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# Lemkin's Situation

## TOWARD A RHETORICAL UNDERSTANDING OF *GENOCIDE*\*

Perry S. Bechky<sup>†</sup>

"You must build the law!"—Raphael Lemkin.<sup>1</sup>

"[L]aw is in the first place a language, a set of terms and texts and understandings that give to certain speakers a range of things to say to each other."—James Boyd White.<sup>2</sup>

### INTRODUCTION

Raphael Lemkin coined the word *genocide* during World War II. The word first appears in his 1944 treatise *Axis Rule in Occupied Europe*.<sup>3</sup> Chapter IX begins: "New conceptions require new terms."<sup>4</sup>

Lemkin regarded *genocide*<sup>5</sup> as not merely a new word, but a new "conception," a new way to understand the Nazi horrors then unfolding. A Jewish refugee from occupied Poland,<sup>6</sup> Lemkin invented his word to help others see the

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<sup>1</sup> A.M. Rosenthal, *A Man Called Lemkin*, N.Y. TIMES, Oct. 18, 1988, at A31 (quoting Lemkin).

<sup>2</sup> JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW*, at xi (1985).

<sup>3</sup> See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS*, at xi, 79 (1944) [hereinafter LEMKIN, *AXIS RULE*]. Some scholars prefer to date *genocide* to 1943, noting that Lemkin uses the word in the preface to *Axis Rule*, which is dated November 15, 1943. *Id.* at xi, xv.

<sup>4</sup> *Id.* at 79.

<sup>5</sup> In this article, I italicize a word when talking about the word instead of using the word in the ordinary way. For example: Hitler committed *genocide*; Lemkin invented *genocide*. Here, as in the title itself, *genocide* is shorthand for "the word 'genocide.'"

<sup>6</sup> Although Lemkin describes himself as Polish, the village where he was raised "changed hands successive times" during his lifetime: "Bezwodne . . . had been under Russian czarist rule; it then shifted repeatedly between Germany and Belarus (except for a period during the inter-war when it formed part of the Second Polish Republic)." Ana Filipa Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EUR. J. INT'L L. 1163, 1166 (2009).

pattern of Nazi acts as he saw them—as “the crime of crimes.”<sup>7</sup> From understanding, Lemkin hoped, preventative action would follow. Specifically, Lemkin envisioned legal action against genocide: he wanted “all nations of the civilized world” to sign a treaty to bring about the laws and mechanisms needed to criminalize and prosecute genocide.<sup>8</sup>

Lemkin pursued this ambition relentlessly. He doggedly sought meetings with prosecutors, drafters, negotiators, and decision-makers in Geneva, London, New York, Nuremberg, Paris, and Washington.<sup>9</sup> He occupied vacant offices in the United Nations “like a hermit crab”;<sup>10</sup> he walked the UN corridors for years, and, in order “[t]o see an ambassador, he would plan and plot for weeks and sit for days in reception rooms.”<sup>11</sup> He gave speeches, wrote articles and letters, and drafted legal texts.

And he proved remarkably successful. Nuremberg prosecutors mentioned *genocide* in the indictment and trial.<sup>12</sup> Just two years after *Axis Rule*, the newfound UN General Assembly unanimously passed Resolution 96(I), which condemns genocide as “a crime under international law” that “shocks the conscience of mankind.”<sup>13</sup> Then, in just two more years, the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) as the UN’s first major action to protect human rights.<sup>14</sup> The Genocide Convention testifies to the power of both ideas and unyielding determination. Lemkin’s efforts would prompt a UN official to observe, decades later, that

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<sup>7</sup> See Raphael Lemkin, *Genocide as a Crime Under International Law*, UN BULLETIN 70, 70 (Jan. 15, 1948) [hereinafter Lemkin, UN BULLETIN] (“[G]enocide must be treated as the most heinous of all crimes. It is the crime of crimes, one that not only shocks our conscience but affects deeply the best interests of mankind.”); Raphael Lemkin, *Totally Unofficial Man* (unpublished draft), in PIONEERS OF GENOCIDE STUDIES 365, 383 (Samuel Totten & Steven Jacobs eds., 2002) [hereinafter Lemkin, *Totally Unofficial Man*].

