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The Bitter Fight Over the Meaning of 'Genocide'

Debates over how to describe conflicts in Gaza, Myanmar and elsewhere are

Illustration by Pablo Delcan

By Linda Kinstler
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On Feb. 26, 2007, Smail Čekić stormed out of the Peace Palace, the seat of the International Court of Justice, carrying the decision the judges had just handed down. The case that concluded that day, Bosnia v. Serbia, was to determine whether Serbia had violated the Genocide Convention during the Bosnian War, when Bosnian Serb forces killed an estimated 100,000 civilians. Čekić, then the director of Sarajevo University's Institute for Research of Crimes Against Humanity and International Law and a Bosnian victim of the war, had hoped the court, which is based in The Hague, would punish his compatriots' deaths and acknowledge them as victims of genocide. Instead, the court declined to classify a vast majority of the Bosnian deaths as genocidal. For Čekić and other survivors, the ruling was a betrayal: They felt that the court had refused to recognize the true nature of the violence. Newspapers reported that Serbia had been found not guilty of genocide; a celebration was planned at the Serbian Embassy. Standing outside the I.C.J., the top court of the United Nations, Čekić tore the text of the judgment to pieces.

That day, the court ruled that over the course of the war, Serbia committed genocide only in one instance. During the 1995 Srebrenica massacre, Bosnian Serb fighters took roughly 8,000 Bosnian Muslim men and boys to predetermined sites before killing them and throwing their bodies into mass graves. In a vast landscape of murder that, as the judges acknowledged, included horrors like the systematic torture, rape and beatings of Bosnians in detention camps and the expulsion of thousands of non-Serbs, this episode alone appeared sufficiently genocidal to the judges. Only there did the perpetrators explicitly display the *dolus specialis*, or specific intent, "to destroy, in whole or in part, the group as such" required for a killing to be considered an instance of genocide. Killings elsewhere in Bosnia may have been war crimes or crimes against humanity — acts that were equally grave — but the decision argued that wherever there were any other plausible reasons for why the killings took place, the court could not rule that genocide definitively occurred. In a dissenting

opinion, Judge Awn Shawkat Al-Khasawneh of Jordan chastised his colleagues for failing to appreciate the "definitional complexity" of genocide by interpreting the intent requirement so narrowly.

Marko Milanović, now a scholar of international law, was working as a clerk at the I.C.J. that day in 2007. He watched on TV as Čekić tore up the verdict in anger. For him, the episode heralded a rupture that by then was already underway. The moral force of the word "genocide" and the public understanding of the word had become fully detached from its relatively narrow legal meaning. Ever since the Polish lawyer Raphael Lemkin coined the word in 1944, by combining the Greek word *genos*, meaning "race or tribe," with the Latin *cide,* or "killing," it has been pulled taut between languages — Greek and Latin, legal and moral.

In his book from that year, "Axis Rule in Occupied Europe," Lemkin explains that he saw the word as describing "an old practice in its modern development." In his view, genocide encompassed a broad array of crimes committed with the intent to destroy a national, religious, racial or ethnic group. A secular Jew who believed that every people carried its own distinct spirit, Lemkin argued that genocide included acts not just of physical obliteration but also of cultural annihilation. For him, the word described any attempt to stamp out a people's essence from the earth. It included mass killings as well as actions to eliminate the "essential foundations of the life of national groups": the destruction of language, traditions, monuments, artworks, archives, libraries, universities and places of worship. Lemkin's hope was that coining the word, and persuading nations to recognize it as a crime, might somehow prevent it from recurring. He wanted his neologism to convert what Winston Churchill once called a "crime without a name" into an identifiable, obvious and abhorrent thing.

But by the time the United Nations approved the Genocide Convention on Dec. 9, 1948, making genocide a crime under international law, only a shadow of Lemkin's original idea survived. After years of contentious deliberation and

diplomatic negotiation, the convention limited genocide to five categories of acts: killing members of a group; causing group members serious bodily or mental harm; imposing measures intended to prevent births within the group; forcibly transferring children from one group to another; and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Each one of these acts could constitute genocide only if and when committed with the specific intent to destroy a protected group. All state parties agreed to prevent and punish any instance of this crime.

