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The Challenge of the Unprecedented – Raphael Lemkin and the Concept of Genocide¹

I. 'Lemkin's Law'

Just a few years ago, the Polish-Jewish jurist, Raphael Lemkin (1900–1959) could be described as a 'largely forgotten immigrant from Poland who coined the word genocide and pushed a convention outlawing it through the General Assembly.'² When he died in New York City in 1959, Lemkin was so destitute that the American Jewish Committee had to pay the costs for his funeral and burial. Only with the creation of the International Tribunal for Crimes in former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (ICTR) (1994) which secured the first ever conviction for the crime of genocide, has Lemkin emerged from undeserved obscurity. Yale University now awards a Raphael Lemkin Prize for International Human Rights and on the centenary of his birth (June 2001) the United Nations paid homage 'to the man who was both father and midwife to the word *genocide*, and brought into being the Genocide Convention.'³ The main speakers were Secretary General Kofi Annan's wife, Nane Annan and David Scheffer, the Clinton administrator's ambassador at large for war crimes. Ironically, the commemoration came at a time when the newly installed Bush administration had already announced that it would not be party to the International Criminal Court (initially supported by the Clinton administration in Rome in 1998) and that it had quietly requested that the United States' negotiator – who had in fact been Mr. Scheffer – be withdrawn.⁴

¹ This article was originally presented as the Vierte Simon-Dubnow-Vorlesung of the Simon-Dubnow-Institut für jüdische Geschichte und Kultur an der Universität Leipzig, December 18, 2003.

² Barbara Cosssette, Salute to a Rights Campaigner Who Gave Genocide its Name, in: New York Times, 19 June 2001. Lemkin's correct birthdate is June 24, 1900, not 1901 as the U.N. commemoration and several secondary sources indicate.

³ Samantha Power, A Problem from Hell, America and the Age of Genocide, New York 2002, 47. Also see William Korey, An Epitaph for Raphael Lemkin, Jacob Blaustein Institute for the Advancement of Human Rights, New York 2001, iii.

⁴ Cosssette, Salute to a Rights Campaigner. For a summary of the US position on the International Criminal Court see David Scheffer, Ambassador at Large for War Crimes Issues, Address at American University, Washington D.C. (14 September 2000) <http://www.state.gov/documents/organization/7095.doc>.

Samantha Power's Pulitzer Prize winning book, *A Problem from Hell. America and the Age of Genocide*, provides an admiring portrait of Lemkin and anoints the Genocide Convention "Lemkin's Law." Power strongly condemns the United States government for its failure to follow Lemkin's example in pressing for international legal and military mechanisms to prevent and punish genocide over five decades. According to Power it was not lack of moral clarity or indifference but the absence of political will that led to that failure:

"What is most shocking is that US policy makers did almost nothing to deter the crime. Because America's 'vital national interests' were not considered imperiled by mere genocide, senior US officials did not give genocide the moral attention it warranted. Instead of undertaking steps along a continuum of intervention – from condemning the perpetrators or cutting off US aid to bombing or rallying a multinational invasion force – US officials tended to trust in negotiation, cling to diplomatic niceties and 'neutrality,' and ship humanitarian aid."⁵

Whatever one thinks of Power's argument – and her critics have underscored some of the paradoxes of her strong defense of unilateralism and military force as opposed to diplomacy and "soft power" – the success of her book leaves little doubt that Lemkin's concept has found new and passionate advocates, and not just among journalists.⁶ Historian Dirk Moses also notes that among historians "recent research is returning to the Lemkinian origins of the concept by stressing the links between the Holocaust and other instances of ethnically motivated mass murder and extermination."⁷ Similarly, the Israeli-American historian Omer Bartov writes, Lemkin has also found strong supporters for his powerful argument that there is a strong interrelationship between war, genocide, and modern identity.⁸

II. Defining "Genocide": The Instability of the Concept

Despite the relative neglect of his contribution, there has been more than a decade of intense discussion of the limits and weaknesses of the concept of genocide. It would be impossible to attempt to summarize this extensive

⁵ Power, *A Problem from Hell*, 504.

⁶ See especially the thoughtful review: Stephen Holmes, *Looking Away*, in: *London Review of Books*, November 2002, accessed online at <http://www.lrb.co.uk/v24/n22/holm01.html>.

⁷ Dirk Moses, *The Holocaust and Genocide*, in: Dan Stone (ed.), *The Historiography of the Holocaust*, New York 2004, 533–555, 535.

⁸ Omer Bartov, *Mirrors of Destruction. War, Genocide, and Modern Identity*, New York/Oxford 2000.

discussion here. There is no doubt that the concept of genocide and the United Nations Convention on the Prevention and Punishment of the Crime of Genocide are, as Lemkin believed they would be, milestones in the progress of international legislation and humanitarian rights. Defining genocide in *Axis Rule in Occupied Europe* (1944), Lemkin included a broad array of techniques of destruction:

"to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."⁹

However, as Lemkin later argued, the Genocide Convention dealt more narrowly "with the monstrous crime of wholesale destruction of nations, races and religious groups [and] requires the specific intent to wipe out all inhabitants of a country belonging to such groups in a manner that substantial parts of these groups are annihilated."¹⁰ According to "The Genocide Convention, adopted on December 9 1948,

"genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."¹¹

Subsequently, some would extend his construction to include more diverse victim groups – political groups and classes – or expand his notion of perpetrators to include not merely states and individuals but "representatives" of the nation-state, including soldiers, settlers, and missionaries.¹² Attempts to include, for example, mass bombardment, effects of occupation, depopulation, famine, disease, and gross negligence (Bhopal, Chernobyl) have led

⁹ Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington, DC 1944, 79–95.

¹⁰ Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Raphael Lemkin Manuscript Collection, Number 60, Box 4, Folder 4 [hereafter Raphael Lemkin Manuscript Collection, AIA], Speech on the Genocide Pact, Delivered at Yale University, n.d.

¹¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948 (Chapter II), Entry into force: 12 January 1951.

¹² Helen Fein, *Genocide. A Sociological Perspective*, London 1993, 8–25; George J. Andreopoulos (ed.), *Genocide. Conceptual and Historical Dimensions*, Philadelphia 1994, especially the essays by Leo Kuiper, Frank Chalk, and Israel W. Charney.

some scholars to propose either eliminating entirely or distinguishing degrees of intent.¹³ The danger here is of course that the word can easily become emptied of meaning, degraded by excessive and needless repetition, finally reaching the stage of what Alain Finkielkraut called “verbal incoherence.”¹⁴ Others would insist on a less elastic concept, closer to Lemkin’s own, distinguishing more sharply, for example, between genocide and “ethnic cleansing” (forcible removal or even killing of populations) or wartime pogroms, massacres, deportations or even mass killing by bombing, none of which “intend” to destroy “in whole or in part” (Lemkin’s formulation) entire population groups.¹⁵

In the American context, the polarization between an “exclusive” notion of “uniqueness” is represented by scholars like Steven Katz, who claims that “the concept of genocide applies *only* when there is an actualized intent to physically destroy an *entire* group [and refers only to the Holocaust] and by ‘inclusivists’ like David E. Stannard and Ward Churchill who include disease and depredation, as well as enslavement and massacre of native Americans in the term. Churchill goes still further, charging that uniqueness was itself a form of ‘denial’” (because it invalidates other genocides).¹⁶ These debates, whose ferocity comes in no small degree from the competitive vic-timhood inherent in American multicultural politics, have generated more confusion than clarity.¹⁷ Significantly, as Dirk Moses has rightly pointed out, *both* Holocaust “exclusivists” and the postcolonial “inclusivists” (who do not consider ‘intent’ crucial) have found support in Lemkin’s writings.¹⁸

Not only these historical controversies but public political debates over the occasion for military and humanitarian intervention underscore the perpetual instability and ambiguity of Lemkin’s concept.¹⁹ Does historical

13 Henry Huttenbach, *Locating the Holocaust on the Genocide Spectrum*, in: *Holocaust and Genocide Studies* 3 (1988), 289–304.

