

Genocide – A Redeemable Concept? A Reply to Martin Shaw

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I welcome Martin Shaw's intervention to redeem the genocide concept by solving its various problems.¹ Decades after his first books on the subject, he remains one of its most perspicacious analysts.² Never shy of applying his scholarship to current affairs, Shaw was an early commentator on the war-genocide nexus in the full-scale Russian invasion of Ukraine in 2022 and in the Israeli campaign against Gaza since late 2023, both published in the *Journal of Genocide Research*.³ Indeed, along with Raz Segal's essay, 'A Textbook Case of Genocide', Shaw was the first to publish on the genocidal character of the Israeli attack on Gaza already on 13 October 2023 – six days after Hamas's attack.⁴

He intends to solve the problems of genocide – to make it a 'serious sociological and legal concept' – by clarifying the war-genocide relationship that he sees muddled by its critics, including myself in *The Problems of Genocide*.⁵ He agrees with my analysis that Raphael Lemkin introduced incoherence into his new concept of genocide by combining discrimination, persecution, 'crippling', and extermination. We also concur that the essence of genocide is the targeted destruction of an enemy civilian population as opposed to its armed forces. That is what genocide 'adds' to our conceptualization of criminality. It can be distinguished from war crimes and crimes against humanity thus: 'when perpetrators see civilian populations as *distinct* enemies and di-

1 See in this issue Martin Shaw, 'In Defence of the Concept of Genocide'.

2 Martin Shaw, *War and Genocide: Organised Killing in Modern Society* (Cambridge: Polity, 2003); Shaw, *What is Genocide?*, 2nd edn (Cambridge: Polity, 2015); Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge: Cambridge University Press, 2013).

3 Shaw, 'Russia's Genocidal War in Ukraine: Radicalization and Social Destruction', *Journal of Genocide Research*, 25.3-4 (2023), 352-370; Shaw, 'Inescapably Genocidal', *Journal of Genocide Research* (2024).

4 Shaw, 'Israel, Gaza, and the Specter of Genocide', *Byline Times*, 13 October 2023, <<https://bylinetimes.com/2023/10/13/israel-gaza-and-the-spectre-of-genocide/>> [accessed 13 December 2024]; Raz Segal, 'A Textbook Case of Genocide', *Jewish Currents*, 13 October 2023, <<https://jewishcurrents.org/a-textbook-case-of-genocide>> [accessed 13 December 2024].

5 Shaw, 'In Defence of the Concept of Genocide'; A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2021).

rect violence against them for that reason, this is different from targeting civilians as a means of pressuring an armed enemy, let alone from what is often called “collateral damage.”⁶

I agree – if we can solve the problem of genocide’s depoliticization. This is a central aspect in my historical reconstruction of the genocide concept but is not taken up by Shaw here. The problem is that because the Holocaust was made genocide’s archetype or ideal type, and because the Holocaust is regarded as an attack on Jews solely for being Jewish – for who they are and not for any political activity, like a rebellion – genocide is understood in the same terms: as a wanton attack on a national, racial, religious, or ethnic group for no political reason, out of hatred, ‘as such’.

However, while emotions like hatred accompany such violence, genocide is in fact driven by paranoid threat assessments, even to the extent of pre-emptively attacking a group because some of its members might engage in subversive political activity. Entire populations are persecuted, expelled, and/or destroyed to ensure that never again can, say, separatists among them threaten the integrity of the state. The Rohingya of Myanmar are a case in point. Most of this population in the Rakhine State was violently expelled in 2017 when the authorities decided to respond to a minor separatist attack by resolving to deal with possible future attacks in a once-and-for-all manner: by attacking and expelling entirely uninvolved civilians. This was a classic example of what I called ‘illiberal permanent security’ – when the pre-emption of paranoid threat assessment is confined to a bounded space, like a nation-state, in the name of an ethnos.

Liberal permanent security, by contrast, denotes often legal modalities of warfare, like aerial bombing, blockades, and sieges, which are animated by universalistic ideals like ‘making the world safe for democracy’. They, too, are driven by permanent security, though in the manner of enduring, low-intensity violence that is less likely to ‘shock the conscience of mankind’. Martin Shaw is playing liberal permanent security off its illiberal version to make a case for the latter in the modality of genocide. Permanent security has no explanatory power, unlike genocide, he argues. I think the reverse holds. Permanent security is the driver: genocide can be redeemed as a species of permanent security if understood as imbued with the political logics that in fact animate it. But not in its current depoliticized form.

