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**Philosophical Foundations of International Criminal Law:
Correlating Thinkers**

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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

Genocide: The Choppy Journey to Codification

Mark A. Drumbl*

18.1. Introduction

Winston Churchill exclaimed in a 1941 radio broadcast – as regards Nazi atrocities – that “we are in the presence of a crime without a name”.¹ Raphael (Rafael) Lemkin, a Polish-Jewish jurist, came up with a name to ease the scourge of this namelessness. He coined the word ‘genocide’ to refer to the mass destruction of groups. Lemkin did not see this kind of violence as novel. Rather, he simply invented a new word to name a recurring tragedy.

Lemkin’s Greek-Roman neologism (the Greek word *genos*- for tribe or race, the Latin word *caedere* [-*cide*] for killing) as elaborated upon in his 1944 book, *Axis Rule in Occupied Europe*, was initially rooted in the intention to annihilate a group through the destruction of its essential foundations of life.² Lemkin postulated that “genocide might be political, social, cultural, economic, biological, physical, religious, and moral”.³ His

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¹ Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*, University of Wisconsin Press, Madison, 2017, p. 19. Churchill was specifically referring to the crimes committed by the *Einsatzgruppen* throughout Eastern Europe.

² Raphael Lemkin, “Genocide”, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington, 1944, p. 79, describing genocide as “intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups”.

³ Weiss-Wendt, 2017, p. 19, *supra* note 1.

concern lay more with the extirpation of identity than of life, of being than of doing, and hence he conceptualised genocide capaciously to encompass the destruction of “social and political institutions, culture, language, national feelings, religion, economic means, personal security, liberty, health, dignity, and finally life itself”.⁴ Early drafts of the crime of genocide within United Nations (‘UN’) bodies reflected these broader formulations, for instance in the form of the inclusion of political groups and acknowledgement of cultural genocide.

For Lemkin, the path forward lay in *law*, specifically an international treaty. Lemkin insisted that “a treaty would take the life of nations out of the hands of politicians and give it [...] objective basis”.⁵ Lemkin was indefatigable in his push towards codification. Lemkin indeed achieved his wish: the Genocide Convention was adopted by the UN General Assembly on 9 December 1948 and entered into force on 12 January 1951. Before the treaty, genocide was just an idea and a word. After the treaty, genocide became proscribed as an international crime. The Genocide Convention definition is as follows:

Article II: In the present Convention, 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.

Article III: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;

⁴ *Ibid.*

⁵ Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, Donna-Lee Frieze (ed.), Yale University Press, New Haven, 2013.

- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

This chapter unpacks what happened to genocide as it travelled along this path to codification. To be clear: codification happened only because of compromise among States. Compromise was a cover for selfishness, spite, manipulation, and machination. As a result, the Convention narrowed – and even mangled – the set of protected groups, limiting it to ethnical, racial, religious, and national groups. The Convention, moreover, shrunk the means by which genocide could be committed. The case-study of genocide, I argue, serves as a more generalisable ode to the foibles of impatience (pushing for law too quickly) and the vaunted virtues of international treaty codification. This chapter thereby calls into question one of the reflexive impulses of the international lawyer, to wit, the hunger to ratify, to sign, and to rack up States Parties.

18.2. Lemkin: ‘Be Cool or Be Cast Out’

Lemkin, the inventor, is inextricably intertwined with the crime of genocide. Lemkin looms large among the ‘grandfathers’ of contemporary international criminal law. He has been the subject of considerable academic and biographical literature; Lemkin, who passed away penniless and middle-aged in 1959, himself penned an autobiography that has only recently been published. In 2001, at an honorific ceremony, former UN Secretary-General Kofi Annan regaled Lemkin, noting that he “almost single-handedly drafted an international multilateral treaty declaring genocide an international crime [...] Lemkin’s success in this endeavour was a milestone in the United Nations’s history”.⁶

In 2016, Philippe Sands, a well-established British international lawyer, published *East West Street*. This book is a biopic of Lemkin, yet one that is deeply interactive in its cadence. Sands places Lemkin in context with both Hersch Lauterpacht, who nurtured the concept of crimes against humanity⁷ and whose son Elihu picked up his father’s professor-

⁶ Quoted in Filipa Vrdoljak, “Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law”, in *European Journal of International Law*, 2009, vol. 20, no. 2, p. 1164.

⁷ Lauterpacht, to be sure, did not invent the term ‘crimes against humanity’. Sands points out that the term had been used (albeit not in a legally binding sense) as early as 1915 to describe the conduct of the Turks against Armenians, see Philippe Sands, *East West Street*:

ship at Cambridge where he taught Sands, and Sands' own grandfather, Leon Buchholz. Each of Lemkin, Lauterpacht, and Buchholz overlapped in that they all spent time in the now Ukrainian city of Lviv, which was formerly known as Lemberg (under Austro-Hungarian rule and the Nazi occupation), Lwów (under Polish rule after World War I), and Lvov (under Soviet occupation). These three men all spent time in this one place either by birth or as students. Lemkin and Lauterpacht, in fact, both read law from the same professors at Lwów's law school which, as a result of Sands' book, now houses two portraits that honour these two alumni as catalytic figures of modern international criminal law.

What the portraits conceal, however, is the rivalries between these two figures. David Scheffer, in his review of Sands' book, unspools this competition as both energising and draining: "Lauterpacht and Lemkin never collaborated over what could have been a joint enterprise to criminalise the worst forms of human injury and destruction. Each man's arrogance, however kindly cast, created an obstacle course".⁸ Lemkin and Lauterpacht modelled two offences, genocide and crimes against humanity, always in orbit but never in tandem.

East West Street has become wildly successful.⁹ In it, Sands paints a darker picture of Lemkin that contrasts with long-standing tendencies in the literature to construct Lemkin's awkwardness as dogged tenacity rather than pugilistic self-importance.¹⁰ No longer lionised, Lemkin morphs from iconoclastic juggernaut to someone who is not a 'team player' and does not 'fit in'. Sands goes to considerable lengths to point out how oth-

On the Origins of Genocide and Crimes Against Humanity, Weidenfeld & Nicolson, London, 2016, p. 111. Importantly, in his review of Sands' book in the *Journal of Peace Research*, 9 July 2018, Morten Bergsmo notes: "Since 'Historical Origins of International Criminal Law: Volume 3' was published in 2015 [the year before Sands' book], we have also known that the term 'crimes against humanity' was used as early as 1861, 36 years before Lauterpacht was born and 78 years before the Nazi invasion of Poland", see Benjamin E. Brockman-Hawe: "Constructing Humanity's Justice: Accountability for 'Crimes Against Humanity' in the Wake of the Syria Crisis of 1860", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 3*, Torkel Opsahl Academic EPublisher, Brussels, 2015 pp. 181-248 (www.legal-tools.org/doc/ce092b/).

⁸ David Scheffer, "Book Review, *East West Street: On the Origins of Genocide and Crimes Against Humanity*", in *American Journal of International Law*, 2017, vol. 111, no. 2, pp. 559, 564.

⁹ Sands also narrates in a multi-media work he bases on the book.

