of states, he turned his personal idea into a universal standard: the Convention on the Prevention and Punishment of the Crime of Genocide. His concept and message have always been universal. He did not focus on any one particular case of genocide, but dealt with colonial crimes, Indian massacres, mass murders in Soviet Russia, the Great Famine in Ukraine, and many others. He extrapolated common ethnic, political, and genocidal patterns, which can be considered his personal contribution to comparative studies of genocide. The Holocaust was the massive tragedy that eventually pushed him to fight for the Convention in the UN.

Lemkin's merits go beyond the Genocide Convention. He consistently demonstrated his humanist attitude that international relations were about people. States are not entitled to decide on the existence of population groups, or effect their annihilation. Finally, Lemkin showed that one man can make a difference. He was not a passive observer of reality, but an example of positive activism for a better world.

48 Jacobs (ed.), *Lemkin on Genocide* 10–11.

49 R. Lemkin, "The Legal Case Against Hitler" (24 February 1945) *The Nation* 205.

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