14 Alain Finkielkraut, *The Future of a Negation. Reflections on the Question of Genocide*, Lincoln 1998, 95.

15 This approach is effectively argued by Eric D. Weitz, *A Century of Genocide. Utopias of Race and Nation*, Princeton/Oxford 2003, 9–11. Weitz distinguishes usefully between genocidal acts and genocidal regimes.

16 David E. Stannard, *American Holocaust. The Conquest of the New World*, Oxford 1992, 236. Steven Katz, *The Holocaust in Historical Context*, vol. 1: *The Holocaust and Mass Death Before the Modern Age*, New York 1994, 28, 129.

17 Indian rights activist Ward Churchill claims that when Raphael Lemkin coined the term in 1944, “he went to considerable lengths in explaining that it was intended to describe policies and processes designed to bring about the dissolution and disappearance of targeted human groups, as such.” Ward Churchill, *Forbidding the “G-Word.” Holocaust Denial as Judicial Doctrine in Canada*, in: *Other Voices*, vol. 2, no. 1 (February 2000), <http://www.othervoices.org/2.1/churchill/denial.html>.

18 Moses, *Holocaust and Genocide*, 535.

19 *Ibid.*, 535.

“genocide” sensitize or desensitize those who suffer from mass murder and ethnic cleansing?²⁰ Does the obligation to act in cases of genocide make it more difficult for representatives of states, especially signatories of the convention, to publicly invoke the word “genocide?” Does the “rhetorical advantage” of invoking the word “genocide” as a polemical instrument paradoxically tend to *support* those who oppose rather than favor intervention?²¹ The chief difficulty that all theorists face is that with the attempt to find a single “generic concept” that would encompass the variety of historical genocides past, present, and future the definitional enterprise increasingly becomes lacking in substance and clarity, becoming at once excessively elastic, or excessively specific.

There is no doubt that whatever are its basic conceptual flaws and lack of political efficacy, the Genocide Convention established for the first time a normative legal basis for the behavior of states toward their own people. In this regard, Lemkin’s legacy is secure. Yet, when Lemkin died in 1959, though it had been adopted by the United Nations and ratified by more than 50 (today 135) countries, the Genocide Convention was plagued by the failure of the most important country, one of its earliest supporters, to ratify the convention – the United States. During the Cold War the charge of genocide, though frequently used as an accusation by both sides in the conflict, was of no substantive legal import. The difficulties Lemkin’s concept faced in the first three decades of its existence is a story about how the concept of genocide was discursively situated at the intersection of the two most fractious issues of the early 1950s – Cold War politics and the politics of race in America. Examining the historical roots of this failure illuminates why the United States government in the 1950s suddenly withdrew from international covenants until the late 1980s. Ronald Reagan, it should be recalled, finally signed the Genocide Convention in 1988, as a public recompense for his notorious trip to Bitburg three years ago. But the historical conjuncture of the concept of genocide is only part of the explanation; in conclusion, I will remark briefly on Lemkin’s unpublished “autobiography” which is particularly revealing about the ambiguity that I believe is inherent in the concept of genocide – the “instability” between the historical and the legal, between the cultural and the “ethnic,” between intent and consequence – that continue to haunt Lemkin’s concept.

The problem, perhaps the impossibility, of finding an heuristic definition that would encompass the wide variety of genocides that have taken place

20 *Ibid.*

21 Peter Novick, *The Holocaust in American Life*, New York 1999, 255. See also Bernard Bruneteau, *Le Stèle des génocides*, Paris 2004; Adam Jones (ed.), *Genocide, War Crimes and the West. History and Complicity*, London 2004; Jacques Semelin, *Analyser le massacre. Réflexions comparatives*, Paris 2002.

both during the 20th century and as well as in the historical past is considerable. As Mark Osiel has argued, the legal and the historical often work at cross-purposes: the law aims at inclusivity and generalizability; history at distinctions and differentiations. Though not all genocides are equal, as a legal concept, the crime of genocide is premised on the historical "commensurability" of genocidal intentions, acts, events, and consequences. For example, if lawyers were to conclude from historical comparisons and juridical evidence that the events judged at Nuremberg were "utterly incommensurable" they would have to conclude that "the legal rules that emerged from the trial would be inapplicable to virtually all subsequent events however similar."²² Courts, and more generally, legal concepts, therefore play down the elements of particularity and notoriously disavow "metaphysical concepts" like uniqueness. For that reason, Hannah Arendt could remark that "the Nazi crimes, it seems to me, explode the limits of the law."²³ During the discussions of the Convention draft the Soviet delegation and its supporters in the Eastern European "People's Republics" opposed including political groups (since states have the right to suppress armed insurrection) while England and France balked at the inclusion of "cultural" genocide (that would, they feared, judge colonial policies). Consequently, neither political nor cultural destruction would be included. As Power points out, if the perpetrator did not target a national, ethnic or religious group *as such*, then killings would constitute mass homicide but not genocide. In November 1946, Lemkin worried that "we might lose the convention because of the inclusion of political groups, which is considered by many delegates as a controversial issue."²⁴ Consequently, the United Nations Convention on Genocide adopted on December 9, 1948 removed from consideration "political" groups and "cultural" genocide from Lemkin's original definition, other parameters were still left notably imprecise. As indicated above, the Convention specified that there must be intent to destroy (not merely eliminate) in whole or in part four types of victim groups – "national, ethnical, racial or religious" – and included six acts that "in whole or in part" count as genocide – "killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about destruction, imposing measures intended to prevent births,

22 Mark Osiel, *Ever Again. Legal Remembrance of Administrative Massacre*, in: *University of Pennsylvania Law Review* 144 (1995), 549.

23 Hannah Arendt, Letter to Karl Jaspers, in: Hannah Arendt Karl Jaspers, *Correspondence 1926–1969*, ed. by Lotte Kohler/Hans Saner, New York/San Diego/London 1992, 54. See also Osiel, *Ever Again*, 550, on this point.