¹⁰ So, too, does Weiss-Wendt.

ers found Lemkin off-putting – so much so that, in particularly painful passages, Sands drily details how the Nuremberg social loop ostracised Lemkin and instead favoured the genteel Lauterpacht. Sands recounts how the Nuremberg team dumped Lemkin, sent him home, organised activities deliberately so he could not participate, and scooted him out before Lauterpacht arrived on site.¹¹ Even Benjamin Ferencz, then a “junior lawyer on Jackson’s team”, who seventy years later has become another lionised ‘grandfather’ of international criminal law, piles on:

[Ferencz] described Lemkin as a disheveled and disoriented figure, constantly trying to catch the attention of prosecutors. ‘We were all extremely busy,’ Ferencz recalled, not wanting to be bothered with genocide, a subject that was ‘not something we had time to think about’. The prosecution lawyers wanted to be left alone to ‘convict these guys of mass murder’.¹²

Sands chides Lemkin for “embellishing” a story about where Lemkin spoke and lectured and who was there and who stayed and who left.¹³ And then the embellishment paragraph just ends, with a touch of innuendo, intimating that Lemkin was full of *braggadocio* – a confabulator not to be trusted. Absent from this discussion is the query as to *why* Lemkin’s memories were somewhat elastic and grandiose – perhaps like Ka-tzetnik, one of the most blistering among the Holocaust memorialists, Lemkin toggled between reality and fiction: such might be the mind of a true inventor and progenitor, no? Also forsaken is the chance to inquire how confabulators, riddled with agonies and demons, might advance the ball of

¹¹ Sands, 2016, p. 185, see *supra* note 7: Jackson’s team “agreed to ‘eliminate him [Lemkin]’ from the inner circle and use him for background tasks, an ‘encyclopedia’ to be available in preparing the trial. Despite being rated as ‘top of the refugees’ and the reliance placed on his materials, he was shifted to the periphery”. See also p. 298: “Lemkin followed developments from Washington, kept far away from Nuremberg by Jackson’s team. It was frustrating to read the daily transcripts as they reached the War Crimes Office, where he worked as a consultant, to read news reports that made no mention of genocide. Maybe it was the Southern senators who got to Jackson and his team, fearful about the implications that the charge of genocide might have in local politics, with the American Indians and the blacks”.

¹² *Ibid.*, pp. 334–5.

¹³ *Ibid.*, p. 175. The embellishment theme wends its way through Sands’ book. Sands, for instance, mentions how he “came to believe” that Lemkin’s memoir was “not entirely free from a touch of creative embellishment”, see p. 142. See also p. 332, reporting that Lemkin spoke with Eleanor Roosevelt and made a claim about the status of his “idea of formulating genocide as a crime” that was only partly accurate. See further p. 337.

history. In the end, thinking of Lemkin's place in *East West Street*, I wander to the angst of the Canadian rock band Rush, filtered through their classic song "Subdivisions":

Nowhere is the dreamer
Or the misfit so alone
Subdivisions
In the high school halls
In the shopping malls
Conform or be cast out
Subdivisions
In the basement bars
In the backs of cars
Be cool or be cast out

Sands' book is a treasure trove of fascinating interviews, rich anecdotes, facts and then more facts – all delivered in lively fashion. We learn that Lemkin was born in June 1900 to a Polish-Jewish family on a farm called Ozerisko near the town of Wołkowysk several hundred miles north of Lemberg.¹⁴ Lemkin was the middle child among three brothers.¹⁵ Lemkin's father was able to own the farm by paying off the Russian officials who at the time controlled the area which was subject to Russian laws that prohibited Jewish land ownership. Sands notes that this ritual circumvention of law offered Lemkin his very first encounter with governmental authority and oppression.

Lemkin's childhood, moreover, was haunted by anti-Semitism and pogroms.¹⁶ Lemkin was influenced by his readings of the ancient Roman ritual of feeding Christians to lions. These rituals stunned Lemkin: how could this be permissible, he wondered, and even cheered on as spectacle? Sands recounts (again, in chiding fashion) how Lemkin "imagined stomachs split apart and stuffed with pillow feathers, although it seems more likely that the impressions were drawn from a poem by Bialik, *In the City of Slaughter*, which offered a graphic account of a different atrocity a thousand miles south, with a line about 'cloven belly, feather-filled'".¹⁷

¹⁴ *Ibid.*, p. 140.

¹⁵ So, too, was Lauterpacht, though he had a younger sister rather than a brother. Lauterpacht was born in August 1897 in the hamlet of Zólkiew, a few miles from Lviv (at the time Lemberg).

¹⁶ Sands, 2016, p. 141, see *supra* note 7.

¹⁷ *Ibid.*

Sands unearths how Lemkin's experiences – whether imagined or real – nudged him towards the seriousness and also prevalence of group destruction. According to Lemkin, “an excessive focus on individuals was naïve [... as] it ignored the reality of conflict and violence: individuals were targeted *because* they were members of a particular group, not because of their individual qualities”.¹⁸

Lemkin studied law in Lwów, where he was taught by many of the same teachers as Lauterpacht, who had passed through just before and who thereafter laboured to develop the notion of crimes against humanity. Sands casts these two legends as foils, along with their legal handiwork – such that crimes against humanity and genocide continue as rivals. Sands, to be sure, does not mask his normative preference for Lauterpacht's views nor his affection for Lauterpacht's spirit.¹⁹

Lemkin was also influenced by the violence in Armenia from 1915 to 1917, which today discursively craves (and often bears) the moniker that Lemkin himself invented, that is to say ‘genocide’, and in which Lemkin notes that “[m]ore than 1.2 million Armenians” were murdered “for no other reason than they were Christian”.²⁰ Lemkin added that “[a] nation was killed and the guilty persons set free”, and he fingered in particular the responsibility of Talaat Pasha, an Ottoman Minister. Lemkin pleaded in his autobiography to question “[w]hy is a man punished when he kills another man, yet the killing of a million is a lesser crime than the killing of an individual?”.²¹ Lemkin also became smitten with Soghomon Tehlirian, who assassinated Pasha, and his trial which, for Lemkin, morphed into a trial not of an individual assassin but instead of “the Turkish perpetrators”.²² Later in his life, Lemkin concluded that the Ukrainian

¹⁸ *Ibid.*, p. 291.

¹⁹ *Ibid.*, p. 291: “I was instinctively sympathetic to Lauterpacht's view, which was motivated by a desire to reinforce the protection of each individual, irrespective of which group she or he happened to belong to, to limit the potent force of tribalism, not reinforce it. By focusing on the individual, not the group, Lauterpacht wanted to diminish the force of inter-group conflict. It was a rational, enlightened view, and also an idealistic one”.

²⁰ Cited in *ibid.*, p. 143.

²¹ Lemkin, 2013, p. 19, see *supra* note 5.

²² *Ibid.*, p. 20. Tehlirian was ultimately acquitted on the basis that he had acted under “psychological compulsion”. This is a defence that receives very little currency in contemporary atrocity trials. Lemkin's response to the assassination and to the acquittal was pointed – he felt that both underscored the need for laws against “racial or religious murder” that would be “adopted by the world”. Lemkin also expressed a similar concern regarding

Holodomor ('extermination by hunger') in 1932–1933 also formed part of a broader Soviet genocidal plan to destroy Ukrainian national identity. In an unpublished essay, Lemkin wrote that the "third prong of the Soviet plan" to crush Ukraine was:

aimed at the farmers, the large mass of independent peasants who are the repository of the tradition, folklore and music, the national language and literature, the national spirit, of Ukraine. The weapon used against this body is perhaps the most terrible of all – starvation. Between 1932 and 1933, 5,000,000 Ukrainians starved to death.²³

It remains doubtful, however, whether the *Holodomor* would actually fit within the ambit of the Genocide Convention that subsequently entered into force.

Lemkin loved languages and the study of philology. As a result, he surely would have appreciated the power of a word as it gradually grows and spreads. Yet, Lemkin formally chose instead to study law at Lwów University from 1921 to 1926. While in school Lemkin completed a book on Russian and Soviet criminal law. After graduation, Lemkin served as a public prosecutor in Poland. He did so for six years.