<sup>8</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at xiii, 93.

<sup>9</sup> See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 27, 49-60 (2002).

<sup>10</sup> *Id.* at 51.

<sup>11</sup> Rosenthal, *supra* note 1.

<sup>12</sup> See John Barrett, *Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945-1946*, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION* 35, 45-47 (Christoph Safferling & Eckart Conze eds., 2010).

<sup>13</sup> The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/231 (Dec. 11, 1946) [hereinafter G.A. Res. 96 (I)].

<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/760 (Dec. 9, 1948) [hereinafter Genocide Convention]. The Universal Declaration of Human Rights passed the next day. See G.A. Res. 217 (III) (A), U.N. Doc. A/777 (Dec. 10, 1948).

“[n]ever in the history of the United Nations has one private individual conducted such a lobby.”<sup>15</sup>

Lemkin's word changed the language as well as the law. Its use is not reserved to legal discourse, for it plays a vital political role too. Since Lemkin, mass atrocities routinely give rise to *genocide* discourse. The “Is it genocide?” debates recur over the Bahais, Bangladesh, Bosnia, Burundi . . .<sup>16</sup> These debates prove that *genocide* matters. It may matter less in law than is sometimes believed—but it matters in morality, in politics, in policy.<sup>17</sup> The Clinton administration cowered before the word lest it compel action in Rwanda that the Administration did not want to take.<sup>18</sup> The Bush administration described Darfur as genocide, with the President expressly acknowledging the “moral obligation” the word entailed,<sup>19</sup> but its failure to commit itself publicly to further action prompted a political movement successful enough to win (over administration objections) passage of the first-ever federal statute approving state divestment.<sup>20</sup> For a meaningful segment of the public, *genocide* is different—and worse—than other atrocities. It is the “crime of crimes.”<sup>21</sup> It

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<sup>15</sup> WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 29 (2d ed. 2009) (quoting JOHN HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 54 (1984)). Evidencing contemporary recognition of Lemkin's singular work on the Genocide Convention, the *New York Times* ran Lemkin's photograph with the caption “His Idea Adopted” in its story reporting UN approval of the Convention. *U.N. Votes Accord Banning Genocide*, N.Y. TIMES, Dec. 10, 1948, at 12. See generally Henry La Cossitt, *The Man Who Outlawed Genocide*, N.Y. HERALD TRIB. THIS WEEK MAG., Jan. 7, 1951, at 14; Herbert Yahraes, *He Gave a Name to the World's Most Horrible Crime*, COLLIER'S, Mar. 3, 1951, at 56.

<sup>16</sup> See, e.g., *A Brief Listing of Some of the Genocidal Acts that Have Occurred During the 20th Century*, 24 SOC. SCI. REC. 94 (1987).

<sup>17</sup> See, e.g., Memorandum from Assistant Secretaries of State on “Has Genocide Occurred in Rwanda?,” May 21, 1994, at 2-3, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw052194.pdf> (“A USG statement that acts of genocide have occurred would not have any particular legal consequences. . . . [but it] could increase pressure for USG activism in response to the crisis in Rwanda.”).

<sup>18</sup> For example, a Pentagon memo warned, “Be Careful. Legal at State was worried about this yesterday—Genocide finding could commit [the U.S. government] to actually ‘do something.’” See POWER, *supra* note 9, at 359.

<sup>19</sup> President George W. Bush, Remarks at the United States Holocaust Memorial Museum, in 43 WEEKLY COMP. PRES. DOC. 458, 460 (Apr. 18, 2007) (“No one who sees these pictures can doubt that genocide is the only word for what is happening in Darfur and that we have a moral obligation to stop it.”).

<sup>20</sup> See generally Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PENN. J. INT'L L. 823 (2009); Perry S. Bechky, *The Politics of Divestment*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW (Tomer Broude et al. eds., 2011).

<sup>21</sup> See, e.g., SCHABAS, *supra* note 15, at 653-54 (defending “the crime of crimes” as the subtitle of his treatise). For a discussion of Lemkin's use of this phrase, see sources cited *supra* note 7.

separates the extraordinarily evil from the ordinarily evil. It demands attention, concern, resources—and action.

