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DOCUMENTS AND DISCUSSION

Responses to Günter Lewy's contribution: "Can there be genocide without the intent to commit genocide?"

With intent to deny: on colonial intentions and genocide denial

Günter Lewy has a transparent historical agenda—to define away any genocide that is not the Holocaust. This time his angle is a far from original distraction. He is by no means the first to use the Genocide Convention to divert attention from the historical enterprise inspired and passionately pursued by its author. Could Lewy be unaware that it was Raphael Lemkin who issued the challenge of integrating the horrors of the Shoah into the Nazi colonialist project and a much larger history of genocidal destruction? Aware or not, Lewy sets out to impose a more limited idea of genocide to fit a more truncated approach to history.

The key matter he wants everyone to address—*again*—is intention. Or, let's nail this down, not "intention" but *intent*. The insistence on legalistic terminology is significant. Most obviously (and purposefully) it skews everything towards law, prosecution, judicial standards of proof, and a court verdict. More importantly, it tends, or—quite plainly—*intends*, to restrict the definition and interpretation of genocide to an actual or putative court setting. That has some virtue in the pursuit of perpetrators, though even there we would do well to be wary. Historically, it is not very bright. Historical understanding is a very different enterprise from criminal investigation and prosecution. It calls for a degree of subtlety, inference and imagination that might rightly be ruled out of order in a court. To restrict historical enquiry to legal rules of evidence makes for the reverse of historical justice. The effect (and sometimes the intention) is injustice; the evidence admitted is partial and inadequate; the complexities of the case are covered over rather than elucidated; the history is primitive.

Primitive is not the kind of word one readily uses about the work of another historian. Even in the case of Keith Windschuttle (and my argument here will continue to refer to Australian genocide) I thought hard before deciding it was the most appropriate descriptor of a method that claims an almost magical status for one part of the historical record.[1] Lewy seems to share Windschuttle's faith that a certain kind of document, privileged by its official status, will reveal all that needs to be considered in matters of "intent to destroy." Even in a court of law,

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the special arena of historical judgement Lewy promotes, official documents are not the only ones admitted and few historians would accept that criteria of legal admissibility have much to do with criteria for historical usefulness. One hesitates even further before invoking the name of David Irving, whose scandalous campaigning for Holocaust denial, waving fistfuls of money on television for the document that proves Hitler's complicity, Lewy knows as well as anyone. Yet, like Windschuttle and Irving, he is willing to go down the path of denying genocide where a very narrowly defined criterion of documentary evidence suits his purpose.

Let's be clear. Intentions are supremely important in the world's grim record of genocide—but not because of they are recorded as "intent to destroy." They matter least where they look like the legally decisive smoking gun. They matter most because of all the ways they are disguised. Intentions were disguised by the perpetrators of atrocities to make sure they were not called to account and they were disguised—also to escape responsibility—by those who should have called perpetrators to account. But that is only the beginning of the difficulties for a judicial criterion of criminal intent. Perpetrators and judicial authorities were able to disguise genocidal intentions from others most effectively where they were also disguised from themselves—by appeal to the exigencies of self-defence, by reference to the larger aims of colonization, and to explicit measures asserting benign intentions towards the indigenous peoples who nevertheless continued to "disappear."

Wherever one goes back to the rare colonial trials for illegal acts against native peoples, the actors and their beliefs step into the public arena with a flair historians have always cherished. In most cases the shared ideology of prosecutors and defence counsel, judge and jury is declared in words and deeds; sometimes rifts are revealed that shed rare light on undeclared assumptions underlying both the legal system and the colonial order. It immediately becomes plain (one might think) that legalities have never been as simplistic as banging on the definition drum would have us believe. Lewy almost seems to agree: "The significance of the issue goes well beyond the question of how best to define genocide as a crime under international law."

If only Lewy would take this point from his opening paragraph seriously, and separate historical understanding from legalistic standards of "proof." His failure to do so infuses his entire argument. Legal intent has to be "*specific*" not "*general*," "regardless of the results achieved." So "there can be no such thing" as genocide by negligence—omitting to protect a population against a preventable outbreak of disease, perhaps. Yet once one pauses over the five active measures listed under Article II of the Convention, as examples of "intent to destroy," the clarity required for proof begins to dissolve. Even the utterly straightforward (a) "Killing members of the group" becomes anything but straightforward amidst the confusions and obfuscations of war or frontier conflict. And (b) "Causing serious bodily or mental harm to members of the group" awaits a defence questioning "serious," "bodily," and the even more slippery "mental" kind of "harm," before the issues of "causing" and "intent" even come into play.

And how is all this to be judged? What can be adduced? For aficionados of definitions the latest edition of the US Federal Rules of Evidence has this one:

"'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[2] One has to wonder how a US genocide trial under the UN Convention (a more unlikely historical occurrence is hard to contemplate) would proceed with all the matters Judge Lewy would insist on excluding. There would have to be an historical argument ranging over much of the ground he would declare irrelevant. Add to this the reluctance of common law ever to define "beyond reasonable doubt" and then the ancient principle of *mens rea*, by which the guilt of intention should be judged and, well, perhaps we still have time to work on the indictment . . .

There is a very powerful reason for relying on documented expression of intent in prosecutions of genocide or other serious crimes. It is simply that any other courtroom proof is complicated, inferential and open to abuse. We all know (or should know) cases of unsafe convictions, miscarriages of justice based on expert evidence allowed to pass without comment, or with approving comment, from the judge. Most often the critical issue is one of identification but juries have also been confused by authoritative opinions and statistical probabilities.[3] Reading Lewy (and not only in this essay) one might believe there was no contested vision of the law as simply laid down. A passion for "black-letter law" does not amount to juridical certitude, and the search for the uncontested "order" proving intent should raise just as many questions. Even where Lewy recognizes questions in the case of the Holocaust, with regard to Nazi genocide of Gypsies he at once reverts to documentary certitude. A "lengthy paper trail" allows him to claim certainty about lack of intent to annihilate all Gypsies. Involuntary sterilizations do, he concludes, "fulfil the letter of the convention" but in every other respect genocide is the wrong word.[4]

The letter of the Convention, he must know, has never been so simple in practice. When Leo Kuper outlined the difficulties in getting agreement he noted how the "appreciable achievement" was beset from the outset with reservations and disputes, especially over cultural genocide and politically defined groups. "One can see, in the controversies about the wording of the Convention, many of the forces which have rendered it so ineffective."[5] The wording continued to cause problems for some of the most important powers, notably the United States. The belated Senate ratification in 1986 was hedged with reservations, including a statement that the "intent to destroy in whole or in part" means "the specific intent to destroy, in whole or in substantial part"—wording that was reproduced in the 1988 Definition of Genocide in the Criminal Code of the United States. Curiously, the criminal code changed the key provision of Article IIc of the Convention, "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" to "subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part." That could be read as a less deliberate and calculating kind of intent, spread even wider when the Code proceeded to add a serious offence of *incitement* to genocide.[6] Where, one wonders, might that have left some citizens of the United States during the founding years of the nation?

At the same time as the US Congress was finally getting to grips with the specific obligations of the Genocide Convention, two kinds of historical awareness were growing in potentially conflicting ways. There is now a general recognition that the naming and understanding of what would henceforth be called the Holocaust was a historical phenomenon with causes and effects specific to place and time—to generations, international and domestic politics, media and public relations. In the English-speaking world the screening of the television series *Holocaust* in 1978 was the breakthrough to popular recognition of the Jewish genocide; academically, a still-growing tide of Holocaust studies was set in motion.[7] Potentially, there was nothing to stop research on the Shoah cross-fertilizing enquiry into other genocides: and (as this journal has demonstrated) examination of the other genocides can further understanding of the National Socialist project that Lemkin, both the architect of the Convention and founder of genocide historiography, saw as a whole. Regrettably, a defensive and sometimes aggressive tendency to establish Holocaust uniqueness inhibited the necessary contextualizing studies for much of two decades.