24 Letter from Raphael Lemkin to Miss Romme, November 1946, *American Jewish Historical Society, New York [hereafter AJHSJ, Lemkin Papers, P-154, Box 2.3, The May 1947 and April 1948 drafts of the Genocide Convention includes political and linguistic groups, but in the final text Article II does not include either group.*

and the forcible transfer of children from the group."²⁵ That definition, as philosopher Berel Lang has pointed out, is excessively vague about the significance of "intent" versus "consequence," "physical" versus "cultural" destruction, and of course, what degree or magnitude is required for mass murder to rise to the level of "genocide."²⁶

Whether courts or juridical decisions can ever render justice in the face of crimes of history (rather than punish criminal behavior *per se*) is debatable; certainly to claim that law could do so exclusively is hubris. Lemkin believed that certain words "carry in themselves a moral judgment" and that they are "the reply of man to social need."²⁷ Not without irony, Lemkin's admirers have marveled at his single-minded belief in the efficacy of both law and language to alter reality. In an age when the word "Holocaust" often attests to the inability of language to communicate the horror inflicted by the Nazis, Lemkin's almost naïve belief that language translated into law could not merely instantiate justice but actually prevent mass murder appears almost quaint. Legal decisions and legal thought are themselves part of the flux of historical memory, all the more so in Lemkin's case, despite his efforts to fix crimes juridically. Though Lemkin believed that the "great force of the genocide convention lies in the fact that it declares the crime of Genocide to be a non-political crime,"²⁸ his efforts to secure its acceptance and adoption demonstrates that issues of international law are no less political than those affecting domestic law. He firmly believed that genocide was a matter of natural right, no different in principle from homicide: "as in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed."²⁹ The problem of the genocide concept however reveals the difficulties of translating supranational principles in a world where international law and sovereignty remained and remain intimately entwined.³⁰ Even an early critic, the jurist Hans Kelsen, concluded that "the new concept of 'genocide' is rather of political than of legal significance."³¹

"Genocide" is, like all concepts, historical in its origin and reception, not exempt from the ways that a traumatic event inevitably disrupts the relation-

25 Convention on the Prevention and Punishment of the Crime of Genocide (1948).

26 Berel Lang, *The Future of the Holocaust: Between History and Memory*, Ithaca/London 1999, 15–25.

27 New York Public Library [hereafter NYPL], Raphael Lemkin papers 1947–1959, Reel VI: Writings – Genocide, Introduction Into the Study of Genocide, n.d.

28 Raphael Lemkin Manuscript Collection, AJA, Number 60, Box 4, Folder 4, Speech to the United Jewish Appeal, n.d.

29 Raphael Lemkin, *Genocide*, in: *American Scholar* 15 (April 1946), 227–230, 229.

30 Finkelkraut, *Future of a Negation*, 100.

31 Hans Kelsen, *Review of Axis Rule in Occupied Europe*, in: *California Law Review* 34 (1946), no. 1, 271.

ship between history and memory. The ambiguity of "genocide" can in large part be attributed to Lemkin's universalization of the specific events of the destruction of European Jewry and the annihilation of the Polish "nation" (ethno-national murder) without adequately reflecting on its own historicity. Put it in another way, the concept of genocide has its historical origins in the last phase of World War II (1943) and implicitly affirms the victory of the moral norm of positive law against the "laws of nature" or "biology" practiced and reiterated by the Germans during the Nazification of Europe.³² More specifically, in his magisterial work *Axis Rule in Occupied Europe* (1944) Lemkin justified the concept of genocide by a strongly historical account of the events of 1939–43 in which the murder of the Jews was simultaneously assimilated to and distinguished from a narrative of the ethnic homogenization or 'Germanization' of annexed Polish and Ukrainian (and also Western European) territory. Lemkin paradoxically acknowledged the "biological" dimension of the Judeocide and simultaneously emphasized that the Jewish catastrophe was only prior to and larger in scale than the planned destruction of the other "Slavic" peoples.³³ In this respect Nazi genocide was, he maintained, analogous to earlier crimes committed against ethnic minorities like the Kazakhs in central Asia, the Armenians in Turkey, or the expulsion of the Greek orthodox population from Asia Minor by the Turks in 1922. Lemkin recognized that the Jews "being one of the main objects of German genocide policy," made them distinctive, but did not entirely separate the fate of the Jews from the fate of the Poles (for whom annihilation was, he believed, also prescribed) and other minorities left unprotected by the post World War I treaties.³⁴

III. A Double Murder: Lemkin in the United States

Arriving in neutral Sweden in 1940 after a harrowing flight from burning Warsaw where he had been assistant public prosecutor until 1939, Lemkin began to collect material on the new Nazi order in Europe. In April 1941 he arrived in the United States where he had been invited to teach international law at Duke University. In June 1942, the US Board of Economic Warfare

in Washington offered him an appointment as chief consultant. Years later, in his unpublished memoir entitled "Totally Unofficial," Lemkin recalled his mood at the time:

"The impression of a tremendous conspiracy of silence poisoned the air. There was no escape from this feeling. There was not even an explanation of such conspiracy morally possible. A double murder was taking place. One performed by the Nazis, the other performed by the Allies, who refused to make it known that the execution of nations and races had already started."³⁵

It is worth noting here that the formulation: "nations and races" informs both his memory and his analysis, encompassing *both* the destruction of the Polish nation and the Jewish "race."

In August 1941 Winston Churchill delivered his famous radio broadcast: "We are," he said, "in the presence of a crime without a name."³⁶ The following year Lemkin provided the name in *Axis Rule*, where he devoted a chapter to "the necessity of coining a new term for this particular concept: genocide. This word is made from the ancient Greek word *genos* (race, clan) and the Latin suffix *cide* (killing). Thus, genocide in its formation would correspond to such words as tyrannicide, homicide, patricide."³⁷ Lemkin's term won almost immediate acceptance. In a *Washington Post* editorial entitled "Genocide" on December 3, 1944, the writer noted recent evidence of the gas chambers in Auschwitz and Birkenau, and wrote "It is a mistake, perhaps, to call these killings 'atrocities.' [...] On the scale practiced by the Germans, this is something new."³⁸

Lemkin repeated the story of the origins of the concept of genocide many times during his career, but with different emphases. In *Axis Rule* he underscored the point that though the word itself was a product of the Second World War he had first proposed the creation of a multilateral convention making the extermination of human groups an international crime in his 1933 report to the Fifth International Conference for the Unification of Criminal Law (though he had not in fact attended this conference, but acted from Poland) held in Madrid under the auspices of the League of Nations.³⁹ While in Poland, he had called

35 NYP, Raphael Lemkin papers, Reel III: Biographical and Autobiographical Sketches, Totally Unofficial, unpublished ms., n.d.

36 Lemkin, *Genocide* [1946], 227.

37 Lemkin, *Axis Rule*, 79.

38 *Genocide*, in: *The Washington Post*, 3 December 1944. See also *Genocide*, in: *New York Times*, 26 August 1945.

39 On Lemkin's role in Poland see Claudia Kraft, *Europa im Blick der polnischen Juristen. Rechtsordnung und juristische Profession in Polen im Spannungsfeld zwischen Nation und Europa 1918–1939*, Frankfurt a.M. 2002; idem, *Volkerrechte im 20. Jahrhundert. Rafael Lemkin und die Abhandlung des Genozids durch das internationale Strafrecht*, in: Joachim Höstler/Wolfgang Kessler (eds.), *Frisis Mundi. Endzeiten und Weltenden im östlichen Europa* (Festschrift für Hans Lemberg), Stuttgart 1998, 91–110.

32 The draft preface to *Axis Rule*, dated 15 November 1943, contains the word genocide. Dan Diner, *The Destruction of Narrativity: The Holocaust in Historical Discourse*, in: *Moishe Postone/Eric Santner* (eds.), *Catastrophe and Meaning: The Holocaust and the Twentieth Century*, Chicago 2003, 67–80.