The NGO Investors Against Genocide captures this point with its tagline: “Draw the Line at Genocide.”<sup>22</sup> The small print clarifies, however, that the NGO means “genocide *or* crimes against humanity.”<sup>23</sup> In other words, it likes the word *genocide* but finds the Conventional definition too cramped to “draw the line” there. It is not alone. A recent task force on genocide prevention, led by two former U.S. Cabinet Secretaries, made the same move.<sup>24</sup> Many others deploy *genocide* as they personally define it, often as something akin to extermination of civilians,<sup>25</sup> territory now covered by *crimes against humanity*. In truth, the Conventional definition is controversial, difficult, narrow, nonintuitive, and—unsurprisingly—used mainly by lawyers. The public may “draw the line” elsewhere, giving *genocide* a different meaning in morality and politics than in international law. But policy often sits at the intersection of politics and law, and therein lies the problem with the semantic gap.<sup>26</sup>

There is a vast literature criticizing the concept of *genocide*, its definition, and its function and priority in public

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<sup>22</sup> See INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.net> (last visited Feb. 1, 2012).

<sup>23</sup> See *Genocide-Free Investing*, INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.net/genocide-freeinvesting> (last visited Feb. 1, 2012) (“The key section of our genocide-free investing shareholder proposal submissions says: Shareholders request that the Board institute transparent procedures to prevent holding investments in companies that, in management’s judgment, substantially contribute to genocide *or* crimes against humanity, the most egregious violations of human rights.” (emphasis added)).

<sup>24</sup> See, e.g., MADELEINE ALBRIGHT & WILLIAM COHEN, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS, at xxi-xxii (2008). Under the heading “Avoiding Definitional Traps,” Albright & Cohen write:

[T]here is the definitional challenge of invoking the word *genocide*, which has unmatched rhetorical power. The dilemma is how to harness the power of the word to motivate and mobilize while not allowing debates about its definition or application to constrain or distract policymakers from addressing the core problems it describes. To avoid the legalistic arguments that have repeatedly impeded timely and effective action, *the task force has defined its scope in this report as the prevention of “genocide and mass atrocities,” meaning large-scale and deliberate attacks on civilians. . . .* We use the term genocide in this report as a shorthand expression for this wider category of crimes.

*Id.* But see William Schabas, “Definitional Traps” and *Misleading Titles*, 4 GENOCIDE STUD. & PREVENTION 177 (2009).

<sup>25</sup> See ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 15-18 (2006) (compiling definitions).

<sup>26</sup> See David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 CHI. J. INT’L L. 303, 303-07 (2006) (arguing that a definitional gap caused newspapers to misrepresent the “no genocide” conclusion of the UN Commission of Inquiry on Darfur).

discourse.<sup>27</sup> Even William Schabas—perhaps the most prominent defender today of the Conventional definition—rests his defense on the way *crimes against humanity* has expanded since Nuremberg to cover vital territory the Convention leaves untouched.<sup>28</sup> Other defenders of the *genocide* concept, like David Luban, advocate amendments extending its reach to extermination of civilians.<sup>29</sup> Leila Sadat recently led a group of scholars in drafting a proposed treaty on crimes against humanity. Her project seems motivated, at least in substantial part, by concern about *genocide*: the Conventional definition does not reach many victims of atrocities, but the word so captures the public imagination as to hinder effective action on behalf of those victims. Sadat calls this the “obstacle of semantic indifference” and blames it for “the victimization of millions of human beings.”<sup>30</sup>

How should one assess proposals, like those of Luban or Sadat, to change what *genocide* means or how it is used? Because past is prologue, a proper foundation for policy discourse about *genocide*'s future should start at the very beginning—with Lemkin.