As the noose of oppression tightened, Lemkin fled Poland. He ultimately journeyed to the United States, having received an offer to teach at Duke University in North Carolina along with a visa. Lemkin's travels were circuitous. He stopped for months in Stockholm. Then he departed Europe through Moscow, ten days by train to Vladivostok, then Japan (where he had a pleasant visit to Kyoto), later by boat across the Pacific to Vancouver, Canada, and then on to Seattle (all because the Atlantic route was barred by war). Lemkin subsequently crossed the United States by train. He alighted at Duke University:

Lemkin wept on arriving at the campus, the first time he permitted himself such a display of emotion. So different from a European university, without suspicion or angst, the smell of fresh-cut grass, boys wearing open white shirts,

the acquittal of Shalom Schwarzbard (on grounds of insanity) who shot the Ukrainian Prime Minister in Paris in retaliation for a 1918 pogrom in which Schwarzbard's parents had perished.

²³ Roman Serbyn and Raphael Lemkin, "Lemkin on Genocide of Nations", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, p. 128.

girls in light summer dresses, books being carried, everyone smiling. A sense of idyll prevailed.²⁴

During his transient months in Stockholm, Lemkin dug into Nazi decrees and ordinances in order to delineate larger motives. His detailed research led him to see an overarching thread of the reduction of non-Germans to nothing, really nothing, mapping onto his identification of the scourge of group-based violence. Lemkin identified a pattern: first, denationalisation in which individuals were rendered stateless; followed by dehumanisation, in which legal rights were removed; and then the killing of the nation “in a spiritual and cultural sense”.²⁵ Lemkin thereby became among the first outside observers to capture the motion of these hideous hydraulics and invidious pneumatics well before the Wannsee Conference in January 1942 and the promulgation of the Final Solution.

Lemkin taught, wrote, and spoke increasingly single-mindedly about genocide. Although he regaled anyone who would listen, he also deliberately targeted contact with influential figures, including U.S. Supreme Court Justice Robert Jackson (who would later serve as the Chief American prosecutor at the International Military Tribunal at Nuremberg). Lemkin wound up in a consultancy at the Board of Economic Warfare in Washington, D.C. in the spring of 1942.²⁶ He wrote a memorandum to President Roosevelt urging a treaty “to make the protection of groups an aim of the war and to issue a clear warning to Hitler”.²⁷ Roosevelt’s response was tepid. At that point, then, Lemkin decided to appeal directly to the American public for support. He decided to write a book, which he titled *Axis Rule in Occupied Europe*.

18.3. Genocide and Crimes Against Humanity as Frenemies

It was in Chapter 9 of *Axis Rule in Occupied Europe* that Lemkin originated and introduced the neologism ‘genocide’ to identify the crime that Churchill lamented had no name. Although Lemkin had intended *Axis Rule in Occupied Europe* for a general audience, the text turned out long, heavy, technical, and wooden.²⁸ Lemkin was deeply concerned with the

²⁴ Sands, 2016, p. 170, see *supra* note 7.

²⁵ Discussed and cited in *ibid.*, p. 166.

²⁶ *Ibid.*, p. 175.

²⁷ *Ibid.*, p. 176.

²⁸ Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Basic Books, 2013, p. 38.

development of legal responses to atrocities that States committed against their own citizens, residents, or inhabitants.²⁹ He made the case for group protection but also unpacked the scourge of group violence. For Lemkin, genocide governed acts “directed against individuals, not in their individual capacity, but as members of the national group”.³⁰ He wrote of the German people, not the Nazis (only once was the term National Socialist mentioned).³¹ Lemkin found fault with the German people for freely accepting Hitler’s conduct and for profiting therefrom.³²

Axis Rule in Occupied Europe is an exhaustive compilation of German criminality – ordinances, laws, decrees, and policies. Lemkin was concerned centrally with Jews, but also emphasised the German policies of destroying other groups, including Poles, and the deployment by the Germans of a vast array of laws in this regard. Lemkin abhorred all forms of State-sponsored murder, but the heart of his efforts “focused on the subset of state terror that he believed caused the largest number of deaths”.³³

Axis Rule in Occupied Europe takes root in Lemkin’s earlier publications. Although the idea of genocide was new, the interests that genocide seeks to protect and the need for those interests to be protected originate much earlier in Lemkin’s intellectual odyssey. In 1933, for example, Lemkin proposed ‘barbarism’ and ‘vandalism’ as new international crimes. Barbarism he saw as persecution of ethnic, racial, religious, or social groups. Vandalism covered the destruction of works of art and culture of those groups. Lemkin was inspired in this regard by his prescient read of *Mein Kampf* – and his insistence on international laws that could protect Jews and other minorities. In *Axis Rule in Occupied Europe*, Lemkin however discarded these terms and replaced them with genocide.³⁴

Jackson read *Axis Rule in Occupied Europe*. Jackson even added genocide – defined as the “destruction of racial minorities and subjugated populations” – to the list of possible crimes with which to charge the Na-

²⁹ Vrdoljak, 2009, p. 1175, fn. 75, see *supra* note 6.

³⁰ Lemkin, 1944, p. 79, see *supra* note 2.

³¹ Sands, 2016, p. 178, see *supra* note 7. Placing responsibility on the German people led to considerable criticism after the book was published.

³² *Ibid.*, p. 178.

³³ Power, 2013, p. 57, see *supra* note 28.

³⁴ Sands, 2016, p. 179, see *supra* note 7.

zis at Nuremberg.³⁵ Indeed, “deliberate and systematic” genocide wove its way into count 3 of the indictment (over the hesitation of the British delegation), where it was defined as “extermination of racial and religious groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, Gypsies and others”.³⁶ Lemkin felt victorious and validated. His joy, however, was fleeting and quickly dashed on the day the Nuremberg judgment was issued – the “blackest day” of his life.³⁷ The Nuremberg judgment of 1 October 1946 made no reference to genocide but did refer to crimes against humanity, Lauterpacht’s brain-child. Certainly, as Sands elaborates, Lauterpacht’s social grace gave him access to and an ease with the Nuremberg prosecution team that chronically eluded Lemkin. As early as late 1940, Jackson – at the time US Attorney-General – saw Lauterpacht as a partner: initially on the question as to how the US could become involved in the war while still neutral.³⁸ By July 1945, when they met to discuss the charges that were being formulated at the London Conference, Lauterpacht straddled an inside track. Lauterpacht also had access to British chief prosecutor Sir Hartley Shawcross and helped write Shawcross’ opening and closing speeches at the trial. Neither Shawcross nor Jackson referenced genocide in their opening statements. That said, Shawcross, entirely on his own, added references to genocide in his closing argument while still however retaining an overall focus on crimes against humanity. Another British prosecutor, Sir David Maxwell Fyfe, deployed the term ‘genocide’ when he cross-examined the German diplomat Konstantin von Neurath.³⁹ But, as mentioned earlier, this thread was not picked up by the judges in their judgment.

Lemkin, the outcast, became completely smitten with the idea of an international treaty to outlaw genocide. After all, “Lemkin, a practical idealist, believed that proper criminal laws could actually prevent atroci-

³⁵ *Ibid.*, p. 184.

³⁶ Count 3 (war crimes), cited in *ibid.*, p. 188.

³⁷ Cited in *ibid.*, p. 377.

³⁸ Robert Jackson, “Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941”, in *American Journal of International Law*, 1941, vol. 35, p. 351.