Still, there was considerable academic exertion in the cause of a more comprehensive understanding of different genocides, and a more historically inclusive definition. In their 1990 review of the literature, Chalk and Jonassohn, who themselves come down on the side of a "deliberately restrictive" definition of intent, note how Helen Fein tried to include within her typology of "calculated murder" kinds of society that caused deaths by pursuing other aims. Her category of "developmental genocide" is characterized as one "in which the perpetrator intentionally or unintentionally destroys people who stand in the way of the economic exploitation of resources." It was a signal advance, though where this left "intent" was obviously a problem. In 1988 Fein advanced again, defining genocide as "a series of purposeful actions by a perpetrator to destroy a collectivity through mass or selective murders of group members and suppressing the biological and social reproduction of the collectivity." Since such activities as "increasing infant mortality, and breaking the linkage between reproduction and socialization of children in the family or group of origin" could count as amplifications of the Convention, and the Convention already envisaged perpetrators other than the state, it might not seem so different, but "a series of purposeful actions" was considerably more realistic about many genocidal outcomes than a notion of documented "intent."[8]

Other scholars, not least Leo Kuper, were alert to the difficulties of fitting the genocide of indigenous peoples into a strictly constructed model of official intent. He reprinted a long passage from Eric Wolf on the extermination of the Aché in "the progress of civilization" and called it "this genocidal process."[9] Even Yehuda Bauer, once the Nazi genocide of Jews was separated out as the unique case of "Holocaust," was willing to extend his definition of "planned destruction" to "the policies of American settlers toward many native American tribes."[10]

This was the context of genocide history when Wallimann and Dobkowski edited *Genocide and the Modern Age*. The book had much to say about the

Holocaust, the Armenian genocide, warfare, state violence and criminal acts but it broke new ground mainly by opening up questions of structural violence and larger historical processes. In examining the "aetiology" of mass death it aimed to problematize the question of intention. No one contributing to the book intended to argue against the intent provisions of the Genocide Convention and even on Lewy's reading Walliman and Dobkowski do not exclude intention: they very wisely say that within larger historical processes "it is harder to locate."

That was very much the sense underlying my contribution to the book. In searching for the "relations of genocide" I had in mind the Marxian principle that there are historical realities (impersonal and powerful, though produced by human activities) that influence perceptions, actions and relationships in ways that are independent of individuals' intentions.[11] There has always seemed to me as much commonsense as theory in this proposition but only a few historians have taken it seriously in the study of genocides. While Lewy is by no means the first to object to my views about intent it continues to be beyond question that the colonial project of taking land inevitably meant taking lives. In the settlement of Australia Dirk Moses showed how actively genocidal episodes combined with the pressures of settlement to raise the number of Aboriginal dead but his careful engagement with the history did not dispute the genocidal nature of the structuring dynamics.[12]

Why it is so important to Lewy and others to question such dynamics? It can't be only the patently inadequate assertion of legal criteria for historical interpretation. Might it be that "the facts on the ground" are too overwhelming to fit the legalistic playing field he summons juridical experts to mark out? Clearly, he believes the matter is too important to be discussed in any other terms; I believe it is too important to be so confined. And, crucially, I do not intend to let "intention" be removed from what he calls "structural violence as a form of genocide." The British—meaning those governing the state and a coalition of public and private interests—determined to plant colonies in North America and then Australia and on these two continents (in contrast to their imperialist enterprise in Asia and Africa) planting meant supplanting. That is a huge fact covered over by the unholy alliance between those who brought death and destruction to indigenous peoples, crying that they did not mean to harm anyone, and denialists who say that if the intention was primarily to take over the land, genocide as "intent to destroy" cannot apply. Both the intention and its effects were visible from the outset, as they were in my original argument:

> It will still be objected that taking over a continent and destroying its inhabitants are two very different things. And—as I have been at pains to agree—the determination to do one did not imply the *intention* to do the other. Only a minority "had to" kill, as they saw it, in defence of their property, or in defence of their own lives—lives on the line because of commitment to property. But the violence accompanying the appropriation of the land was of a scale and ruthlessness—largely uncurbed by official intervention—which could leave no doubt in black or white minds as to the fate of those who resisted the "inevitable" course of events, and it can be no coincidence that it was accompanied, among those with no thought of murder on their minds, by much talk about the "inevitable" dying out of the

> black race. I do not think it is too simplistic to see in this dominant opinion the most comfortable ideological reflection of a relationship which could only be recognised in good conscience for what it was—a relationship of genocide.[13]

There is no "no one is responsible" thesis here, but a typically convoluted mix of self-justifications amidst the fraught activity of claiming a continent. That disease was the major cause of death in Australia as in the Americas is not at issue and I doubt anyone could agree that I "dismiss" its significance in the passage below. The difference with Lewy is in my insistence that the statistics and interlinked causes of death be counted in any reckoning of genocide:

> By 1850 whole tribes from the region of Sydney had disappeared. The story was the same at Newcastle, further North. In the Port Phillip area, after the settlement of Melbourne in 1835, the numbers dropped from more than 10,000 to less than 2000 in eighteen years—a decline of over 80 percent. Around Geelong, a centre of pastoral expansion, the decline was from 279 to 36. In the new colony of South Australia, the number of Aborigines in the region of Adelaide fell from 650 to 180 in the fifteen years after 1841. Relatively few of these deaths—perhaps a fifth of them—were the result of direct violence. The countless undocumented atrocities and the known killings on the advancing frontier of settlement do not account for the vast proportions of the disaster. By far the greatest number—possibly two-thirds—were killed by the previously unknown illnesses against which Aborigines had no resistance (chiefly smallpox) but also by alcohol and malnutrition. Aborigines had a low resistance to alcohol and tobacco and the respiratory complaints which were exacerbated by the European conventions of clothing (often worn when wet) and housing (now fixed, but without adequate sanitation). Malnutrition, in the almost instantaneous adaptation to a high carbohydrate European diet—flour and sugar were irresistible innovations—played a part in the dramatically lowered birthrate, as did venereal disease. A greater part, too easily underestimated, was played by demoralization and despair.

My footnote goes further in raising the critical role of disease. "Noel Butlin, *Our Original Aggression* (Sydney: Allen and Unwin, 1983) speculates on the possibility that the Aboriginal population of southeastern Australia was already severely depleted by smallpox before most contact with settlers occurred." Two decades later Butlin's theses are still considered speculative, but I no more "dismiss" them than I do the whole question of health-related fatalities. I only wish Lewy (and other critics he cites) would take them more seriously. My purpose in rehearsing the combination of factors was to demonstrate the pervasiveness of the catastrophe, in which neither Europeans *nor Aborigines* could imagine the original Australians surviving.

> With many of the their women bearing mixed-race children to white men, the black birthrate dramatically in decline, their social structure destroyed, and their traditional culture impossible to maintain, many Aborigines could hardly envisage a future in such a cataclysmic world.[14]

Whether the propaganda statements I cite ("the perpetuation of the race of Aborigines is *not to be desired*") should weigh as intent may be hard to judge; I give weight to the actions that were excused by the words. Some redefinitions of genocide (see Fein in Gigliotti) have made persistence in a destructive course equivalent to intent to destroy. That makes sense, up to a point. The point,

again, is realism about the nature of the destructive pressures and the ability of those who were associated with them—settlers, gold-seekers, administrators, the first thinly-spread and ignorant health workers—to mitigate the effects of a colonization they had no thought of abandoning. Should all these people therefore be classed as perpetrators? I do not think so. Commentators at the time were less hesitant than later historians to recognize responsibility for the catastrophic outcome and more aware that the whole enterprise, with its globally distributed causes, was to blame. They could see that the intention to take over the land meant death—most often by disease and despair—to the people they displaced.

