PRAVNI ZAPISI, God. XVI, br. 2 (2025)
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UDK 341.485

GUEST EDITORIAL / UVODNI ESEJ

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ESCAPING GENOCIDE'S GRAVITY

1. Introduction: The Unbearable Weight of the Ultimate Crime

Genocide is seen as the supreme crime.[1] Many people consider genocide the worst crime imaginable, certainly the worst among the crimes typically tried in international courts. Its grim stature is not merely the consequence of moral intuition – a proper naming of paramount evil – but also a strategic asset. Activists and victims often assign an almost talismanic power to this legal category, as if calling something genocide might mobilise public opinion, diplomacy, and power in a way that 'mere' war crimes or crimes against humanity evidently do not.

This potential is so evident – so recognisably valuable as a tool of shame and censure – that people regularly debate which terrible atrocities might legitimately count as genocide. Is it just the Holocaust, just a small number of the most extreme events like Rwanda or Srebrenica or the Armenian massacres, or are there many genocides? That last view has become dominant as claimants for the bleak mantle have proliferated:[2] Gaza, Israel, Ukraine, Sudan, Myanmar, Congo, Ethiopia, Xinjiang, Syria, Iraq, Canada, the United States, South Africa [...] But whatever view is taken,

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1 See, *e.g.*, Schabas, W. A., 2009, *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2nd ed.

2 Genocide Watch, Genocide Watch Recommendations 2024: Genocide Emergencies and Warnings, (https://www.genocidewatch.com/_files/ugd/df1038_c0b09883aa-28417ba4e5d832c80aef98.pdf, 31. 1. 2025).

genocide is typically understood to be a supreme and unique evil, the 'word that forms the very emotional heart of international criminal law.'[3]

Still, despite its preeminence, genocide is a troubling candidate for apex crime. In its origins, definition, jurisprudence, and politics, genocide is almost paralytically narrow and radically out of step with important values and sensibilities underpinning other important elements of the global order. Specifically, genocide exhibits a defective, minimally useful definition; is redundant of other crimes; and deploys a moral logic and grammar dramatically misaligned with the individualistic purposes of human rights and international criminal law (ICL). And its very seriousness – the social gravity conceded to genocide as a legal category[4] – makes it hard to prosecute while also displacing other ways of responding to great harm. In short, this Essay argues that genocide exerts a distorting influence on law, transitional justice, and politics – one that may be impossible to separate from genocide's influences on and interactions with ICL itself.

In Part 2, I review the origins, rationales, text and treatment of genocide as a crime. Then in Part 3, I turn to critiques, some familiar and well-rehearsed, others less so: of genocide's narrow definition, which many have observed and criticised, but also its redundancy. In Parts 4 and 5, I consider genocide's poor moral fit and problematic position atop a pyramid of evil. I might be wrong about that misfit – but if so, genocide's effects may be even more troubling. Parts 6 and 7 conclude with a radical thought-experiment – imagining a world without the crime of genocide. Whether genocide is a misfit outlier or the moral centre of our law, what might the world, and the law, look like without it?

2. Foundations: Genocide's Ascent

Genocide is often associated with the Holocaust, but although Raphael Lemkin coined the word in the early 1940s, he began his advocacy during what is now called the interwar period, motivated in part by the Armenian massacres during the Great War. Lemkin imagined a two-fold crime: 'acts of barbarity,' similar to what we recognise as genocide today; and 'acts of vandalism,' focused on harms we now call cultural genocide.

3 Drumbl, M. A., 2018, Genocide: The Choppy Journey to Codification, *Washington & Lee Public Legal Studies Research Paper Series*, Working Paper Series No. 2018–17, p. 22, (http://ssrn.com/abstract=3269430, 31. 1. 2025).

4 'Gravity' has a specific meaning in ICL, as a measure of seriousness. That meaning differs from the focus of my title and Essay. On the legal concept of gravity, see de-Guzman, M. M., 2020, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford, Oxford University Press.

The unifying key to this dual structure, however, was the perpetrators' motivation, the intention to destroy some national or ethnic group's cultural pattern and replace it with the perpetrators' own.

Genocide is mentioned in the Nuremberg indictment, though not as a separate crime, but rather as 'a descriptive term' for war crimes against civilians in occupied territory.[5] Genocide is not mentioned in the judgment. After Nuremberg, however, the term's ascent was swift, and it was soon recognised as an international crime.[6] The definition in the Genocide Convention of 1948 departed from Lemkin's earlier proposals. 'Vandalism' disappeared almost entirely, leaving a conceptual chapeau and set of predicate crimes that mostly presumed biological destruction of the members of some group.[7]

The Genocide Convention provides that

> 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.[8]

Thus the definition requires an intent to commit an underlying harm – killing members of the group or putting them in conditions calculated to cause their destruction, for example – and an intent to commit that harm for the purpose of destroying the group 'as such.'

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5 Genocide Timeline, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/genocide-timeline?parent=en%2F10048, 31. 1. 2025). See Nuremberg Trial Proceedings, Vol. 1, Indictment: Count Three, *The Avalon Project*, (https://avalon.law.yale.edu/imt/count3.asp, 31. 1. 2025). It remains unclear if genocide was anyone's priority at Nuremberg, where the new concept of crimes against humanity was in the ascendant. See Drumbl, M. A., 2018, (discussing this point and drawing on the argument in Philippe Sands' *East West Street*).