³⁹ Sands, 2016, pp. 336–7, see *supra* note 7.

ty”.⁴⁰ He also pushed hard for universal jurisdiction, observing that “by its very nature [genocide] is committed by the state or by powerful groups which have the backing of the state. A state would never prosecute a crime instigated or backed by itself”.⁴¹ Lemkin’s vision was one in which both States and individuals could be held accountable for genocide.⁴²

Undaunted, Lemkin continued to lobby and lobby, push and pull, prod and prompt – he was indefatigable though his efforts strained his health. Lemkin jumped into the world of politics and legislatures and diplomats and capitols. Denied in the courtroom, he persisted in the hallways. The horrific atrocities of World War II fuelled his passionate pleas.

Remarkably, on 11 December 1946, the UN General Assembly unanimously adopted Resolution 96(1), which described ‘genocide’ as “denying the rights of existence of entire human groups” and which it affirmed as a “crime under international law [...] whether it is committed on religious, racial, political or any other grounds”.⁴³ Soon thereafter, in July 1947, the Secretariat of the UN presented a draft convention that also sought “to prevent the destruction of racial, national, linguistic, religious or political groups of human beings”.⁴⁴ All the initial drafts of the Genocide Convention included political groups. Drafts also encompassed the concept of cultural genocide.⁴⁵

Lauterpacht reviewed *Axis Rule in Occupied Europe* in the *Cambridge Law Journal*. Lauterpacht’s review was lukewarm at best.⁴⁶ He saw this book more as a contribution to the historical record than to law

⁴⁰ *Ibid.*, p. 157. See also, p. 181: “Lemkin retained a practical perspective. The existing rules were inadequate; something new was needed. A new word was accompanied by a new idea, a global treaty to protect against the extermination of groups, to punish perpetrators before any court in the world”.

⁴¹ Raphael Lemkin, “Genocide”, in *American Scholar*, 1946, pp. 227–8.

⁴² *Ibid.*, p. 230.

⁴³ General Assembly Resolution 95 affirmed that the principles of international law recognised by the Nuremberg Tribunal, which included crimes against humanity, formed part of international law.

⁴⁴ Norman M. Naimark, *Stalin’s Genocides*, Princeton University Press, Princeton, 2010, p. 21.

⁴⁵ See, for example, Office of the United Nations High Commissioner for Human Rights, Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947, Article I(II)(3)(e) (www.legal-tools.org/doc/a2d995/).

⁴⁶ Sands, 2016, p. 107, see *supra* note 7. Elihu, Lauterpacht’s son, told Sands that his father “didn’t think much of Lemkin” and “thought him to be a compiler, not a thinker”.

and, moreover, expressed scepticism about the rationale and utility of this new neologism. Lauterpacht, according to his son, was “not keen on the concept of genocide” because of his fear that protecting groups would undermine the protection of individuals.⁴⁷ For Lauterpacht, the individual human being as constituting the ultimate unit of all law.⁴⁸ This categorisation, however, seems a touch too overdrawn. After all, how is the prosecution of crimes against humanity so shorn of group protection given the group-like aspect to many crimes against humanity, including persecution and extermination? Crimes against humanity, moreover, protect civilians as a group: must it not be shown, as an element of crimes against humanity, that the impugned conduct took place as part of a widespread or systematic attack against a civilian population? Also, in terms of nomenclature, is not ‘humanity’ the biggest group of all?

I wonder about another possible (speculative) angle of difference between the two men, namely, a difference of methodology. Lemkin, insecure and always off-balance, strikes me as a fan of codification, of treaties, and of clarity: hence, angling constantly to legally define genocide as an international crime. Lauterpacht, centred and secure, perhaps could move instead through *bricolage*, through piecemeal messiness – such that there was no hunger for a crimes against humanity convention that said it all but, rather, charges here and there, national initiatives, commas and semi-colons, something more organic.

18.4. Codification: Its Externalities and Discontents

Lemkin’s hunger for codification, while generative, was also limiting. The Cold War crept in. In an insightful new book, Anton Weiss-Wendt posits that the expansiveness of genocide as an idea was “gutted” – mostly, he argues, by the Soviet Union – in the process of codifying it in an international treaty.⁴⁹ The Soviets were concerned with the exercise of external

⁴⁷ *Ibid.*, p. 107.

⁴⁸ Lauterpacht quoted in *ibid.*, p. 57. See also L. Oppenheim, in Hersch Lauterpacht (ed.), *International Law: A Treatise*, vol. I, 8th edition, London, Longman, 1955, 75 (Lauterpacht arguing that the Genocide convention is more “a registration of protest against past misdeeds of individual savagery”, than an “effective instrument of their prevention and repression”).

⁴⁹ Weiss-Wendt also unpacks the Soviet concept of international law which emphasised bilateral treaties instead of the development of international law through multilateral treaties and binding custom among nations. See also B.S. Chimni, “Customary International Law: A Third World Perspective”, in *American Journal of International Law*, 2018, vol.

penal jurisdiction over political arrests and executions conducted by Stalin (for example, the Great Terror), the Gulag, and expulsions of Koreans and Germans.⁵⁰ The Soviets insisted that “[p]olitical groups were entirely out of place in a scientific definition of genocide, and their inclusion would weaken the convention and hinder the fight against genocide”.⁵¹ In the end, the USSR led a relentless and successful push to exclude political groups from protection.

Initial drafts of the Genocide Convention referenced cultural genocide. A 1948 version included a provision that mentioned “[d]estroying [...] libraries, museums, schools, historical monuments, places of worship and other cultural institutions and objects of the group with the intent to destroy the culture of that group”.⁵² This language resonated with Lemkin’s early formulation of the crime of vandalism. The Sixth Committee, however, omitted the term ‘cultural genocide’ from the final text.⁵³ State parties to the negotiation process were sceptical. The United Kingdom (like the Canadians) feared any connection between cultural genocide and (settler) colonialism.⁵⁴ Denmark chided the lack of proportion and logic in including “in the same convention both mass murders in gas chambers and the closing of libraries”.⁵⁵

Weiss-Wendt concludes that the US delegation to the UN “had played the key role in bringing the Genocide Convention to life”,⁵⁶ adding

112, no. 1, p. 44: “The Soviet Union expressed deep skepticism about customary international law as a source of international law as it reflected the practices and *opinion juris* of the leading capitalist powers”.

⁵⁰ Weiss-Wendt, 2017, pp. 72–75, see *supra* note 1.

⁵¹ Naimark, 2010, p. 21, see *supra* note 44. See also p. 24, noting the Soviet viewpoint that political groups were too fluid and too difficult to define).

⁵² United Nations Economic and Social Council, Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794, 24 May 1948, Article III(2) (www.legal-tools.org/doc/d88e33/).

⁵³ United Nations General Assembly, Official Records, 3rd Session, 83rd Meeting, UN Doc. A/C6/SR83, 1948, p. 206 (www.legal-tools.org/doc/75636f/).

⁵⁴ Weiss-Wendt, 2017, p. 91, see *supra* note 1.

⁵⁵ *Ibid.*, pp. 198–9. Fifty years later, the International Law Commission (‘ILC’) rejected the notion of cultural genocide during the negotiation of the Draft Code of Crimes against the Peace and Security of Mankind, see ILC, Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, UN Doc. A/51/10, 26 July 1996, pp. 46–47 (www.legal-tools.org/doc/7ec2f1/).