The convention was a momentous achievement, but it essentially "sat on a shelf" for 50 years before it was ever used in court, the international legal scholar Leila Sadat told me. Untested, the potential applications of the convention remained undeveloped. Today conflicts around the globe, including Israel's war in the Gaza Strip, Russia's war in Ukraine and the persecution of Myanmar's Rohingya Muslim minority, are forcing a reappraisal of genocide's legal definition. Dozens of states are now directly or indirectly involved in one of four genocide cases pending before the I.C.J. The most closely watched of these cases, and also the most controversial, are two pertaining to the war in Gaza: The first case, brought by South Africa, accuses Israel of violating the Genocide Convention through its indiscriminate attacks on Palestinian civilians. The second case, brought by Nicaragua, accuses Germany of complicity in genocide because of its continued export of arms to Israel.

Final decisions in the suits are not expected for several years, but they've already altered an ongoing debate about whether the definition of genocide ought to be updated for the 21st century. For nearly 80 years, the word has been indelibly associated with the Holocaust. To invoke "genocide" is to immediately conjure up the memory of the destruction of the Jewish people and its associated architecture of murder: concentration camps and deportation trains, ghettos and gas chambers. This relation has at once augmented genocide's moral force and undermined its legal uses. The Holocaust is viewed both as the awful standard

against which all modern atrocities must be measured and as a supposedly unrepeatable catastrophe to which they must never be compared. The Genocide Convention effectively enshrined this paradoxical understanding of the Shoah and established a nearly impossible bar for genocidal intent based on its example. As a result, international courts have rarely recognized more recent mass killings as instances of the crime, and peoples seeking to have their suffering recognized as such have been bitterly disappointed. The suits brought by South Africa and Nicaragua aim to challenge this state of affairs and make the Genocide Convention the tool for prevention and protection that Lemkin wanted it to be.

When the United Nations passed the Genocide Convention, Lemkin did not celebrate. It represented the triumph of many thankless years of work, but Lemkin was nowhere to be found. The Times reporter A.M. Rosenthal found him weeping inside the darkened assembly hall. A few days later, Lemkin was hospitalized for exhaustion, a condition he mordantly called “genociditis.” This anecdote is sometimes told as a story of how his long-fought victory overwhelmed him; it can also be read as evidence of just how profoundly the world had, by then, let him down.

Raphael Lemkin, a Polish lawyer, coined the word "genocide" in 1944 and hoped that persuading nations to recognize it as a crime might somehow prevent it from recurring. Bettmann/Getty Images

Lemkin lost at least 49 members of his family in the Holocaust. He only narrowly escaped the same fate himself. Witnessing the systematic mass murder of European Jews sharpened his desire to codify a law against genocide, but his obsession with the legal problem that it presented predated World War II. As a young boy in Poland, he witnessed pogroms of the Jewish population, an experience that ignited his interest in cases of mass slaughter. Later, he read accounts of the Armenian genocide and wondered how it could be easier to punish someone for killing a single individual than to hold a state accountable

for murdering millions. After escaping the Nazis, he was a presence in the halls of the Palace of Justice at Nuremberg, where he tried and failed to get the Allied judges to include the crime of genocide in their final judgment.

Lemkin nurtured an almost-fanatical belief in law's capacity to alleviate humanity's worst afflictions. He knew that many people regarded him as a "pest" and that he was always at risk of wearing out his welcome wherever he appeared. Sometimes the seeming impossibility of his self-appointed task wore him down. "There were many days when he sat slumped in the cafeteria over a cup of coffee, barely able to lift it for the weariness in him and the rebuff," Rosenthal wrote. He spent the last decade of his life traveling to diplomatic capitals, living off borrowed funds and haranguing United Nations delegates who eventually whittled down his expansive theory of genocide. The Soviets, fearing they could be held accountable for their own domestic mass killings, objected to the protection of political groups under the convention. The Americans worried about language that could be used to interpret a history of lynching and Jim Crow laws as a form of genocide. Major powers compromised in favor of a definition that was both narrow and opaque. By codifying genocide this way, the convention paradoxically made it far more difficult to identify and prove, amplifying the concept's rhetorical power while leaving it to the courts to determine how it would be applied.