Reading Lewy, one might think this was all at odds with Lemkin's original idea of genocide. If he had attended to Lemkin's manuscripts on Australia published by Anne Curthoys, or to recent writings on Lemkin and colonialism, by Curthoys, Docker, Moses and other scholars, he would have had to recognize that the founder of genocide studies saw the deaths of indigenous peoples as a function of colonialism, rather than of "intent to destroy." The section of his writing on Tasmania under that heading emphasizes official benevolence towards the natives and the government's inability to control "the riffraff of Britain [. . .] sent by thousands to the island." Lemkin's conclusions (which I did not know 20 years ago) leave no doubt that benevolence is not enough to prevent colonial genocide.

> With the will to live destroyed, the natives succumbed rapidly to disease and vice and within a few decades the entire race was wiped out. The blame for this destruction of a race lies on the cruelty and lack of understanding of human beings, on the cruelty of the selfish, grasping settlers and convicts who attacked and aroused the spirit of revenge of the originally peaceable natives, and on the lack of understanding of the men who in the end strove to protect them and make them conform to the standard of an alien civilization, and killed them with misguided kindness.

This is not just a general conclusion. It is backed by careful reading of the resources available to him, and consideration of many factors: "Prostitution and treatment of women; Decline in birth rate and child mortality; Stealing of children, Legal status; Liquor; Disease; Natives in captivity." These headings are given equal status with "Cruelties of soldiers and settlers," balanced by "Reactions of public opinion." The balance does not weigh against a judgement of genocide. While "the Tasmanian press and public figures both in Tasmania and in England were horrified at the unfairness and cruelty practiced in the vanquished country" the settlers of Tasmania "felt on the whole completely justified in their treatment of the aborigines."[15]

Why should genocide as the descriptor selected by Lemkin continue to come under attack? Not every questioning of colonial genocide has the denialist undertones of the black-letter intentionalists but my feeling that genocide studies may have reached the high tide mark is bolstered by the many attempts to find alternative ways of accounting for the casualties. *Warfare* leaves victims of conflict rather than conquest. *Resistance* does the same. *Disease*, as we have seen, is ideal for making mass death independent of colonial intentions: microbes cannot be prosecuted for intent. *Massacre* is certainly a fine example of intention, only not

intention to do away with a whole people. Now we have *very violent societies*, in which neither intentions nor historical processes are genocidal.

If such discussion is to be fruitful it will need more sophistication about both historical processes and historical interpretation than Lewy represents.[16] To read the documentary record without an eye for coded designs and experienced actualities leaves little to complicate the emphasis on declared policy. Reading Lewy reminds us that only historians who take seriously the truth that intentions and understandings are expressed in actions as well as words can have access to the realities of the past. They need to recognize that some realities more powerful than individual intentions have destroyed peoples who lived with their own lands, languages and cultures for thousands of years. And they need something Lewy is unable or unwilling to communicate: an ear for those almost extinguished voices in distant places, and a human solidarity with the terrible sufferings of very different others.

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Notes and References

1 Tony Barta, "Decent disposal: Australian historians and the recovery of genocide," in: Dan Stone, ed., *The Historiography of Genocide* (Palgrave, forthcoming).
2 US Federal Rules of Evidence, "Relevant evidence" (Rule 401), December 2006, available at http://judiciary.house.gov/media/pdfs/printers/109th/31310.pdf.
3 False statistical inference about the number of times two cot deaths might occur in one family was a critical issue in sending the mother to die in jail for murdering—with intent—her own babies. ABC Radio National Law Report, 28 August 2007.
4 Günter Lewy, *The Nazi Persecution of the Gypsies* (New York: Oxford, 2000), pp 223–224.
5 Leo Kuper, *Genocide* (Harmondsworth: Penguin, 1981), p 24.
6 Both documents are reprinted, with the Convention, in Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven: Yale University Press, 1990), pp 50–53.
7 The word "Holocaust" was not widely used in English in 1978; it entered the German language in 1979 when the television drama was screened in West Germany. Anton Kaes, *From Hitler to Heimat: The Return of History as Film* (Cambridge, Mass. and London: Harvard University Press, 1989), p 30.
8 Chalk and Jonassohn, pp 15–16. Two years further on, Fein produced a revised definition: "Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through the interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim." Her remarks on the question of intent largely follow Chalk. Helen Fein, "Defining genocide as a sociological concept," in: *Genocide: A Sociological Perspective*, pp 8–31 (London: Sage, 1990). Reprinted in Simone Gigliotti and Berel Lang, *The Holocaust: A Reader* (Oxford: Blackwell, 2005), pp 398–419.
9 Kuper, p 40.
10 Chalk and Jonassohn, p 20.
11 Tony Barta, "Relations of genocide: land and lives in the colonization of Australia," in: Isidor Wallimann and Michael N. Dobkowski, eds, *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, pp 237–251 (Westport: Greenwood Press, 1987). The historical relationship of Marxism and genocide is addressed from another perspective in Tony Barta, "On pain of extinction: laws of nature and history in Darwin, Marx and Arendt," in: Richard H. King and Dan Stone, eds, *Imperialism, Slavery, Race and Genocide: The Legacy of Hannah Arendt* (New York: Berghahn, 2007).
12 A. Dirk Moses, "An antipodean genocide? The origins of the genocidal moment in the colonization of Australia," *Journal of Genocide Research*, Vol 2, No 1, 2000, pp 89–106. See also the introduction in

Moses, *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (New York: Berghahn, 2004).

13 "Relations of genocide," p 248. The ideological case has since been thickened up by Patrick Brantlinger, *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800–1930* (Ithaca and London: Cornell University Press, 2003).

14 "Relations of genocide," pp 243, 250.

15 Lemkin's chapter on Tasmania appeared for the first time in *Patterns of Prejudice*, Vol 39, No 2, 2005, pp 171–196, "Colonial genocide" issue, A. Dirk Moses and Dan Stone, eds. See also Ann Curthoys, "Raphael Lemkin's 'Tasmania': an introduction," pp 162–169. Ann Curthoys and John Docker, "Genocide: definitions, questions, settler colonies," introduction to special section "'Genocide'? Australian Aboriginal history in international perspective," *Aboriginal History*, Vol 25, 2001, and Michael A. McDonnell and A. Dirk Moses, "Raphael Lemkin as historian of genocide in the Americas," *Journal of Genocide Research*, Vol 7, No 4, 2005, pp 501–529.

16 Patrick Wolfe, "Settler colonialism and the elimination of the native," *Journal of Genocide Research*, Vol 8, No 4, 2006, pp 387–409, for example, is much more searchingly engaged with the real conceptual and historical issues.

If it looks like a duck, if it walks like a duck, if it quacks like a duck

Introduction

Guenter Lewy is a renowned scholar and a committed intellectual, who has, in the past five decades written and published on such diverse and complicated matters.[1] In his paper, he poses an important question. The question of intent is paramount for some historians of genocide, not so much for juridical or legal reasons, but because questions of the ethics of research are involved. In my response to Professor Lewy's arguments I would like to take a twofold approach. First, I shall deal with legalistic problems that are at the core of Lewy's arguments about intentionality, and second, I shall question Lewy's contention that legal arguments can be at the core of a definition of genocide. Instead I shall bring forth the argument that it is detrimental to historical research to be stuck in legalistic definitions.

Intent

"There are simple remedies for sausages that are too long." This is also true for a discourse on intentionality of genocides. John B. Quigley, a recognized scholar of genocides, published a standard work on genocide in 2006. In his fourth chapter he deals with the oxymoron "Intent without Intent."[2] This alone should suffice to indicate that there is a problem with simple intent.