33 See John Connolly, *Nazis and Slavs. From Racial Theory to Racist Practice*, in: *Central European History* 32 (1999), 1–35.

34 Diner, *Destruction of Narrativity*, 76.

such crimes "acts of barbarity" paralleling slavery, piracy and other universally recognized offences against the law of nations. Though Lemkin viewed the rise of Nazism in Germany as the immediate threat which necessitated such a new international convention he did not refer to Germany in his report. Under "Acts of Barbarity" he included crimes directed against the ethnic, religious or social collectivities whatever the motive (political, religious) and of all types, for example, "massacres, pogroms, actions undertaken to ruin the economic existence of the members of a collectivity, etc."⁴⁰ Lemkin also included the systematic destruction of works of cultural heritage as "Acts of Vandalism." Though Lemkin had indeed made such a proposal, he had been prevented from attending the Madrid conference, his superiors feared, so as not to offend the German delegation.⁴¹ But a decade later, however, he did not mention this fact and referred to the 1933 Madrid report as "a proposal for international repression of Nazi activities." Given the date of the Madrid Conference it is highly unlikely that Lemkin was so far sighted that he anticipated German crimes committed after 1939. Lemkin's curious insistence on 1933 as the date of the original formulation of his concept might plausibly be considered from another point of view. In virtually everything he wrote about how he invented the concept of genocide and why he decided to dedicate his life to realizing it, Lemkin insisted on emphasizing that he first envisioned the concept in 1933 but only invented the term in 1943 while writing *Axis Rule*. This was no mere vanity on Lemkin's part. It set forth a narrative in which the concept of "genocide" antedated and anticipated the murder of European Jewry. By dating the origin of the concept to the decade prior to the Holocaust Lemkin could and often did disassociate the origin of the term from his personal experiences as a Jew and a Pole, situating it in the pre-Nazi (or early) Nazi era.

40 Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations By Raphael Lemkin, lecturer on comparative law at the Institute of Criminology of the Free University of Poland and Deputy Prosecutor of the District Court of Warsaw. Additional explanations to the Special Report presented to the 5th Conference for the Unification of Penal Law in Madrid (14-20 October 1933), "Les actes constituant un danger general (interetatique) consideres comme delites des droit des gens." Explications additionnelles au Rapport special presente a la Veme Conference pour l'Unification du Droit Penal a Madrid (14-20X. 1933) Paris, 1933. Also see "Akte der Barbarei und des Vandalismus als *delicta juris gentium*" (Acts of Barbarism and Vandalism under the Law of Nations), in: Internationales Anwaltsblatt (Vienna) 19 (November 1933), no. 6, 117-119.

41 Power writes that when Lemkin's paper was circulated, it infuriated the German delegates and caused the Polish Foreign Minister, Josef Beck, to slam him for "insulting our German friends." See Power, *Problem from Hell*, 22. This story conflicts with another version in which Lemkin notes that the occasion for the paper was the murder of 600 Assyrians by the Iraqi army in 1933. See Korey, *An Epitaph for Raphael Lemkin*, 9. It is not clear what actually occurred at the Madrid conference.

In some respects Lemkin's 1933 formulation did anticipate the more comprehensive definition of genocide in *Axis Rule* a decade later (quoted in its entirety):

"Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."⁴²

Axis Rule was path breaking, immensely well-informed, but also a curious book: two-thirds is devoted to documentation of laws and decrees of the Axis powers and their puppet regimes; one third is devoted to a careful analysis of the political, social, cultural, economic aspects of Nazi occupied Europe. An entire chapter (nine) is devoted to an explication of the concept of genocide. *Axis Rule* is aimed at both revealing the nature of Nazi rule and establishing a heuristic and a normative concept of "genocide." "Genocide" thus combined elements of what Lemkin had called "acts of barbarity" and "acts of vandalism" into a single "generic concept." It also drew directly on the then recent fate of Poles and Jews to articulate a concept of group annihilation that was fundamentally different from other kinds of forcible assimilation (Germanization) and "denationalization." As Lemkin explained:

"The author believes, however, that this word is inadequate because: 1.) it does not connote the destruction of the biological structure; 2.) in connoting the destruction of one national pattern it does not connote the imposition of the national pattern of the oppressor; and 3.) denationalization is used by some authors to mean only deprivation of citizenship."⁴³

It is evident that biological destruction is applied here to both *Jews and Poles*, as Lemkin noted in the following passage:

"If one uses the term 'Germanization' of the Poles, for example, in this connotation, it means that the Poles, as human beings, are preserved and that only the national pattern of the Germans is imposed upon them. Such a term is much too restricted to apply to a process in which the population is attacked, in a physical sense, and is removed and supplanted by populations of the oppressor nations."⁴⁴

42 Lemkin, *Axis Rule*, 79.

43 *Ibid.*, 80.

44 *Ibid.*

In other words, Lemkin explicitly rejected terms such as 'denationalization' or 'Germanization' because such terms did not adequately underscore the irreducible biological core of genocide "such as causing the physical decline and even destruction of the population involved."⁴⁵

Elsewhere, however, Lemkin clearly distinguished between Nazi practices toward *three* groups: "people related by blood to the German people," Jews, who are "to be destroyed completely;" and peoples "not related by blood" who are not deemed worthy of being Germanized, like the Poles.⁴⁶ In this schema, genocide is directed against all three types of "nationhood," but Poles are targeted for physical destruction (starvation, ethnic cleansing) while only Jews are targeted for biological destruction.

Lemkin's "one generic notion" suffered from any number of other ambiguities, inconsistencies, and incoherencies which continue to plague its use right up to the present. At times Lemkin distinguished between cases of racial genocide and national genocide, regarding the fate of the Jews and gypsies as "racial" as opposed to "colonisatory," a broader concept that would cover Poles, Serbs, Russians, and even the occupation of the French. While Lemkin "did not yet fully comprehend the total planned annihilation of the Jewish people in Europe," there is no doubt that he understood with great prescience and clarity that the "Jews were to be destroyed completely."⁴⁷ But Lemkin also noted: "The Nazi plan of Genocide was related to many peoples, races, and religions and it is only because Hitler succeeded in wiping out six million Jews, that it became known predominantly as a Jewish case."⁴⁸

Another difficulty is that Lemkin frequently elided the distinction between genocide as a "modern" crime and as a universal feature of mankind throughout history.⁴⁹ In *Axis Rule* Nazi crimes are essentially seen as "a gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations for many years to come." But Lemkin also suggests that the Second World War marked an atavistic regression to "an ancient barbarity."⁵⁰ Elsewhere, Lemkin notes: "the crime of the Reich in wantonly and deliberately wiping out whole peoples is not utterly

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 87.

⁴⁷ Yehuda Bauer, *Whose Holocaust?*, in: *Midstream* 29 (1980), no. 9, 42-46.

⁴⁸ Raphael Lemkin Manuscript Collection, AIA, Number 60, Box 7, Folder 13 (Nuremberg), I Draft: *The Hitler Case*, n.d. - In a footnote Lemkin cited the Joint Declaration by members of the United Nations of December 17, 1942, which reported that the German authorities "are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people of Europe." Lemkin, *Axis Rule*, 87.

