

## **Neglected Foundations**

*Genocide as social destruction and its connections with war*

Only a few major ideas can be traced unequivocally to a single person. Yet one man, Raphael Lemkin, developed the terminology and basis for understanding genocide that we use today. Even more remarkably, he succeeded in getting his 'crime of crimes' defined by the United Nations in an international convention to which most states have become parties. Surprisingly, while accounts of his life and work are available<sup>1</sup>, there is yet no full biography of Lemkin. Every account pays lip-service to his achievements, yet there is little appreciation of how significant his distinctive understanding remains. The debate has moved considerably beyond Lemkin's formulations - indeed this study will extend it further. He was a lawyer and campaigner, and his ideas reflected his legal orientation and the political contexts in which he worked. In the half century since Lemkin died new genocides have occurred, the understanding of the past has changed (in his day the name 'Holocaust' was not yet applied to the Nazi genocide) and political and legal responses have developed. The appreciation of Lemkin's work has suffered, however, from his success. It is to the Convention, rather than Lemkin himself, that most refer in defining genocide. This tendency is unfortunate because, although Lemkin's was far from the last word, he offered a more adequate understanding. Moreover many authors, trying to improve on the Convention, have actually moved even further from Lemkin in ways that militate against understanding. We should approach his contribution with more than the

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<sup>1</sup> See particularly Power, *'A Problem from Hell'*, pp. 17-78.

ritual piety of commentators who discard his key ideas. Recovering the meaning of genocide for Lemkin is a necessary beginning for serious study.

### **Lemkin's sociological framework**

Lemkin first formulated his ideas in 1933 when he proposed a draft law banning 'barbarity' - 'the premeditated destruction of national, racial, religious and social collectivities'; and 'vandalism' - 'destruction of works of art and culture, being the expression of the particular genius of these collectivities'.<sup>2</sup> Barbarity included

first and foremost, acts of extermination directed against ethnic, religious or social collectivities whatever the motive (political, religious, etc.); for example massacres, pogroms, actions undertaken to ruin the economic existence of the members of a collectivity, etc. Also belonging in this category are all sorts of brutalities which attack the dignity of the individual in cases where these acts of humiliation have their source in a campaign of extermination directed against the collectivity in which the victim is a member.<sup>3</sup>

Lemkin aimed to define a *general* crime that was more than the individual types of violent or repressive action and subsumed these:

Taken as a whole, all the acts of this character constitute an offence against the law of nations which we will call by the name "barbarity."

Taken separately all these acts are punishable in the respective codes; considered together, however, they should constitute offences against the

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<sup>2</sup> Presented to the Fifth Conference for the Unification of Penal Law, held in Madrid; *ibid.*, p. 21.

<sup>3</sup> Raphael Lemkin, *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations*, 1933.

law of nations by reason of their common feature which is to endanger both the existence of the collectivity concerned and the entire social order.

He argued that barbarity and vandalism were international crimes: 'It is not particularly a question of public danger, but of a broader concept, general danger, that we want to call international danger.'<sup>4</sup>

'Barbarity' is usually noted as the forerunner of 'genocide'. Lemkin was looking for a term and a law that brought together a whole *class* of violent and humiliating actions against members of collectivities. Genocide was not a specific type of violence, but a general charge that highlighted the common elements of many acts that 'taken separately' constituted specific crimes. In contrast to subsequent interpreters who narrowed genocide too down to a specific crime, Lemkin saw it as including not only organized violence but also economic destruction and persecution. What concerned him was precisely the 'common feature' of these types of action: their threat to the existence of a collectivity and thus to 'the social order' itself. As Samantha Power recorded, Lemkin's concern with such threats became, during the Second World War, a campaign against the atrocities of the Nazi occupations in Europe and for recognition of their singular destructiveness. He was particularly galvanized by Winston Churchill's statement, 'We are in the presence of a crime without a name.'<sup>5</sup> 'Suddenly', Power described, 'Lemkin's crusade took on a specific objective: the search for a new word.'<sup>6</sup>

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<sup>4</sup> Ibid., but I have altered James Fussell's translation of *danger interétatic* as 'transnational danger'. This makes contemporary sense, but the word 'transnational' was not available in Lemkin's day. *Interétatic* means literally 'interstate' but is more comprehensibly rendered as 'international'.

<sup>5</sup> Quoted by Power, *A Problem from Hell*, p. 29.

<sup>6</sup> Ibid.

His well-known solution was introduced in *Axis Rule in Occupied Europe* (1944): 'By "genocide" we mean the destruction of a nation or of an ethnic group. This new word ... is made from the Greek word *genos* (race, tribe) and the Latin *cide* (killing).'<sup>7</sup> A footnote noted, 'Another term could be used for the same idea, namely, ethnocide, consisting of the Greek word "ethnos" – nation – and the Latin word "cide".'<sup>8</sup> Lemkin warned against a narrow interpretation: '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 aim of annihilating the groups themselves.'<sup>9</sup> The nuances of the key word, 'destruction', were indicated here by the difference between 'immediate destruction' of a nation and 'destruction of essential foundations' of its life. Lemkin was clear that genocide refers *generally* to the latter; 'immediate' destruction in the sense of 'mass killings of all members of a nation' was a specific type but did *not* define genocide.

Lemkin's definition was exemplified in the substance of his book. 'The Nazi genocide was effected', he wrote,

through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by Germans); the social field (by disrupting the social

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<sup>7</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, p. 79.

<sup>8</sup> *Ibid.*, p. 79n. Interestingly, this term now describes a dimension or variant of genocide: see Chapter 5.