6 Shaw, ‘In Defence of the Concept of Genocide’.

The current understanding leads to the problems that Martin Shaw identifies in his essay: the reluctance of the International Criminal Court (ICC) to prosecute Russian and Israeli leaders for genocide. At the same time, it remains the claim of choice for victim groups that experience identity-based targeting as a 'lived reality'.⁷ He observes this in relation to Gaza where he also argues genocide is taking place. The problems of genocide are nowhere more evident than in this case: because of the ICC's refusal to issue warrants for genocide. Why is genocide so difficult to prove? Because Lemkin, the United Nations Genocide Convention, and subsequent jurisprudence distinguish between genocidal and military logics and intentions. I am unsure whether Martin Shaw does the same, so I'll explain how and why this is an error.

The first problem is Lemkin's overly capacious concept of genocide, mentioned above. He went in this direction for two reasons. To begin with, he believed that peoples and nations were the building blocks of humanity: group identity was elemental to human identity, and nations were 'spiritual' entities. His own nationalism was Zionism, as James Loeffler has shown.⁸ He was sympathetic to the 'small nations' of Europe caught between the land empires of Russia and Germany; his layered identity as Jewish and Polish played a role in this orientation.

Then there was the contingent reason of wartime emergency: he observed that the Nazi destruction of European Jews was underreported and misunderstood in USA, where he was living – US President Roosevelt denounced Nazism primarily as an anti-Christian project. To have the Christian Allies empathize with the plight of Jews, Lemkin devised an extremely broad generic term that joined the fate of European Christians and Jews under Nazi occupation: persecution and extermination.

Like the Polish and Czechoslovak governments-in-exile in London, which published reports on the Nazi ravaging of their countries, he defined 'nation' equally broadly to include culture ('national spirit'), natural resources, political institutions, as well as bare life. Already in December 1940, the Polish authorities issued a public statement about 'German Crimes in Poland' that detailed infractions of the Hague Conventions governing belligerent occupation. Significantly, the statement interpreted nonviolent violations, like cancelling the Polish citizenship of Poles in German-annexed Poland and forcing Poles to vitiate their oath of loyalty to the Polish state, as part of 'one long chain of physi-

7 Shaw, 'In Defence of the Concept of Genocide'.

8 James Loeffler, 'Becoming Cleopatra: The Forgotten Jewish Politics of Raphael Lemkin,' *Journal of Genocide Research*, 19.3 (2017), 340–60.

cal and moral violence directed towards the destruction of the Polish nation'.⁹ This style of reasoning linked comparatively anodyne government regulations to mass atrocities by virtue of their shared intention: national destruction. The intensity of anxiety about national survival and the loyalty of occupied Poles led the exiled Polish government to conclude that the 'Violation of conscience . . . is even worse than physical terror'.¹⁰

Lemkin followed this thinking in proposing genocide as an augmentation of the Hague Conventions. It should include, he wrote:

every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one such group to the prejudice or detriment of another.¹¹

I am ambivalent about this definition. It does cover the experience of occupied peoples: the path to destruction begins with discrimination. This aspect is crucial to appreciating the experience of, say, Indigenous people for which culture and land stand at the centre of collective life. And yet the danger of incoherence is impossible to ignore, because if the law of genocide included persecution, it would be linked to the Holocaust, genocide's archetype. Since the Holocaust has become history's symbol of ultimate evil, it is little wonder that victim groups seek to associate their fate with genocide.

As might be expected, the victorious Allies and most other states in the United Nations had no intention of codifying this definition in a convention when they were debating its contents in 1947 and 1948. They did not want an international law that could impugn their various crimes, whether the Soviet mass persecution and murder of its citizens, the British and French suppression of uprisings and denial of independence in their empires, or the American anti-Black laws and practices in the country's southern states.¹² As is now well known, the

⁹ Moses, p. 187.

¹⁰ Ibid.

¹¹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), pp. 92-93.

¹² Cf. Moses, 'Inventing Genocide in the 1940s', in *The Problems of Genocide*, pp. 201-40; Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (Madison: University of Wisconsin Press, 2017).

UN Convention definition restricts genocide to its physical dimension; even the last article on child transfer is directed to the inability of the group to physically reproduce itself.¹³ The UN delegates modelled genocide on the Holocaust as they understood it: mass murder, concentration camps, torture, and the like intended to physically destroy the group.