6 General Assembly Resolution 96(I), (The Crime of Genocide), 11 December 1946, A/Res/96-I.

7 'Mostly' because mental harm, preventing births, and removing children remain in the definition, but other proposed elements, such as forced impregnation and forced divorce, did not survive.

8 Convention on the Prevention and Punishment of the Crime of Genocide 9 Dec. 1948, entry into force 12 Jan. 1951, United Nations Treaty Series, (further in the text: Genocide Convention), Vol. 78, p. 277, Art. 2, (https://ihl-databases.icrc.org/assets/treaties/357-IHL-51-EN.pdf, 31. 1. 2025).

This second element is called special intent. It is relatively rare in domestic law – where similar mental elements are called motive[9] – but it does occur: common-law burglary, for example, or hate crimes. Although both intents must be present – I intend to kill, and by so doing I intend to destroy the group – the governing element is the intent to destroy the group. Several predicate acts against members of the group can underlie genocide – even attempted acts[10] – but only one element directly relates to the group itself. The intent to destroy the group is the essential feature of genocide.[11]

Like crimes against humanity, genocide can be committed in war or peace.[12] Although the Genocide Convention also describes state obligations along with providing for individual prosecution, it appears to contemplate trial only in the jurisdiction where the crime occurred or in an international forum,[13] rather than universal jurisdiction, which has nonetheless developed, along with genocide's status as a *jus cogens* violation of customary international law.[14]

Notwithstanding its increasing status, the crime itself was rarely invoked.[15] This was not due solely to some unique feature of genocide: ICL as a whole was largely dormant after the post-World War Two trials,[16]

9 In a 1946 article, Lemkin argues that a separate crime of genocide is needed because 'mass murder' is not an adequate descriptor, 'since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national, or religious considerations'. Lemkin, R., 1946, Genocide, *American Scholar*, Vol. 15, No. 2, pp. 227–330, (http://www.preventgenocide.org/lemkin/americanscholar1946.htm, 31. 1. 2025).

10 This focus on intention partly explains why attempt, conspiracy, and incitement to commit genocide are also crimes even though inchoate crimes are quite rare in ICL. It is theoretically possible to commit one of these inchoate crimes without any of the predicate acts being completed.

11 The intended destruction can be 'in whole or in part', but this does not significantly affect the essential focus. Another element – 'as such' – plays a more important role, and will be examined later on in this Essay.

12 Genocide Convention, Art. 1.

13 *Ibid*., Art. 6.

14 Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. Human Rights Council, 16 Sept. 2025, A /HRC/60/CRP.3, p. 4. ("The prohibition of genocide is a peremptory norm of international law (*jus cogens*)").

15 See Weiss-Wendt, A., The interpretation and (non-)application of the Genocide Convention during the Cold War, in: Simon, D., Kahn, L., (eds.), 2023, *Handbook of Genocide Studies*, Cheltenham, Edward Elgar Publishing, p. 85.

16 Beside, Nuremberg and Tokyo, trials were conducted by the Allied powers, as well as in individual countries. These trials generally relied on crimes against humanity or domestic criminal law. The *Greiser* trial in Poland in 1946 was the first conviction for genocide, and 'used Lemkin's definition of genocide from [his book] Axis Rule, including the 'cultural and spiritual aspects' of the crime, to find Greiser guilty of genocide for pursuing the German policy of removing Polish national patterns

only reviving in the 1990s with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and then the International Criminal Court (ICC). The first international conviction for genocide was in 1998, entered against Jean-Paul Akayesu in Rwanda.[17] Since then, an efflorescent jurisprudence has developed, both in international courts and domestic courts relying on universal jurisdiction principles; in parallel, provisions of the Genocide Convention have been invoked in state-to-state proceedings before the International Court of Justice. Today, there are numerous active legal proceedings, both against individuals and states, and accusations of historical or ongoing genocide have become commonplace.[18] Genocide's prominence appears more secure, more relevant, and weightier than ever.

3. Weightlessness – The Insubstantiality of Genocide

Before considering the problem of that weight, it's important first to consider its opposite: genocide's lightness and insubstantiality. Genocide

in Warthegau and imposing German national patterns through Germanisation efforts[.]' Irvin-Erickson, D., The History of Rapha'l Lemkin and the UN Genocide Convention, in: Simon, D., Kahn, L., 2023, p. 8. Thereafter, trials only rarely used genocide as a legal category. For example, in the 1960s, Eichmann was convicted of 'crimes against the Jewish people' – an Israeli statute – and crimes against humanity, while in the Frankfurt *Auschwitz* trials, 20 defendants were charged under German domestic law with murder and related crimes. See Postwar Trials and Denazification, The Holocaust Explained, *The Wiener Holocaust Library*, (https://www.theholocaust-explained.org/survival-and-legacy/postwar-trials-and-denazification/the-nuremberg-trial/, 31. 1. 2025); Postwar Trials, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/war-crimes-trials, 31. 1. 2025); Subsequent Nuremberg Proceedings, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings, 31. 1. 2025).

17 Rwanda: The First Conviction for Genocide, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/rwanda-the-first-conviction-for-genocide, 31. 1. 2025).

