

Genocide
Christopher Macleod, Lancaster University
Draft for *Encyclopedia of Political Thought*

Genocide is the “denial of the right of existence of entire human groups” (United Nations General Assembly Resolution 96(I)). In its archetypal form, it is an act of mass-murder, committed with the aim of destroying a population on the grounds of their nationality, ethnicity, race, or religion. Genocide is outlawed under Article 6 of the Rome Statute for the International Criminal Court, and “is generally taken to be amongst the most heinous of all acts, the ‘crime of crimes’”.

1. Raphael Lemkin and the Origin of the Concept of Genocide

Raphael Lemkin coined the term ‘genocide’ in 1944, in the work *Axis Rule in Occupied Europe*. “This new word,” he writes, “is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing)” (Lemkin 1944: 79). In this work, Lemkin defined genocide as “the destruction of a nation or of an ethnic group”, though elsewhere he would give an expanded interpretation: “Genocide means the destruction of racial, national, religious, linguistic or political groups.” (Lemkin undated-a: 1). We shall return to the issue of the *sorts* of groups which can be subject to genocide below. But behind Lemkin’s uncertainty (which was, in fact, pragmatic flexibility) was a well considered cultural conception of genocide. For Lemkin, the wrong of genocide was the wrong of robbing humankind of a culture. Humanity, Lemkin thought, was richer for the plurality of cultures that it contained, and world civilization itself lost something when a culture was extinguished. “The destruction of a nation, therefore, results in the loss of its future contributions to the world.” (Lemkin 1944: 79).

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 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 Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich. (Power 2002: 53, quoting Lemkin).

The loss to humanity involved in genocide was one that Lemkin was keen to emphasize, carefully separating issues of genocide from issues of the enforcement of individual human rights. If *humanity* as a whole suffered a loss in genocide, he reasoned, *all* humans – not merely those directly targeted by genocide – have a vested interest in preventing the crime.

The context of the publication of *Axis Rule*, of course, was the Nazi killings throughout Europe in the 1930s and 40s. But Lemkin is clear that Genocide can be carried out in other ways – genocide should be distinguished from the crime of mass-murder. There are methods besides the murder of individuals by which the destruction of a human group can be accomplished – mass-murder is not *necessary* in order to eliminate a group *as a group*. Besides forced assimilation, sterilization, and

dispersal of populations, Lemkin catalogued methods of genocide that occurred during the Germanization of annexed German territories under Nazi rule: the imposition of economic conditions that cripple the cultural life of a group, the eradication of national liberal arts, and the undermining of a group's moral commitments that are necessary for cultural fulfillment.

Neither is mass murder *sufficient* for genocide. Under the cultural conception Lemkin adopts, mass killing is genocidal only if it destroys a culture and thereby “inflict[s] grave losses on humanity” (Lemkin 1951: 3). Additionally, of course, such destruction must be criminally intended in order to be considered genocidal. Lemkin took seriously the analogy between the death of an individual and the death of a culture, noting that “[t]he human group is envisaged as a living entity with body and soul.” (Lemkin undated-b: 1). Such a group is capable of “collective personality, which reveals itself in the form of continuity throughout ages” (Lemkin 1951: 4). The *natural* death of a culture is therefore akin to the *natural* death of an individual – to be regretted and mourned, but not to be equated with murder. As each individual is unique, and is to be valued, so too each culture is unique, and is to be valued, but there is nevertheless a distinction between murder and death. “[T]here is a different contingency when [a culture is] murdered on the highway of world history. Dying of age or disease is a disaster but genocide is a crime.” (Dirk Moses 2010: 28, quoting Lemkin).

Lemkin, then, conceived of genocide in cultural terms. The underlying claim that cultural plurality is a good is a philosophically difficult one, however. It would be contentious to claim that *each and every* possible culture – even those practicing distasteful or unethical ways of life – should be considered valuable *as a culture*, and worthy of preservation separate from the good of its individual members. So too would it be contentious to claim that cultural variety is a good in its own terms – that we should find more cultural diversity better, just because such diversity is an irreducible good. Lemkin's claim, rather, is that plurality is a means to progress, and that a rich set of cultural resources is worth preserving within the international community in order to enable the sort of interaction between cultures that leads to our collective advancement.

Lemkin lobbied for the explicit inclusion of cultural modes of genocide with the 1948 Genocide Convention. The cultural conception was, he claimed, “the soul of all the convention” (Cooper 2008: 159, quoting Lemkin). He was not successful – explicit recognition of cultural genocide within the Convention was removed in the process of negotiation between parties. Nevertheless, Lemkin's approach left its mark on the Convention, and as we shall see below, the cultural conception therefore remains implicit in law.

2. The Law of Genocide

Such was Lemkin's understanding of the term ‘genocide’. The publication of his *Axis Rule* led to immediate interest in this new concept, and residues of this attention can be found in the judgments of the 1945-6 International Military Tribunal at Nuremberg, where the term was invoked on various occasions. The IMT, however, did not charge suspects with genocide, but only with ‘crimes against humanity’, ‘war crimes’ and

‘crimes against peace’. Codification of genocide into law would come only with the 1948 Genocide Convention.