<sup>9</sup> *Ibid.*, p. 79.

cohesion of the nation involved and killing or removing elements such as the intelligentsia ... ); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking); in the economic field (by shifting wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism 'without reservations'); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied countries); and in the field of physical existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provides not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).<sup>10</sup>

This full explanation is important. It shows that genocide, for the term's inventor, was a comprehensive process in which a power 'attacked' and 'destroyed' the way of life and institutions of peoples.<sup>11</sup> By the standards of later debates, Schabas pointed out, 'Lemkin's definition was narrow, in that it addressed crimes directed against "national groups" rather than against "groups" in general. At the same time, it was broad, to the extent that it contemplated not only physical genocide

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<sup>10</sup> Ibid., pp. xi-xii

<sup>11</sup> In this sense, it went beyond the 'brutality and exploitation' that had marked the earlier German occupations in the First World War, even if as Isabel V. Hull concluded these 'certainly provided a foundation for later developments.' (*Absolute Destruction: Military Culture and Practices of War in Imperial Germany*, p. 248).

but also acts aimed at destroying the culture and livelihood of the group.<sup>12</sup>

'Physical' genocide - mass killing - was only one dimension of the comprehensive 'attack'.

Lemkin's was clearly different from many later definitions, as some of their proposers acknowledged. Steven Katz, for example, redefined genocide as happening 'only where there is an actualized intention, however successfully carried out, to physically destroy an *entire* group (as such group is defined by the perpetrators).<sup>13</sup> This narrowed down Nazi genocide to the Jews, yet Katz recognized that 'Lemkin's own use of the term *genocide* ... did not, in his own understanding, apply only to Nazi anti-Jewish policy. He appears to have held that Nazi behaviour vis-à-vis a number of other groups approached, if not actually replicated, Nazi anti-Jewish activity and, therefore, should also be identified as genocide.'<sup>14</sup> Katz stated: 'The reason I give primacy to physical genocide is directly and unambiguously due to the fact that this is what one means, first and foremost, when one characterizes the Holocaust as an instance of genocide.'<sup>15</sup> He added: 'I make bold to suggest that Raphael Lemkin may well have formulated a definition closer to (if not exactly like) mine had he been writing after the end of World War II when it became clear what Hitler's Judeocidal intentions were. Working in 1942-43, Lemkin was still unable to see the entire uncompromising, totalistic assault for what it was.'<sup>16</sup> Yet since Lemkin (who lived until 1959) campaigned against the Nazis to the end of the war and beyond, lobbying for genocide charges in the Nuremberg trials and for the Convention, it seems that if

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<sup>12</sup> Schabas, *Genocide*, p. 25.

<sup>13</sup> Steven T. Katz, *The Holocaust in Historical Context*, Vol. 1, pp. 127-29. Emphases in original.

<sup>14</sup> *Ibid.*, p. 129n.

he had wished to revise his definition he would have done so. The reason he did not is clear when we examine the short chapter on the idea of genocide in the context of *Axis Rule* as a whole. For Lemkin (although himself Jewish and absolutely concerned about the horrors inflicted on the Jews), Nazi genocide was never exclusively or primarily an anti-Jewish campaign; that was not the standard against which other Nazi persecutions were measured. On the contrary, his book aimed to demonstrate (by placing on record translations of Nazi laws in the occupied countries) how comprehensively, against a range of subject peoples, the Nazis had attempted to destroy the existence of nations, their well-being, institutions and ways of life. Genocide's 'two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor'<sup>17</sup> could be seen across the continent. Genocide, like barbarity, was *a comprehensive concept of the social destruction of national groups*, and Lemkin believed that it had very wide applicability.

All this is indisputable from how Lemkin presented genocide. The reasoning of the German occupiers, he wrote,

appears to be the following: The enemy nation within the control of Germany must be destroyed, disintegrated, or weakened in different degrees for decades to come. Thus the German people in the post-war period will be in a position to deal with other European peoples from the vantage point of biological superiority. Because the imposition of this policy of genocide is more destructive for a people than injuries suffered in

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<sup>15</sup> Ibid., p. 129n.

<sup>16</sup> Ibid., pp. 129-30n.

<sup>17</sup> Lemkin, *Axis Rule*, p. 79.

actual fighting, the German people will be stronger than the subjugated peoples after the war even if the German army is defeated. In this respect genocide is a new technique of occupation aimed at winning the peace even though the war itself is lost.<sup>18</sup>

Lemkin was hardly unaware of the huge differences in the severity of Nazi policies towards different peoples, but he still saw them all under the same rubric:

The plan of genocide ... varies according to subject, modalities, and degree of intensity in each occupied country. Some groups - such as the Jews - are to be destroyed completely. A distinction is made between peoples considered to be related by blood to the German people (such as Dutchmen, Norwegians, Flemings, Luxemburgers) and peoples not thus related by blood (such as Poles, Slovenes, Serbs). The populations of the first group are deemed worthy of being Germanized.<sup>19</sup>

Thus Lemkin clearly recognized that only 'some groups', the Jews were foremost among them, were 'to be destroyed completely'. However in all cases, 'The techniques of genocide, which the German occupant has developed in the various occupied countries, represent a concentrated and coordinated attack upon all the elements of nationhood.'<sup>20</sup>

It may be the case, as Power argued, that 'the link between Hitler's Final Solution and Lemkin's hybrid term would cause endless confusion for policymakers and ordinary people who assumed that genocide occurred only where the perpetrator of atrocity could be shown, like Hitler, to possess an intent to exterminate every

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<sup>18</sup> Ibid., p. 81.

<sup>19</sup> Ibid., p. 81-82.