18 Many cases at the ICTR and ICTY included genocide charges. At the ICTR, convictions covered the whole range of massacres against Tutsis; at the ICTY, convictions were limited to Srebrenica. The ICC has issued one indictment for genocide against former Sudanese President al-Bashir. The ECCC convicted for genocide only for a very limited set of the Khmer Rouge's persecution and killings. State-to-state litigation before the International Court of Justice has also expanded dramatically: A few cases arose out of the Yugoslav wars, but recently there have been cases involving Myanmar, Ukraine, and Palestine. More broadly, popular, journalistic, and scholarly discourse has increasingly resorted to claims of genocide, most prominently in connection with the war in Gaza, but also in many other conflicts.

has a notoriously narrow definition, which excludes many atrocities that laymen commonsensically, if inaccurately, think of as genocide. Three narrowings in particular merit mention: definition of the group, exclusion of cultural genocide, and the effects of special intent. These features are familiar – some have been the source of criticism since genocide's conception – but here I want to consider them anew and examine what their obvious insufficiencies add up to.

3.1. THE GROUP

The requirement that genocide be committed against one of four protected groups – racial, national, ethnic,[19] and religious – excludes many large-scale killings and persecutions. The most significant example is the Cambodian genocide, as it is commonly called. Juridically, the extermination of roughly one quarter of Cambodia's population was mostly not genocide, and it is only because the Khmer Rouge also killed members of smaller ethnic groups like the Cham that genocide charges succeeded. This is often misinterpreted as the exclusion of 'auto-genocide,' but there is no reason members of a group could not commit genocide against their own. The real stumbling block is that the killers chose their victims for their political and ideological qualities, which the definition excludes.

This narrowness – a function of negotiating positions when the Convention was drafted[20] – is familiar, and the source of much criticism. The usual remedy is to expand the definition to include political groups and sexual minorities – to head in the direction of the layman's sensibilities that genocide is large-scale extermination, if still for some specific purpose.

19 The Genocide Convention refers to this as 'ethnical' – regretabbly, since 'ethnic' is preferable to native speakers. But one often encounters the longer, less correct form – a lexical example of the rigidity arising from law's conservatism and the original definition's sticky prestige.

20 Irvin-Erickson, D., 2023, pp. 21–22. ('Careful scholarship of the negotiations of the treaty has shown the extent to which the delegations of UN member states worked to scrub from the definition of genocide anything that could expose their governments to international prosecution. [...] Stalin and Vyshinky poured over every draft of the convention to make sure there was nothing in the treaty that could be used against Soviet famines, the USSR's nationalities policies, state terror, and the gulags. [...] While many genocide scholars and anti-genocide activists uphold the UN Genocide Convention as a kind of moral document, the convention was a product of post-Second World War geopolitics, starting as an explicitly anti-colonial idea that was transformed into a treaty that colonial powers could tolerate').

3.2. KILLING CULTURE

The predicate acts list has also been criticised for its narrowness, in particular excluding acts that would fit Lemkin's 'vandalism' or cultural genocide.[21] Lemkin certainly imagined genocide as not limited to, or indeed even focusing on physical destruction – '[h]is concern lay more with the extirpation of identity than of life'[22] – and the current definition encompasses much more than killing. Theoretically, genocide can be committed without killing anyone, for example by removing children from families or preventing births through sterilisation.

Yet there are no successful prosecutions for genocide and few widely recognised acts of genocide that do not involve significant killing.[23] Nor is this mere accident, the Brownian motions of jurisprudence: This narrowed focus is consistent with both early paradigmatic instances of genocide – the physical destruction of Armenians and Jews – and the drafting of the Convention. The narrowness in the predicate acts, if not essential to the nature of genocide, is closely woven into its realised form.

The typical remedy, as with critiques of the group definition, is the obvious one: expand the list of predicate acts to include acts that radically alter a group's culture and way of life, even if the group's members are not killed – a shift that would also align the definition more closely with Lemkin's original.

3.3. GENOCIDE AS SUCH: SPECIAL INTENT

Like the group definition and the predicate acts list, special intent dramatically narrows the scope of genocide, removing many atrocities from its ambit because they lack this additional *dolus* – at least, because it is difficult to demonstrate they have it.

Jelisić, a case at the ICTY, demonstrates this feature. Goran Jelisić, the self-described 'Serbian Adolf,' admitted to killing and torturing numerous Muslims in Bosnia and pled guilty to 31 counts of war crimes and crimes against humanity – but not genocide. That charge went to trial and was dismissed. On appeal, the court found this was in error, but refused to reinstate proceedings, citing judicial economy and prudential concerns.[24]

21 See, *e.g.*, Schabas, W. A., 2009, pp. 207–215.

22 Drumbl, M. A., 2018, p. 3.

23 See, *e.g.*, National Inquiry into Missing and Murdered Indigenous Women and Girls, A Legal Analysis of Genocide – Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, (https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf, 31. 1. 2025).

24 See ICTY, *Brčko*, (IT-95-10) Goran Jelisić – Case Information Sheet, (https://www.icty.org/x/cases/jelisic/cis/en/cis_jelisic.pdf, 31. 1. 2025).