Not long after it was adopted, genocide allegations began to flood diplomatic channels. In 1951, the American Civil Rights Congress presented a paper titled "We Charge Genocide" to the United Nations, arguing that the United States was indeed guilty of genocidal actions against African Americans. (In a letter to The Times, Lemkin strongly rejected the logic of this claim.) Arab nations argued that French colonial massacres in Algeria had been instances of genocidal violence. African nations argued that South Africa's apartheid policies amounted to a genocide of its Black population and that Portugal had committed genocide in its colonial territories. After Israel captured and occupied the Gaza Strip and

other territories during the Arab-Israeli War of 1967, neighboring states increasingly accused it of genocide against the Palestinian people. None of these allegations were converted into formal proceedings. For decades to come, the jurisprudence of genocide remained conspicuously silent, while philosophical and colloquial uses of the word accumulated moral and political force.

Lemkin died penniless and alone in 1959 and was buried in a modest plot in Queens. It was only in the 1990s that the convention was actually used in court, and even then the memory of the Holocaust limited its application. In 1994, the United Nations established the International Criminal Tribunal for Rwanda in order to try Rwandan officials on charges of genocide, which eventually resulted in convictions. (Until the International Criminal Court, or I.C.C., began operating in 2003, special tribunals — bespoke judicial outfits created to prosecute a specific group of perpetrators — were the only means by which individual offenders could be held accountable by international bodies.) “In the Rwanda tribunal, genocide was never really in question there,” the legal scholar William Schabas told me. “It was just obvious.” The manner of the killing — one ethnic group deliberately and systematically slaughtering another — closely resembled Nazi Germany’s genocidal campaign.

After Rwanda came the first wave of international genocide cases, each of which exposed the convention’s limitations. A similar tribunal, the International Criminal Tribunal for the Former Yugoslavia, tried individual perpetrators of the Yugoslav wars. Struggling to classify the wars’ disparate and varied killings, it fell back on a strict interpretation of the Genocide Convention, finding that only in Srebrenica was genocidal intent the only possible motivation for the murders — an interpretation that the I.C.J. later emulated in its separate consideration of Serbian state responsibility. The resulting ruling in the Bosnia v. Serbia case marked at once the beginning of genocide litigation at the I.C.J. and, for many years, its functional end.

The strict legal interpretation of genocide has meant that courts might never recognize many of the worst atrocities of the past several decades as genocide. These include but are not limited to the killing of some 300,000 people in the Darfur region of Sudan, the murder of more than a million during the Nigeria-Biafra war, the Iraqi government's mass deportation and killing of an estimated 100,000 Kurds in the late 1980s and the Yazidi massacres by ISIS in 2014. If Lemkin were alive today, he would most likely recognize the Chinese effort to indefinitely detain, re-educate, imprison and torture Uyghurs, and to destroy their mosques, confiscate their literature and ban their language in schools, as precisely the kind of cultural and physical genocide that he hoped his convention would eliminate. While China is a party to the Genocide Convention, it has refused — like the United States, France and Russia — to recognize the jurisdiction of the I.C.J., shielding itself from the court's authority.

The many catastrophes that have been publicly, but not legally, recognized as genocide underscore the outsize influence of the I.C.J.'s 2007 Bosnia v. Serbia decision. That case marks the only instance in the court's 79-year existence in which its judges have determined that genocide definitively occurred, as well as the only time the court has ruled that a state actively failed to prevent the crime from unfolding. The ruling established several critical elements about the law of genocide, including that states are obligated to prevent genocide even outside their own borders and that isolated instances of genocide can occur amid a broader field of crimes against humanity.

A Bosnian Muslim woman searching coffins in Potocari, near Srebrenica, in 2011. The Bosnian Serb army killed an estimated 100,000 civilians during the Bosnian War of 1992-95; the International Court of Justice declined to classify most of these deaths as genocidal. Dado Ruvic/Reuters

Yet in its remarkable parsimony, the 2007 ruling also reinforced the status of "genocide" as a somewhat inscrutable and unimaginable crime, underscoring the gravity of the offense while establishing such a high bar for genocidal intent that it would become virtually impossible to hold states responsible. It effectively meant that unthinkable atrocities could fail to satisfy the convention's requirements if they were not accompanied by an overt statement of intent to wipe out an entire people, such as the written plan for a "final solution" that the Nazis adopted at the 1942 Wannsee Conference. "It was the nail in the coffin of the Genocide Convention," Sadat says of the Bosnia decision. In her view, the ruling converted the Genocide Convention from an active mechanism for preventing and punishing the elimination of entire peoples into a memorial to the Holocaust and the world's failure to prevent it from unfolding. Events in Srebrenica and Rwanda were deemed genocidal in part because they resembled episodes from the Holocaust in form and process. Instances that did not fit this neatly macabre protocol could not be deemed genocidal beyond a reasonable doubt.