Once proposed by Lemkin to the United Nations, the drafting of the concept into law proved a difficult process. There was much political negotiation, driven by state interests, over how the term should be defined for the purposes of the Genocide Convention; as such, the meaning of the term shifted significantly. This process of negotiation, which involved to-ing and fro-ing over which groups were to be considered genocide-eligible, whether cultural genocide was to be included, and the methods by which the crime could be committed, led to a legal definition that is, as we shall see, unstable. The process of case law interpretation has therefore played a significant role in solidifying the legal concept. Nevertheless, the definition of genocide as stated in Article II of the Genocide Convention has remained unaltered, being replicated in the statutes for the *ad hoc* International Criminal Tribunals for Rwanda (ICTR) and Yugoslavia (ICTY) and in Article 6 of the Rome Statute of the International Criminal Court (ICC). In each of these statutes, genocide is defined as:

[A]ny of the following acts committed with the 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.

The Genocide Convention, to which 140 states are now party, also notes that the occurrence of genocide “whether committed in time of peace or in time of war” imposes an obligation on states to “prevent and to punish”. This legal obligation to intervene is, however, an onerous one, and has arguably led states to be wary of using the term, lest it oblige them to act (Power 2002: 358-364).

As with other criminal acts, in order to convict an individual of genocide, both *actus reus* (a guilty act) and *mens rea* (a guilty intent) must be demonstrated. As such, it must not only be shown that an event of the sort specified in (a)-(e) *occurred* and was substantially *caused* by an act or omission of the accused – it must also be shown that a sufficient mental element was present in the accused. Although the case law has been willing to consider genocide carried out by one individual acting in isolation as “theoretically possible” (*Prosecutor v. Jelisić*, Judgment para. 100), the mental element has generally been taken to involve awareness of, and active participation in, a general plan or policy of extermination.

Genocidal intent to destroy a group (in whole or in part) as a group must be shown. Yet there exists debate as to whether the mental element of genocide should be understood as: (i) the intention to destroy a group as the very end of the act (a purpose-based approach), or (ii) the furtherance of a campaign of destruction with knowledge of that goal (a knowledge-based approach). The stricter purpose-based approach has been generally adopted, though knowledge of the broader context of a genocidal plan is taken to be important evidence of genocidal intent. Both knowledge and intent set a high bar. It is not clear that every participant in a genocidal campaign

intends by his very act to contribute to the destruction of a group rather than the achievement of some other military objective; neither is it clear that knowledge of a genocidal state policy by those 'on the ground' can be taken for granted. For this reason, those found guilty of genocide are usually high ranking officials, who can be shown to have been privy to, and intended their action as a contribution to, a systematic effort of destruction.

Standard defenses applicable in criminal law more generally are also applicable to the crime of genocide. Diminished capacity on the grounds of mental defect and intoxication are allowed as defense by Article 31 of the Rome Statute. Other defenses, such as the claim that the crime was necessary as a proportional means of self-defense or of preventing a greater harm are also theoretically available, though the severity of the crime of genocide renders them impractical. The defense of 'superior orders' cannot relieve a person of criminal responsibility for genocide, though might mitigate punishment. Such defense can undermine criminal responsibility only in cases which orders received are not *manifestly unlawful* – a condition which cannot be met with regards to genocide. The defense was considered at length in the Nuremberg Trials for other serious international crimes, and found inadmissible; its explicit disavowal has been incorporated into the ICTR, ICTY, and Rome Statutes. As distinct from 'superior orders' defense, duress *can* be a defense to genocide, in cases in which the crime results "from a threat of imminent death or of continuing or imminent serious bodily harm" (Rome Statute, Article 31 1(d)). The fault line between the defense of duress and 'superior orders' is a principled one, though is hard to draw in practical cases in which orders are coercively enforced.

Having acted in an official capacity as a leader of state, elected representative, or member of government, is no defense to genocide. Article IV of the Genocide Convention notes that individuals will be considered responsible "whether they are constitutionally responsible rulers, public officials or private individuals." Article 27 of the Rome Statute indicates that acting in an official capacity is 'irrelevant', and shall not constitute grounds for a reduction of sentence. Of course, official capacity as an invalid *defense* must be distinguished from *immunity from prosecution* on grounds of current office. It remains a principle of international law that high ranking incumbent officials of state are immune from prosecution in foreign courts, in order to allow them to fulfill the function of their office (*Case Concerning the Arrest Warrant of 11 April 2000 (the Congo v. Belgium)*, Judgment para. 23).