⁵⁶ Weiss-Wendt, 2017, p. 142, see *supra* note 1.

that “[t]he structure and form of the convention was unmistakably American; the text of the convention was grounded in Anglo-American legal tradition”.⁵⁷ When readers consider the rich details that Weiss-Wendt presents, however, it quickly becomes apparent that the US government was also complicit in the “gutting” of the treaty. US officials were preoccupied with race, specifically, the Convention’s implications for segregation in the American South, including managing some of the public’s fears regarding the domestic “campaign to indict the US government for genocide of American blacks”.⁵⁸ The Soviets leveraged these fears throughout the negotiation process, underscoring the connections between genocide and racism. Weiss-Wendt observes that “racial segregation in the American South was probably *the* major concern for US politicians”.⁵⁹ The State Department assured that the lynching of African-Americans (which it described as “sporadic outbreaks against the Negro population”) would fall outside the scope of genocide.⁶⁰ The Senate Foreign Relations Subcommittee on Genocide went so far as to recommend ratification of the Convention with reservations, including the explicit exclusion from the understanding of genocide of “lynching, race riots, and so forth”.⁶¹ But, still, serious worries endured among US politicians and diplomats:

[O]pponents of the Genocide Convention hinted at the probability that the United States might be indicted for genocide [...] on evidence of race riots. On the other, they expressed regret that the omission of political groups from the wording of the Convention prevented similar charges from being leveled against the Soviet Union.⁶²

This reluctance came not only from the US and the USSR, to be clear. Brazil, Iran, and South Africa all objected to the inclusion of political groups.

Ironically, the Soviets ratified the Convention on 3 May 1954, over three decades before the Americans did. The Bricker faction in the US

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 9.

⁵⁹ *Ibid.*, p. 228.

⁶⁰ *Ibid.*, p. 80. Concerns also arose regarding the status of Native Americans, see p. 117.

⁶¹ *Ibid.*, p. 228.

⁶² *Ibid.*, p. 153. See also, p. 227: “Potential indictment for crimes committed against black Americans was among the main reasons why organizations like the Daughters of the American Revolution denounced [...] the Genocide Convention”.

Senate, which “stood on guard against UN encroachments on the ‘right’ of southern states to keep black Americans in check”, prompted President Eisenhower to withdraw support for the treaty.⁶³

Weiss-Wendt is critical of Lemkin. Rather than the “saintly figure” often venerated in public accounts, Weiss-Wendt presents Lemkin as a “rather odious character – jealous, monomaniacal, self-important, but most of all unscrupulous”.⁶⁴ Weiss-Wendt paints Lemkin as vain, and as complicit in the curtailment that ultimately “gutted” his own concoction. As early as 1947, Lemkin himself came to favour the exclusion of political groups in order to secure the adoption of the Convention. He enlisted the World Jewish Congress in this process.⁶⁵ Lemkin came to believe that the destruction of political groups should be its own crime, separate from genocide, which he called “political homicide”.⁶⁶ “Every revolutionary regime comes to power by destroying some of its opponents”, Lemkin wrote, and then added:

Later this regime is recognized by other nations, sometimes the whole world. Should political groups be included in the definition of genocide, recognition of a revolutionary regime would imply acceptance of genocide as legal. This would kill the Genocide Convention before it took root in world society.⁶⁷

Weiss-Wendt elaborates how, when it came to excluding political groups, “even Lemkin’s closest associates expressed astonishment that he was ‘willing to throw anything and everything overboard in order to save a ship’”.⁶⁸ Weiss-Wendt is unstinting in his analysis, showing how Lemkin accepted the US position regarding African-Americans and the Ku Klux Klan; and even as late as the mid-1950s Lemkin continued to fret that genocide might be tied to discrimination.⁶⁹ Lemkin spouted an ardent anti-communism in order to secure what mattered as much to him as the entry into force of the Genocide Convention, that is, the US ratification

⁶³ *Ibid.*, p. 273.

⁶⁴ *Ibid.*, p. 280.

⁶⁵ *Ibid.*, p. 100. See also William A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, p. 136.

⁶⁶ Lemkin, 2013, pp. 161–2., see *supra* note 5.

⁶⁷ *Ibid.*

⁶⁸ Weiss-Wendt, 2017, p. 101, *supra* note 1.

⁶⁹ *Ibid.*, p. 267.

thereof. Lemkin did not live long enough to witness this moment.⁷⁰ Weiss-Wendt ably demonstrates how Lemkin's insistence may have become annoying, if not cloying, and actually may have hindered US ratification.⁷¹ Weiss-Wendt reveals, through meticulous research, how Lemkin degraded other international instruments (like the Universal Declaration of Human Rights, the draft Covenant on Social and Political Rights, the Convention Concerning the Abolition of Forced Labour, and the Draft Code of Offenses against the Peace and Security of Mankind) because he regarded them as contradicting the Genocide Convention. In this regard, as well, the relentlessly myopic focus on a curtailed Genocide Convention additionally "gutted" the number and variety of instruments that could be responsive to episodes of genocide. That said, this manoeuvring and Lemkin's obstinacy also sired a compromise that led to the Convention in the first place.

As for Lemkin: well, perhaps he was neither saintly nor odious. Perhaps he was both. Or perhaps he was just a man with missionary zeal, an activist with a cause, who laboured to get what he sought. That said, Weiss-Wendt makes an enormous contribution to the literature by demonstrating how Lemkin's thinking on genocide was far from 'static'. This means that the activists of today who invoke Lemkin's 1944 *Axis Rule in Occupied Europe* as grounds to expand the crime of genocide rely on only one – albeit perhaps the most attractive – of "many Lemkins".⁷² In so doing, their invocation of Lemkin's contributions, while opportunistic, is also distortive. That said, this Lemkin is the original Lemkin. This is Lemkin as the progenitor of a word, a different Lemkin than the Lemkin – perhaps himself morphing through the law-making process – who became the progenitor of a Convention.

What are the fundamental values that genocide seeks to protect? Lemkin's initial thinking was that a broader scope of law was required to protect his vision, but then he became complicit in narrowing the scope of that law. Does this mean that his values changed through time? Or that some law, whatever law he could grasp, would suffice to protect those values? What is more, of course, this shard of law – its content – then

⁷⁰ France had joined before Lemkin's death. The United Kingdom became a party in 1970, over a decade after Lemkin's passing.

⁷¹ Weiss-Wendt, 2017, p. 149, see *supra* note 1.

⁷² *Ibid.*, p. 281.

became customary international law – thin, assuredly, but perhaps had it been too thick it would never have hardened in this fashion, or at all. That said, the conventional definition carries its silences and omissions into the realm of the customary.

Another theme is whether private economic actors, business people, or corporate officials could be contemplated as individuals capable of committing genocide. To be sure, German industrialists were prosecuted in a number of the subsequent proceedings held at Nuremberg for their role in the aggressive war and the Holocaust. The Genocide Convention’s drafters, however, focused on the leaders or officials of States, and other political and military organisations opposing States, as potential perpetrators. No consideration was given to the possibility that private economic actors, business people, or corporate officials (or corporations as legal persons) could be liable for participating in genocide.⁷³ To be sure, the lines between private corporations and public actors are often blurred in many polities – and atrocities may involve contexts in which such blurring is particularly pronounced. Lemkin’s initial perspective on the matter inclined to the possibility that private individuals could be prosecuted for genocide. The first draft of the Genocide Convention (written by a committee made up of three experts including Lemkin) included “rulers, public officials or private individuals”.⁷⁴ Article IV of the final version of the Genocide Convention retains this language: “Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.

However, as Magda Karagiannakis ably demonstrates, the negotiation process of the Genocide Convention, and the commentaries made thereto, ordinarily placed potential perpetrators in an hierarchy. Private actors were on the bottom rung and additionally came to be seen as liable mainly when they acted as members of public organisations.⁷⁵ The Sixth

⁷³ Magda Karagiannakis, *Business Persons and International Criminal Law: Challenges of Policy, Principle and Proof*, Ph.D. Thesis, University of Melbourne, Melbourne, 2017, p. 39.