The alleged paramount importance of intent in the definition of genocide is enforced through a simplistic argument, i.e. the differentiation between homicide and murder. "The difference between homicide and murder, for example, turns on

the degree of intent that is present in the act of taking life," to quote Lewy. This is not so. According to Alan C. Michaels, between "[. . .] intentional murder and manslaughter lies a series of crimes sharing some, but not all, of the characteristics of both offences. [. . .] The historical development of unintended murder and the variety of current attempts to define the offence reveal this disagreement."[3]

Intent, as defined in US courts, is more than the simple determination to act in a certain way. Intent is also given if a person "contemplates any result, as not likely to follow from a deliberate act of his own."[4] Intent is a "state of mind," a "[. . .] mental attitude which can seldom be proved by direct evidence, but must be ordinarily be proved by circumstances from which it may be inferred."[5]

I do in fact doubt that "[p]ractically all legal scholars accept the centrality of the intent clause in the Geneva Convention," as Lewy states. The intent clause, however, is an obsolete legal principle both in criminal and in tort law and has been replaced in many areas by strict liability regulations or by laws that impute criminal negligence. The distinguished international lawyer Cécile Tournaye affirms: "To determine the meaning of the genocidal intent under customary international law is undoubtedly one of the most difficult tasks put before the ICTY. [. . .] Such a task is complicated by the fact that none of these three crimes have a crystal-clear definition under customary international law but, on the contrary, are historically linked, if not mingled, to cover one single reality."[6]

Lewy ignores these definitional problems or is unaware of the ongoing legal debates between jurists about the meaning of intent and the contemporary international laws of superior responsibility.[7] The military Tribunal sitting in Tokyo, for instance, convicted both military and non-military persons for failing to prevent or punish atrocities in 1945. These stipulations were, however, not integrated in either the Geneva Convention of 1949 or the UN Genocide Convention of 1948, because of the political implications of the Cold War.[8] Lewy's failure to discuss the problematic of intent in its historical context is even more disturbing, as debates about the juridical meaning of the intent clause in criminal law are ancient. Just to quote some easily accessible cases: in Jones v. State (Texas, 1921), the court decided that intent to kill and violence leading to a homicide are not necessarily linked. "The assault is only required to be with an intent to kill; that is an intent to kill someone."[9] The unintentional killing of one person in the attempt to kill another can be murder (State v. Gallagher, 85 Atl. 207).[10]

Early Common Law viewed defendants who committed homicides in the perpetration of felonies as worthy of punishment for murder, even though these defendants lacked the intent to kill necessary for a murder conviction. In People v. Hubbard (1923), for instance, the court noted that the defendant could be found guilty of second-degree murder for killing with a gun, even if the gun discharged accidentally, if the circumstances disclosed such a wanton recklessness as to show an abandoned and malignant heart.[11] "The common law dealt with this problem by creating a class of homicides called felony-murders that provided for a murder conviction even though the defendant may have lacked the intent to kill at the time of the homicide."[12] Another example for modifications in how the intent clause may be used are cases of "depraved heart murder," which may be translated

as "callous disregard for human life, resulting death" or negligent homicide. In most US States, depraved heart killings constitute either second-degree murder or first-degree manslaughter. Additionally, jurists propose a "strict liability approach" for felonies that result in homicides as a consequence of "rough sex," for instance. Another example would be the application of strict liability "to instances of mere possession of dangerous instruments without regard for the defendant's intent to use those instruments" as an acknowledgment of the impossibility of proving the defendant's intent.[13]

The courts have boosted the meaning of intent in recent decisions. There is a definition of "conditional intent" now in use before US criminal courts.[14] The United States Court of Appeals for the Second Circuit stated "that under conditional intent, death is more than merely foreseeable: it is 'fully contemplated and planned for' and is part of a 'wilful and deliberate plan'," thereby giving room for a broad reading of the intent clause in order to enhance the applicability of the statute. The Supreme Court affirmed.[15]

In other recent decisions, courts have also modified the intent clause, when dealing with the infection by the HIV virus. In these cases, "prosecutors usually point to 'extrinsic evidence' of the defendant's intent to kill—that is, evidence beyond the defendant's mere awareness of his HIV-positive status and the means of transmission."[16] In Smallwood v. State, the court decided, "knowingly exposing someone to a risk of HIV infection is by itself [not] sufficient top infer [. . .] an intent to kill."[17] The court's decision notwithstanding, Grishkin argued that in light of the difficulties "involved under traditional criminal statutes, States that currently lack laws that make knowing exposure [to HIV] a felony should enact such statues."[18] But the difficulties in defining the meaning of intent are not limited to the American version of the Common Law. In Great Britain similar complexities are observable as well.[19]

Lewy quotes from an article by Alexander K. A. Greenawalt in the *Columbia Law Review* and leaves out the important modifications of the prevailing interpretation of intent clause brought forward by Greenawalt on the following pages. Greenawalt is resolute to state that the "strict reading" of the crime exemplifies the prevalent understanding of genocide. He continues, however, "there is nothing in the text of the Genocide Convention that requires such a [strict] reading." He states that the Genocide Convention's intent standard is ambiguous, and must be so, because the intent standard in common and civil law jurisdictions themselves have gone thorough historical vacillation.[20] Instead of relying on a strict application of the notion of intent, which is, given its legal history, a very tricky affair, Greenawalt then proceeds to propose that "principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions."[21] The fact that the intent clause of the UN definition has not been altered in 1978 and in 1985 does—according to Lewy—not serve as a strong indicator that a change is not justified and necessary. Lewy also fails to note the problems connected with the Draft Code of Crimes Against the Peace and Security of Mankind of 1996, outlined in order to cope with the Khmer Rouge's

brutal rule in Cambodia, which has been criticized for its contradictions in the application of the intent clause.[22] Summed up, Lewy's argument in favour of upholding the ill-constructed intent clause is basically that the intent clause must be good because it has been impossible to alter it.

Lemkin's concept of genocide

Martin Shaw, in the introduction to his seminal "What is genocide?," deplores the state of recent genocide studies. "[. . . G]enocide studies have lost some of the central insights of their founding thinker, Raphael Lemkin and [. . .] the Genocide Convention [. . .] started a process of narrowing his core idea that many subsequent academic writers [. . .] have unfortunately continued."[23] In Lewy's discussion of genocide and intent, there is a lacuna that is, like all gaps, very telling. The name of Raphael Lemkin is not mentioned once in Lewy's article. Lewy takes the text of the UN Convention as a ready-made object and severs the link between the main person responsible for the existence of the Convention and its actual wording. Fortunately, the *Journal of Genocide Studies* published a special issue on Lemkin not so long ago.[24] From the innovative research presented in these articles it must be clear that the "inventor" of the term genocide had a somewhat different conception of responsibility that what transpires from Lewy's disclosures. First of all, Lemkin considered many more events genocides that Lewy would like us to believe. Lemkin has done extensive historical studies on the genocide against Native Americans in the Americas as he has also examined genocide in Africa, committed by the colonialist European regimes.[25] Second, Lemkin aimed at a more inclusive definition of genocide. To quote from *Axis Rule in Occupied Europe*, genocide is effected "[. . .] through a synchronized attack on different aspects of life of the Captive people: in the political field [. . .]; in the social field [. . .]; in the cultural field [. . . and] in the field of morality [. . .]."[26] The UN General Assembly followed him initially by drafting a unanimously adopted resolution condemning the crime of genocide in its 55th session. The definition given in this draft, which was later debilitated due to political reasons, reads as follows:

> Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; [. . .] Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part [. . .] The General Assembly, therefore, affirms that genocide is a crime under international law [. . .] whether the crime is committed on religious, racial, political or any other grounds [. . .][27]

Moreover:

> 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.