⁴⁹ Raphael Lemkin, *Genocide - A Modern Crime*, in: *Free World, A Non-Partisan Magazine* devoted to the United Nations and Democracy 4 (April 1945), 39-43.

⁵⁰ Lemkin, *Axis Rule*, 80.

new in the world. It is only new in the civilized world as we have come to think of it. It is so new in the traditions of civilized man that he has no name for it."⁵¹ In a contemporaneous interview, however, Lemkin claimed that genocide "was a crime as old as history."⁵²

Finally, one of the major reasons for "genocide's" ambiguity lies in the considerable gap between the magnitude of Lemkin's 1944 example and his frequent recourse to more culturally restricted cases where he argues for minority rights and the protection of minority cultures that he had foregrounded in 1933.⁵³ Genocide, he argued, affects "the vital interests of all civilized people." Since minorities exist in all countries, if their persecution is tolerated anywhere, the very moral and legal foundations of constitutional government may be shaken. Its toleration "is an admission of the principle that one national group has the right to attack another because of its supposed racial superiority." Finally, he asserted that there is a universal cultural obligation or moral imperative to prevent genocide:

"cultural considerations speak for international protection of national, religious and cultural groups. Our whole heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza, if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie, the Czechs, a Hus, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovitch."⁵⁴

Is this merely Lemkin's "eurocentrism" as Michael Ignatieff has claimed? Is genocide only something that happens when civilized peoples destroy civilized peoples, a feature of Lemkin's blinkered universalism?⁵⁵

IV. The Challenge of the Unprecedented

In 1945, Lemkin left scholarly life and took up "the challenge of the unprecedented" to establish a positive legal basis for a crime that would be subjected to international jurisdiction. At that time, the idea of a law against genocide represented a legal novum. The "unprecedented," Arendt pointed out, "once it has appeared, may be a precedent for the future" and conse-

⁵¹ Lemkin, *Genocide - A Modern Crime*, 39.

⁵² Raphael Lemkin Manuscript Collection, AIA, Number 60, Box 7, Folder 13 (Nuremberg), Lemkin Interview, n.d.

⁵³ Lemkin, *Genocide*, in: *American Scholar* 15 (April 1946), 227-230.

⁵⁴ Lemkin, *Genocide - A Modern Crime*, 42.

⁵⁵ Michael Ignatieff, *The Danger of a World Without Enemies*. Lemkin's World, in: *The New Republic*, 26 February 2001, 26-28.

quently "all trials touching upon 'crimes against humanity' must be judged by a standard that is today still an 'ideal.'"⁵⁶ Even the International Military Tribunal at Nuremberg (IMT), for which Lemkin worked for a brief time as a member of the US delegation, advising Chief Prosecutor Robert H. Jackson in preparing the indictment of the top Nazi officials, was far from the ideal. As he wrote to David Maxwell Fyfe, deputy chief prosecutor at the Nuremberg trial,

"I think the inclusion of Genocide in the judgement would contribute to the creation of a preventive atmosphere against repetition of similar acts of barbarity. Indeed, we cannot keep telling the world in endless sentences: - Don't murder members of national, racial, and religious groups; don't sterilize them; don't impose abortions on them; don't steal children from them; don't compel their women to bear children for your country; - and so on."⁵⁷

Though he was encouraged by the inclusion of "genocide" in the indictment read by the British Prosecutor Lord Hartley Shawcross at the outset of the trial - the first public appearance of "genocide" in a court of law - the fact that it went unmentioned in the verdict made it what he called "the blackest day of my life."⁵⁸ Genocide, Lemkin insisted, applied to *all* acts committed by the perpetrator nation, not merely those that occurred in *time of war*.⁵⁹ He even went so far as to claim that "*from the point of view of international law, however, acts committed before the war by Germany on its citizens were more significant.*"⁶⁰ After Nuremberg, Lemkin always regarded the IMT as a legal failure because it did not establish a precedent precluding a group "from destroying groups of its own citizens."⁶¹

⁵⁶ Hannah Arendt, Eichmann in Jerusalem. A Report on the Banality of Evil, New York 1977, 273.

⁵⁷ Raphael Lemkin to David Maxwell Fyfe (IMT), August 26, 1946, AJHS, Lemkin Papers, P-154, Box 1:4.

⁵⁸ Cited in Korey, An Epitaph for Raphael Lemkin, 55.

⁵⁹ His view was consistent with the initial US position on the treatment of war criminals, articulated by Samuel Rosenman at the San Francisco Conference establishing the United Nations, which maintained the right to try defendants for crimes "not limited to atrocities and crimes committed in violation of the domestic law of any Axis Power or satellites or of any of the United Nations." See Arreh J. Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment, Chapel Hill 1998, 165.

⁶⁰ Raphael Lemkin, Genocide as a Crime under International Law, in: American Journal of International Law 41 (1947), 145-151, 148 (emphasis in original).

⁶¹ Ibid.: Lemkin wrote: "A cursory perusal of them filled me with shudder. [...] It was clear that no action on the Draft Code of Offences be taken until the principles of the Nuremberg judgment would be confirmed by the Assembly. These latter were to be offences only when committed in execution of war of aggression. Since aggression was and is still not defined, the entire concept of crimes against humanity is not defined. Here we are again in 1950 where we started in 1946." NYPL, Raphael Lemkin papers 1947-1959, Reel VI: Writings - Genocide, notebook.

The Genocide Convention came into force on January 12, 1951, two years after the unanimous General Assembly vote adopting the convention and after it was ratified by twenty countries. However, the United States government, despite a favorable report from a Senate Foreign Relations subcommittee in 1950, withheld recognition for more than 35 years, dooming it to legal limbo. In fact, subcommittee members were hardly well-disposed towards Lemkin, manifesting a significant degree of anti-Semitism; one senator complained to his colleagues that Lemkin was "a man who comes from a foreign country and who speaks broken English."⁶²

In a 1956 interview with the *Christian Century Magazine* Lemkin was asked: "Why has the United States refused to accept the genocide convention?"

"Many Americans," he replied, "have confused genocide with the long-range human rights program of the United Nations [Universal Declaration of Human Rights], which deals with many individual problems. This later effort is divorced from genocide; it deals with the position of the individual in society on all levels - education, employment, freedom of movement, etc. Genocide deals with the life of peoples - the annihilation of existence. Human rights are concerned with different levels of existence, while genocide deals with nonexistence. Human rights are still a controversial issue since many nations claim that they lie within the exclusive domestic jurisdiction of alien states, i.e., France in North Africa. Genocide is not a controversial matter; the UN has recognized it as a world concern. This confusion has been aggravated by enemies of progress. The two issues must be separated and recognized by the American people before the Senate will act on Genocide."⁶³

Lemkin feared that the Human Rights Declaration could "swallow" the Genocide Convention.⁶⁴

Lemkin's antipathy to the Human Rights Declaration is at first glance puzzling. The two declarations were introduced simultaneously and adopted within 24 hours of each other in December 1948.⁶⁵ But, the following year, the Soviet Union questioned the necessity of a separate Genocide Convention and proposed treating genocide, together with the codification of the Nuremberg Law, as part of a "Draft Code of Offenses against the Peace and Security of Mankind." The Soviet proposal was ultimately rejected, but Lemkin worried that in the United States domestic civil rights could still pose a threat to the Genocide Convention. "The surest way to defeat the Senate ratification of the Convention," he wrote in 1950, "is to confuse it with the UN Declaration on Human Rights. For many Senators, the human

⁶² Cited in William Korey, Revisiting the UN's Genocide Convention, Foreword (10 August 2001). Accessed at: http://www.forward.com/issues/2001/01_08_10/oped2.html.