Lemkin's coinage of *genocide* was instrumental, a means to an end. The term played a central role in his strategy to change the way the world saw and treated the Nazis and perpetrators of similar crimes. It was conceived to “build the law,”<sup>31</sup> to induce the nations of the world to change international

<sup>27</sup> Among the many possible entry points into this literature, see generally David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229 (2006) (advocating use of “precursors of genocide” and “atrocity crimes”); Symposium, 2 GENOCIDE STUD. & PREVENTION 31 (2007) (articles by Schabas, Minow, Garibian, Bazylar, Mennecke, Akhavan, Leven, and Scheffer); Gareth Evans, *Crimes Against Humanity: Overcoming Indifference*, 8 J. GENOCIDE RES. 325 (2006) (arguing to replace genocide as the trigger for intervention with crimes against humanity or Scheffer's “atrocity crimes”); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005) (arguing that *genocide* should be irrelevant to questions about whether to intervene).

<sup>28</sup> See SCHABAS, *supra* note 15, at 642-47, 653-54.

<sup>29</sup> See Luban, *supra* note 26, at 319-20.

<sup>30</sup> LEILA SADAT, A COMPREHENSIVE HISTORY OF THE PROPOSED INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY 7-8 (2010).

<sup>31</sup> Rosenthal writes:

We would say to him: Lemkin, what good will it do to write mass murder down as a crime; will a piece of paper stop a new Hitler or Stalin? Then he put aside cajolery and his face stiffened. “Only man has law. Law must be built, do you understand me? You must build the law!”

Rosenthal, *supra* note 1; cf. *Genocide: A Commentary on the Convention*, 58 YALE L.J. 1142, 1157 (1949) [hereinafter *Yale Commentary*] (“Compared with established

law, their own domestic laws, and their social norms of acceptable state behavior. It was, in short, rhetoric.

Rhetoric is often described as the “practical art” of persuasion.<sup>32</sup> To better understand the Genocide Convention from the perspective of the man most responsible for it, this article draws from the ancient discipline of rhetoric to ask, *Whom* did Lemkin want to persuade to do *what*, and *why* did he choose this particular means of persuasion? To address these questions, this article applies rhetorical theory—in particular, Lloyd Bitzer’s idea of the “rhetorical situation”—to a reading of nine texts Lemkin published in English during the key period between *Axis Rule* in 1944 and the Genocide Convention in 1948<sup>33</sup>: *Axis Rule*; articles in the *American Journal of International Law*, *American Scholar*, the *Christian Science Monitor*, *Free World*, the *Nation*, and the *United Nations Bulletin*; and two letters to the editor in the *New York Times*.<sup>34</sup>

This article makes two contributions to the debate about the meaning and value of *genocide*. First, it offers a new conception of *genocide* as rhetoric. This conception opens the door to importing insights from rhetorical scholarship into the *genocide* debate. It describes Lemkin’s rhetorical situation—particularly the problem for which he saw *genocide* as the solution—and assesses his rhetorical strategy. By focusing on Lemkin as an advocate, Bitzer’s prism reveals the extent of

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standards of national penal enforcement, the Convention might seem an instrument of pioneer justice; but these are pioneer days in world law. Perhaps this is the kind of quasi-law from which effective world law may be expected eventually to develop.”). One bibliography identifies Lemkin as “a contributor” to this Commentary. See Jim Fussell, *Comprehensive Bibliography: Writings of Raphael Lemkin*, PREVENT GENOCIDE, <http://www.preventgenocide.org/lemkin/bibliography.htm> (last updated May 26, 2001). The bibliography does not explain this conclusion, but it seems plausible: Lemkin was working at Yale Law School at the time, see, e.g., JOHN COOPER, *RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION* 119 (2008), and the Commentary closely tracks some arguments Lemkin had made elsewhere. See generally *Yale Commentary, supra*.

<sup>32</sup> See *infra* Part II.

<sup>33</sup> After UN approval of the Genocide Convention, Lemkin’s rhetorical situation shifted fundamentally from establishing and promoting the concept of *genocide* to securing ratification of the Convention. For a possible example of Lemkin’s turn to his ratification project, see *Yale Commentary, supra* note 31, at 1151-56.

<sup>34</sup> Given the focus here on work published in English, additional research might be done on the extent to which Lemkin’s archival materials and his writings in other languages further illuminate his rhetorical situation. See generally Tanya Elder, *What You See Before Your Eyes: Documenting Raphael Lemkin’s Life by Exploring His Archival Papers, 1900-1959*, 7 J. GENOCIDE RES. 469, 472 (2005) (surveying the archival materials available); see also COOPER, *supra* note 31, at 78, 149 (referencing articles Lemkin published in Belgian, French, and Norwegian law journals in 1946 and in *Le Monde* in 1948).