Genocide is a historical and political concept

Nothing important is ever free from a "non-historical cloud." Lewy asserts that genocide is a "legal term [in] international criminal law" based on intent and he relies exclusively on the definition of genocide given by the UN Convention in 1948. Lewy fails, however, to quote the whole of section 2 of the Convention, which reads as follows:

> In the *present Convention* [my italics, N.F.], 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: (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) Forcibly transferring children of the group to another group.[28]

The Convention remained in effect for the first ten years, after which its validity was extended in five-year intervals. The contracting parties could renounce it through a written notification (Article 14). The framers of the Convention obviously expected political or historical developments that would require altering, in wording or substance, the Convention as it was ratified by the member states of the UN. This expectation was not met, because of the effects of the Cold War that lasted for the next 40 years.[29]

The UN Convention was not an agreement that has acquired a timeless meaning beyond the realm of politics, but it was and is until today a politico-juridical instrument. Lewy's statement that the Convention establishes "a *prima facie* authoritativeness" is a very important concession in what seems to be a "solid state definition" of genocide. *Prima facie* as a legal term related to "evidence" (not definitions) that is "good and sufficient on its face," if not rebutted, to prove a particular proposition of fact.[30] This evidence, however, may be contradicted, in which case it looses its character as uncontested evidence. One way to contradict this definition is by demonstrating its historical becoming, thereby rendering it open to historical change over time.

I argue that the concept of genocide is at the same time a legal construct and a historiographical concept. Both must not be equalized with one another. Much of my argument rests on the useful dichotomy that A. Dirk Moses has pointed out as a "conceptual blockage" or a "definitional dilemma," when he discussed the "uniqueness question" of the Holocaust.[31] Relying on David Moshman, Moses underlines that the problem with definitions of genocide "is that they have been based on prototypes: a paradigmatic genocide underlies the normative definition against which all others are measured."[32] Moses proceeds by segregating two schools of genocide definitions, i.e. the liberals ("liberal theorists insist that genocide, both as a concept and as formulated in the United Nations Convention of

1948, entails physical extermination or extinction [. . .]") with "premeditation as the key element." "Liberals [. . .] are inclined to typologize genocides according to motive [. . .]"[33] According to Moses the account of genocidal intentions is "radically voluntarist and can only 'explain' why they develop with circular logic by referring to the intentions of the perpetrator."[34] The other side of the dilemma is constituted by the "post-liberals," who link genocides to colonialism. Post-liberals also lament the "[. . .] incremental restriction of Lemkin's promising start in the immediate post-war years as Cold war politics conspired [. . .]" to produce the restrictive UN Convention.[35] If one follows Moses' classification, the Lewy's arguments clearly fall into the group of liberal arguments, while what I have been bringing forth so far reveals my genuinely post-liberal stance. In a way, and I follow Moses here, the concept of genocide is "burned," not because of definitional problems, but because "too much trauma has been caused, and too many individual and group emotions and political claims are invested."[36] Moses argues in favour of a definition that takes account of both sides of the coin: structure and agency. Moses is right in assuming that structure and agency belong together. My proposal takes up Moses' propositions, since I try to define an alternative mode of bringing structure and agency together. The synthesis may lie in the definition of the event. An event, according to Gilles Deleuze, is producing itself within chaos in which a sieve ("crible") intervenes. Out of the chaotic "many" congeals a "one," through intervention of a sieve or a membrane, filtering out certain elements. Chaos is defined as an ensemble of possible individual essences that are filtered by a sieve and this sieve lets pass compossible elements only.[37] What turns chaos into an event is the filter. The event of a specific genocide then cannot be determined by referring to predefined and exterior conditions, but must be seen as a process. The notion of process defies causal explanation, because it is more than the sum of concepts and causes just in the way that baking a cake cannot be explained by the list of its ingredients in a recipe. Therefore, it might be helpful not to conceive of genocides as an event with a fixed intention of the perpetrator, but as a process, consisting of many micro-politics by a multitude of agents rather than "perpetrators." The event of genocide is always a surface effect, attained by complex processes in the form of rhizomatic connections between individuals.[38] The juxtaposition of colonial rule and genocide, as constructed in Moses, is thus resolved because colonial rule (or Axis rule) consists of many layers of micro-politics that can, at a certain point in space and time, emerge as genocide.[39] It is the historian's job to reconstruct these processes, not in order to find a legal guilty party, but in order to expose the "truth" about genocide.

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Notes and References

1 Lewy (1978, 2000, 2005).
2 Quigley (2006, pp 111–120).
3 Michaels (1985, p 787). Pertaining to German law, Lin (2003, p 75). Ryu and Silving (1957, p 440). Krug (1854, pp 8–23). For the changes in German law, enactment of § 211of the German Penal Code through the law of September 4, 1941 (RGBl. I S. 549).
4 Black and Nolan (1990, p 810).
5 State v. Gantt, 26 N.C.App.554, 217 S.E.2nd 3,5.
6 Tournaye (2003, p 462).
7 Azuelos-Atias (2007); Quigley (2006); Henham and Behrens (2007); Bantekas (1999).
8 Bantekas (1999, pp 573–575); Van Schaack (1997, pp 2261–2264).
9 Recent Important Decisions (1921, pp 234–235).
10 Notes (1913).
11 64 Cal. App., 220 P. 315.
12 Buzash (1989, p 569); Finkel and Duff (1991).
13 Buszash (1989, p 572).
14 Norborg (2000).
15 Tushnet and Tribe (1999, p 380).
16 Grishkin (1997, p 1617).
17 680 A. 2d 513 (MD 1996).
18 Griskin (1997, p 1622).
19 Uglow (1983).
20 Greenawalt (1999, p 2265).
21 Ibid, p 2259.
22 Allain and Jones (1997).
23 Shaw (2007, p 4).
24 Segesser and Gessler (2005); Elder (2005); McDonnell and Moses (2005); Schaller (2005); Stone (2005); Weiss-Wendt (2005).
25 Elder (2005); McDonnell and Moses (2005); Schaller (2005).
26 Lemkin (1944, pp xi–xii).
27 Legal and Administrative Decisions, United States Weekly Bulletin, December 31, 1946, quoted in Van Schaack (1997, p 2263).
28 United Nations General Assembly (1948).
29 Weiss-Wendt (2005).
30 Black and Nolan (1990, p 1190).
31 Moses (2007).
32 Ibid, p 159.
33 Ibid, pp 162–163.
34 Ibid, p 164.
35 Ibid, p 166.
36 Ibid, p 171.
37 Deleuze (1988, pp 103–105).
38 Ibid, pp 103–112. Deleuze (1990, p 22); Finzsch (2007).
39 Deleuze (1988, pp 22–25).

Bibliography

Allain, J., & Jones, J. R. W. D. (1997) A patchwork of norms: a commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, *European Journal of International Law*, Vol 8, No 1, pp 100–117.

Azuelos-Atias, S. (2007) *A Pragmatic Analysis of Legal Proofs of Criminal Intent: Discourse Approaches to Politics, Society and Culture* (Amsterdam and Philadelphia: J. Benjamins).

Bantekas, I. (1999) The contemporary law of superior responsibility, *The American Journal of International Law*, Vol 93, No 3, pp 573–595.

Black, H. C., & Nolan, J. R. (1990) *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (St. Paul, MN: West).

Buzash, G. E. (1989) The "rough sex" defense, *The Journal of Criminal Law and Criminology*, Vol 80, No 2, pp 557–584.

Deleuze, G. (1988) *Le Pli: Leibniz et le Baroque: Collection "Critique"* (Paris: Editions de Minuit).