⁷⁴ United Nations General Assembly, Resolution 180 (II), Draft Convention on the Crime of Genocide, UN Doc. A/RES/180 (II), 21 November 1947, Article 4 (www.legal-tools.org/doc/d499f2/).

⁷⁵ Karagiannakis, p. 43, see *supra* note 73. See also p. 48: “[T]he drafters, while casting the net wide enough for the prosecution of any person involved in genocide, chose to consider potential perpetrators to be the leaders of officials of states and other political and military

Committee, Karagiannakis notes, “did not have any discussions regarding the possibility of business persons or corporations being liable”.⁷⁶ In sum, then, while the prospect of private economic actors acting in a purely private capacity may have only been meekly conceptualised by Lemkin as having the capacity to be responsible for acts of genocide, this capacity withered even further in the process of negotiating the Convention. Roughly half a century later, however, the International Criminal Tribunal for Rwanda (‘ICTR’) convicted Alfred Musema, owner of a tea factory, on charges that included genocide.⁷⁷ The ICTR extended command responsibility to a corporate officer for the acts of his employee subordinates. This is but one example of the interpretive push and pull that the judges of today exercise on the crime that Lemkin laboured to codify nearly three generations ago. At times this interpretive activity expands the scope of genocide, while at other times it shrinks the likelihood of securing an individual conviction.

18.5. Legacy: Passing the Baton to Contemporary Institutions and Judges

Articles 4(2) and (3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’, 1993), Articles 2(2) and (3) of the ICTR Statute (1994), and Article 6 of the Rome Statute of the International Criminal Court (‘ICC’, 2002) each adopted the same definition as Article II of the Genocide Convention. Once negotiated, the definition of genocide remained fixed, even at the 1998 Rome Conference that established the ICC. In large part, this stasis can be traced to a reluctance to re-open negotiations, to path dependency, and also to a lack of consensus among

organisations opposing states. This demonstrated a focus upon public officials as perpetrators of genocide rather than private economic actors such as businessmen or industrialists”.

⁷⁶ *Ibid.*, p. 44. What is more, Article IV covered only the punishment of natural persons for genocide – thereby excluding legal persons such as corporations. See Ben Saul, “In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities”, in *Columbia Human Rights Law Review*, 2001, vol. 32, p. 596. The ability of corporations to be held responsible for serious violations of international law remains contested. The Rome Statute, for example, only applies to natural persons. In 2018, in the *Arab Bank* litigation, the US Supreme Court held that corporations cannot be sued for damages under the Alien Tort Statute for violations of customary international law.

⁷⁷ ICTR, *The Prosecutor v. Alfred Musema*, Trial Chamber I, Judgement and Sentence, ICTR-96-13-A, 27 January 2000, para. 148 (www.legal-tools.org/doc/1fc6ed/): The Chamber held that the “definition of individual criminal responsibility [...] applies not only to the military but also to persons exercising civilian authority as superiors”.

delegates regarding the merits of including cultural genocide and political groups as potential actors.⁷⁸

Without the Genocide Convention as a template – however circumscribed its definition may be – contemporary institutions such as the ICTR, the ICTY, and the ICC would likely not be able to prosecute genocide under their own enabling instruments and, in the case of the first two of these institutions, actually have proceeded to convict defendants. Although each of these enabling instruments basically replicated the definition of genocide from the Convention, judges have come to play an important role as legal interpreters. Judges on the ICTR and ICTY in their application of the crime of genocide extended it to the Tutsi of Rwanda (determined to be an ethnic group) and 7,000 to 8,000 Bosnian Muslim men and boys of military age massacred in Srebrenica by Bosnian Serb forces (determined to be a substantial part of the targeted group, a qualification that the ICTY added). The ICTY convicted and sentenced some of its highest profile defendants (Radovan Karadžić and Ratko Mladić) on charges that included genocide – albeit only at Srebrenica.⁷⁹ The ICTR categorically identified genocide as the “crime of all crimes”, thereby knocking the crime of aggression off the pedestal upon which the Interna-

⁷⁸ As to cultural genocide, ICTY judges also remained circumspect. In *Prosecutor v. Radislav Krstić*, which delivered a conviction for aiding and abetting genocide (the first such conviction at the ICTY), an ICTY Trial Chamber insisted that genocide involves only the “physical or biological destruction of all or part of the group”, thereby explicitly excluding acts aimed to destroy the cultural aspects of a particular group. See ICTY, *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgement, IT-98-33-T, 2 August 2001, para. 580. (www.legal-tools.org/doc/440d3a/). The Trial Chamber, however, recognised that destruction of cultural identity may proceed simultaneously with physical or biological destruction, and evidence of destruction of cultural property may be considered as evidence of the intent to physically or biologically destroy the targeted group. The Appeals Chamber in *Krstić* affirmed the Trial Chamber’s ruling on this point.

⁷⁹ The War Crimes Chamber of the Court in Bosnia-Herzegovina has also issued genocide convictions for the massacre at Srebrenica. The application of the crime of genocide to the Srebrenica massacre has proven controversial in academic quarters as being unduly elastic. See, for example, Menachem Z. Rosensaft, “Ratko Mladić’s Genocide Conviction, and Why it Matters”, in *The Tablet*, 22 November 2017, supporting this application but citing William A. Schabas as being “bothered by what he called a ‘micro-genocide’”. The ICTY in a series of cases nonetheless underscored that the women, children, and elderly at Srebrenica suffered ‘forcible transfer’ and ‘serious bodily and mental harm’ – each of which is proscribed as genocide by the ICTY Statute (and the Genocide Convention, of course); these judgments, beginning with *Krstić*, also explored at length what a ‘substantial’ part of the overall population constitutes and developed a series of factors to consider in the context of Srebrenica.

tional Military Tribunal at Nuremberg had placed it. The ICTR moreover elaborated at length on how to determine genocidal intent in contexts lacking direct evidence.⁸⁰ Prosecutors at the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) also have also pursued genocide charges. In proceedings against Khmer Rouge leaders Nuon Chea and Khieu Samphan, ECCC prosecutors allege genocide against the Vietnamese and Cham people. In a 1978 radio broadcast, which ECCC prosecutors put into evidence, Pol Pot estimated that “each Cambodian soldier was capable of killing 30 Vietnamese, and therefore Cambodia could wipe out the entire population with only 2 million soldiers”.⁸¹ As for the Muslim Cham minority, prosecutors emphasised that, while many Cham were “given the opportunity to survive by abandoning their customs [this] still constitutes genocide”.⁸²

So, indeed, while the “[t]wo superpowers worked in dialectical unison to the detriment of international criminal law” while negotiating the Genocide Convention,⁸³ the instrument that was thusly created surpassed the lifespan of one of the superpowers and ultimately helped support the creation of international courts to prosecute and punish. Weiss-Wendt may simply be too harsh, or too hasty, when he evokes Lemkin’s “metaphor of the Genocide Convention as his own child” only to add that “the child was stillborn”.⁸⁴ The entering into force of the Genocide Convention seeded a definition that ultimately replicated itself in the Rome Statute and the Statutes of the ICTY and ICTR. The reproduction of this ruffled definition demonstrates the path dependency of the law – once negotiated, forever knotted it seems. That said, the responsibility for

⁸⁰ In terms of circumstantial evidence, the ICTR identified as probative: “The overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim’s membership in a protected group and the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators”. See ICTR, *The Prosecutor v. Siméon Nchamihigo*, Trial Chamber III, Judgement and Sentence, ICTR-01-63-T, 11 December 2008, para. 331 (www.legal-tools.org/doc/b3c6e0/).