Jurisdiction for prosecution of genocide is granted to the ICC by the Rome Statute for any crime taking place after 2002 committed by citizens or within the territory of state parties. The ICTY, with authority given by the United Nations Security Council, has jurisdiction over genocide committed after 1991 in the territory of the Former Yugoslavia. Similarly, the ICTR is vested with jurisdiction over genocide committed during 1994 in Rwanda, and by Rwandan citizens responsible for genocides committed in neighboring states during this period. The Genocide Convention, requiring that states "undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention," has led to states enacting domestic legislation against genocide (*Convention on the Prevention and Punishment of the Crime of Genocide*, Article V). Many states have done so, and therefore have jurisdiction over genocide in accordance with local law.

It is generally taken to be the case that the principle of *universal jurisdiction* is applicable to cases of genocide. As such, states can prosecute *any* case of genocide, whether committed inside or outside their own territory, and regardless of the victim or criminal's citizenship. In 1960, Israel abducted and asserted the right to try Adolf Eichmann for his involvement in the Nazi Holocaust on the grounds that his crimes were odious to the international community as a whole; this assertion of the right of a third party to enact justice paved the way for the principle of universal jurisdiction, which has gradually established itself in customary law (Schabas 2009: 246ff.). Such exercise of jurisdiction can be useful in bringing to justice perpetrators where there is a lack of political will in the territory or state, though it will often be impractical to successfully extradite a suspect and gather evidence without the assistance of a state unwilling to prosecute in their own courts.

3. Legal Debates: Genocide Eligible Groups

As noted above, the legal definition speaks of genocide as the destruction of a national, ethnical, racial or religious group. The question naturally arises as to the rationale for identifying only these four types of groups as uniquely genocide-eligible. The exclusion of political groups from the legal definition of genocide has proved particularly controversial. It seems clear that the non-inclusion of political groups in the Genocide Convention definition was the result of ongoing concern that a treaty incorporating such a definition would prove too risky for key states to endorse. It is often claimed that the Soviet Union blocked the inclusion of political groups on grounds that it might be subject to accusations of genocide (Cooper 2008: 154). The concern must surely be that the definition agreed upon by political wrangling is at best unreliable – that such conditions were disruptive to the process of forming an account of genocide.

Indeed, if it is found that such a limitation is arbitrary, the question arises whether we should consider the legal definition *incorrect* in placing this limitation on the meaning of the term. To insist that the definition of the crime contained in statute law, being a stipulative definition, *simply cannot be incorrect* would be to insist unnaturally on the law's authority over meanings, and would assume an unreasonably positivistic starting point in legal-theoretic terms. It would also be to insist that Lemkin was misusing his own term when referring to linguistic and political groups as genocide-eligible.

Complicating matters still further, states have, while enacting domestic genocide legislation as required by the Genocide Convention, often added or removed genocide-eligible groups to their own domestic definition (Schabas 2009: 406). The term 'genocide' is, of course, interpretative. Neither Raphael Lemkin, the UN Drafting Committee, nor any one of these States has *a priori* authority over what constitutes genocide, and which groups are genocide-eligible – we must be allowed to seek a reasonable and coherent interpretation of the term 'genocide' in line with the purpose and history of the concept. The omission of certain groups from the definition of genocide contained in law, then, may or may not be correct: this will depend on whether good sense can be made of excluding these groups from a critical and informed interpretation of the term.

Not all groups can be considered genocide-eligible: groups such as ‘those who wear jeans’ cannot be genocide-eligible, lest the term be broadened into triviality. It has been generally recognized that genocide-eligible groups must be those sorts of groups which are (at least) stable and permanent, and membership of which is not voluntary. Such criteria must be applied with sensitivity, however, if it is not to rule out the inclusion of religious (and perhaps even national) groups. Groups such as these might be considered *theoretically* voluntary, though almost impossible in practice to resign oneself from. With such practicalities in mind, it is perhaps difficult to justify the non-inclusion of political groups, which can play a similar role in individuals’ lives and in the formation of their identity to religion, and may be practically or psychologically unrenounceable.

The status of groups *as* groups might be said to have its basis either in *objective* or *subjective* factors. The identification of a set of individuals as an ‘ethnic group’, that is to say, might be in virtue of the *facts about that set*, or might be in virtue of *facts about how the set is perceived*. Further, *subjective* identification of a group might be divided into *victim-side* and *perpetrator-side* identification; a set of individuals might be an ‘ethnic group’ because *they* take themselves to be so, or because *their persecutors* take them to be so. It must be observed that objective identification for genocide-eligibility may be problematic solely on the grounds that there is ‘no such thing as race’, being a fiction in scientific-biological terms. So too might we doubt that there is *objectively* anything that means to have a certain ethnicity, or membership of a religious or national group, over and above subjective factors. Nevertheless, ‘socially constructed’ groups might be taken to be identifiable by external and impartial observers with a measure of objectivity, and *this* objectivity should be taken as sufficient.