Nor was this an outlier: All of the ICTY prosecutor's numerous attempts to charge genocide beyond Srebrenica failed, and the tribunal as a whole produced a singularly narrow jurisprudence – a 'little genocide.'[25]

Narrowness is evident at the ICC as well, where prosecutors have successfully brought genocide charges only once, against Sudan's President al-Bashir – on the second try. On the first, the evidence they confidently presented for al-Bashir's intent to destroy particular ethnic groups was instead read by the Pre-Trial Chamber as ambiguous.[26] Recently, the ICC prosecutor brought charges against leaders of Russia, Israel, and Hamas, but not for genocide, despite widespread belief that genocide is occurring in those conflicts. It cannot be known with certainty why the prosecutor didn't do something, but it is reasonable to suppose – especially as the predicate acts could easily be met (including, for Israeli leaders, large-scale killing, and for Putin, removal of children) – that either doctrine or politics made genocide charges inadvisable.

None of this means that convictions are impossible. The ICTR produced many convictions, even taking judicial notice of the genocide.[27] But the Rwandan genocide involved killing on an unprecedented level – perhaps 800,000 people in three months, mostly well away from combat zones. On more ambiguous facts – smaller numbers of deaths, intertwined with combat – convicting for genocide has proven vanishingly difficult. Yugoslavia, not Rwanda, is the paradigm. Even the most confident assertions that what is happening in Gaza is genocide will face considerably greater obstacles of proof if ever they are aired in a courtroom.[28] This narrowness is no accident, but a consequence of genocide's structure.

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25 Waters, T. W., 2016, The little genocide: A Karadzic conviction in The Hague that will satisfy no one, *Los Angeles Times*, Los Angeles, (http://www.latimes.com/opinion/op-ed/la-oe-0327-waters-karadzic-genocide-20160325-story.html, 31. 1. 2025).

26 See International Criminal Court, *Al Bashir case: The Appeals Chamber directs Pre-Trial Chamber I to decide anew on the genocide charge*, Press Release 3 February 2010, (https://www.icc-cpi.int/news/al-bashir-case-appeals-chamber-directs-pre-trial-chamber-i-decide-anew-genocide-charge, 31. 1. 2025). Nor does success on the second try alter this bleak analysis, because the threshold for sustaining an indictment is quite low.

27 United Nations International Residual Mechanism for Criminal Tribunals, *ICTR Appeals Chamber takes Judicial Notice of Genocide in Rwanda*, Press Release 20 June 2006, (https://unictr.irmct.org/en/news/ictr-appeals-chamber-takes-judicial-notice-genocide-rwanda, 31. 1. 2025).

28 On the differences between courtroom standards and other standards (such as for investigative commissions) – as well as the conceptual challenges commonly encountered in thinking about the evidentiary proofs required for genocide – see Milanovic, M., Proving Genocide, *EJIL: Talk!*, 18 Sept. 2025, https://www.ejiltalk.org/proving-genocide/; and, *contra*, Ambos, K., Proving Genocide: A Follow-up to Marko Milanovic, *EJIL: Talk!*, 1 Oct. 2025, (https://www.ejiltalk.org/proving-genocide-a-follow-up-to-marko-milanovic/).

3.4. STRANGE ACTION – REDUNDANCY

Perhaps narrowness is just a feature – after all, there are other crimes to cover other cruelties. But in fact that feature is not a gap, but an overlap: genocide, narrow as it is, does not cover any truly unique space.

Like most international crimes, genocide is a 'crime [...] of characterisation.'[29] It shares with other crimes the same underlying *actus* and is distinguished from them by characterizing those acts and facts according to some abstract criteria. This is why, in *Jelisić*, the ICTY Appeals Chamber declined to order a retrial. The facts – the killings – were not at issue and indeed were the basis of Jelisić's guilty pleas. The only question was if those same killings were also genocide. In fact, there is almost no act of genocide that is not also a crime against humanity (and often a war crime). Genocide only qualifies and characterises those acts; it is almost entirely[30] redundant – a Venn diagram of one circle.

This drive to characterise has consequences. When the ICTR sought to transfer the case of Michel Bagaragaza, a genocide participant and co-operating witness, Norway offered its domestic courts as venues, relying on its domestic murder statutes. The ICTR Chamber rejected this, insisting on a complementary jurisdictional basis – that is, charges of genocide. A subsequent attempt to transfer Bagaragaza to the Netherlands similarly failed. Eventually the ICTR was obliged to try him.[31] Bagaragaza's acts had to be characterised as genocide as such.

A different characterisation is a difference, and arguably treating the Holocaust as 'just murder multiplied' misses something essential. Geno-

29 Waters, T. W., 2019, The Persecution of Stones: War Crimes, Law's Autonomy and the Co-optation of Cultural Heritage, *Chicago Journal of International Law*, Vol. 20, No. 1, p. 97.

30 'Almost': Because of genocide's intent standard and lack of an 'attack' requirement, it is possible to imagine a lone figure bent on genocide even in the absence of the contextual circumstances needed for crimes against humanity. (In addition, genocide criminalises inchoate acts that crimes against humanity don't.) But these are vanishingly narrow circumstances, and they haven't occurred in actual cases, in which, in practice, genocidal acts have occurred in the context of widespread and systematic attacks. Thus, someone like Jelisić could have been convicted on such a theory, had he done what he did in isolation, but in the actual event there was a campaign of ethnic cleansing going on – a factual context so obvious that he pleaded guilty for crimes against humanity for the same acts. The ICC's elements of the crime require evidence of a plan or policy, which seems to import some of the contextual elements required by crimes against humanity, making genocide in certain respects even more redundant, as well as harder to prove. Thanks to Margaret deGuzman for these clarifying points.