<sup>20</sup> Ibid., p. 82.

last member of an ethnic, national, or religious group.<sup>21</sup> However Lemkin's approach was coherent, plausible as an overall account of Nazi occupations, and took account of variation in the experiences of occupied peoples. Moreover it was this concept that largely informed public debate in the aftermath of the Second World War, although some narrowing had already set in. The third count of the 1945 Nuremberg indictment stated that all twenty-four defendants 'conducted deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies.'<sup>22</sup> Here 'extermination' was still understood in a broad sense, as the destruction of ways of life as well as of lives. Since the indictment included the Poles, it clearly did not narrow genocide to the intention to kill every last member of a group, which is how 'extermination' has come to be understood since.<sup>23</sup>

Likewise the Convention on the Prevention and Punishment of the Crime of Genocide, by defining genocide as a *range* of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such', maintained the core of Lemkin's broad approach. However its list of acts constituting the crime - '(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)

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<sup>21</sup> Power, *'A Problem from Hell'*, p. 43.

<sup>22</sup> *France et al. v. Goering et al.* (1946), cited by Schabas, *Genocide*, pp. 37-38.

<sup>23</sup> Witness the aim 'to physically destroy an *entire* group' seen as essential by Katz, *The Holocaust*.

Forcibly transferring children of the group to another group'<sup>24</sup> - laid greater emphasis on physical destruction. This was particularly evident in (c), where 'inflicting on the group conditions of life' was genocidal only in so far as it was 'calculated to bring about its physical destruction'. For Lemkin in contrast it was quite clear that 'a synchronized attack on different aspects of life' was genocidal *in itself*. Both Nuremberg and the Convention laid stronger emphasis than Lemkin on *physical and biological destruction*, and less on broader *social destruction*. This difference is largely explicable because the former were designed to apply and define genocide law: killing and physical harm were the sharpest ends of the destructive processes and thus obvious legal foci.

In contrast Lemkin - however much he wished to establish and enforce genocide law - offered a historical and sociological account. He was surely right that in order to understand genocide, we should see killing and physical harm as elements of the broader process of social destruction. The Nazis did not aim simply to kill subject peoples, even the Jews: they aimed to destroy their ways of life and social institutions. It is implausible to reduce this aim to a 'means' of physical destruction, as the Convention section (c) would imply. It was the other way round: when physical destruction came to be a distinct, eventually overriding end this was an extreme development of pre-existing Nazi policies of social destruction. Lemkin was correct to stress the integrated, multidimensional, nature of the attack, and not to fall (as later writers have) into the trap of separating physical violence from social destruction. In this sense his work, rather than the

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<sup>24</sup> *Convention on the Prevention and Punishment of the Crime of Genocide.*

Convention, remains the essential starting point for sociological understanding and hence for political and international responses.

Nevertheless Lemkin had not presented, in *Axis Rule*, a fully plausible account of the relations of socially destructive ends and violent or murderous means. His listing of 'the field of physical existence' as one aspect of Nazism's coordinated attack was too mechanical. It failed to clarify that while genocide involved much more than killing, violence and its threat lay behind all genocidal policies.

*Although genocide could not be defined by a specific violent method like killing, the idea of social destruction necessarily entailed generally violent methods.* What else could social 'destruction' mean? The deficiency of Lemkin's listing approach meant that this relationship between violence and social destruction remained to be fully grasped.

### **Genocide and the laws of war**

While Lemkin offered a socio-historical conception of genocide, his conceptualization was heavily influenced by the legal tradition. He drew on two major sources: the international laws of minorities and of war, especially those relating to the role of occupiers and the treatment of civilians. I shall therefore examine the relationship between these sources in the evolution of the concept of genocide.

The existence of minorities with different beliefs from the ruler had been an issue in interstate politics at least since medieval conflicts between Muslims and Christians, and a central issue in the European interstate system since the splits in

Christianity in the sixteenth century. Various treaties, from Augsburg (1555) to Westphalia (1648), attempted to regulate this relationship and consolidated the rule, *cuius regio, eius religio*, by which rulers defined their states' religions.<sup>25</sup> However these treaties also respected subjects' rights to practice their religion and to seek the protection of a ruler of their own faith, beginning the process of defining 'minority rights'. From the nineteenth century, states were increasingly defined by nations rather than faiths, so that these rights came to be conceived in national rather than (or as well as) religious terms. This tendency reached its peak after the First World War when, as Lemkin put it, 'National and religious groups were put under a special protection by the Treaty of Versailles and by specific minority treaties, when it became obvious that national minorities were compelled to live within the boundaries of states ruled by governments representing a majority of the population.'<sup>26</sup> Lemkin, like most thinkers of his time, assumed the centrality of national groups to social life, commenting, 'The trend is quite natural, when we conceive that nations are essential elements of the world community. The world represents only so much culture and intellectual vigour as are created by its component national groups. ... The destruction of a nation, therefore, results in the loss of its future contributions to the world.'<sup>27</sup> Yet he was at pains to emphasise: 'The idea of a nation should not, however, be confused with the idea of nationalism.'<sup>28</sup> *Against* the prevalent nationalism, his view of nations as contributors to world culture was strikingly universalist. This belief inspired his determination to establish the crime of genocide in international law.

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<sup>25</sup> See Paul Q. Hirst, 'The International Origins of National Sovereignty', pp. 216-22.

<sup>26</sup> Lemkin, *Axis Rule*, p. 91.

<sup>27</sup> *Ibid.*, p. 90-91.

<sup>28</sup> *Ibid.*, p. 91n.