Both perpetrator-side and victim-side subjective identification of the group have been taken as relevant in evidencing genocide-eligibility, though perpetrator-side identification has generally been taken to have more importance. So, for instance, in *Prosecutor v. Musema*, it is explained that “for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as a member of said group.” (*Prosecutor v. Musema*, Judgment and Sentence, para. 161). This perhaps overstates the case for subjectivity slightly, as other courts have insisted upon “consulting both objective and subjective criteria” on the grounds that subjective factors alone, even if establishing membership of a group, could not establish that the type of group was of a type protected by the genocide convention (*Prosecutor v. Brdjanin*, Judgment, para. 684). This approach, combining objective and subjective identification, has established itself as the norm.

4. Legal Debates: ‘In Whole or in Part’

Were genocide to be conceived of as requiring the *total* destruction of a genocide-eligible group, it would be questionable whether genocide had ever really occurred; destruction of a group so thorough as to be aimed at total elimination of the group in its entirety throughout the world was not accomplished, and perhaps not even

attempted, by the Nazis. More or less fine-grained groups can be seen as the target of genocide, however. It may be more useful to view the Armenian genocide, for instance, as perpetrated on the group ‘Ottoman Armenians’ rather than on those of Armenian ethnicity *simpliciter* with only limited and local success. Case law has favored such fine-grained groups over coarse-grained groups: “to destroy the group within a geographically limited area” is taken as sufficient (*Case Concerning the Application of the Convention*, para. 199). The identification of an area suitably substantial is, we should note, a matter for judgment: it is questionable whether genocide might be perpetrated by the destruction of a group at *town* level, far less questionable at *regional* level, and entirely uncontroversial at *national* level.

Nevertheless, the worry will remain that the standard of total destruction – even when applied to a group identified in finely-grained terms – in practice reduces all instances to merely ‘attempted genocide’. For this reason, the crime has been taken to be the destruction of a group in whole *or in part*. How to interpret ‘in part’ is a contentious issue. Strictly speaking, one member might be taken to comprise a proper part of his or her group. A literal reading of ‘in part’ therefore renders the scope of the definition of genocide too wide, allowing murders involving relatively small number of individuals to be counted as instances of genocide. Any specification of the proportion of a group that must be destroyed, however, is likely to appear arbitrary, and to invite the killing of a sub-genocidal proportion in order to avoid prosecution.

One solution has been to interpret the destruction of a group ‘in part’ as referring to the destruction of a numerically *substantial* part of the genocide-eligible group, and to allow contextual factors to determine what this threshold amounts to in any given instance. This condition has, confusingly, been variously taken to apply to the *actus reus* or *mens rea* component of the crime – to cover cases in which the realization of intent to destroy a whole group results in only the destruction of a substantial part of that group, or to cover cases in which the intent *itself* is only to destroy a substantial part of the group.

It has also been suggested that genocide might occur when a numerically non-substantial, but in some manner qualitatively *significant*, subset of the group is targeted. A United Nations Commission of Experts, established to investigate the law of genocide in relation to the former Yugoslavia found that

[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others [...] Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide.
(*Final Report of the Commission of Experts*, para. 94).

The thought seems clear: destruction of a numerically small, but vital, section of the group would have the same effect on that group’s existence as the destruction of a numerically substantial part. In directing violence at significant figures of leadership, one endangers the group’s viability to continue as a functioning group.

Any interpretation of ‘in part’, however, that is grounded on the claim that partial destruction is genocidal only when it renders that group no longer viable again sets the bar extremely high. This has been recognized with regards to the ‘numerically substantial’ criterion. In the case of destroying ninety-five percent of a large group, Pust asks “would a defense be that the remaining five percent, now even more unified in its group identification and determination, was never targeted and still constitutes a viable entity?” (Pust 1989: 95). This criticism applies equally to the significance criterion. In cases where there emerges a new leadership in response to the destruction of a significant ‘leadership’ subset of a group, we might question whether sustained viability really renders the act non-genocidal.

5. Legal Debates: Genocide Without Killing and Cultural Genocide

The legal definition makes it clear that genocide can take place without killing: subsections (b)-(e) of the statute law quoted above offer other ways in which genocide might occur. While we might interpret (b) the causing of serious bodily or mental harm or (c) the inflicting of harmful conditions as in practice *tantamount* to killing individuals, it will be implausible to read (d) the prevention of births, and especially (e) the forcible transfer of children, in this way.

Though the possibility of non-lethal cases of genocide might strike some as counterintuitive, it is in line with an understanding of the crime as the destruction of groups *as groups*. One need not destroy the constituent members of a group in order to bring to an end the group as such: one can, rather, impair the ability of constituent members to function as a group, or take non-lethal action to ensure that the group’s continued existence past the present generation will be impossible. Such methods target the group’s ability to sustain its own way of life into the future.