31 Ryngaert, C., 2009, The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands, *Hague Justice Journal*, Vol. 4, No. 3, p. 235.

cide names a specific form of atrocity. Special intent does similar work in hate crimes, which define some underlying, otherwise redundant crime by its meaning and motive, thereby deepening condemnation. In that sense, genocide's 'characterisation' is a valuable conceptual distinction. Indeed, the Holocaust was not merely six million murders, but something connected and more profound. According to Sands, Lemkin saw 'an excessive focus on individuals [as] naïve [because] 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.'[32]

However, it is in fact possible to prosecute acts of genocide using ordinary crimes without ignoring the character of the crime. Oskar Grüning was convicted for being an accessory to the murder of 300,000 people at Auschwitz; Bruno Dey for contributing to the murder of 5,230 people at Stutthof.[33] The legal category was ordinary murder; the context – about which no one could be mistaken – was the Holocaust. Norway, in offering to try Bagaragaza, evidently believed it could do the same sort of justice for the Rwandan genocide; the ICTR's rejection of that offer was based, not on an essential social meaning, but a judicially generated distinction.

These criticisms – about group definition, predicate acts, and special intent – are commonplace.[34] It is a separate matter what one should do about them, and from here, my argument will depart from the more usual run of observations and remedies – a criticism less commonly made, which goes to the heart of the problem with genocide, or maybe with ICL.

4. Victim, Nation – Genocide's Moral Mismatch

Genocide's odd admixture of narrowness and redundancy might be remediable. Many crimes are narrow in focus, and redundancy is, well, a repeated feature of ICL.[35] But there is a more foundational divergence that is not so readily reparable: Genocide invokes a moral grammar radically out of step with the individual logic that originally motivated ICL and

32 Sands, P., 2016, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'*, New York, Knopf, p. 291, as cited in Drumbl, M. A., 2018, p. 7.

33 See, *e.g.*, The Wiener Holocaust Library.

34 See, *e.g.*, Kinstler, L., 2024, The Bitter Fight over the Meaning of 'Genocide', *New York Times Magazine*, New York, (https://www.nytimes.com/2024/08/20/magazine/genocide-definition.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb, 31. 1. 2025), (reviewing critiques of genocide's definition and jurisprudence and proposals for reform).

35 *Cf.* Waters, T. W., 2019, pp. 95–97, (describing the redundancy of charging practices in ICL, with reference to war crimes and crimes against humanity).

human rights. Genocide is very much a conceptual creature of its era, and that era was suffused with assumptions about humans' national essence.

Much criticism of genocide's definition focuses on which groups aren't included. Less noticed, perhaps, is what groups are: national, ethnic, racial, and religious – the traditional elements of the nation. These are qualities for which people are often discriminated against or persecuted, but the definition goes further. It requires the predicate acts be done in order to destroy the protected group 'as such.' As we've seen, this is conventionally seen as the genius of the definition, the essential move that explains why a separate characterisation and crime is needed: to condemn violence that harms and kills for this reason.

However, in doing this, the definition shifts the moral and analytical focus. Harm to individual humans is not, strictly speaking, the crime. Genocide is a crime against a group, and the individuals constituting that group take on a very different formal quality. Genocide presumes organic national identities to which individuals are essentially attached, while reifying culture, ethnicity, and race. In genocide's moral universe, individuals are not victims, but indicia of a generalised, abstract crime against a nation. They, and their suffering, are evidence.

Contrast this with crimes against humanity, which proscribes certain acts when committed as part of a systematic or widespread attack on a population. Although superficially similar to genocide's 'act and an intent,' crimes against humanity focus on the criminality of the act – the attack is simply the context in which a specific harm occurs: necessary, but not essential. Even the usual formula for indictments and judgments makes this difference plain: war crimes and crimes against humanity are always described by the predicate act, which is then characterised: 'murder as a crime against humanity,' for instance, or 'pillage as a war crime.'[36] But genocide is called 'genocide,' specified only by mode: 'genocide by killing,' 'genocide by causing serious bodily or mental harm.'[37] Even lexically, the difference is clear: one, harm to an individual because he belongs to a targeted group; the other, harm to the group caused by harming an individual.

Although much that Lemkin advocated for fell away, his focus on the group survived: 'Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their

36 ICC, *Pros. v. Al-Bashir*, Warrant for Arrest of Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09 (Public), (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF, 1. 2. 2025).

37 ICC, *Pros. v. Al-Bashir*, Second Warrant for Arrest of Omar Hassan Ahmad Al-Bashir, 12 July 2010, ICC-02/05-01/09 (Public), (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF, 1. 2. 2025).

individual capacity, but as members of the national group.'[38] Lemkin was quite clear that the harm was against a nation's essence, which is why he focused so intently on the purging and replacement of a group's cultural pattern. It was not biological death, but cultural destruction that was at the heart of his concern, the loss of an integral connection of group to place:

> *Generally speaking, genocide does not necessarily mean the immediate destruction of a nation [...] It is 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 [...] Genocide has two phases: one, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone after removal of the population and the colonisation of the area by the oppressor's own nationals.*[39]

Lemkin's was, in short, a concern grounded in the *Weltanschauung* of the 19th and early 20th centuries: the line from Hegel and Fichte through European national liberation movements to Wilsonian and Leninist self-determination. Lemkin was concerned with the brutal excesses of that order – he lived in his times – but his vision was of the same order. He was not worried about nationalism, only its persecution. The narrow group definition in the Convention is not a politically informed limitation. It is a worldview.