The Holocaust was the ‘textbook case of genocide’, and certainly not armed conflict that occasions massive civilian casualties, which they cleanly delineated from genocide. After all, the Allies had killed hundreds of thousands of Axis civilians in their bombing of cities, and then countenanced the transfer (actually, ethnic cleansing) of Germans from east-central Europe towards the end of the war. These practices needed to be kept out of the convention, which was soon elevated into the ‘crime of crimes’, meaning that only genocide truly ‘shocked the conscience of mankind’. The massive civilian casualties caused by armed conflict were not so shocking according to the development of the West’s moral imagination. For that reason, victim groups, say Tamils and Uyghurs, claim they are victims of genocide rather than counter-insurgency although members of their groups were or are engaged in insurgencies. They experience the security campaigns against them as attacks on their national identity rather than as incidental (or ‘collateral’) consequences of state action directed against a separatist movement among them. The fact that counter-insurgencies end up attacking the group as a whole in various ways also raises the question of genocide, because, indisputably, destruction (the operative verb in the UN Genocide Convention) is occurring.

Lemkin understood this point in making his case of genocide. He began with a promising premise. Genocide, he wrote, was

the antithesis of the Rousseau-Portalis Doctrine, 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.¹⁴

13 Dimitrios A. Kourtis, ‘The Greek Civil War and Genocide by Forcible Transfer of Children’, *Journal of Genocide Research*, 26.2 (2024), 142-163.

14 Lemkin, *Axis Rule in Occupied Europe*, p. 80.

He then narrowed this frame to fixate on the ethnic, racial, and national groups covered by the minority treaties that the victors of World War I forced upon new states like Poland. This conceptualization could be redeemed if imbued with political logics; that is, if perpetrator intention is recognized as driven by political aims rather than by apolitical hatred. But he followed the conventional view that Nazi policies towards Jews and Roma differed from the policies towards Slavs by their unpolitical, ideological motivation – as ‘purely racial’:

The case against the Jews and the Gypsies was not based upon colonisatery [sic] but upon racial considerations [...]. The case against the Jews and Gypsies was of a purely racial rather than emotional political nature. The race theory served the purpose of consolidating internally the German people. The Germans had to be shown that they are racially valuable Nordics. Their favorable racial classification could be understood better by comparing them with those who were called and classified as vermin of the earth – the Jews and the Gypsies.¹⁵

In other words, he depoliticized the Holocaust and genocide of Roma by arguing that their victims were attacked because of their group attributes and not because of potential political activity: for who they are not for any action they (or members of the group) might undertake. He combined the identitarian and depoliticized focus in making the legal case for the prosecution of Nazis:

It appears in light of this evidence that the term genocide is a correct one since the defendants [Nazis] aimed to destroy, cripple, or degrade entire nations, racial and religious groups. The terms mass-murder or mass-extermiation in the light of hitherto produced evidence seems to be inadequate since they do not convey the racial and national motivation of the crime. [M]ass-murder or extermination do not convey the elements of selection and do not indicate the losses in terms of culture represented by the nation's victims.¹⁶

Alas the depoliticized conception of the Holocaust came to colour the understanding of genocide, rather than the politicized one Lemkin at-

15 Raphael Lemkin, ‘Hitler Case-Outline’, Jacob Rader Marcus Center of the American Jewish Archives, Collection 60, Box 7, Folders 12 and 13.

16 Raphael Lemkin, ‘Memorandum to R. Kempner’, 5 June 1946, United States Holocaust Memorial Museum, R. Kempner Papers (RS 71.001).

tributed to the genocide of Slavic peoples. This is where the concept's problems emerged. They could be solved by moving from the former to the latter conception. That is what I see Martin Shaw doing in his paper. It is time to recover Lemkin's original understanding that genocide is not distinct from warfare *but a mode of warfare against entire populations*, as he noted above.

We are unfortunately stuck with the outlandish view of the matter of Justice Robert Jackson, the American prosecutor at the Nuremberg Trials. In a *New York Times Magazine* article titled 'The Worst Crime of All,' he justified why aggressive wars were the supreme crime because all other wartime crimes derived from the act of invasion. From the terrible ravages of the war that he witnessed as he toured defeated Germany and learned of its crimes, he drew a further conclusion: 'If there are to be future wars we have got to win them [by] being better killers, by killing more and killing more quickly than the enemy, by killing with less risk to ourselves'.¹⁷ In making this declaration, he then proceeded to advocate violating the principle of distinction between combatants and noncombatants (the 'Rousseau-Portalis doctrine' invoked by Lemkin) by casting warfare as conflict between peoples and not solely by military forces. 'For the fact is obvious that modern war has become more and more a struggle between whole populations, not between armies alone. The issue is which shall be subjugated and which will survive'.¹⁸

This is what we are witnessing in Gaza. It is a scandal that the law of genocide, and the imaginary of evil that undergirds it, cannot easily capture it. I believe that Martin Shaw and I are united in believing that genocidal and military logics are in fact fused and run together. It is time for the law to catch up.

17 Robert Jackson, 'The Worst Crime of All', *New York Times Magazine*, 9 September 1945, p. 89.

18 Ibid.

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