In acknowledging non-lethal genocides as within the legal definition, provision for the recognition of cultural genocide is implicitly generated. Given that a genocide might be committed in acts that terminate the group’s existence without causing physical death to any of its members, the focus shifts to the deprivation of the possibility of transferring group qualities and modes of existence to future generations. There is, that is to say, an internal normative push from *within* the existent legal definition towards the inclusion of cultural genocide. As noted, cultural genocide was central to Lemkin’s conception of the crime; yet in drafting the Genocide Convention, an article explicitly treating this category was removed. Residues of Lemkin’s meaning remain, however: the removal of this category from statute law is in tension with the embedded potentialities of other sections of the statute law and with the Preamble to the Convention.

To the extent that cultural genocide is contained within the legal definition, it remains latent, and is in general explicitly disavowed by courts. On occasion, however, the issue has become manifest in the process of interpretation. So, for instance, in an important dissenting opinion in *Krstić*, Judge Shahabuddeen notes that the destruction of a group can be accomplished by the destruction of “characteristics – often intangible – binding together a collection of people as a social unit.” Shahabuddeen goes on to argue that the crime can be committed by cultural means and that it is “not convincing to say that the destruction, though effectively obliterating the group, is not

genocide because the obliteration was not physical or biological” (*Prosecutor v. Krstić*, Partially Dissenting Opinion, para. 51). So too *Prosecutor v. Krajisnik* notes that “the Genocide Convention’s ‘intent to destroy’ the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said.” (*Prosecutor v. Krajisnik*, Judgment, note 1701).

It is significant that cultural genocide has been firmly established in recent years to *evidence* intent of genocide proper. It is also notable that legal scholars have been quick to speak about the failings of a definition that does not include cultural genocide: Cassese refers to the absence of cultural genocide from the Convention as one of “the most blatant” of the “flaws or omissions” of the convention; Schabas notes that “the Convention’s exclusion of cultural genocide is to be regretted.” (Cassese 2009: 130; Schabas 2009: 464). Lemkin’s conception of genocide, therefore, continues to assert itself.

6. Moral Debates: Who is Damaged by Genocide?

The question of *who* is damaged by genocide might seem like an odd one. Of course, when genocide occurs by means of killings, rapes, and assaults, it is clear that the individuals targeted by those criminal acts suffer immense damage. We might, however – without seeking to downplay the harm on individuals targeted by those crimes – ask whether there is any *separate* damage done, over and above the catalogue of evil caused by individual acts, by the crime of genocide which is emergent from these crimes taken together. If so, the question of *what* that ‘genocidal damage’ is, and *who* suffers it, becomes pressing. There are three options in assigning such damage: that genocidal damage is conveyed upon those same *individuals* that suffer non-genocidal damage, upon *groups* targeted by genocide, or upon *humankind*.

Those arguing in favor of genocidal damage as individual have pointed out that the context of genocide can generate the circumstances in which otherwise unlikely harm occurs. Consider, for example, the otherwise identical murders of *p* and *q*, *p* within the context of genocide and *q* outwith that context. It is arguable that although *p* and *q* both suffer harms of death, pain, curtailed opportunities, etc, that *p* suffers additional contextual harms. It might be held that murder-qua-genocide is more harmful *simpliciter*: that it is worse on the grounds of the heightened degradation of being killed on the basis of what one is, rather than who one is. Some have suggested, however, that in a genocidal context in which *p*’s broader community has been destroyed or crippled, the social structures which are a necessary condition of recognizing and marking *p*’s life, his achievements, and his death, are also lost, and that *this* is the source of additional harm. Meaning and worth are constituted within a community: in being subjected to murder-qua-genocide, an individual suffers the grave damage of losing the very possibility that his life and contribution can be recognized as such. Not only is *p* killed: he is killed in a such a way that his projects or interests have no hope of survival, and in such a way that the social conditions that structure interpretation of his life a success or failure are annulled. Even *p*’s death is rendered meaningless, being unrecognizable within the community that would normally convey significance upon it. This is an extra damage to that which befalls *q*.

Insofar as *p* and *q*'s circumstances are locally indistinguishable – insofar as the pain, suffering, and ultimate demise are identical – it might, however, be considered implausible to hold that one suffers a lesser fate than another. In this case, genocidal damage must be located elsewhere, and one natural option is that the extra harm is upon the group targeted by genocide. Consider cases *A* and *B*. Assume in both *A* and *B*, the same high number of individuals are killed, but that *A* amounts to genocide on the grounds that individuals belong to a genocide-eligible group *G*, whereas *B* does not, being selected entirely at random from the global population. The total pain and suffering of individuals caused in cases *A* and *B* are identical, let us suppose. It might be claimed that in case *A*, however, additional genocidal damage is committed upon the group *G* itself.

The notion of harming a group independently of harming its members need involve no particularly extravagant metaphysical pledges. Groups can have an existence that is not immediately reducible to the existence of their members – France could cease to exist, were its citizens to be kept alive but dispersed amongst other nations. The harm of destruction, then, might be thought to fall upon the group *G* independently of any harm done to its members. So too might other fundamental group interests – interests in remaining unimpaired and able to act – be damaged without this harm being reducible to the damage of individuals. Under this account, the *genocidal* damage that occurred in (for instance) the Armenian Genocide was damage conveyed upon the Ottoman Armenians *as a group* – destroying or at least severely incapacitating that group – and this damage was additional to any damage to individual Ottoman Armenians.