And, as such, a view mismatched with much that happened after the war. ICL and human rights, for all their failures and faults, arose in an era defined by a moral and legal grammar of the individual. Of course, these timelines overlap – the Genocide Convention and the Universal Declaration of Human Rights were adopted literally one day apart. But crimes against humanity and human rights were conceived as turns away from the apotheosis of the nation and state. Reflecting that, ICL became individualist in method and teleology. Indeed, a frequently expressed purpose of ICL is to assign responsibility for crimes to individuals so that collec-

38 Lemkin, R., 2008, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Clark, New Jersey, Lawbook Exchange, 2nd ed., p. 79, cited in Raphael Lemkin and the Genocide Convention, *Facing History and Ourselves*, 2 August 2016, (https://www.facinghistory.org/resource-library/raphael-lemkin-genocide-convention, 31. 1. 2025).

39 Lemkin, R., 1944, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, DC, Carnegie Endowment for International Peace, cited in Excerpt from Axis Rule in Occupied Europe by Raphael Lemkin, *Facing History and Ourselves*, 16 March 2008, (https://www.facinghistory.org/resource-library/excerpt-axis-rule-occupied-europe-raphael-lemkin, 31. 1. 2025).

tives might be spared condemnation.[40] These projects are a rebuke to statism and nationalism by declaring the individual as the moral centre of our shared politics.

By contrast, genocide is premised on something entirely different. Genocide was a rebuke to nationalism's excess. It accepted the underlying collective matrix and insisted that a proper nationalism would preserve all groups as such. Even seen as a defence of diverse humanity, genocide's four categories describe a particular kind of diversity, one premised on core, immutable attributes, not easily changeable affinities. Genocide as a crime defends the nation against destruction, but in so doing, it assumes an essential nation.

Concern with the national, even tribal focus of genocide has been voiced almost since Lemkin first mooted the idea. Lauterpacht's advocacy for crimes against humanity, in many respects in opposition to Lemkin's for genocide,

> *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 intergroup conflict. It was a rational, enlightened view, and also an idealistic one.*[41]

40 See, *e.g.*, Drumbl, M., 2007, *Atrocity, Punishment, and International Law*, Cambridge, Cambridge University Press. Drumbl is skeptical about that move, as I am – but the move was made. It's important to recall that in ICL, the individual focus is primarily on the perpetrators and their individual responsibility. It's entirely consistent with that project, in theory, to conceptualise crimes against groups or indeed even objects – a crime to destroy cultural heritage, for example. So even if genocide's victims are treated as evidence, as part of a group, as long as perpetrators are tried as individuals, then arguably focusing on their wrongful, essentialising reduction of individual victims to group members is appropriate to their crime, whatever its effects on others' view of the victims. (Thanks to William Dodge for this point.) I think that's true, but by that same token would hardly justify actually embracing their reductive worldview, which is arguably what genocide jurisprudence encourages. And it's also clear that ICL, following larger trends in domestic criminal law and human rights, has focused increasingly on victims as the rationale for the project – that is, victims as individuals. Individualism isn't just about responsibility but also about harm, and it is with this sensibility that genocide seems out of alignment.

41 Sands, P., 2016, p. 291. Schabas suggests that support for genocide's entrenchment in law was in part motivated by a desire to limit the expansion of crimes against humanity, favouring instead 'a more narrowly described form of crime against humanity: genocide'. Schabas, W. A., 2006, "The Odious Scourge": Evolving Interpretations of the Crime of Genocide, *Genocide Studies and Prevention: An International Journal*, Vol. 1, No. 2, p. 96. (https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1241&context=gsp, 31. 1. 2025).

The crimped definition we have today is not Lemkin's. Indeed, at various points Lemkin advocated much more capacious definitions protecting 'almost any social group imaginable [...]'[42] But they share a conceptual core, especially the destruction of the group as such, which seems radically different from the broader individualistic trend in postwar law.

Of course, I might be wrong or out of date: It has been a long time since human rights focused only on atomised individuals: indigenous peoples, minority rights, hate crimes, identity politics, and the fashion for post-colonial analysis – many trends suggest collective identities are now central to how we think about humans and law. Perhaps individualism was a mid-century product, and over time everything has come to look a little more like Lemkin's groups. Indeed, many proposals for expanding the definition – like cultural genocide – would actually align genocide more closely with Lemkin's nationalist vision, reinforcing the view that harm to individuals is damage to some ineffable collective quality called culture. So perhaps genocide is closer to the sensibilities of modern human rights and the ICL that I have suggested – even a leading indicator, in which case we should rather say they are closer to it.

If so, that may simply indicate the enormous gravitational power of genocide, which has drawn attention away from a different trajectory and back towards categories of meaning that seemingly had been left behind in the ashes of the world wars.

5. Gravity – Genocide's Distorting Power

Genocide is either an outlier or the weather, driving the direction in which the international legal order is heading. Regardless, many of genocide's features present real challenges, which might be addressed if genocide occupied only a small or co-equal space in the constellational imaginary of ICL. But genocide has attained an outsized hierarchical priority – both inside the discipline and in the public mind. Genocide is gravitational.

