

WHY INTERNATIONAL LAW FAILS TO PREVENT GENOCIDE: THE CIVILIZATION MYTH AND LEGAL EVASION

by

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ABSTRACT

Based on this expanded idea offered by Raphael Lemkin¹ this paper will critically discuss the failure of the international law in the prevention of the modern genocide. This discussion shows how applying a limited legal understanding of the definition of genocidal intent legitimizes state accountability across three case studies of U.S. racial policies, Indigenous erasure in Brazil, and existing persistence of violence in Gaza. This paper holds the view that genocide is systematically camouflaged in the terms of development, civilization, and security. Applying critical legal and postcolonial theoretical approaches, this paper suggests an enlargement of the legal meaning of genocide identifiers to those of predictable destruction, structural oppression, and colonial continuities. The study finds that unless there is a reform of such definitions, the international law is going to remain on impunity-making mandate other than justice delivery.

KEYWORDS: genocide, international law, Raphael Lemkin, colonial violence, genocidal intent, structural oppression

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¹ Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress 79-95 (Carnegie Endowment for International Peace 1944)

METHODOLOGY

The present work is a qualitative work with interdisciplinary perspective addressing both critical legal theory and postcolonial studies. The study involves a comparative approach to the case study of three historically and geographically differing instances on alleged genocide. Case selection criteria included: (1) documented state involvement in systematic violence against groups, (2) official justification of actions under development, security, or civilizational narratives, and (3) availability of both official documents and independent documentation. Primary sources include government documents, congressional hearings, International Court of Justice proceedings, and contemporaneous media reports. Secondary analysis draws on critical legal scholarship, postcolonial theory, and genocide studies literature. The theoretical framework integrates Lemkin's original genocide conception with contemporary critiques of international law's colonial underpinnings.



INTRODUCTION

The international legal instrument expected to provide protection against genocide has ironically acted as a protection to the bad guys, instead of a weapon of justice. The mass atrocities experienced world-wide do not end with the horrors that led to Genocide Convention of 1948, and they are even committed with impunity. This presents the basic question: is the international law just dead as an instrument of justice

DEFINING LEGAL “DEATH”

In this paper, legal death is conceptualized as not encompassing the total lack of legal rules but following a capacity of law to fulfil its professed purposes. We can call the international law dead when it is formally living but consistently failing to deliver on the ends to which it is devoted, that is foiled in its purpose and organized to cause such failure.² More precisely binds international law into legal death when it: (1) perverse its goal by privileging the interests of its perpetrators over that of its victims; (2) legalizes its violations by giving them legal protection; (3) provides systematic impunity by setting up procedural obstacles to holdings accountable.

The latter relies on the critical legal understanding of the law as having the possibility of fulfilling the role of what Roberto Unger has called false necessity: legal forms and institutions that seem neutral, inevitable, and serving certain interests.³

THE CIVILIZATION MYTH: HOW GENOCIDE WAS JUSTIFIED

The correlation between modernity and genocide points out how societies have traditionally masked the brutality of systematic violence in the name pacification and civilization. Such linkage between colonialism, genocide and the making of the modern states reveals that colonial domination never ended with the formal independence of concluding states since it was metamorphosed into a new form of power and social subjection. Societies in throughout history have built vertical hierarchies of a so-called civilization scale to classify the human population as one-which had to be considered as backward, which apparently slowed down the development and thus was authorized to be eradicated.⁴

² Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 79 (Carnegie Endowment for International Peace 1944)

³ Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 48-51 (1976).