Although the First World War had seen destruction of national communities, notoriously the Armenians, minority issues were seen generally under the rubrics of persecution and rights.<sup>29</sup> Lemkin's efforts to enlarge the legal framework to recognize genocide were successful after the Second World War mainly because they linked minority protection to another tradition, the law of war. Lemkin's concern remained the recognition of a general crime of the destruction of national groups, but he framed his case in terms of inadequacies in the laws of war. He argued that Nazi 'techniques of genocide represent an elaborate, almost scientific, system developed to an extent never before achieved by any nation. Hence ... the need to review international law ... . These practices have surpassed in their unscrupulous character any procedures or methods imagined a few decades ago by the framers of the Hague Regulations.<sup>30</sup> Therefore, 'we must see to it that the ... Regulations are so amended as to expressly prohibit genocide in any war that may occur in the future.'<sup>31</sup> Lemkin's case was (yet again) that the laws of war needed to address the destruction of groups *as a general problem*: 'Genocide is ... a composite of different acts of persecution or destruction. Many of these acts ... are prohibited by [various articles of] ... the Hague Regulations. But other acts falling within the purview of genocide ... are not prohibited by the Hague Regulations. The entire problem of genocide needs to be dealt with as a whole; ...<sup>32</sup> It was almost as an afterthought that he extended his case beyond the war context: 'Moreover we should not overlook the fact that genocide is a problem not

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<sup>29</sup> During the Cold War, minority rights issues faded in international (especially European) politics, being seen more as domestic issues. They resurfaced after 1989: see Jennifer Jackson Preece, *National Minorities and the European States System*.

<sup>30</sup> *Ibid.*, p. 91.

<sup>31</sup> Lemkin, *Axis Rule*, p. 93.

<sup>32</sup> *Ibid.*, p. 92.

only of war but also of peace. ... An international multilateral treaty should provide for the introduction, not only in the constitution but also in the criminal code of each country, of provisions protecting minority groups from oppression because of their nationhood, religion, or race.'<sup>33</sup>

The tension with which Lemkin grappled was that genocide was clearly not 'normal' warfare, or merely an excess of war, but a criminal enterprise that went beyond it. As he later said, 'Genocide is not war! It is more dangerous than war!'<sup>34</sup> And yet genocide *had* developed, in the Nazi case and in others such as Armenia, in the context of general war, as an illegitimate extension of warfare. Lemkin demarcated genocide *in relation to* legitimate warfare:

Genocide is the antithesis of the Rousseau-Portalis Doctrine<sup>35</sup>, which may be regarded as implicit in the Hague Regulations. This doctrine holds that war is directed against sovereigns and armies, not against subjects and civilians. In its modern application in civilized society, the doctrine means that war is conducted against states and armed forces and not against populations. It required a long period of evolution to mark the way from wars of extermination, which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and states.<sup>36</sup>

This seminal statement pinpointed the fact that identifying genocide as criminality distinct from war still *depended* on the modern distinction between 'civilized' and 'uncivilized' warfare. Only by distinguishing 'sovereigns and armies'

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<sup>33</sup> Ibid., p. 93.

<sup>34</sup> Lemkin, quoted by Power, '*A Problem from Hell*', p. 51.

from 'subjects and civilians' could genocide be delimited from war. Although genocide was a crime *sui generis*, which might occur at least exceptionally in 'peacetime' outside more conventional warfare, it was a modern form of the historic 'wars of extermination'. As Mark Levene put it: 'The whole thrust of Lemkin's conceptualization ... suggests a phenomenon which does not simply take place within a war context but is itself a form of warfare.'<sup>37</sup>

Lemkin's prescriptions followed from this definition of the problem and were primarily concerned, at this stage, with the laws of war. His starting point was the inadequacies of the 1907 Regulations concerning occupation: he urged their revision to incorporate a definition of genocide. He also urged 'an international controlling agency vested with specific powers, such as visiting the occupied countries and making inquiries as to the manner in which the occupant treats natives in prison.'<sup>38</sup> If, as Schabas argued, 'he also signalled the great shortcoming of the Hague Regulations: their limited application to circumstances of international armed conflict'<sup>39</sup>, he was clearly very concerned to improve them to ensure that genocide did not occur in wartime.

It was also through the law of war that the crime of genocide was first established. Schabas, on whose careful legal history the following relies considerably (although I have many disagreements with his position), pointed out that the Allied powers also first considered genocide in the context of war crimes. Their

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<sup>35</sup> So named after the restatement by the early nineteenth-century jurist Jean-Étienne-Marie Portalis of the ideas of Jean-Jacques Rousseau.

<sup>36</sup> Lemkin, *Axis Rule*, p. 80.

<sup>37</sup> Mark Levene, *Genocide in the Age of the Nation State: Volume 1. The Meaning of Genocide*, p. 51. See also my *War and Genocide*, Chapter 2.

<sup>38</sup> *Ibid.*,. 94.

United Nations War Crimes Commission was originally concerned with offences 'against the laws and customs of war', but 'from an early stage in its work, there were efforts to extend the jurisdiction of the Commission to civilian atrocities committed against ethnic groups not only within occupied territories but also those within Germany itself.'<sup>40</sup> However the four Allied powers 'insisted upon a nexus between the war itself and the atrocities committed by the Nazis against their own Jewish populations. It was on this basis, and this basis alone, that they considered themselves entitled to contemplate prosecution.'<sup>41</sup> Thus as the Allies developed their plans to prosecute Nazi leaders in 1945, Robert Jackson, head of the United States delegation, argued: 'The reason that this extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war.'<sup>42</sup> Other delegates questioned the tightness of this connection, but it was in this context that Nazi leaders were tried at Nuremberg. As we saw above, the International Military Tribunal arraigned the defendants for genocide 'against the civilian populations of certain occupied territories'.<sup>43</sup> The Tribunal's judgement documented the emergence of genocidal policies before as well as during the war, but noted the Prosecution's central contention concerning their connections with aggressive war.

### **Separation of genocide from war**

It was clear from this application that recognition of the crime of genocide developed primarily in the context of war and war-preparation; genocide's initial

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<sup>39</sup> Schabas, *Genocide*, p. 29.

<sup>40</sup> *Ibid.*, p. 31.