It was noted above that Lemkin held that *humanity* might be harmed by genocide. Just as national groups might be said to have interests, so too the larger group of humanity might be said to have interests. It might, for instance, be in the interests of humanity to retain diversity in the international community, independently of the interests of any individuals or nations, and so we might think humanity as such as capable of damage by genocide. It is in this sense of an emergent damage, irreducible to “a flood of atrocities”, that Arendt took the Holocaust to be “a crime against humanity perpetrated on the body of the Jewish people.” (Arendt 2006: 275, 269).

The pressing question for accounts drawing upon non-individual notions of damage, however, is why we should be concerned about such interests. We are well aware of why *individual* interests are important, and worthy of respect, but it is not immediately obvious why *group* or *species* interests, when divorced from the concerns of individuals, should motivate us.

7. Moral Debates: Genocide's Discontinuity

These are issues of the nature of genocidal harm. A related, but distinct, question is whether genocide is of a different gravity to other crimes. This question is of whether genocide is in some sense qualitatively distinct from lesser crimes – including other international crimes of war – or whether the crime is fundamentally continuous in moral terms with other evils. Nobody will deny that genocide will in general be considered a greater crime than a single murder, or that an act of genocide can be more morally serious than other war-crimes. The claim, however, that genocide is

discontinuous with other criminal acts is intended as a more significant one than this: that genocide is somehow of an inherently different moral order than other criminal acts. Yet it is not entirely clear what it means to claim that one crime is of a different 'moral order' from another.

Nevertheless, the thought is embedded in public perception of genocide, and is reflected in the notion of genocide as the 'crime of crimes'. Legal opinion has occasionally touched upon the issue of genocide's outstanding moral significance, with *Prosecutor v Krstić* finding that its characteristics make "genocide an exceptionally grave crime and distinguishes it from other serious crimes" (*Prosecutor v. Krstić*, Judgment, para. 553). Others have noted that, formally speaking, "there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law'" (*Prosecutor v. Kayishema and Ruzindana*, Judgment (Reasons), para. 367). Yet genocide attracts longer sentences than other international crimes, it being not uncommon for individuals to 'plead down' from genocide to other offences; as Schabas notes, genocide is, legally speaking, at the "apex of the pyramid" of international crimes. (Schabas 2009: 11).

Philosophers have differed amongst themselves on the issue. Some have agreed that the moral difference between genocide and other crimes is a significant one. Arendt argues that the success of the Eichmann trial was that it "did not fall into the trap of equating this crime with ordinary war crimes." The basic moral character of the genocide was divergent, Arendt thought, from anything that had come before. "Nothing is more pernicious to an understanding of these new crimes [...] than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is 'no new crime properly speaking.'" (Arendt 2006: 275, 273).

Indeed, the qualitative differentiation of genocide takes on an important jurisprudential role in Arendt's thought, and is put to significant use. Insofar as the crime genuinely involved a previously unseen moral wrong, it was unprecedented. And insofar as the crime was unprecedented, Arendt held that it could not have been anticipated by law-makers prior to the crime being witnessed. Such was a justification for retroactive legislation in reaction to the Holocaust. "[T]he principle *nullum crimen, nulla poena sine lege*, [...] applies meaningful only to acts known to the legislator; if a crime unknown before, such as genocide, suddenly makes an appearance, justice itself demands a judgment according to a new law." (Arendt 2006: 254). The crime, previously, was in some significant sense unthinkable, and the birth of a new *sort* of moral crime necessitated new *sorts* of moral concepts.

Others have been more skeptical. Those attempting to shed light upon genocide have been suspicious of ascribing it discontinuity with other moral wrongs, lest this render the concept mysterious. Larry May argues that "we should not continue to talk of the harm of genocide as morally unique and worse than all other international crimes", claiming that "it is not the crime of crimes." (May 2010: 78, 20). There are, he suggests, no principled conceptual or normative reasons to think of genocide as a special sort of crime, its main elements being observable in instances of group-based persecution and crimes against humanity. Rather, the special status attached to genocide has been the result of a historical attempt to pay homage to victims of the Holocaust, to which the term is most commonly applied.

8. Conceptual Debates: Applying the Concept and the Holocaust Paradigm

The issue of genocide's relation to Holocaust is of significance beyond May's account. The concept of genocide was born in recognition of the horrors of the Nazi era, and understanding of the crime – both in the popular consciousness and in more specialist debates – remains closely tied to this concrete historical episode. As the paradigmatic genocide, other mass-crimes directed against populations are in general measured against the Holocaust: identification of these crimes as genocide often turns on demonstrating some parallel to this event.