⁶³ Christian Century Magazine, 18 July 1956, 834.

⁶⁴ Raphael Lemkin to James N. Rosenberg, August 30, 1948, AJHS, Lemkin Papers, P-154, Box 1:6.

⁶⁵ Mary Ann Glendon, World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, New York 2001, 169.

rights program of the UN is synonymous with the civil rights program of President Truman and they are allergic to that."⁶⁶ Truman's foreign policy advisors were unprepared for a postwar world of growing racial equality. Southern white supremacists still ruled the Senate and efforts by Northern liberals to quell racial tension and violence in the American South in 1946 and 1947 by proposing anti-lynching legislation was unceremoniously blocked.⁶⁷ Lemkin noted that at its meeting in September 1948, the conservative American Bar Association declared both the Genocide Convention and the Human Rights Declaration to be unconstitutional by transgressing state law and making murder and other crimes subject to Federal jurisdiction. According to its opponents, "if the Covenant on Human rights were adopted as part of a treaty by the United States, every death in a race riot, every lynching, would become an international matter."⁶⁸

Lemkin's worries about the possibility that a connection could be made between the deprivation of civil rights and genocide were not entirely paranoid. In 1946, Harry Truman, responding to pressures from A. Philip Randolph's National Association for the Advancement of Colored People (NAACP) and recognizing that racial discrimination at home was hurting United States international prestige, formed a Civil Rights Commission, and, in 1948 desegregated the US military. The President's Committee on Civil Rights reported in 1947: "the white population can threaten and do violence to the minority member with little or no fear of legal reprisal."⁶⁹ Truman enraged Southern Democrats who hated the UN, and wanted to keep the Democrats the party of the white south, Jim Crow, and segregation. In 1947, W.E.B. Dubois, speaking for the NAACP, presented a petition to the United Nations which outlined the history of the denial of human rights in the US and justified the petition on the grounds that "Negroes" in America were in a "quasi-colonial status."⁷⁰ In 1951, a campaign was launched by the Civil Rights Congress, a Communist sponsored civil rights organization headed by an African-American Communist, William L. Patterson, to put into effect a plan to make the Charter and the Conventions of the UN "the instrumentality through which the 'Negro question' could be lifted to its highest dimension."⁷¹ "We would be the first organization in history to

charge the Government of the United States with the crime of genocide."⁷² The Civil Rights Congress purposefully drew the connection between Nazi racism and American racism: "I could not fail to recognize that just as the United States," wrote Patterson, "under cover of law, carried out genocidal racist policies in police murders of Black men, framed death sentences, death that came from withholding proper medical care to Black people, just so had Hitler built and operated his mass death machine under cover of Nazi law."⁷³ The result was a petition entitled *We Charge Genocide. The Crime of Government against the Negro People* signed by a number of prominent (pro-communist) African-Americans, including W.E.B. Dubois and Paul Robeson, and presented to the United Nations in December 1951 by Robeson (in New York) and by Patterson in Paris.⁷⁴ Ranked by the embarrassing and effective exploitation of what Senator Henry Cabot Lodge called "our Achilles heel before the world," the State Department withdrew the passports of Robeson, Dubois, Patterson, while simultaneously, sending sympathetic black emissaries abroad.⁷⁵ Nonetheless, the campaign had persuaded Southerners and other conservatives that ratification of the convention would lead to embarrassing UN involvement in domestic issues, resulting in their staunch opposition to international covenants.⁷⁶

By 1949, Lemkin had developed what his sympathetic biographer William Korey called "an obsession bordering on paranoia" and recommended the "tactical" need to sever any linkage between genocide and human rights or civil rights.⁷⁷ He emphasized that the definition of genocide as an act

⁷² Civil Rights Congress, *We Charge Genocide. The Historic Petition to the United Nations for Relief from a Crime of the United States Government against the Negro People*, New York 1951, 170.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 193.

⁷⁵ Borstelmann, *The Cold War and the Color Line*, 78. Despite Lemkin's fear that the Human Rights Declaration was being instrumentalized by such actions, in fact, Eleanor Roosevelt, then head of the US Human Rights delegation, replied to the petition (without naming it) on the previous day, when she replied to Soviet "charges of the violation of the human rights of Negroes in the United States" by arguing that "Negroes were becoming increasingly active in the political life of the U. S."

⁷⁶ Korey, *An Epitaph for Raphael Lemkin*, 70.

⁷⁷ *Ibid.*, 62. The American Bar Association acknowledged Lemkin's role as "a man from a foreign country who loves this country," but staunchly opposed Senate ratification of the Convention and countered that its wording "would in effect legalize tremendous programs of destruction in Estonia and in other parts behind the 'curtain,' because those groups are not being destroyed because they are Ethiopians or because they are Jews or because they are Christians; they are being destroyed because they are enemies of the state." Even a Northern liberal congressman, like Emanuel Celler of New York, was concerned that the US might not ratify, noting that the Convention "has no teeth, no sanctions, no punishment" and that "the United States would not commit itself to turn over offenders to (1) a new international penal court or to the existing (2) World Court."

⁶⁶ Raphael Lemkin, *Senate Weighs Genocide Convention*, in: *Foreign Policy Bulletin*, no. 29, 20 January 1950, 2f.

⁶⁷ Thomas Borstelmann, *The Cold War and the Color Line. American Race Relations in the Global Arena*, Cambridge 2001, 53.

⁶⁸ AHS, Lemkin Papers, P-154, Box 5:1, 4.

⁶⁹ *Ibid.*, 56.

⁷⁰ James L. Rank, *American Black Leaders. The Response to Colonialism and the Cold War, 1943-1953*, in: *African Historical Studies* 4 (1971), 253-270, 261.

⁷¹ William L. Patterson, *The Man who Chied Genocide. An Autobiography*, New York 1971, 172.

committed with intent "to destroy, in whole or in part," a "racial, ethnic, or religious group," did not open the door to lynching as a form of genocide. In 1950, he wrote the Senate Committee on Foreign Relations that "the destruction in part must be of a substantial nature so as to affect the entirety."⁷⁸ Recognizing that charges of racial genocide in America might mean the final blow to American ratification, Lemkin sought feverishly to disconnect "discrimination" from "destruction." He pressed Erwin M. Cahnham, editor of the *New York Times* editorial Page, to publicize the distinction between discrimination and destruction and was responsible for the publication of an editorial in *The Christian Science Monitor*, entitled "A Needed Distinction" which noted: "destruction is very different from discrimination. It involves murder, mass deportations and other acts of brutality."⁷⁹

On December 18, 1951, the *New York Times* reported Lemkin's reaction to the use of the word "genocide" to describe the situation of African-Americans: "The accusations," he said, "were a maneuver to divert attention from the crimes of genocide committed against Estonians, Latvians, Lithuanians, Poles and other Soviet subjugated peoples."⁸⁰ Patterson recalled that

"in a considerable correspondence with me, he [Lemkin] argued vehemently that the provisions of the Genocide Convention bore no relation to the US government or its position vis-à-vis Black citizens. Lemkin and other law professors and practicing attorneys were evidently fearful of criticizing a government whose conduct in relation to its Black citizens was a disgrace to civilized mankind."⁸¹

With the Korean War, the Slansky Trials, and the Rosenberg espionage case dominating world headlines, the Soviet Union continued to press the genocide charge against the United States in the UN. In the General Assembly session of May 9, 1952, the Soviet delegation proposed a text to be included in the draft Covenant on Human Rights which would submit lynching under the control of the UN.⁸² As Lemkin put it, "under such circumstances it will be impossible to charge the Soviet Union with her crimes against millions of people because she will retaliate with discrimination and lynching charges."⁸³ In January 1953,

Emanuel Celler to Raphael Lemkin, February 26, 1949, AHS, Lemkin Papers, P-154, Box 2-1.