<sup>41</sup> *Ibid.*, p. 34.

illegality was an extension of the laws of war. However as Lemkin pinpointed, the crime's distinctiveness lay in the *fundamental* nature of its departure from the legitimate conduct of war. There was something novel in the systematic character of contemporary violence against civilian groups, going beyond the excesses termed 'war crimes' or even 'crimes against humanity'. The formulation of what became the Genocide Convention began with the first session of the United Nations General Assembly in late 1946, shortly after the conclusion of the Nuremberg trials. In the drafting process, genocide emerged as a concept in its own right, increasingly independent of its origins in the history and laws of minority rights and war. Thus Resolution 96(I) of the General Assembly, adopted unanimously on 11 December 1946, defined genocide as 'a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.'<sup>44</sup> This formulation expressed a central, but theoretically difficult, idea of genocide, the comparison of group and individual harms. But as Schabas noted, it also eliminated 'any nexus between genocide and armed conflict'.<sup>45</sup> I shall question whether separating genocide from war was really, either legally or sociologically, the 'unfortunate legacy of the Nuremberg jurisprudence' that Schabas contended. However it is important to note that this was taking place.

The drafting process lasted two years until the Convention's adoption on 9 December 1948 - the day before that of the Universal Declaration of Human

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<sup>42</sup> Quoted in *ibid.*, p. 35.

<sup>43</sup> *France et al. v. Goering et al.* (1946), cited in *ibid.*, p. 37-38.

<sup>44</sup> *Ibid.*, 45.

<sup>45</sup> *Ibid.*, p. 46.

Rights. Its debates - of which Schabas' comprehensive analysis<sup>46</sup> supersedes Kuper's account<sup>47</sup> - resulted in an international political and legal document of fundamental importance. Not only has it remained the unamended basis of policy and law; it has also informed public debate and scholarly discussion in all disciplines. While law often informs as well as reflects social debate, it is highly unusual for a major concept to be so strongly defined by a legal document. Thus moving out of the restrictive legal framework is a major issue for the sociology of genocide.

Although the laws of war may have effectively prohibited genocide before the Convention, Article I now designated it a crime 'whether committed in time of peace or in time of war'. The contracting parties confirmed that it was a crime that 'they undertake to prevent and to punish.' Article II enumerated genocide's modalities or acts, but actually began 'by delimiting the intentional element of the crime'<sup>48</sup>: '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.' Discussion of this article has focussed on the omission of 'political' groups from the list, and the ambiguity of the 'in whole or in part' provision. Schabas also considered 'enigmatic'<sup>49</sup> the words 'as such', but they provided a useful clarification of the fact that genocide involves the aim of destroying a group *in itself*- rather than group destruction as a means of defeating a state in war.

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<sup>46</sup> Ibid., pp. 51-81.

<sup>47</sup> Leo Kuper, *Genocide*.

<sup>48</sup> Schabas, *Genocide*, p. 73.

<sup>49</sup> Ibid., p. 73.

The list of acts constituting the crime was given above. As we have noted, however, here genocide had a much narrower scope than indicated by *Axis Rule*. The emphasis was on killing, bodily harm and indirectly caused physical destruction, together with measures concerning group reproduction. The wider issue of the destruction of the social, economic, political and cultural life and institutions of groups had largely disappeared, even if there have been indications in legal discussions that 'the list of acts of genocide is non-exhaustive'.<sup>50</sup> Article III of the Convention dealt with acts which 'shall be punishable': conspiracy, incitement, attempting and complicity in genocide, as well genocide itself. This was significant in more than a legal sense, since it exhibited the understanding of genocide as a process, not just a result. Article IV specified that 'persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' This was also important, indicating that rulers and officials were likely to be the main perpetrators. The remaining articles, V-XIX, dealt with issues like legislation to give effect to the Convention, trials, extradition, the UN's responsibilities, resolution of issues of interpretation, signature and ratification, coming into and periods of force, revisions, etc., which were less significant for general understanding.

An important argument in the drafting process concerned genocide's relation to crimes against humanity. It was argued that the Nuremberg Tribunal had defined the latter in relation to international armed conflict, whereas genocide could be committed in war or peace.<sup>51</sup> This was, as we have seen, a misunderstanding of

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<sup>50</sup> Ibid., p. 87. Moreover 'some sources suggest that the prohibition on genocide under customary international law is even broader than under the Convention.' Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, p. 42

<sup>51</sup> Schabas, *Genocide*, p. 78.

Nuremberg, which had actually dealt with crimes against humanity committed in peacetime. However, whether genocide constitutes a crime against humanity (which in non-legal terms is self-evident) remains contentious, and connected to the issue of genocide's relationship to war. The latter question remains essential for the subsequent social-scientific debates. The most striking fact about the process that produced the Convention was its separation of genocide from war. In one sense, this was entirely valid: clearly genocide was not ordinary warfare and it was conceivable that it could occur outside pre-existing contexts of warfare. However, the major, commonly recognized instances of genocide - not only the Holocaust, but also Armenia and Rwanda - have been clearly connected with war contexts, and this is an overwhelming empirical trend.<sup>52</sup> Thus the legal separation of genocide from war left unresolved the more general conceptual questions: what are the connections of war and genocide in terms of their *meanings*, and in terms of *causation*? These are fundamental issues for understanding genocide, which I have dealt with elsewhere<sup>53</sup> and return to later in this book.

### **Narrowing genocide to physical destruction**

Criticizing the Convention has been a major industry in genocide studies, and I shall not be able to avoid joining in. At this point, however, let us summarize its strengths. These lie first and foremost in its political and legal resonance: we should almost certainly not discuss 'genocide' so much if the idea had not been embedded in this document. Conceptually, however, it also helped consolidate the basis for subsequent discussion. The idea of genocide as the *intentional*

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<sup>52</sup> Shaw, *War and Genocide*, Table 2.1, pp. 42-43.