⁴ Alonso Gurmendi Dunkelberg, *How to Hide a Genocide: Modern/Colonial International Law and the Construction of Impunity*, 27 J. Genocide Res. 6-7 (2025)

Raphael Lemkin coined the phrase genocide, not to denote mass killings, but complete destruction of cultural heritage and ethnic identity in addition to physical destruction.⁵ Within this context, the colonial system in itself was a method of genocide, whereby the more dominant countries were imposing their national identity systematically on conquered cultures, and totally destroying indigenous forms of life. Lemkin later refined his definition to include genocide of Indigenous peoples in the Latin America, as part of the way in which European colonialism held a continuity across the continents.⁶

The broad meaning Lemkin gave was swiftly endorsed by the anti-colonial critics that directly linked together the Nazi policies in Europe to the current state of colonialism. Yet as the international law was shaped after the war, the major powers consciously reduced Lemkin original definition to protect their own forms of genocide which were colonial in nature.⁷ The modern world order thereby possesses identical clergy like structures that Lemkin attempted to unmask in his revolutionary treatise.

GENOCIDE BY ANOTHER NAME: RACIAL OPPRESSION AND LEGAL EVASION

On January 23, 1950, the U.S. Senate held hearings regarding the Genocide Convention to discuss the possible consequences of the country's racial policies.⁸ Senator Brien McMahon stated that the distinguishing feature of genocide is the specific intent to destroy an entire people.⁹ Dean Rusk, the Deputy Under Secretary of State, stated that genocide had never occurred in America despite racial violence in the form of lynchings and the continued oppression of Black Americans.¹⁰

The Convention cast doubt on whether American racial violence would be considered genocide. Alfred J. Schweppe and other critics of the treaty believed that race riots and lynchings would be considered genocidal acts under the treaty.¹¹ Raphael Lemkin initially considered U.S. racial policies genocidal,¹² but later ruled out lynching and segregation as

⁵ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 79 (Carnegie Endowment for International Peace 1944)

⁶ Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 *Am. J. Int'l L.* 145, 147-150 (1947)

⁷ *Id.* at 9-10.

⁸ *Genocide Convention: Hearings Before a Subcomm. of the S. Comm. on Foreign Relations*, 81st Cong. 203 (1950) (statement of Sen. Brien McMahon)

⁹ *Genocide Convention: Hearings Before a Subcomm. of the S. Comm. on Foreign Relations*, 81st Cong. 203 (1950) (statement of Sen. Brien McMahon).

¹⁰ *Id.* at 204 (statement of Dean Rusk, Deputy Under Sec'y of State)

¹¹ *Id.* at 267 (statement of Alfred J. Schweppe).

¹² Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* 245-267 (University of Pennsylvania Press 2017)

being outside the Convention, since they were aimed at maintaining racial supremacy rather than destroying the Black population. Lemkin tried to appease the United States, but the nation decided not to ratify the Convention because of its fear of legal consequences. In 1951, the Civil Rights Congress presented a petition to the United Nations accusing the U.S. of committing genocide against Black Americans due to discrimination and acts of violence.¹³ Lemkin dismissed the allegations, arguing that the physical destruction of a group was necessary to prove discrimination as genocide.¹⁴

THE HIDDEN GENOCIDE: INDIGENOUS ERASURE UNDER THE GUISE OF DEVELOPMENT

The Brazilian government executed a planned Indigenous eradication program under development goals in the mid-twentieth century. In the 1940s, Brazilian dictator Getúlio Vargas initiated a civilizing project in the Amazon by promoting migration and launching programs such as the Roncador-Xingu Expedition for Indigenous land exploration. The Indian Protection Service (SPI) received a mandate to work with indigenous communities for assimilation, yet its programs led to violent attacks, complete cultural erosion, and abusive treatment of indigenous peoples.¹⁵

A government investigation led by Attorney General Jader Figueiredo revealed in 1967 that the SPI had perpetrated widespread crimes through their campaign to exterminate people like the Cintas-Largas by using dynamite, toxin weapons, and gunfire.¹⁶ The report investigated the connection between these government policies and starvation, forced labour and outbreaks of diseases. The result was met with worldwide anger when revealed by *The Sunday Times* and other news companies about the finances of the genocide. These sources included taking over Indigenous lands to grow rubber operations and make land deals. Indigenous people were considered mere obstacles to economic growth.¹⁷

The Brazilian government rejected genocide accusations while claiming that Indigenous extermination was limited to individual criminals who wanted land ownership. Brazil attempted to shape public perception by permitting International Committee of the Red Cross

¹³ Civil Rights Cong., *We Charge Genocide: The Crime of Government Against the Negro People* (1951), reprinted in 1 *Race & Class* 9 (1971).