78 Cited in Korey, An Epitaph for Raphael Lemkin, 65.

79 Raphael Lemkin Manuscript Collection, AJA, A Needed Distinction, draft. Published in: *Christian Science Monitor*, 29 October 1954, 2.

80 *The New York Times*, 18 December 1951; Patterson, *The Man Who Cried Genocide*, 193.

81 Patterson, *The Man Who Cried Genocide*, 179. For the impact of the petition, see Borsheimann, *The Cold War and the Color Line*, 77.

82 NYPL, Raphael Lemkin Papers, 1947-1959, Reel 3, Box VIII.

83 *Ibid.* - Lemkin recognized the danger of including lynching under genocide as early as November 9, 1947: "If the French suggestion would be followed it would 'internationalize' even individual crimes of the murder type like lynching. This was certainly not the intention of the authors of the resolution of December 11, 1946." Letter to Mr. Fainy,

Lemkin countered with his own genocide charge. Writing about the anti-Semitic "Slansky trial of thirteen Communists in Prague" (eleven were Jews), he pointed out: "The anti-Jewish nature of the indictment, and the technique of conducting the trial in a way calculated to create panic among all Czechoslovak Jews and Jews in Russia, are part and parcel of the crime of genocide."⁸⁴ In short, genocide, far from being an "apolitical" concept had become an article of mutual slander in the Cold War. Ukrainian exiles charged the Soviets with "the total destruction of the Volga Germans, Crimean Tatars, the peoples of the Caucasus and by partial destruction of the Estonians, Latvian, Lithuanians."⁸⁵ The French, embroiled in their own war in Algeria, declared French colons immune from responsibility for crimes committed against Algerians because "private individuals are only culpable when they act at the instigation of the authorities of a state."⁸⁶

Rather than opening a dimension of human suffering and historical memory to discussion and adjudication, the "charge" of genocide became party to the mental blockade perpetrated by both sides. Already in 1945 John Foster Dulles, who participated in the San Francisco Conference and worked as adviser to Republican Senator Arthur H. Vandenberg, to help draft the preamble to the United Nations Charter, expressed skepticism about the human rights clause in the Charter because it could lead to an international investigation of the Negro question in the U.S. In April 1952 Lemkin wrote to Dulles, now the newly installed Secretary of State, that the Genocide Convention was not only constitutional, but reminded him that he, Dulles, himself had been disappointed by the US failure in 1948 to "ban effectively the crime of Genocide."⁸⁷ Dulles' response was to abandon international rights covenants entirely in the face of Republican efforts to secure a constitutional amendment reducing the authority of the executive to make treaties with foreign powers. *The New Yorker's* Janet Flanner quipped that the Senate hearings on the Convention were instructive

November 9, 1947, AHS, Lemkin Papers, P-154, 1-5. As he wrote to Max Sorenson, the Danish delegate to the United Nations in 1951: "While reading the draft Covenant on Human Rights I was unfavorably impressed by its legal formulation. Especially article 3 worries me, because I heard from one of the non-governmental organizations here of a planned attempt to include some of the elements of the Genocide Convention in the Human Rights Covenant." Raphael Lemkin to Max Sorenson, April 15, 1951, Raphael Lemkin Manuscript Collection, AJA, Number 60, Box 2, Folder 1.

84 Raphael Lemkin, *Is it Genocide?*, in: *The ADL Bulletin* [Anti-Defamation League] 10 (1953), no. 1, 3.

85 NYPL, Raphael Lemkin papers, Reel III [Resolution adopted at the mass meeting of Ukrainian exiles], Protest against Investigation of American Race Problems by the Soviets, January 1954.

86 Raphael Lemkin Manuscript Collection, AJA, Number 60, Box 7, Folder 13 (Nuremberg), Lemkin Interview, n.d.

87 Raphael Lemkin Manuscript Collection, AJA, Box 2-3.

because they "so sharply revealed certain mid-century ironies," for example, "that the chairman of the subcommittee on genocide [sic], Senator [Brien] McMahon [of Connecticut] was also chairman of the Joint Congressional Committee on Atomic Energy, a group concerned with forging instruments of genocide so effective that total race destruction is in prospect."⁸⁸ By 1953, with the Eisenhower administration in office, ratification of the Genocide Convention was a dead letter.

V. Totally Unofficial: Lemkin's Autobiography

Michael Ignatieff has written that Lemkin belonged to those Central European intellectuals who responded to barbarism by creating new structures of law. Lemkin, he writes, "never secure in the Poland of his birth he sought belonging in the law."⁸⁹ True enough, Lemkin was one of those Jews of the inter-war period for whom the only safe place was in the kingdom of the law. But he was also both a Polish Jew and a Polish patriot; the combination of the two were given expression in the hybrid term, "genocide." There are moments in his unpublished autobiography provisionally entitled "Totally Unofficial," where he evokes, not only the idyllic world of his parents' farm outside Warsaw, but of religious Jewish life subject to law: "The Jewish religion is the only one in the world which is based on a covenant entered into between the individual and Yahweh, his God."⁹⁰ Also instructive is a dialogue that he later remembered describing a conversation among his comrades during their flight East from Lvov in 1939, evoking the fractures running through the short-lived Polish Republic. One comrade calls "Pilsudski the greatest patriot Poland ever had," a second portrays him as a "dictator," and a third regrets "having delegated government to one man." Poland, this last voice concludes, is "now a nation on the road, like the wandering Jew, whom we used to blame for all evils."⁹¹ This comment, with its identification of the Jew and the Polish nation, reveals a great deal about Lemkin's tragic patriotism. Lemkin believed that vulnerable nations, like Jews and other ethnic minorities, require special – legal – protections. He identified the Polish nation with the wandering Jew, with the refugee nomad that he had himself become. But he had little patience with what he

called a "feast of nostalgia" for prewar Warsaw. "The twentieth century," he wrote, "marked by violent and social and moral changes, is the paramount century of the refugee, living with one lung and one kidney. Their permanent impermanency, the suspension of most of their values and hopes, their gnawing uncertainty and longing for normalcy gradually ravage their souls."⁹²