*destruction of social groups* remains foundational, and although none of the terms (intention, destruction, groups) is straightforward these can be elaborated. The *list of protected groups* as 'national, ethnical, racial and religious' identified some of the most important types threatened by genocide; although it is unjustifiably restricted, it can be added to or (better) replaced by a generic definition. The idea that *killing and physical harm* are the prime acts through which genocide is carried out is seminal; it is hardly possible to conceive genocide without physical violence, even if its role needs broader contextualization. The idea of the *imposition of conditions of life that led to the destruction of groups* was a reflection, albeit inadequate, of Lemkin's idea of genocide as 'a synchronized attack on different aspects of life of ... peoples'. The relationship between 'physical' and broader 'social' destruction goes to the heart of genocide, even if here it is poorly specified. The specification of control of births and children, even if the wording resonates with the eugenics of early twentieth century, anticipated the emphasis on *sexual and gendered violence* that has become important in recent accounts. Although drafted by diplomats and lawyers rather than social scientists, and approved by governments as a result of political debate and compromise, the Convention laid out an intellectually powerful concept. While flawed in important respects, its influence reflects real internal strengths as well as political and legal weight.

Academic commentators have simultaneously improved on and regressed from the Convention's understanding. Let us take a preliminary look at the developments they have proposed. Helen Fein, an early exponent of sociological genocide theory, has been perhaps the closest follower of the Convention. Her

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<sup>53</sup> Ibid., pp. 41-49.

definition, 'Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim'<sup>54</sup>, was very close to its idea. 'Sustained purposeful action' resumed the Convention idea of intentional destruction. The idea that physical destruction of a group could either be 'direct' or be carried out through interdiction of reproduction faithfully reflected the Convention's specification of means. However Fein modified the Convention concept in three respects. First, she referred only to collectivities and groups in general, and did not reproduce the Convention's restriction to 'national, ethnical, racial and religious groups'. She saw the protected groups as 'basic kinds, classes, or sub-families of humanity, persisting units of society', and argued cogently that 'the specification of groups should be consistent with our sociological knowledge of both the persistence and construction of group identities in society' and 'should conform to the implicit universalistic norm and a sense of justice, embracing the right of all non-violent groups to co-exist.'<sup>55</sup> Second, by inserting the word 'physically' in her definition, she went even further than the Convention in narrowing the scope of the crime from Lemkin's original idea that genocide is 'a synchronized attack on different aspects of life of (captive) peoples' towards an exclusive emphasis on killing and other measures of 'biological' rather than social destruction. Third, Fein's phrase, 'sustained regardless of the surrender or lack of threat offered by the victim', emphasized genocide's separation from war: victims are destroyed even if they are not military threats.

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<sup>54</sup> Fein, 'Genocide', p. 24.

Frank Chalk and Kurt Jonassohn offered a more distinctive refinement in their widely quoted definition: 'Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and members in it are defined by the perpetrators.'<sup>56</sup> In defining genocide simply as 'mass killing', Chalk and Jonassohn departed more radically from the Convention, identifying genocide with physical destruction even more narrowly than Fein, and moved still further from Lemkin's broad concept. Fein criticized them for failing to allow for 'other forms of intentional biological destruction' and pointed out that specifying states as perpetrators was unnecessarily restrictive.<sup>57</sup> Even if states are commonly organizing centres, parties, settlers, paramilitaries and others have also been responsible, thus it seems perverse to define genocide by the state (even with the let-out of 'or other authority'). However it was Chalk and Jonassohn's definition of the victim-group 'as that group and members in it are defined by the perpetrators' that was their most distinctive contribution. This was important for emphasising that perpetrators work according to their own, often fantastical, ideas of 'enemy' groups. This idea brought into question the assumption that groups necessarily exist 'objectively' or are defined by their own consciousness of their identity, and this is what genocidists aim to destroy. This assumption had been made by Lemkin, the Convention and Fein, and was later supported by Schabas: however it cannot be sustained, as I explain more fully later. Since all agree that the genocidists' intention to destroy a group is central, it follows that *their* idea of that group counts in the process. We know that genocidists like the Nazis (with their Nuremberg laws defining who was Jewish) or the Rwandan

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<sup>55</sup> Ibid., p. 24.

<sup>56</sup> Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies*, p. 23.

<sup>57</sup> Fein, 'Genocide', p. 13.

Hutu nationalists (with their ideas of who was a Tutsi), have often followed definitions of their target groups that are different from those held by the victims: thus they often appeared arbitrary in theory as well as in practice. Extending this point, we cannot rule out from the scope of genocide groups like the *kulaks* ('rich peasants') attacked by Stalin, simply because the population did not recognize itself as belonging to this group, or because this category could not be 'objectively' defined. In cases like this, the ideological representation still refers to a real population and often a definite group (in the Soviet Union, the peasantry in general) who are subjected to genocide just as much as if they had been named in a manner they recognized. Clearly, as Fein suggested, Chalk and Jonassohn's definition involved the opposite danger of according too much significance to the ideas of the perpetrators<sup>58</sup>, and it needs to be corrected to acknowledge the role of victims' self-perceptions. However by recognizing the role of ideas in genocide, Chalk and Jonassohn opened up an important, indeed an unavoidable dimension.

They also gave new emphasis to the general separation of genocide from war. Their idea of 'one-sidedness' could be taken as meaning that genocide is something one party does to another without conflict or resistance. Clearly there is a fundamental sense in which one-sidedness *is* what genocide is about: everyone understands that its violence is targeted by an organized, armed power against a largely unarmed, civilian population. However such violence has often been imposed in the context of conflict between organized forces (war) and often provokes resistance, and hence new conflict, so that the genocidal element of one-sided killing is often part of a situation of two- or many-sided conflict and

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<sup>58</sup> Fein criticises this aspect of Chalk and Jonassohn's definition (ibid.).

violence. Genocide's definition as 'one-sided' killing is potentially misleading if as a result we miss these connections.