⁸¹ Andrew Nachemson, “Case made for genocide verdict”, in *The Phnom Penh Post*, 16 June 2017.

⁸² *Ibid.*

⁸³ Weiss-Wendt, 2017, p. 280, see *supra* note 1.

⁸⁴ *Ibid.*

curating that definition, for either rendering it more elastic and purposive or more restrictive and brittle, now falls to contemporary judges, whether national or international. And, although many observers rightly posit that judges have toughened the *mens rea* requirements for genocide,⁸⁵ the fact remains that the term has become purposively applied by judges to a number of tragedies and has been claimed by groups world-wide as a descriptor of their suffering.

In sum, then, once genocide became a legal term, *grâce à* Lemkin, its interpretation became one for international criminal courts and tribunals to make.

But not only criminal courts: the International Court of Justice ('ICJ'), moreover, would not have been able to rule in 2007 in litigation brought by Bosnia-Herzegovina against Serbia for genocidal violence or in 2015 by Croatia against Serbia (and vice-versa), insofar as jurisdiction over those disputes was solely assured by the Convention.

In its claim (the '*Bosnian Genocide* case'), Bosnia-Herzegovina asserted that Serbia and Montenegro, the State into which the Federal Republic of Yugoslavia was transformed in 2003, violated its obligations under the Genocide Convention. The Confederation of Serbia and Montenegro was dissolved in May 2006 when, following a plebiscite, Montenegro narrowly voted for independence. Serbia became the successor State to Serbia and Montenegro. On 26 February 2007, the ICJ held that, although Serbia was not directly responsible for committing genocide in Bosnia-Herzegovina, it was responsible for having failed to prevent genocide at Srebrenica in July 1995.⁸⁶ The ICJ affirmed that States can be held civilly responsible for breaching the Genocide Convention – thereby closing a debate that had opened at the negotiation of the Genocide Convention and settling that debate in a manner that aligned the interpretation of the Convention closer to Lemkin's initial views.

⁸⁵ Scheffer, 2017, p. 565, see *supra* note 8: "Jurists have erected such a high bar for the crime defined by Lemkin that Lemkin's singular focus on such evil overshadowed the far more pragmatic approach by Lauterpacht".

⁸⁶ ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007 (the '*Bosnian Genocide* case') (www.legal-tools.org/doc/5fcd00/). As an aside, Bosnia-Herzegovina brought its claim against Serbia in 1993; Serbia was found responsible for failure to prevent a genocide that occurred at Srebrenica in 1995, *after* the claim was brought against it.

The ICJ found that only acts committed at Srebrenica in July 1995 qualified as acts of genocide, while other atrocities complained of by Bosnia-Herzegovina in its application did not constitute genocide.⁸⁷ The ICJ concluded that the Srebrenica atrocities could not be attributed to Serbia directly through acts committed by its dependent organs or persons or by parties under its direction or control.⁸⁸ In other words, Bosnian Serb forces at Srebrenica were not acting under Serbia's direction or effective control and, thereby, Serbia could not be directly responsible for genocide. However, Serbia's responsibility was incurred in that it did not meet its obligation to prevent genocide. Failure to meet the obligation to prevent genocide can be triggered by omission and can be incurred when a State is merely aware that genocide might be committed, instead of the standard for complicity which is one of a positive act where there is knowledge that a genocide is incipient or underway. The ICJ also found Serbia responsible for its failure to prevent genocide at Srebrenica, as well as responsible for breaching the Genocide Convention because of its failure to fully co-operate with the ICTY (in particular its failure to bring notorious suspects into custody).⁸⁹ The ICJ did not award damages against Serbia. It ruled that the issuance of the judgment alone constituted satisfaction for Bosnia.

As a matter of jurisprudence, the ICJ ruled that State responsibility can arise from a breach of the Genocide Convention: States, in short, can be responsible for genocide. Individual culpability does not extinguish collective State responsibility. The ICJ held that “*duality* of responsibility continues to be a constant feature under international law”,⁹⁰ citing an

⁸⁷ *Ibid.*, paras. 291–7.

⁸⁸ *Ibid.*, paras. 395, 412. The ICJ found that Serbia did not have effective control over the VRS (the Army of *Republika Srpska*) and that the VRS and other entities were not organs of Serbia, meaning that Serbia's responsibility for direct commission of genocide, conspiracy to commit genocide, incitement to commit genocide, or complicity in genocide could not be established. Four judges disagreed on the complicity point. See, for example, Judge Bennouna, who held that: “[L]e mens rea exigé du complice n'est pas le même que celui qui incombe à l'auteur principal, soit l'intention spécifique (*dolus specialis*) de commettre le genocide, et il ne peut pas en être autrement, car exiger cette intention reviendrait à assimiler le complice au coauteur”. The *Bosnian Genocide* case, Déclaration de M. le juge Bennouna, 26 February 2007 (www.legal-tools.org/doc/014fb5/).

⁸⁹ The ICJ took note of evidence signifying that Serb authorities failed to take reasonable efforts to apprehend General Mladić, indicted (and convicted in 2017) by the ICTY for genocide. See the *Bosnian Genocide* case, Judgment, paras. 447–9, *supra* note 86.

⁹⁰ *Ibid.*, para. 178 (emphasis mine).

International Law Commission Commentary that notes a “State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out”.⁹¹

On 3 February 2015, the ICJ separately ruled in a series of long-standing claims of genocide reciprocally brought by Croatia and Serbia against each other (the ‘*Croatia v. Serbia* litigation’).⁹² The ICJ dismissed all claims. Invoking the jurisdictional clause of the Genocide Convention, Croatia alleged in 1999 that Serbia was responsible for several Convention violations, such as commission, conspiracy, attempt, and complicity in genocide against Croats, including failure to prevent and punish genocide, in particular from 1991-1992. Serbia counterclaimed in 2009, alleging genocide by Croatia against Serbs living in the Krajina region of Croatia in 1995 in the context of Croatia’s decisive ‘Operation Storm’. The ICJ dismissed some arguments on the basis of retroactivity (arguments that related to alleged conduct that occurred before Serbia has declared itself bound to the Convention on 27 April 1992). Croatia, however, also argued that the Genocide Convention comprehended succession as a possible mode of responsibility and, hence, that Serbia could be responsible for the acts of a predecessor State, in this case the Socialist Federal Republic of Yugoslavia (‘SFRY’), for acts committed prior to 27 April 1992. The ICJ read Article IX of the Genocide Convention as incorporating succession as a possible mode of responsibility.⁹³ The ICJ determined however that the question of responsibility could be examined only if it were established that acts amounting to genocide had been contributed and were in fact attributable to the SFRY.

⁹¹ *Ibid.*, para. 173. See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 58 (www.legal-tools.org/doc/10e324/), which stipulates: “[T]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State”.

⁹² ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia.*), Judgment, 3 February 2015 (the ‘*Croatia v. Serbia* litigation’) (www.legal-tools.org/doc/1f2f59/).

⁹³ Article IX reads as follows: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”. See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951 (www.legal-tools.org/doc/498c38/).