Personally, I have long found this preeminence analytically and morally questionable: 'It is not more wrong to kill people because of their ethnicity than it is to kill them because of their political beliefs, gender, or for the sheer pleasure of watching them die [...] [y]et this is precisely what elevating genocide presupposes.'[43] But even if the moral

42 Irvin-Erickson, D., 2023, p. 14.

43 Waters, T. W., 2012, Never Again to Genocide Trials, *Project Syndicate*, (https://www.project-syndicate.org/commentary/never-again-to-genocide-trials-2012-07, 31. 1. 2025).

supremacy of genocide is accepted, this does not mean genocide is actually doing the work it should. Debates about Israel and Palestine, or Russia and Ukraine, suggest the simultaneous centrality and uselessness of genocide, trapped in a rhetorical cycle of its own prestige: So valuable it is invoked for every crisis, as proof that the crisis matters; but so valuable it cannot be used, lest it cheapen and become meaningless. The result is conceptual and practical paralysis:

> *As an almost perverse methodology, governments and institutions seem incapable of responding effectively to atrocities because these have not yet been determined to be genocide. If and when such events are painstakingly defined as genocide, the same governments and organisations are paralyzed, prevented from acting by the presumption that any action will trigger that nation's or organisation's legal responsibility to commit enough personnel and resources, and stay the course long enough, to defeat the forces of genocide.*[44]

Instead of encouraging effective responses, 'genocide's technicality, its legalism and formalism create a stultifying, distracting simulacrum — a set piece of condemnatory theater.'[45]

Being a priority has not reordered politics. Genocide prosecution – or centering our rhetoric about conflict around genocide – has not appreciably encouraged rapprochement or shared understanding. In the Balkans, the divisiveness of the ultimate crime exacerbates communal tensions; likewise, naming the Armenian massacres 'genocide' has made the Turkish state and society less willing to acknowledge them. Frankly, it is difficult to see how claims of genocide ameliorate tensions in Gaza or the broader Middle East.

Meanwhile, there are costs, because the economy of justice is finite. Attention paid to genocide trials is drawn from the budget of outrage and mobilisation – and literal fiscal budgets – that might support intervention or rebuilding. The Yezidis believe that they have been the victims of over 70 genocides throughout history. The accounting is an historical anachronism, but also a moral claim for support, sympathy, and resources: 'They know their suffering will only be validated if it rises to the level of genocide; victimhood depends on mobilising this name.'[46] Whether even that name will get them what they so desperately need, of course, is another

44 Scheffer, D., 2006, Genocide and Atrocity Crimes, *Genocide Studies and Prevention: An International Journal*, Vol. 1, No. 3, pp. 229–230.

45 Waters, T. W., 2016, Yezidis vs. ISIS at the ICC, *Foreign Affairs*, (https://www.foreignaffairs.com/articles/iraq/2016-03-29/yezidis-vs-isis-icc, 31. 1. 2025).

46 *Ibid*.

question.[47] In the meantime, there are other claimants, a list that expands because victimhood is a valuable if wasting asset.[48]

Prestige has systemic effects. Prestige displaces other crimes and discourses, trivialising their value. Consider *Jelisić* again: I was at the ICTY when the trial and appeals judgments came down. One would have thought the prosecution had lost, rather than securing conviction on 31 out of 32 counts. Only genocide mattered. Similar angst broke out when Radovan Karadžić – like every other Serb the Tribunal charged with genocide – was acquitted for all but Srebrenica.[49] When the ICC prosecutor first charged al-Bashir, the press release ran several pages, almost entirely about genocide; the few paragraphs on war crimes and crimes against humanity – the only charges to survive – were tacked on to the end, like an afterthought.

This risk was recognised early on. Lauterpacht's concern about genocide was motivated, in part, by concern that this '"crime of crimes' [would] elevat[e] 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 [...]'[50]

If there were evidence that the crime of genocide actually prevented genocide or mitigated its harm, it might well be worth keeping whatever its incoherence or distorting effects. But there is no evidence that this happens. In part this is a problem of epistemology – observers still debate the effect of domestic criminal law, so is it surprising that the effects of this thin new field are not known? However, 'no evidence' is not just a knowledge problem, it is the better reading of what is known, namely the absence of evidence that genocide, as a crime, is doing the work assigned to it – or much of anything really.

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47 *Cf.* United Nations Office of the High Commissioner for Human Rights, *Ten years after the Yazidi genocide: UN Syria Commission of Inquiry calls for justice, including accountability and effective remedies, for ISIL crimes* (2 August 2024), (https://www.ohchr.org/en/press-releases/2024/08/ten-years-after-yazidi-genocide-un-syria-commission-inquiry-calls-justice, 31. 1. 2025).

48 Even the recent expansion of genocide cannot keep pace with the demand. Events that might plausibly be qualified as genocide – like the mass killings of 'Communist' ethnic Chinese in Indonesia in the 1960s – are not generally recognised. (Thanks to Geoff Dancy for this observation.) Having stepped away from the 'singularity of the Holocaust', there is simply no end to the expansive potential, and no morally or intellectually stable stopping point for counting genocides.

49 Waters, T. W., 2016.

50 Sands, P., 2016, p. 380, cited in Drumbl, M. A., 2018, p. 22.

Still, many decades have passed since 1948. This world is one in which genocide is defined. Perhaps it ought never to have been, but what's done is done, and there is no escape. Or is there?