In the draft of his autobiography Lemkin goes to great lengths to provide what might be called a "Judeo-Christian" provenance for his concept. Written during the last decade of his life, after Lemkin's long career and decades of work to make the Genocide Convention international law, it should be read, not as a purely factual account of his youth and struggles, but also as a kind of palimpsest for his life dedicated to law and memory. Numerous drafts and versions of his autobiography begin: "As a young boy back in Poland, I read this book *Quo Vadis* by [Henryk] Sienkiewicz, describing the attempt of the Roman emperor to exterminate the Christians. I asked my mother: 'Why did the Christians permit [themselves] to be thrown to the lions without calling the police?' Her answer was: 'Do you think the police could help them?'"⁹³ Lemkin continues: "the cases of genocide in history caught my imagination. My thinking was so intense that I have been almost seeing the events with my own eyes. – I saw the French King, Charles XII [sic] who enjoyed from the balcony of the royal castle the execution of the Huguenots and ordered more light be thrown on their faces so he can see better their tortures. – I saw the Catholics of 17th century Japan being compelled to drink water, after that all openings of their bodies were cemented and heavy loads put on their bodies until they exploded. – I saw the Moslems of Spain crowded half naked on the decks of boats under the murderous African sun [...] and I heard the screaming of the Jews in pogroms, when their stomachs have been opened, filled with feathers and tied with ropes."⁹⁴

Whatever the "truth" of his early life as a Jew on a Polish farm, he reconstructed his childhood imagination as an amalgamation of ethnic and religious suffering: early Christians, 15th century Spanish Muslims, 16th century Huguenots, 17th century Catholics, and last but not least, the Jews of the Pale. In fact, of all the genocidal events recounted, only one took place during his lifetime and can plausibly be considered part of Lemkin's own memory rather than the literary and historical memory of an educated Central European. The Bialystok pogrom took place from June 1–3, 1906, when Lemkin was five years old and aroused protests throughout Russia and Poland. When he was twelve, the family moved from their farm to Warsaw,

88 The New Yorker, 11 February 1950, 56. McMahon was chairman of the Senate Foreign Relations subcommittee on the constitutionality of the Genocide Convention.

89 Ignatieff, *The Danger of A World Without Enemies*, 26.

90 NYPL, Raphael Lemkin papers, Reel III: Biographical and Autobiographical Sketches, Totally Unofficial, unpublished ms., n.d.

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid. (The Charles in question was Charles IX).

perhaps, but not necessarily because of the hostility of their neighbors. During September 25 through October 28, of that year, 1913, the sensational blood-libel trial of Mendel Beilis in Kiev filled the world press with charges and counter-charges about the blood-libel. Lemkin recalled that "all Jewish pupils were called by the other pupils by the collective name 'Bailes'" and that the "Jewish population counted with the possibility of a pogrom."⁹⁵ Without resorting to psychoanalysis, many of the descriptions of genocide in Lemkin's autobiography merge with his historical researches to the extent that they can be described with some justification as "displaced trauma" ("as if with my own eyes"). Sometimes his identification with the victims of genocide is almost total. For example, in a handwritten note describing his flight from burning Warsaw in 1939 he wrote: "the sun which caresses my (frozen) body and restores it to life, [is] the same [sun that] burned to death the half naked Moors on the decks of the deportation boats from Spain in the 14th century [sic]."⁹⁶ Even more striking is Lemkin's description of his own experience with the Biaystok pogrom and Christian suffering under Nero as a contiguous event: "News of a pogrom in the city of Biaystok, 50 miles away, came to our farm. The mobs have opened the stomachs of their victims and stuffed them with the feathers from the pillows and feather comforters. [...] A line of blood led from the Roman arena to the pogrom of Biaystok."⁹⁷ Lemkin's apparent identification with the victims of suffering could be alleviated only by his decision to become a lawyer: "I identified myself more and more with the sufferings of the victims, whose numbers grew, as I continued my study of history. I understood that the function of memory is not only to register past events, but to stimulate human conscience."⁹⁸ Though as if to underscore how little it figured in his personal experience before the Holocaust, only rarely does Lemkin indulge in a moment of reflection on his own autobiographical connection to the concept:

"When I have conceived the idea of outlawing Genocide, I could hardly imagine that it will affect me personally. During the war 49 members of my family perished from Genocide, including my parents. Suddenly I felt that the earth is receding from under my feet and the sense of living is disappearing. But soon I have transformed my personal disaster into a moral striking force. Was I not under a moral duty to repay my Mother for having stimulated in me the interest in Genocide? Was it not the best form of gratitude to make a 'Genocide pact' as an epitaph on her symbolic grave and as a common recognition that she and many millions of others did not die in vain?"⁹⁹

95 *Ibid.*96 *Ibid.*97 *Ibid.*98 *Ibid.*99 *Ibid.*

There is considerable irony in the fact that Lemkin was personally a victim of xenophobic and anti-Semitic slurs focusing on what was described as his "irritating" persistence.¹⁰⁰ Lemkin was a Polish Jew, but he was not, by most accounts, what could be called a Jewish-identified Jew, or even a "non-Jewish" Jew. Though his parents died at the hands of the Nazis and the extermination of the Jews weighed heavily in his formulation of the notion of genocide, he consistently played down the Holocaust, and during the Cold War, focused almost exclusively on the cultural destruction of minorities by the Soviet Union. According to his biographer, William Korey, "there is little in the Lemkin archives to challenge the view that his principal preoccupation with presumed cultural genocide focused almost entirely on non-Jewish ethnic groups in Eastern Europe."¹⁰¹ In the end, the fate of the Genocide Convention was not substantially different from that of the UN Universal Declaration of Human Rights which Lemkin so tenaciously opposed. The most important factor in postponing U. S. ratification was the Korean war and American nativism, which made Congress suspicious of any and all international covenants and once Eisenhower took office they were shelved as unwanted nuisances and threats to American sovereignty in international affairs.

VI. The Limits of the Law

In the late fall of 1939, after he reached neutral Vilnius and successfully applied for a Swedish passport, the young Polish lawyer, former state prosecutor of Warsaw, Raphael Lemkin arrived in Riga awaiting to passage to Stockholm and ultimately to the United States. In Riga he paid a visit to the Jewish historian Simon Dubnow at his home in Kaiserwald. Lemkin recalled that it was a frosty winter day, with a penetrating icy wind blowing from the Baltic Sea. In his study a fire was burning and a cup of tea was waiting. "It's so pleasantly peaceful here," Lemkin said. "The hull before the storm," the professor replied. "When will it start, do you think?" Dubnow answered: "Now that Hitler has swallowed Poland he plans his next move while we sit here comfortably by the fireplace. It is strange how initiatives taken by dictators fascinate and even paralyze statesmen of democratic nations, and how easily they let them get away with such bold actions." Lemkin told him of his plan to "outlaw the destruction of peoples" and Dubnow agreed: "the most appalling part about this type of killing," said Dubnow, "is that in the past it has ceased to be a crime when large numbers are in-

100 Cited in Korey, *An Epitaph for Raphael Lemkin*, 67.101 *Ibid.*, 77.

volved and when all of them happen to belong to the same nationality, or race, or religion. [...] Let nations take their choice whether they want to belong to the civilized world community. I have always felt that history must sit in judgment."¹⁰² Perhaps an apocryphal story, but not one that is as flattering to Lemkin as he might have thought. History, not courts (even if such a law were to exist), Dubnow reminded the young lawyer, sits in judgment. Had Lemkin been a historian and not a jurist, he might have wondered about the fate of his law in history.

Aus der Forschung