There are dangers in utilizing the Holocaust as a standard in this manner. Disembodying the Holocaust – mounting it into an abstract standard – does little for our understanding of history. But it can also cloud application of the concept of genocide. We need not believe that the Holocaust is unique, unrepeatable, or in some sense singular, in order to think it an evil of almost unimaginable proportions. In requiring that all instances of genocide are comparable to this level of evil, however, it might be argued that we set the bar too high. If any genocide must be on a par with the Holocaust, the term becomes in practice unusable. If inseparable from the maximal evil of the Holocaust and its particularities, the notion of genocide ceases to have application, and its use in understanding and tackling other instances of evil is diminished.

The word 'genocide' did not exist prior to 1944, and yet is routinely used to describe events prior to that time. It has, for instance, been used to describe the actions of Genghis Khan, the treatment of Native Americans during the period of European colonization, and the British actions in Ireland during the 19th century famines. There has been little resistance to the theoretical possibility of applying the term genocide this widely, though it might seem *prima facie* anachronistic. Sartre (1968) claimed that "[t]he word 'genocide' has not been in existence for very long [...] [t]he thing is as old as mankind", and others have agreed. Indeed, Lemkin was actively engaged in surveying historical instances of genocide, and reservations about extending the term have never been mounted on historiographical grounds. Though historical agents could clearly not have conceived of their actions as genocidal, or perhaps even drawn on the ideas that we use to understand genocide, the category is nevertheless useful for comparative purposes because we do not think it important for agents committing genocide to conceptualize their actions in this manner.

We have seen that there is a *legal* definition of genocide, and that Lemkin's original usage of the word differed from (although to some extent remains present in) this definition. So too, it is often claimed, there is an informal understanding of the term amongst the general population: a broader social conception of genocide, used to categorize egregious mass-killings and treatment of civilian populations that might not meet the technical definition as set out in law. I noted above that no one source should be considered to have ultimate authority on the final meaning of the term: to insist that the legal definition is by stipulation correct would be excessively positivistic, and to insist that Lemkin has total authority of the word just because he used it first would be equally implausible. Neither should we seek to define our terms by straw-poll.

Because of the variety of usages of the term, it may be tempting to believe that there is not only *one* concept of genocide, but various entirely distinct concepts at work: *Lemkin's* concept, a *legal* concept of genocide, a broader *social* concept, and perhaps others besides. While this proposal nicely captures the extent to which the term 'genocide' is flexible, being used in different settings in different ways, it does not adequately explain the source of disagreement and interaction in discussions appealing to rival conceptions. If legal-genocide, Lemkin-genocide, and social-genocide are entirely distinct concepts – if the general population, Lemkin, and the courts are just speaking about different *things* when using the same word – it is unclear why we should take one statement about genocide to have any relevance at all to the subject addressed by another. Moreover, it is unclear what it would mean to hold that one concept of genocide was more fundamental, or what it would mean to attempt to utilize one in offering critique upon another. Yet clearly we *do* use rival conceptions in this way. Courts and legal scholars rightly consider Lemkin's usage in seeking to better understand their own conception. And to criticize the legal conception for being too far divorced from the popular social concept of genocide by technicalities is not to indulge in deep confusions about the unity of unrelated notions.

The various conceptions of genocide are not different and unrelated *things* – we do not discover different and separately packaged concepts labeled 'genocide' and explicate them as found – they are, rather, rival interpretations of one central, but contested, concept. When offering an understanding of genocide, we must attempt to form an understanding of the concept that clarifies, relates, and integrates all reasonable usages. In doing so, we seek to make sense of the purpose of possessing and using the concept, of how others are using it, and how we use closely connected concepts.

See also: International Law; Holocaust; Crimes Against Humanity; Arendt, Hannah; International Political Theory; Nationalism; Cosmopolitanism; Assimilation; Justice, International; Humanitarianism; Diversity.

References and Suggested Reading

Jones (2010) is a useful introduction to the subject of genocide, and includes discussion of historical instances of genocide. Shaw (2010) provides a more theoretical and sociological introduction, with sustained investigation of the concept's use for social science. Lemkin's own writings are still hard to access, being largely unpublished. Lemkin (1944) and Lemkin (1947), however, provide an overview, and are generally accessible. Cooper (2008), Dirk Moses (2010), Ignatief (2001) and Power (2002) provide insightful commentary on his life and thought. Treatise and statute law should be consulted by way of the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Rome Statute of the International Criminal Court* (see also *Statute of the International Tribunal for the Former Yugoslavia* and *Statute of the International Tribunal for Rwanda*.) Case law is now

abundant; Judgments from *Prosecutor v. Krstić* and *Prosecutor v. Akayesu* are perhaps amongst the most important. By far the most comprehensive and reliable guide to the law of genocide is Schabas (2009); Cassese (2009) ch. 6 provides a more concise introduction. Van der Herik (2007) and Abed (2006) argue that the legal meaning of 'genocide' diverges from other usages of the term.