6. Escape Velocity – The Abolition of Genocide

Genocide is simultaneously too insubstantial and too weighty to do serious, useful work, so morally elevated it becomes unwieldly and impractical, but its prestige also makes reform seem implausible. Human rights and ICL have evolved – perhaps towards genocide's collectivist instincts – but at least they can move. Genocide's mid-century definition is among the most rigid in international law – the extremely modest changes confirm its magisterial inertia.[51]

Nearly twenty years ago, David Scheffer proposed a category of 'atrocity crime' that would encompass the various international crimes, with the purpose of 'liberat[ing] governments and international organisations from the genocide factor [...] to enable them to readily identify precursors of genocide without being constrained by legal requirements that must be met to properly identify the crime of genocide.'[52] In proposing a sweeping simplification of ICL, Scheffer intuitively centred on genocide: trouble with the whole field, but special trouble there. Unsurprisingly, Scheffer's proposal has not been taken up.

Sheffer nonetheless still spoke in the language of reform and law, and perhaps that's too modest a goal. Would it be possible to 'liberate genocide from law' altogether?[53] I am not even sure genocide's preeminence is a legal problem at all. Perhaps it is social: the hopes people insistently place on this crimped minimally usable legal category. If only it weren't the object of such idolatry! So, if the legal definition cannot be strengthened, perhaps another approach is to deflate its bloated social currency, to recognise that it is just a narrow, technical category, rarely invoked and rightly so. Still, that is probably an even harder project, and anyway I suspect genocide's special social role – the heightened, talismanic expectation

51 Compare Schabas, W. A., 2009, p. 93. (describing 'significant' broadening of the definition, but identifying narrow, technical issues: the existence of a state plan or policy, or the subjective approach to identifying the group, and acknowledging failure to include cultural destruction). Reportedly, as late as the Rome negotiations, there was at least some marginal discussion about folding genocide into crimes against humanity, but this did not happen. Thanks to Margaret deGuzman for this observation.

52 Scheffer, D., 2006, p. 229.

53 Thanks to David Lefkowitz for this formulation.

surrounding the word – is related to its special legal definition. Its remedy will not be one thing or the other.

So, perhaps it must be neither. Consider, despite the impossibility, what a world without genocide law might look like: Delegalized genocide, still a social category of great power, but not a legal one, much like 'ethnic cleansing.' Without genocide weighing atop it, might the modern system of transitional justice, legal order, and politics be more manageable and morally rational? Might other crimes then gain an independent signaling effect not automatically compared and called lesser? In diplomacy and politics, might the mobilisation of outrage – a dubious, chimerical resource in the best of circumstances – no longer be subordinated to an unrealisable, legalised standard?

Maybe, but it seems improbable to me that anything would be much better, and I wonder if questioning genocide isn't just a proxy for something larger. It is hard to be satisfied with the genocide law we have today – but what if 'genocide' were replaced in that sentence with 'ICL'? If genocide is an outlier, that misfit is a problem for the system of ICL – but it is not as if ICL's individualism works well. It's not as if the entire judicialized ICL project has produced clear, measurable payoffs any more than genocide has.

And if genocide is not an outlier – if it has become the impenetrable, immovable centre of ICL's moral universe – then that whole project is even less likely to do anything useful. ICL is a set of legal processes structured around the norms and methods of criminal law, doctrinally focused on individuals, but using those methods to adjudge complex, collective violence. An ICL assimilated to the concepts of genocide is a project aspiring to judge the most fraught aspects of human conflict – not only the atrocities, but the purposes and meanings those atrocities serve. A world in which all rights and laws are modelled on genocide's assumptions is a formula for failure. Indeed, if there is one thing in which genocide is not an outlier, it is its fundamental marginality and the distracting effects of treating violent politics as a legal question.

7. Conclusion: A Modest Thought Experiment

Well, suddenly the abolition of genocide looks modest by comparison. It is getting to be too much for a practical person. I will not here describe an actionable path for the abolition of genocide as a crime. I would not know where to begin or how to do it. Abolition seems not only impossible, but unstartable: Having invented the crime of genocide, it would be seen as a moral setback to be rid of it – a *status quo* fallacy, but fallacies have power. So my purpose is not a practical design, but a thought experiment,

like a more gruesome Schrödinger's cat: Before the world can escape the crushing insubstantiality of genocide – or come to realize just how deeply imbricated genocide is in how the whole of ICL works – it must first realise that there is some alternative to escape to. Not just reforms on the margins – a revised definition, expanded lists, tweaks to intent – but a world without the crime of genocide, in which genocide has been stripped of its legal particularity, subsumed into 'atrocity,' or simply abolished – and with it, whatever part of the ICL project partakes of its nature.

It would be a leap, a jump to an entirely different condition. What it would be, we cannot say. But we can be sure abolition would not be a paradise: On the day genocide or ICL was abolished, somewhere something truly terrible would be happening that used to be called the crime of crimes. And would continue: There is no game of language that will answer for the evil humans do. But that truth is no reason to persist in holding fast to concepts that make even our most imperfect responses harder. Precisely because this is not a game of language, it should not be treated like one. Perhaps thinking about a world without this crime – or the idea that crime is how to respond to the harm humans do – is the only plausible first step towards realising it. That impossibility – that very unthinkability – is the thing we ought to think about.

Essay History:

Received: 2 September 2025

Accepted: 1 December 2025