Lemkin's ambition and achievement: he helped to create modern international law. Second, this article provides an example of how a Lemkinian understanding of *genocide* can inform the construction of the Convention on pressing matters of contemporary controversy. Specifically, it points to a better understanding of the Convention's intent requirement than that underpinning the UN Commission of Inquiry on Darfur's "no genocide" conclusion.<sup>35</sup>

Part I introduces Lemkin and his *genocide* project. Part II introduces Bitzer's rhetorical situation, and Parts III and IV apply that prism to *genocide*. Part V assesses Lemkin's rhetorical strategy. Part VI discusses the significance of understanding Lemkin's rhetorical situation to the Genocide Convention and to ongoing debates about the role of genocide in our international legal order and thereby also illustrates how legal scholarship may better utilize Bitzer's ideas.<sup>36</sup> The article then concludes.

## I. RAPHAEL LEMKIN AND HIS *GENOCIDE* PROJECT

### A. *Background to Genocide*

Lemkin's biographers depict him as having both personal experience with, and intellectual interests in, atrocity and violence from an early age.<sup>37</sup> Jews in a nearby town suffered a murderous pogrom when Lemkin was about five years old. During World War I, Lemkin's childhood home was destroyed, much of his family's property was seized, and his brother Samuel died of illness and malnourishment. As a child, Lemkin read "an unusually grim reading list" about "historical cases of mass slaughter."<sup>38</sup>

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<sup>35</sup> Int'l Comm'n of Inquiry on Darfur, Report to the United Nations Secretary-General ¶¶ 513-18 (Jan. 25, 2005), [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

<sup>36</sup> Bitzer's work has been underappreciated in legal literature. Among the handful of U.S. law review articles that draw on his work, see generally Leigh Hunt Greenhaw, "To Say What the Law Is": *Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861 (1995) (arguing, from an example of rhetorical situation analysis of *Marbury v. Madison*, that law schools should integrate legal writing courses with substantive courses); Linda Levine & Kurt Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL ED. 108 (1993) (arguing that law schools should train students in rhetoric, including rhetorical situation analysis); Robert Prentice, *Supreme Court Rhetoric*, 25 ARIZ. L. REV. 85 (1983) (applying rhetorical situation analysis to *Brown v. Board of Education*).

<sup>37</sup> POWER, *supra* note 9, at 20-21; accord COOPER, *supra* note 31, at 1-13; WILLIAM KOREY, AN EPITAPH FOR RAPHAEL LEMKIN 4-6 (2001).

<sup>38</sup> POWER, *supra* note 9, at 20.



Lemkin studied law and philology as a university student in Lvov, Poland. A news article caught his attention in 1921. It described the trial in Germany of Soghomon Tehlirian, an Armenian who had assassinated Mehmed Talaat for his leadership of the Ottoman slaughter of Armenians. Lemkin noted the inconsistency between trying Tehlirian for the murder of one man when Talaat had escaped prosecution for the murder of “more than a million men.”<sup>39</sup> On the other hand, Lemkin could not approve of individual vengeance as the appropriate response. Instead, he sought to make the Talaats of the world stand trial for their crimes.<sup>40</sup>

To this end, in 1933, Lemkin proposed to an international legal conference in Madrid the adoption and universal prosecution of two crimes: barbarity and vandalism.<sup>41</sup> Lemkin defined *barbarity* as an action taken “out of hatred towards a racial, religious or social collectivity or with the goal of its extermination . . . against the life, the bodily integrity, liberty, dignity or the economic existence of a person belonging to such a collectivity.”<sup>42</sup> He defined *vandalism* as an action, taken with the same motive, which “destroys works of cultural or artistic heritage.”<sup>43</sup> Although Lemkin regarded Hitler’s ascension to power that year as an urgent justification to legislate against these crimes, at least some participants in Madrid deemed his proposal irrelevant to a Europe years removed from the First World War. The conference “tabled” Lemkin’s proposal.<sup>44</sup>

The failure of *barbarity* and *vandalism* informed Lemkin’s later effort to coin and promote *genocide*. Lemkin

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<sup>39</sup> *Id.* at 17 (quoting Lemkin).