The starting point for philosophical reflection on the category of genocide has generally been the epilogue to Arendt (2006), which contains the most significant points of argument. In the analytic tradition, Card (2003) and Lee (2010) offer interpretations of the damage of genocide to individuals; Macleod (forthcoming) offers an account of genocide as harming humankind. Lackey (1986) tackles the issue of whether genocide is morally worse than mass murder; Lang (1984) connects this question to broader issues within moral philosophy. Abed (2006) offers philosophic investigation of the sorts of group that are susceptible to genocide. May (2010) offers the first unified and comprehensive treatment of all of these issues within the analytic tradition; Roth (2005) collects together various useful essays treating the meaning of genocide, its evil, and how philosophy should respond to the crime.

Abed, M. (2006) "Clarifying the Concept of Genocide," *Metaphilosophy*, 37(3-4): pp. 308-330.

Altman, A. (2012) "Genocide and Crimes Against Humanity: Dispelling the Conceptual Fog," *Social Philosophy and Policy*, 29(1): pp. 280-308.

Arendt, H. (2006) *Eichmann in Jerusalem: A Report on the Banality of Evil*. London: Penguin.

Card, C. (2003) "Genocide and Social Death," *Hypatia*, 18(1): pp. 63-79.

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 Feb 2007.

Case Concerning the Arrest Warrant of 11 April 2000 (the Congo v. Belgium), Judgment.

Cassese, A. (2009) *International Criminal Law* 2nd ed. Oxford: Oxford University Press.

Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec 1948.

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

Dirk Moses, A. (2010) "Raphael Lemkin, Culture, and the Concept of Genocide." In D. Bloxham and A. Dirk Moses, eds., *The Oxford Handbook on Genocide Studies*. Oxford: Oxford University Press.

Final Report of the Commission on Experts Pursuant to the Security Council Resolution 780 UN Doc. S/1994/674.

Ignatieff, M. (2001) "The Danger of a World without Enemies: Lemkin's Word," *The New Republic*, 21 February 2001.

Jones, A. (2010) *Genocide: a Comprehensive Introduction* 2nd ed. Routledge: London.

Lackey, D.P (1986) "Extraordinary Evil or Common Malevolence? Evaluating the Jewish Holocaust," *Journal of Applied Philosophy*, 3(2): 167-181.

Lang, B. (1984) "The Concept of Genocide," *Philosophical Forum*, 14(1-2): pp. 1-19.

- Lee, S. P. (2010) "The Moral Distinctiveness of Genocide," *Journal of Political Philosophy*, 18(3): pp. 335-356.
- Lemkin, R. (undated-a) "Radio Talk on Genocide," *Raphael Lemkin Papers, American Jewish Historical Society* (box 7, folder 3).
- . (undated-b) "Memorandum on Genocide," *Raphael Lemkin Papers, American Jewish Historical Society* (box 7, folder 3).
- . (1944) *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington: Carnegie Endowment for International Peace.
- . (1947) "Genocide as a Crime under International Law," *American Journal for International Law*, 41(1): pp. 145-151.
- . (1951) "Manuscript on Genocide," *Raphael Lemkin Papers, American Jewish Historical Society* (box 7, folder 3).
- Macleod (2012) "An Alternative Approach to the Harm of Genocide," *Politics* 31(2).
- May, L. (2010) *Genocide: A Normative Account*. Cambridge: Cambridge University Press.
- Power, S. (2002) *A Problem from Hell: America and the Age of Genocide*. New York: Basic Books.
- Pust, J.J. (1989) "Congress and Genocide: They're Not Going to Get Away With It," *Michigan Journal of International Law*, 11: pp. 90-104.
- Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998.
- Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004.
- Prosecutor v. Jelisić*, IT-95-10-T Judgment, 14 December 1999.
- Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001.
- Prosecutor v. Krajisnik* IT-00-39-T, Judgment, 27 September 2006.
- Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2002.
- Prosecutor v. Krstić*, IT-98-33-A, Partially Dissenting Opinion, 19 April 2004.
- Prosecutor v. Musema.*, ICTR-96-13-A, Judgment and Sentence, 21 May 1999.
- Rome Statute of the International Criminal Court*, adopted 17 Jul 1998.
- Roth, J.K. (2005) *Genocide and Human Rights: A Philosophical Guide*. London: Palgrave Macmillan.
- Schabas, W. A. (2009) *Genocide in International Law: the Crime of Crimes* 2nd ed. Cambridge: Cambridge University Press.
- Sartre, J.-P. (1968) "Genocide," *New Left Review* 1(48): pp. 13-25.
- Shaw, M. (2010) *What is Genocide? A New Social Theory*. Cambridge: Polity Press.
- Statute of the International Tribunal for Rwanda*, adopted 8 November 1994.
- Statute of the International Tribunal for the Former Yugoslavia*, adopted 25 May 1993.
- United Nations General Assembly Resolution 96(I)*, adopted 11 Dec 1946.
- Van den Herik, L. (2007) "The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect." In R. Henham and P. Behrens, eds., *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*. Burlington: Ashgate, pp. 75-95.