Deleuze, G. (1990) *The Logic of Sense: European Perspectives* (New York: Columbia University Press).
Deleuze, G., & Guattari, F. (1987) *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis, MI: University of Minnesota Press).
Elder, T. (2005) What you see before your eyes: documenting Raphael Lemkin's life by exploring his archival papers, 1900–1959, *Journal of Genocide Research*, Vol 7, No 4, pp 469–499.
Finkel, N. J., & Duff, K. B. (1991) Felony-murder and community sentiment: testing the Supreme Court's assertions, *Law and Human Behavior*, Vol 15, No 4, pp 405–429.
Finzsch, N. (2007) "[. . .] extirpate or remove that Vermine": genocide, biological warfare, and settler imperialism in the 18th and early 19th century, unpublished manuscript.
Greenawalt, A. K. A. (1999) Rethinking genocidal intent: the case for a knowledge-based interpretation, *Columbia Law Review*, Vol 99, No 8, pp 2259–2294.
Grishkin, J. (1997) Knowingly exposing another to HIV: Smallwood v. State, 680 A.2d 512 (Md. 1996), *The Yale Law Journal*, Vol 106, No 5, pp 1617–1622.
Henham, R. J., & Behrens, P. (2007) *The Criminal Law of Genocide: International, Comparative, and Contextual Aspects*, International and Comparative Criminal Justice (Burlington, VT: Ashgate).
Krug, A. O. (1854) *Über dolus und culpa und insbesondere über den Begriff der unbestimmten Absicht* (Leipzig: Tauchnitz).
Lemkin, R. (1944) *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, Division of International Law).
Lewy, G. (1978) *America in Vietnam* (New York: Oxford University Press).
Lewy, G. (2000) *The Nazi Persecution of the Gypsies* (New York: Oxford University Press).
Lewy, G. (2005) *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide* (Salt Lake City: University of Utah Press).
Lin, Y-T. (2003) Wie ist Verantwortungsethik möglich? Zur transzendentalpragmatischen Begründung der Diskursethik im technologischen Zeitalter. Disseration, Freie Universität Berlin.
McDonnell, M., & Moses, A. D. (2005) Raphael Lemkin as historian of genocide in the Americas, *Journal of Genocide Research*, Vol 7, No 4, pp 501–529.
Michaels, A. C. (1985) Defining unintended murder, *Columbia Law Review*, Vol 85, No 4, pp 786–811.
Moses, A. D. (2007) Conceptual blockages and definitional dilemmas in the "racial century": genocides of indigenous peoples and the Holocaust, in: A. Dirk Moses and Dan Stone, eds, *Colonialism and Genocide* (Abingdon: Routledge).
Norborg, C. (2000) Conditional intent to kill is enough for federal carjacking conviction, *The Journal of Criminal Law and Criminology*, Vol 90, No 3, pp 985–1012.
Notes (1913) Criminal law: specific intent. assault with intent to kill, *Harvard Law Review*, Vol 26, No 5, pp 452–453.
Quigley, J. B. (2006) *The Genocide Convention: An International Law Analysis*, International and Comparative Criminal Justice Series: International and Comparative Criminal Justice (Aldershot and Burlington, VT: Ashgate).
Recent Important Decisions (1921) Criminal law: assault with intent to kill: intent, *Michigan Law Review*, Vol 20, No 2, 234–235.
Ryu, P. K., & Silving, H. (1957) Error juris: a comparative study, *The University of Chicago Law Review*, Vol 24, No 3, pp 421–471.
Schaller, D. (2005) Raphae Lemkin's view of European colonial rule in Africa: between condemnation and admiration, *Journal of Genocide Research*, Vol 7, No 4, pp 531–538.
Segesser, D., & Gessler, M. (2005) Raphael Lemkin and the international debate on the punishment of war crimes (1919–1948), *Journal of Genocide Research*, Vol 7, No 4, pp 453–468.
Shaw, M. (2007) *What Is Genocide?* (Cambridge: Polity Press).
Stone, D. (2005) Raphael Lemkin and the Holocaust, *Journal of Genocide Research*, Vol 7, No 4, pp 539–550.
Tournaye, C. (2003) Genocidal intent before the ICTY, *International and Comparative Law Quarterly*, Vol 52, No 2, pp 447–462.
Tushnet, M., & Tribe, L. H. (1999) The Supreme Court, 1998 term, *Harvard Law Review*, 113, No 1, pp 26–198, 200–441.
Uglow, S. (1983) Implied malice and the Homicide Act of 1957, *The Modern Law Review*, Vol 46, No 2, pp 164–177.
United Nations General Assembly (1948) Prevention and punishment of the crime of genocide. Available at http://www.hrweb.org/legal/genocide.html (accessed July 12, 2007).
Van Schaack, B. (1997) The crime of political genocide: repairing the genocide Convention's blind spot, *The Yale Law Journal*, Vol 106, No 7, 2259–2291.
Weiss-Wendt, A. (2005) Hostage of politics: Raphael Lemkin on "Soviet Genocide," *Journal of Genocide Research*, Vol 7, No 4, pp 551–559.

Déjà vu all over again

In the summer of 2004 I received a letter from an editor at *Commentary* magazine asking if I might be interested in responding for publication to a forthcoming article, which he enclosed. Written by Guenter Lewy, it was entitled "Were American Indians the victims of genocide?" After reading the piece and finding it to be superficial, tendentious, and unaware of recent scholarship in the field—and because the venue provided by the magazine did not afford sufficient space for an adequate critique—I declined to write a response.

Now, several years later, much of Lewy's *Commentary* article appears once again, this time in the *Journal of Genocide Research* under the title "Can there be genocide without the intent to commit genocide?" To be sure, Lewy has made changes to the piece. He has appended footnotes, has expanded and moved his discussion of intent, and has deleted about 2,500 words dealing with massacres of American Indians from the seventeenth through the nineteenth centuries. But almost half of the essay that *JGR* readers presently have before them is identical with the *Commentary* article—word-for-word and paragraph-by-paragraph, with only minor emendations here and there—beginning with the section labelled "The fate of the American Indian" and stopping near the end of "A demographic disaster."

Because most editors of scholarly journals understandably reject writings that have been published previously, it is a well-recognized and fundamental breach of professional ethics to submit for publication—without acknowledgment at the time of submission—work that, in large measure, has appeared elsewhere. The term for this practice is "self-plagiarism," and it has received increasing attention of late. *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification* is just one journal that has published articles on the topic during this past year.[40] Indeed, concern with self-plagiarism in computer science has resulted in the creation of "Splat" (http://splat.cs.arizona.edu/), an electronic tool for detecting the offence in articles submitted to scholarly journals in that field. It's a pity that *JGR* editors did not have access to a similar tool while considering Lewy's essay for publication.

But here it is. If only to point out that certain types of recycling do not necessarily benefit the common good, and to urge Professor Lewy to stop doing it, I have agreed to comment briefly on this latest version of his essay.

Lewy appears to be one of the last of a disappearing breed: the extreme "uniqueness" advocate determined to assert—in the face of contrary and increasingly overwhelming fact and logic—that, of all the mass killings that have ever occurred in the history of the world, only the Holocaust, or more precisely the Shoah, rose to the level of true "genocide." American Indians are not the only victims whose suffering he places in a lesser category. Elsewhere, he has said much the same thing, at length, about the Nazi destruction of the Roma and the now almost universally accepted genocide perpetrated under the Ottoman

Empire against the Armenians.[41] His increasing scholarly isolation became evident when, in March of 2000, more than 100 Holocaust and genocide scholars signed a public statement affirming that "the World War I Armenian genocide is an incontestable fact." While many genocide scholars had long held that view, what made this document notable was that its signatories included Yehuda Bauer and Steven Katz, two of the most prolific and dedicated proponents of the uniqueness argument. Then, in the summer of 2007, even the Anti-Defamation League officially conceded that the early twentieth century massacres of Armenians "were indeed tantamount to genocide."[42]

Still, Guenter Lewy pushes on with his campaigns of denial, revealing in the present essay several especially egregious failings that have long characterized his work. The first of these, appearing at the start of his second paragraph, is a straightforward absence of scholarly honesty. Here, in support of his contention that for mass murder to constitute genocide it must involve "specific or special intent" (which requires a finding that the perpetrator deliberately desired to inflict destruction upon the group in question, as opposed to knowing that his/her actions would result in the group's destruction), Lewy provides the following: "Genocide, writes Alexander K. A. Greenawalt, 'is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself.'" But Lewy does not quote the first part of Greenawalt's sentence, which reads (italics added): "As regards the question of intent, the *prevailing interpretation* assumes that genocide is a crime of specific or special intent [. . .]," and so on. Nor does Lewy inform his readers that the entirety of Greenawalt's 35 page, closely argued, *Columbia Law Review* article is a hard-hitting criticism of that "prevailing interpretation," contending instead that, "in defined situations, culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions for the survival of the relevant victim group"—precisely the opposite of what Lewy would lead readers to believe.[43] Lewy, of course, is not obligated to agree with Greenawalt. But he is obligated to provide an honest description of Greenawalt's clearly stated argument if he chooses to cite it, and then, if he disagrees, to contend with it. His bumbling effort to enlist Greenawalt's important work in his own attempt to propagate the reverse of Greenawalt's intention is, to be polite, disingenuous—though perhaps not surprising.