<sup>40</sup> *Id.* at 2-19.

<sup>41</sup> The Madrid conference was the fifth in a series of intergovernmental meetings to promote international cooperation on criminal matters. It was hosted by the Spanish government and attended mainly by states. The conference adopted texts on arms, family abandonment, prostitution, and terrorism. The conference was organized in cooperation with the League of Nations, but states that were not members of the League (such as the United States) also participated. See generally ACTES DE LA CONFÉRENCE, V<sup>e</sup> CONFÉRENCE INTERNATIONALE POUR L’UNIFICATION DU DROIT PÉNAL (1935); *Report of the Secretary General on Penal and Penitentiary Questions*, League of Nations Doc. A.14.1934.IV, at 7 (1934) (summarizing the conference results). Lemkin’s proposal is printed in French in the ACTES DE LA CONFÉRENCE, *supra*, at 48. I have relied on James Fussell’s unofficial English translation. *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations*, PREVENT GENOCIDE, <http://www.preventgenocide.org/lemkin/madrid1933-english.htm> (last visited Feb. 1, 2012) [hereinafter Lemkin, *Madrid Proposal*].

<sup>42</sup> Lemkin, *Madrid Proposal*, *supra* note 41, proposed art. 1.

<sup>43</sup> *Id.* art. 2.

<sup>44</sup> See POWER, *supra* note 9, at 21-22.

learned not to rely on existing words to define new crimes.<sup>45</sup> Instead, according to Samantha Power:

Lemkin saw he needed a word that could not be used in other contexts (as “barbarity” and “vandalism” could). He self-consciously sought one that would bring with it “a color of freshness and novelty” while describing something “as shortly and as poignantly as possible.” . . . Somehow it had to chill listeners and invite immediate condemnation.<sup>46</sup>

### B. *Axis Rule and Other Lemkin Texts*

Early in World War II, Lemkin escaped from invaded Poland to Lithuania and then Sweden. A professor at Duke Law School with whom he had collaborated then helped Lemkin receive both permission to immigrate to the United States and an appointment at Duke. Lemkin journeyed across Russia, the Pacific, and North America to reach Duke. In the summer of 1942, Lemkin left Duke for Washington to consult with the U.S. Board of Economic Warfare.<sup>47</sup> Lemkin started writing *Axis Rule* in Sweden in 1940, continued his work at Duke, and ultimately finished the book in Washington.<sup>48</sup>

*Axis Rule* is “a catalogue raisonné of Nazi legislation in occupied territory.”<sup>49</sup> The bulk of the book consists of a country-by-country litany of German actions in nineteen occupied territories, supported by a compilation of “statutes, decrees, and other documents” translated into English. The book begins, however, with “a rational synthesis”—a relatively short overview—of “German techniques of occupation.”<sup>50</sup> Chapter IX, entitled “Genocide,” is the last chapter of this overview. Lemkin presents his word in this passage:

By “genocide” we mean the destruction of a nation or of an ethnic group. . . . [G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members 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. The objectives of such a plan would be disintegration of the political and social institutions, of culture,

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<sup>45</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79 (“New conceptions require new terms.”).

<sup>46</sup> POWER, *supra* note 9, at 42 (quoting Lemkin). Lemkin drew on George Eastman’s explanation for the name *Kodak*: “First. It is short. Second. It is not capable of mispronunciation. Third. It does not resemble anything in the art . . .” *Id.* at 41-42.

<sup>47</sup> See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 383.

<sup>48</sup> See LEMKIN, *AXIS RULE*, *supra* note 3, at xiv.

<sup>49</sup> Luban, *supra* note 26, at 307.

<sup>50</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at ix.

