

## WORDS AND CRIMES

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In recent times the horrendous treatment of the Uighur community has received the attention it requires. Some assert that a genocide is being perpetuated by China, by reported sterilisations, displacements, mass incarcerations and other inhumanities. Voices are raised, démarches prepared, a complaint lodged with the International Criminal Court.

The use of the word ‘genocide’ attracts attention like no other. It is unique, in opening the imagination, the pinnacle of criminal horrors, the desire to destroy a group in whole or in part. Other terms, including ‘crimes against humanity’, which focuses instead on the protection of individuals, do not carry the same dread resonance, or attract headlines. The focus on the G word – almost a reverence - is regrettable. It skews our responses to other acts of mass atrocity, leaving the unfortunate impression that ‘crimes against humanity’ or war crimes are somehow less terrible. How did this happen?

It was seventy-five years ago that Rafael Lemkin, a remarkable Polish jurist, invented the term ‘genocide’. He amalgamated the Greek word *genos* (tribe or race) and the Latin word *cide* (killing), to create an obligation to protect groups. His focus was on Jews, Poles and Roma. He hoped to introduce the word into the charter of the Nuremberg tribunal, alongside ‘crimes against humanity’, but failed. He did get it into the indictment of the individual defendants, as a war crime, and persuaded three of the four Allied prosecution teams to argue that the Nazis committed genocide - but the Americans resisted, and the famous judgment makes no mention of it. Lemkin did not give up. Through the UN he persuaded the world to negotiate a convention on the prevention and punishment of genocide, adopted in 1948 as the world’s first modern human rights treaty.

For fifty years, nothing much happened to apply the new rules. Then along came Yugoslavia and Rwanda, and in the mid-1990s the term gained a new lease of life. Two new tribunals were created by the UN Security Council, and then the ICC came into being. Prosecutors at these and other courts came to understand that victims wanted their crimes to be labelled as a genocide. Anything less was not seen as being sufficiently

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grave.

Over time, a hierarchy has emerged. This has curious consequences. In Britain, the Holocaust Day Memorial Trust encourages remembrance of the Holocaust and subsequent genocides, but only if they have been recognised by international courts. The victims of Cambodia, Rwanda, Bosnia, and Darfur are remembered, but other victims of mass violence are not mentioned. Why recall the murder of eight thousand Bosnian Muslims at Srebrenica, but pass in silence the three million murdered in the Democratic Republic of Congo?

Genocide skews, also in other ways. Lemkin's brilliant, necessary invention was motivated by his perception that people are often targeted or killed because of who they happen to be, not what they have done. Yet the 1948 Convention protects only some groups – those defined by nationality, ethnicity, race, or religion – not those bonded by political affiliation, or sexual orientation, for example.

The word does something else, as feared by Hersch Lauterpacht, who came up with the idea of 'crimes against humanity' as an international crime. Both wanted international laws to place limits on the power of the state, to make it a crime to kill one's own citizens. His focus, however, was on to give people rights as individual human beings, not because they happened to be a member of a group. Lemkin's response: you protect humans by safeguarding their groups. Lauterpacht worried that the emphasis on the group would replace the tyranny of the state with the tyranny of the group.<sup>2</sup>

I fear he may have been right. The invention of genocide reinforces the sense of group identity, with psychological and other consequences, elevating group kinship and, perhaps, catalysing the sense – and hatreds – of the 'other'. This I have seen for myself in cases in which I have been involved, for example in the former Yugoslavia. I am not alone in worrying that the criminalisation of genocidal acts – necessary as it is – may unintentionally foment more group hatred, not less.

Lemkin's brilliant word is here to stay. What, then, is to be done? His original conception set a lower bar on the meaning of genocide than the 1948 Convention, so that more acts would be characterised by law as genocides. Reverting to his original approach is one option – genocide is not a numbers game, and forced sterilisations of the kind alleged should be recognised as genocidal acts. Beyond that, states should redouble their effort to level the playing field and expeditiously adopt the draft Convention on

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<sup>2</sup> See generally, PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY"* (2016).

crimes against humanity created by the Crimes Against Humanity Initiative and prepared by the UN's International Law Commission.<sup>3</sup>

No one has been more instrumental in the Crimes Against Humanity initiative than Leila Sadat. Beginning in 2008, she has worked with a fearless and tireless intelligence and purpose to work with experts from around the world to develop a convention that would build on Lemkin's original approach to genocide and fill the awful gap left by the absence of a parallel convention. Her commitment is absolute, and it is right: to ensure that no international crimes – whether they be forced sterilisations, displacements, or mass incarcerations – are allowed to proceed with impunity, irrespective of whether they fall within the limited definition of “genocide”.

Whichever future path is chosen, let us not fetishise the name we give to acts of horror or international criminality. The treatment of the Uighurs, or the Yazidis, or the Rohingya, or of a myriad of other gatherings of individuals or groups, is wrong and criminal, whatever it is called. For the sake of Uighurs, and others who need the protective embrace of the law, let us focus on the substance, not the label.

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<sup>3</sup> *Crimes Against Humanity Initiative*, WASHINGTON UNIVERSITY IN ST. LOUIS, <https://crimesagainsthumanity.wustl.edu> (last visited Feb. 25, 2022).