And this is only the beginning. Next, in an effort at illustration, Lewy discusses the case of General Radislav Krstic, convicted of genocide in 2001 by the International Criminal Tribunal for the former Yugoslavia (ICTY) because he ordered the executions of between 7,000 and 8,000 Bosnian Muslim military-age men in what are now known as the infamous Srebrenica massacres. Comparing the Krstic decision with that handed down in the case of Goran Jelisic, Lewy appears to accept the Tribunal's judgment that Krstic's crime involved "specific" intent. Nowhere, however, does Lewy seem to recognize two fundamental problems that this case presents for his own argument.

First, the ICTY decision has been criticized by prominent international human rights scholars for failing to articulate adequate evidence of specific intent to destroy "in whole or in part," in the words of the Genocide Convention's Article 2, a specified "national, ethnical, racial or religious group, as such." This is because, prior to the massacre of the able-bodied military-age men of Srebrenica, the locale's women, children, elderly, and wounded were rounded up and moved to a safe haven. Thus, as one critic has noted, "instead of seeking to destroy part of the Bosnian Muslims in killing the middle-aged men of Srebrenica, the VRS [Bosnian Serb forces] may have primarily sought to eliminate a military threat in a hotly contested region."[44] And that, technically, is not genocide—at least according to a specific intent reading of the UN Convention.

On the other hand, if the events at Srebrinica did constitute genocide—as the ICTY found, and as Lewy appears to agree—there can be no doubt that, contrary to Lewy's thesis, genocide repeatedly was perpetrated against American Indians. To cite just one example among many, in June of 1666 the colonial governor of Virginia, Sir William Berkeley, explicitly instructed his military leaders "to destroy all these Northern Indians." And so they did, although—as in Srebrenica—they spared the women and children. Unlike Srebrenica, however, where females and non-military-age males were sent to a place of safety, in Virginia they were forcibly removed from their homes and sold into slavery as a way of paying for the military expenditures. By the end of that century Virginia's indigenous people had been almost wholly exterminated, having suffered what one historian recently has called "genocide on the Carthaginian model."[45] And this was only one incident among too many to count, beginning decades earlier and subsequently recurring time and again across the entire North American continent for the next 200 years and beyond. Many of these cases involved the deliberate targeting of women and children, complete with vivid and unambiguous declarations of specific genocidal intent based on the infamous principle that "nits make lice."

The limited space available for this comment precludes detailed critical analysis of Lewy's superficial narrative regarding the destruction of the indigenous peoples of North America. Lewy, in any case, makes such analysis unnecessary, for two reasons. First, his specific claims are unoriginal; they were made by others and answered in depth long ago, by me and by others. Moreover, contrary to what Lewy at one point implies, most contemporary historical research examining the topic with care and in depth (for example, recent work by Mark Levene and Ben Kiernan) demonstrates with a wealth of documentation that American Indians were indeed victims of genocide.[46] Second, Lewy completely ignores a significant body of scholarship that has appeared both in this journal and elsewhere, written by regular contributors to and editors of *JGR*, that renders his already flimsy thesis wholly obsolete. I refer, of course, to essays by such scholars as A. Dirk Moses, Jürgen Zimmerer, Michael A. McDonnell, Patrick Wolfe, and others.[47] Lewy does not have to agree with these writings—which go, like a dagger, to the heart of his essay—but he cannot expect to be taken seriously if he simply pretends they do not exist.

If Lewy's essay does not, then, provide a foundation for serious discussion of genocide in North America or other colonial situations, it does (however clumsily and inadvertently) introduce a topic that deserves scrutiny: the matter of "specific" intent versus "general" intent in determining whether particular cases of historical violence should properly be described as genocide. I emphasize the word "historical" here because, on the matter of specific versus general intent, the most commonplace argument favouring a specific intent criterion in adjudicating present-day cases of alleged genocide is—as I will demonstrate below—irrelevant when considering extreme violence that occurred prior to the mid-twentieth century.

In his previously published version of this essay, as part of a passage that is deleted in the present rendition, Lewy stumbled upon this fact, but failed to recognize its implications. Reflecting on historical instances of mass violence that may or may not be correctly described as genocide, Lewy wrote: "Our knowledge of many of these occurrences is incomplete. Moreover, the malefactors, long since dead, cannot be tried in a court of law, where it would be possible to establish crucial factual details and to clarify relevant legal principles." He then used this truism to put forth a canard—that many instances of past violence that we today would regard as genocide should be judged less harshly because moral standards were different at that time and the perpetrators may have felt they had no "choice" but to act as they did. He cites as an example the American Puritans, to whom we should extend "greater indulgence" as we read of them burning and shooting and hacking to death hundreds of unarmed Pequot Indian men, women, and children.[48] Of course, once this particular Pandora's Box of "historical context" and *perceived* lack of "choice" is opened, all manner of historical justification can emerge regarding horrors ranging from the African slave trade to the Holocaust and more.

But if Lewy drew a wrongheaded conclusion from his simple observation that most perpetrators of historical atrocities are now beyond the reach of the law, that elementary fact provides the primary reason for employing a general rather than a specific intent criterion in judging cases of possible genocide in the past.[49] In the first place, the text of the Genocide Convention says nothing about "specific" or "general" intent. The application of a strict intent criterion subsequently emerged for a number of reasons, but the most important and oft-cited one does not concern judicial philosophy so much as it does international power politics. It also is focused exclusively on the ever-unfolding present and future, not the past. And that is because the major concern of scholars and others involved in human rights law as it pertains to present-day genocide is enforcement—including the fear that a general intent definition may inhibit and perhaps even effectively prohibit future convictions.

The idea that a more general definition of a crime might result in fewer convictions than a narrow and strict definition seems paradoxical on its face. But, in the case of genocide, the reality is that more than one of those jealously sovereign nations that today sit in judgment over the actions of others could themselves become defendants against charges of genocide. The more narrow and restrictive the definition, the less likely that is to happen. And thus, so this conventional

though not uncontroversial argument goes, the more shielded the major nations of the world are by a narrow definition of the crime, the more likely they will be to seek the convictions of others.[50]

Similarly, as William A. Schabas puts it, "although the Convention is principally about the punishment of a crime—a matter addressed in most of its substantive provisions—the treaty also imposes an obligation of prevention." And, for various reasons, nations often are reluctant to take action to prevent genocide, even in cases where violence is both ongoing and undeniably genocidal. The most infamous such case occurred with the 1994 genocide in Rwanda, when the UN Security Council froze into inaction. At the same time, in a press briefing, an American State Department spokesperson explained that the US would not use the word genocide to describe the horrors that were then unfolding in Africa because "there are obligations which arise in connection with the use of the term." Those were obligations—despite the relentless massacre of 10,000 people each and every day—that the United States did not wish to honour. Although the precise reasons behind the US inaction are "not entirely clear," Schabas claims, he suggests that they may have been driven in part by a lack of clarity "about the crime's parameters." Thus, he contends: "Strict definition of the crime explains why, in 1948, the international community was able to achieve a convention [. . .]. And it remains the price to be paid for recognition of a positive duty to act in order to prevent genocide." Many, but by no means all, human rights scholars and activists—though pained, as one of them writes, by the fact that such a conclusion results in "the absurdity of differentiating the appalling from the horrific"—agree with Schabas, however unhappily, about the necessity of adhering to a specific intent criterion in addressing possible current and future genocides.[51]