¹⁴ Douglas Irvin-Erickson, *Genocide, the 'Family of Mind' and the Romantic Signature of Raphael Lemkin*, 15 *J. Genocide Res.* 273, 284 (2013).

¹⁵ Deena Metzger, *Germ Warfare Against Indians by Brazil Government Charged*, *L.A. Free Press*, Mar. 6, 1970, at 13.

¹⁶ *Germ Warfare Against Indians Is Charged in Brazil*, *Med. Tribune & Med. News*, Dec. 8, 1969, at 98.

¹⁷ *Id.*

(ICRC) investigators to examine the situation in the country. The 1971 ICRC report dismissed reports of genocide against Indigenous communities by describing their disappearance as a normal process through which their cultures naturally changed during Brazilian societal assimilation.¹⁸ The process of cultural assimilation served as a cover for ethnic cleansing since tribal groups faced displacement and dispersion followed by economic exploitation.

GENOCIDE, APARTHEID, AND THE NAKBA

The narrow definition of genocidal intent enables criminals to evade punishment. Scholars have criticized the current legal standards, which require the perpetrators to have direct group-destroying intent. Some scholars, who consider the case of Apartheid policies, believe that the foreseeable consequences of actions that result in destruction should be included in the definition of genocidal intent.

Several states involved in the ICJ case against Myanmar complained about the necessity to prove genocide by only reasonable inference since it creates an unreasonably high bar. South Africa brought to the ICJ that the Israeli military actions in Gaza against Hamas are, in fact, genocide, as they cause serious harm to civilians. Genocidal intent can be supported by statements from Israeli officials and widespread destruction.¹⁹ In this respect, the Israeli Apartheid can be associated with the modernity/coloniality and, consequently, the genocidal mode of operations is applied in the Gaza even though the modernity/coloniality has been completed with the humanitarian disguise that has been invented by Israel. First, Gaza Strip has been placed in the state of severe famine since March 2024 and specialists have realized that everything there is dreadful: they have mentioned that Gaza situation is catastrophic.²⁰

The Palestinian experience has been a clear representation of how genocidal mechanisms can be executed without the direct concomitant destruction of masses of people within a short period of time but under large-scale processes of dispossession facilitated by decades. 1948 Nakba denoted by the Arabic term meaning catastrophe, was the mass displacement of more than half the Palestinian population in the Arab-Israeli war.²¹ Palestine was multi-ethnic and multi-cultural before 1948, but as conflict intensified after more people joined due to increase

¹⁸ Int'l Comm. of the Red Cross, Medical Mission to the Brazilian Amazon Region: Introduction and Conclusions, 123 Int'l Rev. Red Cross 234 (1971).

¹⁹ Nimer Sultany, A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine, J. Genocide Res., Forum: Gaza: Int'l Humanitarian L. & Genocide (2024).

²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (S. Afr. v. Israel), Order, 2024 I.C.J. (pending).

²¹ G.A. Res. 194 (III), ¶ 11, U.N. Doc. A/RES/194(III) (Dec. 11, 1948).

in Jewish immigration and the UN partitioning plan, there was mass displacement of Palestinians.²² Already in December 1948, the UN General Assembly had demanded the return of refugees, restoration and compensation of property, but yet 75 years after, there are still over 5 million Palestinian refugees spread all over the Middle East.²³ What is happening today to Palestinians in form of Israeli settlements, evictions, confiscation of land and the demolition of homes is consistent with this dispossession of Palestinians and is a sign of how genocidal destruction can be a structural process and not simply one of mass killing.²⁴

The UN's recent formal recognition of this ongoing process is significant for expanding legal frameworks. In 2023 UN General Assembly passed resolutions requesting the annual celebration of Nakba anniversary as the first time that the UN formally recognized and institutionalized the memory of such events. The reproduction of this realization stems out of a larger understanding that at least in some sense the Nakba is still a process of displacement and cultural annihilation that has been and continues to be shaping Palestinian lives.²⁵

This recognition acknowledges that the Nakba was not merely a historical event but represents an ongoing process of displacement and cultural destruction that continues to shape Palestinian experience.