These trends were taken to their logical conclusion by Israel W. Charny:

'Genocide in a generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defencelessness and helplessness of the victims.'<sup>59</sup> The 'generic' description echoed Lemkin's view of genocide is a broad category of destructive activity against groups. However Charny went even further than Fein and Chalk and Jonassohn in reducing genocide to physical violence. He made genocide a general term for any kind of mass killing, and took any sort of social content out of the definition. He completely lost the 'group' element that was so essential to Lemkin's original account and the Convention, and which the two more sociological definitions addressed. Yet his approach had the virtue of directly addressing the issue of genocide and military action, and it is illuminating to separate its valid and invalid elements. Clearly he rightly wished to indicate that the killing of civilians in genocide was in principle *different from* the killing of civilians in war. But when he defined the difference as that genocide occurs 'not in the course of military action against the military forces of an avowed enemy', he was misleading. In the classic Holocaust case, how else did the Nazis come to control their Jewish and other victims, except through war and conquest as Lemkin recognized? And how else did they come to practice their genocidal violence, except 'in the course of military action against the military forces of an avowed enemy'? It was during the course of the German invasion and

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<sup>59</sup> I.W. Charny, 'Toward a Generic Definition of Genocide', p. 75.

occupation of Poland that Jews were brutally uprooted, concentrated in ghettos, starved and over-worked. The German armies that invaded the Soviet Union and Yugoslavia, and the *Einsatzgruppen* or special action groups that accompanied them, slaughtered Jews alongside Soviet prisoners-of-war, Communists and other citizens. *To define genocide as outside the context of war is manifestly misleading and mystifying when the connections have often been so strong.*

Moreover Charny's approach mistook the meaning of genocide as well as its context. If genocidal slaughter of civilians takes place in the course of military action, what is its relationship with the 'normal' killing of soldiers or the unintended, 'collateral' killing of civilians that is going on at the same time? Charny implied no relationship. Yet it seems more plausible to propose that for the Nazis the Jews were also an 'avowed enemy', against whom (although they largely lacked military forces) a course of 'military action' was also undertaken. Thus as Lucy Davidowicz suggested, there was a 'war against the Jews'<sup>60</sup>: a special branch of the general Nazi war effort. Not only was genocide committed in the context of war, but it also was *a particular kind of war* that involved a new kind of enemy - an essentially civilian population - alongside more conventional ones. However 'essentially defenceless and helpless' unarmed civilians were, Charny's formulation, like Chalk and Jonassohn's, appeared to *define away the possibility of resistance*, or of a relationship of the victims to armed allies who might eventually defeat the genocidists. Many European Jews, after all, joined the war against the Nazis, either in resistance groups or in Allied armies.

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<sup>60</sup> Lucy Davidowicz, *The War Against the Jews*. The idea of the Nazi genocide as a 'war on the Jews' was current much earlier: Lemkin (*Axis Rule*, p. 88n) cites the Institute of Jewish Affairs of

To add to the confusion, Charny proceeded to develop a typology of genocide in which 'genocide in the course of an aggressive ("unjust") war' was one variety. This he defined as genocide 'that is undertaken or even allowed in the course of military actions by a known aggressive power, e.g. Germany and Japan in World War II, for the purpose of or incidental to a goal of aggressive war, such as massive destruction of civilian centers in order to vanquish an enemy in war.'<sup>61</sup> Even more confusingly, he proposed that 'war crimes against humanity' (an amalgam of the legal categories of 'war crimes' and 'crimes against humanity') should be considered in the 'definitional matrix for crimes of genocide'. Therefore although genocide was defined as 'mass killing ... not in the course of military action against the military forces of an avowed enemy', mass killing *in* the course of such action was considered a sub-type! Perhaps it is not surprising that Charny also argued against an excess of 'definitionalism'. He was right that extended debate on definition could lead to the point 'where the reality of the subject under discussion is "lost", that is, no longer experienced emotionally by the scholars conducting the enquiry.'<sup>62</sup> But this was hardly a justification for adopting loose definitions that made it difficult to distinguish types of violence in a coherent way. If we are to do justice to the victims, and help understand the enormities of violence, we cannot but engage with these issues abstractly as well as in concrete ways. The point is certainly to 'prevent and punish' genocide; but to do this, we must understand the beast. The issues of definition cannot be avoided in this task.

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the American Jewish Congress and World Jewish Congress, *Hitler's Ten-Year War on the Jews*, 1943.

<sup>61</sup> Charny, 'Toward a Generic Definition', p. 88.

<sup>62</sup> *Ibid.*, p. 81.

## Conclusion

I have argued in this chapter that in the international legal and political discussions of the 1940s, genocide began to lose two key elements of Lemkin's early formulations. One was its broad sociological meaning as social destruction, of a people and their way of life, and the second was the understanding of how genocide was related to war. Despite the Genocide Convention's many strengths, its drafting assisted both losses. Moreover, the debate at the end of the twentieth century consolidated them. Although later writers reformulated 'genocide' in more generic ways - including the destruction of any social collectivity or group or even any mass killing - none restored Lemkin's broader sociological understanding and most aided both the narrowing of the understanding of genocide to killing and its more comprehensive separation from war.

My argument is that these tendencies have been very unhelpful to the understanding of what genocide is, why it happens and how it can be prevented. To define genocide as 'physical destruction' begs the sociological question, *why* do genocidists engage in physically destroying their victims? However much they may despise the very bodies of their victims - labelling them 'vermin', 'cockroaches', and other terms indicating their fitness only to be killed - is killing itself a sufficient definition of their 'intention to destroy'? Or, as Lemkin contended, is killing one way in which groups as such are 'destroyed', as part of a more comprehensive 'attack' on their social existence? In this case, we can see the role of killing of its individual members as a *means* of destroying a social group. Killing, along other with forms of physical harm and cruelty, is the ultimate

destructive means, which in the end trumps all others. But it is not the primary *meaning* of group destruction: that lies in the end of annihilating the way of life, social networks, institutions and values of the attacked community. This amounts to *destroying the (real or putative) social power* of the target groups, which is embodied in their ownership of land, houses and other property, their schools, religious institutions, cultural and political organisation, and all the other ways in which their presence in given social spaces and territories is manifested.