Such a tightly confined definition of intent is not, however, a price that historians of genocide must pay, especially historians studying genocide in settler colonial societies prior to the middle of the twentieth century when the UN adopted the Genocide Convention. For the victims of those atrocities, and their descendants, there is no possibility of a legal hearing in an international court to voice their grievances. That is because there was no such thing as a crime of genocide during the time of their suffering. Indeed, even those paradigmatic genocidaires—the Nazis—were not, and could not have been, convicted of genocide during the 1946 Nuremberg Tribunal because the law prohibiting genocide had not yet been written. And neither could the Nazis subsequently be convicted of genocide in an international court, because of the widely held legal principle that prohibits retroactive criminal prosecution. Yet, few people other than neo-Nazi ideologues would deny Nazi culpability in the crime of genocide—even though the crime, as such, did not exist while the Holocaust was in progress.

The notion of specific intent, then—as Schabas and others effectively acknowledge—is a political instrument, a post-ratification artefact designed for use in specifically post-ratification circumstances. There remain many other problems with the original definition of genocide as cobbled together at the UN by

adversarial parties in the wake of the Second World War, including (at the insistence of the Soviet Union) the failure to embrace political groups as acceptable victims. This particular exclusion has allowed the ghastly devastation in Cambodia under the Khmer Rouge to pass as non-genocidal in the analyses of many human rights scholars.[52] It also, perversely, has permitted Paraguay to openly admit that it systematically killed approximately half of that country's Northern Aché Indians while simultaneously denying that it committed genocide—because the killings in question allegedly were based on politics and economics, and not on the fact that the Aché were (as the Convention requires) an intentionally targeted national, ethnical, racial or religious group, as such.[53]

These, however, are matters of scope—of breadth of coverage—not intent. And, for better or for worse, the restrictive definition of scope is part of the original language of the Convention. The matter of specific versus general intent, in contrast, is found nowhere in that language: it was an appendage added on in subsequent legal interpretation for specific political purposes having everything to do with seeking convictions in the present and the future, and having nothing to do with judging the past. Consequently, even historians of genocide who agree to be guided by the Genocide Convention's terminology—as opposed to those who prefer to coin their own definitions of the crime—are not bound to a specific intent interpretation of the Convention's non-specific language. On the contrary, in the absence of a specific intent stipulation in the Convention and of a demonstrable or at least arguable need for it in the conduct of their work (as with the claims of some human rights scholars pursuing contemporary cases of alleged genocide), historians have no reason not to follow a more commonsense general intent interpretation. Not only is it more appropriate in terms of the limited resources usually afforded by the historical record, but even in the contemporary realm there is growing pressure to recognize, as former UN human rights legal officer Jason Abrams puts it, that "the very integrity of the concept of defining genocide calls for an expanded definition of the crime—one that protects all groups based on fundamental aspects of human identity."[54]

None of this, of course, will mean the end of debate. As Lewy himself says in a different context, but in words that are most appropriate regarding his own brand of genocide exclusivity, only "time will tell whether it will be possible to rescue history from nationalists who have plundered history to serve their own political ends."[16]

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Notes and References

1 See, for example, Patrick M. Scanlon, "Song from myself: an anatomy of self-plagiarism," *Plagiary*, Vol 2, No 1, 2007; and Tracey Bretag and Saadia Carapiet, "A preliminary study to identify the extent of self-plagiarism in Australian academic research," *Plagiary*, Vol 2, No 5. Both articles are available online at http://www.plagiary.org.

2 Guenter Lewy, *The Nazi Persecution of the Gypsies* (New York: Oxford University Press, 2000); Guenter Lewy, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide* (Salt Lake City: University of Utah Press, 2005).
3 "Statement by 126 Holocaust scholars, holders of academic chairs, and directors of Holocaust research and studies centres," originally published in the New York Times on June 9, 2000, is available online at http://www.armenian-genocide.org/Affirmation.21/current_category.3/affirmation_detail.html. The Anti-Defamation League decision was widely reported in the press; see, for instance, "Jewish group in U.S. reverses stand—calls Armenian massacre 'genocide,'" *International Herald Tribune*, August 21, 2007.
4 Alexander K. A. Greenawalt, "Rethinking genocidal intent: the case for a knowledge-based interpretation," *Columbia Law Review*, Vol 99, No 8, pp 2264–2265.
5 Katherine G. Southwick, "Srebrenica as genocide? The Krstic decision and the language of the unspeakable," *Yale Human Rights & Development Law Journal*, Vol 8, 2005, p 211; see also, William A. Schabas, "Was genocide committed in Bosnia and Herzegovina? First judgments of the International Criminal Tribunal for the Former Yugoslavia," *Fordham International Law Journal*, Vol 25, 2001, pp 23–53.
6 Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975), p 233; Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007), p 223.
7 Mark Levene, *Genocide in the Age of the Nation-State* (London: I. B. Tauris, 2005), Vol II, Part One; "Kiernan, blood and soil," Chapters 6 and 8. As an example of work that long ago undermined the exact points that Lewy tries to make in the historical portion of the present essay, I invite readers to compare the actual content of David E. Stannard, "Uniqueness as denial: the politics of genocide research," in: Alan S. Rosenbaum, ed., *Is the Holocaust Unique? Perspectives on Comparative Genocide*, pp 163–208 (Boulder: Westview Press, 1996), with Lewy's representations.
8 A. Dirk Moses, "Genocide and settler society in Australian history" and Jürgen Zimmerer, "Colonialism and the Holocaust: towards an archeology of genocide," in: A. Dirk Moses, ed., *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, pp 3–48, 49–76 (New York: Berghahn Books, 2004); Michael A. McDonnell and A. Dirk Moses, "Raphael Lemkin as historian of genocide in the Americas," *Journal of Genocide Research*, Vol 7, No 4, 2005, pp 501–29; Patrick Wolf, "Settler colonialism and the elimination of the native," *Journal of Genocide Research*, Vol 8, No 4, 2006, pp 387–409.
9 Guenter Lewy, "Were American Indians the victims of genocide?" *Commentary*, September 2004, p 62.
10 Here, and in what follows, I present a greatly abbreviated version of an argument contained within an essay that I am currently preparing for publication.
11 In this regard, it is worth recalling that the United States took 40 years to ratify the Convention, and then did so with such restrictive and self-serving stipulations that Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Spain, Sweden, and the United Kingdom filed formal objections to the US action. For this and more, see Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham: Duke University Press, 1991).
12 William A. Schabas, "Problems of international codification—were the atrocities in Cambodia and Kosovo genocide?" *New England Law Review*, Vol 35, No 2, 2001, pp 301–302; Southwick, "Srebrenica as genocide?" p 227.
13 See, for example, Schabas, "Problems of international codification," pp 289–293. A prominent exception is Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79* (New Haven: Yale University Press, 1996), pp 460–463.
14 See brief discussion in Greenawalt, "Rethinking genocidal intent," p 2285, citing Richard Arens, *Genocide in Paraguay* (Philadelphia: Temple University Press, 1976).
15 Jason Abrams, "The atrocities in Cambodia and Kosovo: observations on the codification of genocide," *New England Law Review*, Vol 35, No 2, 2001, p 309.
16 Guenter Lewy, "Revisiting the Armenian genocide," *Middle East Quarterly*, Fall 2005, available at http://www.meforum.org/article/748.