Genocide legislation should be changed, as suggested by legal scholars, to enable courts to deal with the devastating activities that occur under colonial or apartheid rule.²⁶ Systematic oppression is a new term introduced by scholars who support the use of Nakba.²⁷ The ongoing debate that continues to exist shows that international law does not have the full ability to deal with modern mass destruction and ethnic annihilation processes.²⁸

CONCLUSION

The influential states have been keeping on the back of the international law which was imagined to put an end to genocide. We can find it in the case of the unwillingness of the U.S.

²² Rashid Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* 13-45 (2006).

²³ U.N. Relief & Works Agency for Palestine Refugees in the Near E., *Where We Work*, <https://www.unrwa.org/where-we-work> (last visited June 24, 2025).

²⁴ Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 *Am. J. Int'l L.* 145, 147-150 (1947).

²⁵ G.A. Res. 77/23, U.N. Doc. A/RES/77/23 (Nov. 30, 2023); G.A. Res. 79/82, U.N. Doc. A/RES/79/82 (2024).

²⁶ Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* 328-345 (University of Pennsylvania Press 2017).

²⁷ Ghassan Eghbariah, *Nakba and the Legal Politics of Genocide*, *J. Genocide Res.*, Forum: Gaza (2024).

²⁸ Jessica Whyte, *A 'Tragic Humanitarian Crisis': Israel's Weaponization of Starvation and the Question of Intent*, *J. Genocide Res.*, Forum: Israel-Palestine: Atrocity Crimes & the Crisis of Holocaust & Genocide Stud. (2024).

to ratify the Genocide Convention, the massacre of the indigenous people in the name of development in Brazil, or the eternal violence of Israel in Gaza, but the patterns are identical: genocide is rebranded as civilization, security or progress. The issue here is the problem with the law as such.

Most legal scholars work towards broadening the genocidal intent to incorporate foreseeable effects of institutionalized discrimination. Reformed systems must include what has been called structural oppression: well-planned policies that will inevitably lead to the destruction of particular groups purely as an effect, despite the possible intentions not to do so. This would involve the systems of apartheid, compulsory assimilation policies and measures that established circumstances that were predetermined to achieve physical destruction.

Reconstructed structures have also to acknowledge colonial legacies of modern forms of violence.²⁹ Recent thinking regarding the continuous processes of Nakba through processes of displacement, dispossession, and cultural destruction serve to explain how these activities figure as processes of genocide even when they work slowly over many decades.

Focusing on establishing a case of a certain malicious intent to commit destruction of an entity, the courts fail to cover broader themes of violence, whether it is apartheid, forced assimilation or famine machines. Myanmar and Gaza are instances of how easily such loopholes provide an easy ground to perpetrators. In the meantime, the victims are never justified. It is not just a failure of the law but it is the failure of morals. The international law is incapable of having other meanings unless it recognizes the fact that genocide is not always about gas chambers and mass graves.³⁰ In the other instances it comes in the guise of a humanitarian aid, an economic growth or even a counterterrorism. The act needs to be amended to include destruction that may be reasonably foreseen (e.g., mass starvation when there is blockade), structural oppression (e.g., apartheid, cultural genocide), as well as post-colonial aftermaths (land expropriation, dehumanizing discourse). At present the Genocide Convention will remain what it is now: an instrument of impunity rather than justice.

²⁹ Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 Am. J. Int'l L. 145, 147-150 (1947)

³⁰ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 82-90 (Carnegie Endowment for International Peace 1944)