Scholars point to the response to the Khmer Rouge slaughter of an estimated two million Cambodians as a telling case of how the convention failed. The tribunal examining the crimes found that a vast majority of the killings did not legally qualify as genocide, because they were mostly of intellectuals and

political opponents, not ethnic or religious groups. In the 16 years before it disbanded in 2022, the tribunal convicted only two individuals of genocide, and those convictions applied only to the killing of minorities. “This very strict interpretation of genocide does a disservice to those like Lemkin who really fought for this treaty,” Sadat says. Alex Hinton, a genocide scholar, says that “ultimately, by not punishing certain sorts of crimes,” the convention “leaves a big hole in the legal architecture for preventing mass human rights violations.”

For Milanovic, the 2007 Bosnia decision augurs how the I.C.J. will probably rule in the two cases it is currently considering regarding Israel’s ongoing war in Gaza. While the I.C.J. is not strictly bound to follow its own precedent, whatever judgments are eventually handed down are almost certain to build on that decision’s example and to disappoint those who might look to the court as a source of emotional recognition and moral authority. On April 30, the I.C.J. issued an initial order in the Nicaragua v. Germany case. While the court was “deeply concerned about the catastrophic living conditions of the Palestinians in the Gaza Strip,” it declined to order provisional measures in the case. Instead, it merely reminded all states of their obligation “to ensure respect” of rules governing the conduct of war and said that Germany (the largest supplier of weapons to Israel other than the United States) was obliged to use “all means reasonably available” to prevent the commission of genocide.

The lawyers John Dugard (left), Tembeka Ngcukaitobi and Adila Hassim at the International Court of Justice in The Hague before a January 2024 hearing in the genocide case against Israel brought by South Africa. Hollandse Hoogte/Shutterstock

In the only dissenting opinion, Al-Khasawneh, who is serving as an ad hoc judge in the case, pointed out that Germany sent 3,000 anti-tank weapons to Israel after Oct. 7. “Anyone familiar with their use in civil wars would know or ought to know that, especially when employed against an enemy which does not have tanks, as is the case in Gaza, they are used to target homes and other buildings with the devastating effect of penetrating the building and indiscriminately incinerating everyone inside,” he wrote. By declining to take further action, the court betrayed the preventive function of the Genocide Convention. Not only was Germany surely aware of a possible genocide in the making in Gaza, he argued, but there was also an imminent risk that the possibility would soon become a reality: “There are none so blind as those who will not see.”

The ongoing debate over whether “genocide” describes the current Israeli violence in Gaza has become an occasion for politicians, scholars, activists and lawyers to reappraise the legal architecture — and the history — that we have all inherited and to begin to rethink how moral responsibility for the worst categories of crimes ought to be assigned. Over the past several months, as the I.C.J. has begun to weigh the two cases pertaining to Israel and Gaza, protesters around the world have offered their own judgments in advance. “Stop the Genocide,” their posters have proclaimed. “Let Gaza Live.” They have urged

universities to divest from Israel's arms suppliers and have called for a cease-fire, among other measures. Their signs and demands have sought to mobilize the rhetorical force that "genocide" has accrued.

They have many potential instances of the crime to point to. In December, President Biden rebuked Israel for its "indiscriminate bombing" of Gaza. Israeli attacks with the stated goals of targeting Hamas commanders or freeing hostages have resulted in tens of thousands of civilian casualties, deaths that are grouped under the military acronym "CIVCAS." Half a million Gazans are facing catastrophic levels of starvation; earlier this month, the Israeli finance minister, Bezalel Smotrich, suggested that allowing the entire Gazan population to die of hunger might be "justified and moral." Palestinian communities in the West Bank have been forcibly removed from their lands, and entire swathes of Gaza have been emptied and flattened — actions that are intended, the protesters would argue, to bring about (in the convention's language) "conditions of life" that would result in the "physical destruction" of the Palestinian community there. But Israel argues that the continued presence of Hamas — a violent organization that aims to "obliterate" Israel — in Gaza necessitates such military action. This means that if the strict interpretation of the Genocide Convention prevails at the I.C.J., it is possible that none of these actions will meet the legal definition of the crime.

