

10-10-2022

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Recommended Citation

Pensky, Max (2022) "Round Table (Part 4): *The Marginal Man*," *Genocide Studies and Prevention: An International Journal*: Vol. 16: Iss. 2: 11–13.

DOI:

<https://doi.org/10.5038/1911-9933.16.2.1898>

Available at: <https://digitalcommons.usf.edu/gsp/vol16/iss2/7>

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Round Table (Part 4): *The Marginal Man*

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Raphaël Lemkin and the Concept of Genocide

Douglas Irvin-Erickson

Philadelphia, University of Pennsylvania Press, 2017

320 pages; Price: \$46.95 Paperback

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This commentary is part of the Round Table Feature in Issue 16.2. Full version is available at <https://doi.org/10.5038/1911-9933.16.2.1929>.

The Marginal Man

by Max Pensky

In a line from *The Origins of Totalitarianism*, Hannah Arendt dismissed the significance of the Universal Declaration of Human Rights and, indirectly, the Genocide Convention as well. These new, highly normative instruments of international law, Arendt wrote:

... were sponsored by marginal figures—by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued show an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them seriously...¹

In her chapter on Arendt and Lemkin,² political theorist Seyla Benhabib offers Arendt's quote to document both Arendt's deep initial skepticism regarding the power of international law to exert meaningful effects on the new constellation of mass political movements of the 20th century. Among the "marginal figures" that Arendt scorns is almost certainly Raphaël Lemkin, who in all likelihood Arendt had never met, even though their geographical and personal spheres overlapped considerably.

Douglas Irvin-Erickson also offers this quote toward the end of his fine intellectual biography, *Raphaël Lemkin and the Concept of Genocide*. As the biography of a concept and a historical constellation, and not just a man, Irvin-Erickson's book joins the ranks of recent studies exploring the remarkably specific origins of the universalist norms that transformed international law in the decades before, during and after the Second World War and the Holocaust. These studies, including Benhabib's recent work,³ Philippe Sands' *East-West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*⁴ that explores the relation between

¹ Hannah Arendt, *The Origins of Totalitarianism* (New York: HarperCollins Publishers, 1951), 292.

² Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity Press, 2013), 43.

³ Seyla Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isiah Berlin* (New Jersey: Princeton University Press, 2018).

⁴ Philippe Sands, *East-West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (New York: Vintage Books, 2016).

neighbors and eventual adversaries Lemkin and Hersch Lauterpacht, and James Loeffler's *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century*,⁵ have provided us with rich, concrete accounts of a small group of Jewish legal theorists and jurists, rooted in the shifting and violent political universe of eastern Europe, in what was, alternately, East Prussia, Poland, and Ukraine. Their experiences of marginalization and persecution, of cultural and physical vulnerability under capricious political authority, and ultimately of the destruction of their families and their world, appropriated the concepts and mechanisms of international law with the goal of transforming a collection of treaties and customs, largely designed to lubricate international commerce, into a demand for the protection of individuals from obliteration by their own political authorities.

Better than any previous biography, Irvin-Erickson's book is clear, adept and engaging in reconstructing the political bargaining that, bit by bit, produced the text of the Genocide Convention; a document that, depending on one's point of view, is a singular leap forward in the power and purpose of international law, a deeply problematic betrayal of Lemkin's motivation vision, or, most likely, a messy combination of both.

The post-Convention life of the genocide concept, as a result, has always been peculiarly two-faced. A "narrow" legal definition often appears so narrow as to be nearly useless as the powerful legal response to state targeting of vulnerable groups, as we see most evidently in the lofty evidentiary bar for special intent that the International Court of Justice now sees as settled law, or the claim that China's campaign to eradicate the Uighurs as a distinct ethnic, national and religious group, lacking only the direct evidence of mass killing, does not meet the legal threshold of genocide.

At the same time as this steady winnowing down of the reach and relevance of the legal construct, of course, once the concept of genocide broke from its narrow legal channels, it became so mainstreamed and broadened that it is now available to condemn and justify everything from unprovoked attacks on Thanksgiving turkeys to national defense against Russian paramilitaries in Donbas. What is increasingly hard to locate in this bipolar development is precisely the sane and motivating middle ground, the promise of law as both expression and enforcement of a global consensus that demands enforceable limits on state power, that motivated both Lemkin and the rest of his cohort in the first place.

Why did this happen? One low-hanging explanation is that Lemkin, like others, was simply overconfident in what law, and especially international law, could accomplish as the "gentle civilizer of nations," as Martti Koskeniemi⁶ put it in a classic study. Irvin-Erickson's detailed history of the concept of genocide makes this easy explanation harder, fortunately. The legal route toward a global norm restraining sovereign attacks against a state's own domestic population never lost sight of the fact that norms, whether legal, moral, or otherwise, only exert an effect on would-be perpetrators of atrocity crimes if the norm succeeds in catalyzing an international political shift of values, priorities, and interests strong enough to change potential *genocidaire's* calculations of cost and benefit. For that, a new legal regime would need to be met halfway, so to speak, by corresponding normative and institutional changes in international politics. For a brief window stretching from the beginning of the 1990s to roughly the end of the first decade of the 2000s, that change seemed, with many reservations, to be taking place. For many observers, it is now in full retreat.

Thus, while it is tempting to lay at least a part of the blame for the erosion of this law-driven constellation of international atrocity prevention on the marginalization, the legalism, and the insufficient intimacy with the demands of *Realpolitik* characteristic of the founding generation (those "few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists," as Arendt

⁵ James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven: Yale University Press, 2018).

⁶ Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

dismissively wrote), it is a temptation worth resisting, or at least seriously qualifying. As a marginal figure, Lemkin was also marginalized from the kind of political engagement that would no doubt have proven useful once his plan for legal protection of vulnerable groups had to go through the sausage factory of international political bargaining. Irvin-Erickson's book is at its most informative and poignant as it reconstructs Lemkin's gradual abandonment, through a series of sometimes questionable compromises of what is arguably the core innovation of his own conception of genocide: the recognition of state efforts to eradicate the cultural foundations of national groups as a distinctive crime, regularly perpetrated, with catastrophic results, but utterly excluded from domestic criminal legal systems due to the peculiarities of state sovereignty.

Would Lemkin have had more success in preserving more of the most valuable elements of his own conception of genocide if he had had more experience, stature, and access (and, to be honest, native talent) as a political negotiator? Very possibly. But his very marginality, as the book documents, actually had much to do with the impressive success that Lemkin did in fact achieve. An international jurist from a small patch of hinterland lying somewhere on the shifting border between Poland and Ukraine turned out to be perfectly positioned to catalyze this most complex and contested of concepts. Change can be expected from the margins most of all. And as the global community of genocide prevention practitioners works to preserve what it can of the power of that concept, it is likely that similarly marginalized actors, perhaps more than important political figures, will take the lead.