Certainly violence and killing mark all genocidal processes. The intention to destroy a social group is always pregnant with violence, threatening the grossest violation of individual and collective lives. However extents of killing and physical harm depend on the particular ways that genocidists frame their destructive aims, as well as on instrumental decisions about the utility of different kinds of violence, and contingent factors deriving from contexts of war and resistance. Genocide is, as Lemkin recognised from his earliest formulations of 'barbarity' and 'vandalism', about social and cultural destruction. It involves batteries of coercive powers - legal, administrative, political, ideological and economic as well as armed, violent and military. Genocide always involves physical violence but it involves many other things as well. Defining genocide by killing misses the social aims that lie behind it. *Genocide involves mass killing but it is much more than mass killing.*

Inverting the question may help the reader grasp this point. Is all mass killing genocidal? Nearly all those quoted would disagree: mass killing is genocidal only when it is carried out with the intention of 'destroying' a social group. But how do

we know that there is such an intention? There has been much discussion of this issue, since such intentions are rarely clearly stated and must be inferred from patterns of action and euphemistic policy statements. However we can circumvent the question by asking instead, in what circumstances would deliberate, organized mass killing *not* be genocidal? Charny, as we have seen, provided an answer, which can be paraphrased as 'when mass killing is warfare'. The element of truth is that most mass killing other than for war must indeed be genocidal in virtually all circumstances. This is not because it is killing, hence Charny's positive definition is wrong. It is because it is difficult to conceive of reasons (outside war) for which collective actors would plan to kill a large number of people, *other than* to destroy that group of people or a larger social group of which the victims are considered members. Although individual killers and mobs sometimes slaughter fairly randomly, apparently with little or no reason, organized killing by collective actors is invariably purposeful, informed by conceptions of group enemies to be socially destroyed - even if this too fades into arbitrary, random violence in practice. Paradoxically, although genocide *is not* reducible to mass killing, organized mass killing *is* generally understandable as genocide. 'Can there be any case of mass murder which is not genocide?' asks Charny. He answers, 'I do not believe so'<sup>63</sup>, and this is almost correct: only relatively spontaneous killings by civilians, for example in ethnic riots and pogroms, might not be fully genocidal. But understanding killing as genocide involves filling out the larger social context of destruction - why the genocidists regard a group as an enemy, what is their larger plan to destroy the group, what role killing plays, and how they attempt to carry out their plan in the concrete

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<sup>63</sup> Israel W. Charny, 'Foreword', p. x.

social, political, military and other circumstances that they face, including the probable resistance of the target group and/or of armed actors allied to the group.

This understanding brings us back to war. War, supposed to be directed (in Lemkin's terms) against 'against states and armed forces', accounts for the largest part of organized killing in modern society and its only generally legitimate form. Genocide, directed 'against subjects and civilians' or 'populations' and hence by definition illegitimate, accounts for most of the remainder. The distinction is clear, but questions remain about the connections. Why does most genocide occur in contexts of general war, and why is even 'peacetime' genocide committed by militarized regimes? Why does war, under certain circumstances, develop into genocide? Are these connections causal? Or do they reflect basic similarities in the two types of action, how practitioners understand their aims, and how violent means fit? That is to say, are the connections *internal* to the character of the two modes of action, connected to what these *mean* to the actors themselves, and how therefore these actions should be *understood*?<sup>64</sup>

I have suggested that the commonality is that in both war and genocide, organized actors aim to 'destroy' the power of the enemy, through means that are pre-eminently violent. The idea of 'destroying' the enemy's power, as the end of war and the reason for the violence of its means, is fundamental to Carl von Clausewitz's *On War*.<sup>65</sup> Lemkin had a closely parallel understanding of genocide, with 'destroying' a group as its end and the reason for its use of physical violence.

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<sup>64</sup> Sociological readers will recognise my deployment of Weber's distinction between explanation and understanding. I return to this in Chapter 6.

<sup>65</sup> Carl von Clausewitz, *On War*.

The key difference lies in the nature of the enemy: in war, another state or armed force; in genocide, a civilian social group. Yet recovering Lemkin's broader sense enables us to see how genocide involves three elements borrowed from the older, more legitimate social practice of war:

1. The *identification of a social group as an enemy in an essentially military* (rather than political, economic or cultural) *sense*, i.e. against whom it is justified to use violence in a comprehensive and systematic way.
2. The *intention to destroy the real or imputed power of the enemy group*, including its economic, political, cultural and ideological power, together with its ability to resist this destruction.
3. *The deployment and threat of violence to destroy the power of the enemy group* through killing and physically harming a significant number of its members, as well as economic, political and ideological coercion.<sup>66</sup>

Seeing genocide in this way enables us to see it as a destructive *process* and escape from the trap of defining it by physical destruction alone. War, as a social activity, involves identifying the enemy, formulating the goal of destruction, and developing its means; so too genocide. War involves the development of strategies, and also many different moments of preparation, organization, supply and deployment; so too genocide. War involves political, economic and ideological as well as military power; so too genocide. Physical destruction is the ultimate manifestation of the destructive process of war, but it is not what is going on most of the time in most wars; so too in genocides. Thus genocide, like war, involves much more than the mass killing through which we most easily

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<sup>66</sup> Shaw, *War and Genocide*, p. 37.

recognize its destructiveness. Just as war can occur without large-scale killing, genocide too can occur where this element is not extensively carried out.

In the remaining chapters of Part One, I critically examine some of the broader intellectual tendencies that have surrounded and followed from the narrowing of the concept of genocide. I shall return to my new definition, reformulating Lemkin's 'broad' concept, in the concluding chapter of this book.