But the protests underscored that the story will not end there. Just as previous generations levied claims of "genocide" to expose racial injustice, colonial violence and ethnic cleansing around the world, today's activists are grasping for language with which to describe the violence that they see unfolding. The word "genocide," the international-affairs scholar Zachariah Mampilly says, is not meant to be precise. "It's meant to serve a political, moral purpose, not to be a technical legal term," he argues, and protesting students are recruiting this

quality to their cause. The genocide scholar A. Dirk Moses puts it even more stridently. “The broader view of genocide is the more accurate one,” he says. “The law is designed to allow states to hide, but ordinary people are not fooled.”

Law is designed to move slowly, its gaze fixed firmly upon the past rather than the future. “Laws as they emerge are always fighting the previous war,” the legal scholar Sarah Nouwen told me. The Genocide Convention emerged as an immediate response to World War II; today its terms are being renegotiated in real time as part of an effort to bring them up to date with the last 80 years of war. One likely effect of all this activity is that the court will relax its evidentiary requirements for proving genocidal intent. Last November, several nations, including Canada, Germany and Britain, filed a joint submission in the Myanmar case arguing that the court should do precisely that, taking into account factors like the victimization of children, the commission of gender-based violence and the forced displacement of the Rohingya people as circumstantial evidence of genocide. Loosening the legal interpretation of the special-intent requirement, Schabas argues, would “thereby make the convention a living instrument that can be applied.”

There is also momentum building behind a new convention that would patch the loophole that the Genocide Convention exposed. Ever since the 2007 Bosnia ruling, a group of legal scholars led by Sadat has been working to advance a proposed crimes-against-humanity convention that would create a mechanism for states to bring actions against other nations for perpetrating such crimes. This proposed convention aims to rebalance the hierarchy of violence that has elevated genocide above all other violations. It could help end the regime of impunity that has allowed states to get away with acts of mass killing for far too long.

In 2019, the United Nations International Law Commission submitted its own draft convention inspired by Sadat’s proposal. In early April, the U.N. Sixth Committee, which considers legal questions, held a series of hearings on the

draft. This October, the committee will meet to decide whether the proposed convention should move forward into the formal negotiation phase. “The crimes-against-humanity convention will fill a legal gap that will provide a pathway for justice for those who are excluded from the Genocide Convention,” the international human rights advocate Kate Ferguson told me in the U.N.’s basement cafe. The new convention aims to carry forward Lemkin’s legacy and provide a sorely needed mechanism for innocent people to be protected from slaughter — or, at the very least, to seek legal recourse for their suffering.

Lemkin crafted the word “genocide” in an attempt to close the gap between our moral imagination and the constraints of our legal systems. His unflagging belief in the power of law ushered the Genocide Convention into being, yet it also produced its own set of intractable dilemmas. “He encouraged journalists to think of him as a total idealist, which made it easier to screen out harder questions about politics and law,” the historian James Loeffler told me. Lemkin created an important pathway for accountability, but in restricting his pursuit of justice to the courts, he largely avoided questions about how political power can hinder just outcomes. Today we have another chance to grapple with that problem.

“What does justice look like for Palestine? What does justice look like for Israel? We haven’t really gotten to the point of thinking through what that would mean,” Loeffler says. “As the gap grows between those who are genuinely anguished by the violence they see unfolding, and this arcane maneuvering to lumber toward legal clarity — that can challenge the whole system.” The time for evading those hard questions ran out long ago. For Palestinians, Israelis, Ukrainians, Rohingya, Sudanese and so many others, no judicial decision can change the fact of destruction or undo the sheer volume of loss. Yet out of the debate over what “genocide” means in the courts and in the streets, a renewed sense of moral clarity may soon come.

Read by Soneela Nankani Narration produced by Krish Seenivasan Engineered by Ted Blaisdell

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