As to the merits of the question, then, the ICJ ruled that although some acts cited by each party met the *actus reus* for genocide, the mental intent – the very high *dolus specialis* – was not satisfied. Here, the ICJ referred to its 2007 judgment in the *Bosnian Genocide Case*, though it added to the evolving nature of the crime of genocide by suggesting that serious mental harm (included in Genocide Convention Article II(b)) could be found in situations where the “psychological pain suffered by the relatives of individuals who have disappeared in the context of an alleged genocide [arises] as a result of the persistent refusal of the competent authorities to provide the information in their possession which could enable these relatives to establish with certainty whether and how the persons concerned died”.⁹⁴ The ICJ, moreover, also clarified that in the absence of a specific plan, any *dolus specialis* will be inferred only if that is the only *reasonable* inference to be drawn from the impugned pattern of conduct,⁹⁵ which could be seen as a departure from the suggestion in the *Bosnian Genocide Case* that genocide could be inferred if it were the only *possible* inference to be drawn. The ICJ also clarified the requisite methods of proof. In the *Croatia v. Serbia* litigation, the ICJ affirmed the general finding from the *Bosnian Genocide case* that it regarded ICTY factual findings as “highly persuasive” and deserving of due weight.⁹⁶

Summarising the *Croatia v. Serbia* litigation, Surabhi Ranganathan digs into Serbia’s argument that, when it comes to discussing the ICTY as an entity, the ICJ should not accord greater weight to the findings of the ICTY Appeals Chamber than to the findings of the ICTY Trial Chamber.⁹⁷ Serbia emphasised that all the judges who are involved in an ICTY case ought to be given equal consideration. Serbia’s motivation in this regard, to be sure, originates with the ICTY’s judgments in the *Gotovina* litigation,⁹⁸ where the Trial Chamber unanimously convicted two Croatian generals of participation in a joint criminal enterprise that constituted the *ac-*

⁹⁴ The *Croatia v. Serbia* litigation, Judgment, para. 356, see *supra* note 92.

⁹⁵ *Ibid.*, para. 148.

⁹⁶ *Ibid.*, para. 182, quoting the *Bosnian Genocide case*, Judgment, para 223, see *supra* note 86.

⁹⁷ Surabhi Ranganathan, “Current Developments, The 2015 Judicial Activity of the International Court of Justice”, in *American Journal of International Law*, 2016, vol. 110, p. 504.

⁹⁸ ICTY, *Prosecutor v. Ante Gotovina et al.*, Trial Chamber I, Judgment, Vol. II, IT-06-90-T, 15 April 2011; *Prosecutor v. Ante Gotovina and Mladen Markač*, Appeals Chamber, Judgment, IT-06-90-A, 16 November 2012 (www.legal-tools.org/doc/03b685/).

tus reus of genocide. The Appeals Chamber, in a controversial decision, reversed these convictions by a margin of three judges to two. Ranganathan observes that “Serbia contended that the ICJ should take into account the fact that, counting across both [ICTY] Chambers, a greater number of judges were convinced of the guilt of the Croatian generals” and then adds:

The ICJ rightly dismissed these arguments, noting that it was not for the ICJ to pronounce on the manner in which the Appeals Chamber were constituted and that the ICJ was bound to respect the hierarchy between the two chambers.⁹⁹

Sands constructs Lemkin and Lauterpacht as foils, if not nemeses; and genocide, on the one hand, and crimes against humanity, on the other, as sparring partners. Indeed, as Ranganathan observes in the *Croatia v. Serbia* litigation, both disputing States, when accused of genocide, may have acknowledged the acts of violence but then insisted that these acts fell outside the frame of genocide and, instead, into the realm of crimes against humanity. Both States made these arguments in a very utilitarian sense: there is not yet an international treaty for crimes against humanity and, hence, no jurisdictional clause that can trigger ICJ review. Ranganathan morbidly notes:

[A] layperson reading the case may be struck by the parties’ ready utilization of their own terrible deeds and intentions as arguments in support of their cases. Acknowledging claims of forced displacement and ethnic cleansing, the parties argued that those acts, committed only in order to gain control over the territory, did not disclose genocidal intent. This was a sound argument in a context where the Court’s jurisdiction extended only to violations of the Genocide Convention. Nevertheless, not only laypersons, but also lawyers, must feel discomfort at the jurisdictional constraints that necessitate such fragmentary adjudications of responsibility [...].¹⁰⁰

The Genocide Convention includes while it excludes. Such is the outcome of Lemkin’s vision in which he pursued the criminalisation of genocide above all. In the *Croatia v. Serbia* litigation, this led to the case being dismissed because the allegations failed to fit. The litigants admitted to crimes against humanity, but for the case it simply did not matter –

⁹⁹ Ranganathan, p. 512, see *supra* note 97.

¹⁰⁰ *Ibid.*

it was all about genocide, all about Lemkin, because of the Convention and its jurisdictional clause.

18.6. Conclusion: A Counterfactual

What if Lemkin had pursued a different strategy? What if he had advanced ‘genocide’ *outside* of the world of law and diplomacy and international conventions and, instead, within the realm of plain social discourse at the national level? What if the term had stewed and brewed at that level for a generation or two (or more), marinating a bit, before (possibly) crystallising into law? Would law have crystallised and, if so, might it have been more expansive and better aligned with Lemkin’s initial conceptualisation of genocide? Though this counterfactual knows no answer, it still ought to be presented.

Such has largely been the path of crimes against humanity: a somewhat more *ad hoc* journey of *bricolage*. Crimes against humanity may actually have played a larger role in the enforcement of international criminal law *despite* a lack of co-ordinate codification.¹⁰¹ To be sure, crimes against humanity fall within the textual ambit of the enabling instruments of the many international criminal courts and tribunals but crimes against humanity were never jump-started by codification in a solo “owner-occupied” treaty. So perhaps the virtues of codification may be overrated and too hungrily stated. Or, perhaps, codification has nothing to do with anything: it may simply be that crimes against humanity have played a larger role because they are far easier to prove than genocide and apply to a much broader set of atrocities.

Now, many decades later, talk has arisen of a treaty devoted singularly to crimes against humanity. Pioneered by legal academics, the text of a draft treaty is currently before the ILC for development and elaboration.

As for Lemkin, it is fitting to conclude by pivoting back to his love of philology. Lemkin added a new word not only to one language but to *all* languages. He coined a term that is now broadly recognisable within and outside of law. He constructed a word that resonates and ripples widely: in my view, he invented the word that forms the very emotional heart of international criminal law. Although genocide may have lost at Nuremberg, it may have prevailed in the long game. Echoing Ranganathan and Scheffer, Sands laments:

¹⁰¹ Scheffer, 2017, p. 565, *supra* note 8.

In the years after the Nuremberg judgment, the word genocide gained traction in political circles and in public discussion as the ‘crime of crimes’, elevating the protection of groups above that of individuals. Perhaps it was the power of Lemkin’s word, but as Lauterpacht feared there emerged a race between victims, one in which a crime against humanity came to be seen as the lesser evil. [...] Proving the crime of genocide is difficult [...] It enhances the sense of solidarity among the members of the victim groups while reinforcing negative feelings toward the perpetrator group.¹⁰²

A contrario, Lemkin the man quickly faded in health and comfort. The passage of time was not good to Lemkin – either physically or reputationally. Even during his youthful studies in Lwów, each “new home” in which he lived “seemed less grand than the previous one, as though Lemkin were on a downward trajectory”.¹⁰³ Lemkin died of a heart attack in New York. He was previously “destitute and ill”, living “on West 112th Street, a space filled with books and paper, a single room with a daybed but no telephone or water closet”.¹⁰⁴ Lemkin never married, never had children; amid all the “material” that Sands “found on Lemkin [...] none contained any hint of an intimate relationship”.¹⁰⁵ His intimacy is shared with, and felt by, a word.

¹⁰² Sands, 2016, p. 380, see *supra* note 7.

¹⁰³ *Ibid.*, p. 146.

¹⁰⁴ *Ibid.*, p. 139.

¹⁰⁵ *Ibid.*, p. 160.

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