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. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>51</sup>

*Genocide* thus brings together elements of Lemkin's *barbarity* and *vandalism* in a single new concept.<sup>52</sup> With *Axis Rule*, Lemkin "renew[ed]" his effort to create a new international crime.<sup>53</sup> For example, given the opportunity to write a one-page memorandum to Franklin Roosevelt, Lemkin urged the President to negotiate a treaty banning genocide.<sup>54</sup>

After *Axis Rule*, Lemkin vigorously promoted *genocide* and his proposal for a treaty outlawing it. By the time the United Nations approved the Genocide Convention, Lemkin had written numerous articles advocating this action, testified before Congress in support of "war crimes" prosecutions,<sup>55</sup> consulted with the Nuremberg prosecutors,<sup>56</sup> wrote the first draft of General Assembly Resolution 96(I), served on the UN experts committee that prepared the first draft of the Genocide Convention,<sup>57</sup> gave speeches, and lobbied diplomats and journalists.

<sup>51</sup> *Id.* at 79; *see also id.* at xi (previewing *genocide* in a summary of the book's contents).

<sup>52</sup> Despite many similarities between *genocide* and its forerunners, there are meaningful differences. For example, Lemkin does not repeat in *Axis Rule* the specific motive requirement ("out of hatred") that he had specified for *barbarity* and *vandalism*. *See generally id.*; *cf.* Lemkin, *Madrid Proposal*, *supra* note 41, proposed arts. 1-2.

<sup>53</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at xiii ("[T]he author [made] a proposal . . . in Madrid in 1933 . . . that an international treaty should be negotiated declaring that attacks upon national, religious, and ethnic groups should be made international crimes . . . . His proposal not having been adopted at that time, he feels impelled to renew it now . . . ."); *see also* Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 148 (1947) [hereinafter Lemkin, *AJIL*] (describing his work on G.A. Res. 96 (I) as a "return to the postulates submitted . . . in Madrid in 1933").

<sup>54</sup> *See* Lemkin, *Totally Unofficial Man*, *supra* note 7, at 383. I have not been able to locate Lemkin's memorandum to Roosevelt or further details about it. James Fussell has reported his own unsuccessful efforts to find the same memorandum at the Roosevelt archive in Hyde Park. *See* James Fussell, *Lemkin's War: Origins of the Term "Genocide,"* Speech at the U.S. Holocaust Memorial Museum (Mar. 11, 2003) (transcript available at <http://www.ushmm.org/genocide/analysis/details.php?content=2003-03-11>). On the gaps in Lemkin's archives, *see generally* Elder, *supra* note 34.

<sup>55</sup> *See Punishment of War Criminals: Hearing Before the H. Comm. on Foreign Aff. On H. J. Res. 93*, 79th Cong. 61-62 (1945) (statement of Raphael Lemkin) [hereinafter Lemkin Statement] (advocating prosecution of "extermination of peoples" without mentioning the word *genocide*).

<sup>56</sup> *See* Barrett, *supra* note 12, at 47-51 (describing a limited and somewhat strained arrangement).

<sup>57</sup> *See* SCHABAS, *supra* note 15, at 60-64, 77.

Public revulsion against war created a “Grotian moment,”<sup>58</sup> when there was a public hunger to build a new international legal order committed to collective security and human rights.<sup>59</sup> Lemkin reached official circles in Washington in 1942 and published *Axis Rule* in 1944, both early enough to participate in this creative moment.<sup>60</sup> He had the idea, the rhetorical strategy, the energy, the talent,<sup>61</sup> the timing, and the gumption to contribute *genocide* to the postwar agenda—and then the will and the stamina to persevere across the increasingly harsh terrain of the Cold War. By the time Resolution 96(I) passed, Winston Churchill had given his “iron curtain” speech; by the time the Genocide Convention opened for signature, the Soviets had boycotted the Marshall Plan, the Berlin blockade and airlift were underway, and the red star had risen over Czechoslovakia and much of mainland China; by the time the Convention entered into effect, China had crossed the Yalu into the Korean War.<sup>62</sup>

After the Convention entered into force, Lemkin continued to devote himself to securing ratifications.<sup>63</sup> At his death in August 1959, the Convention had sixty-one state parties.<sup>64</sup>

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<sup>58</sup> I borrow the phrase from Michael Scharf's *Grotian Moment* blog but extend it beyond significant “legal developments” within international law to encompass transformative political developments reshaping that law. See GROTIAN MOMENT: THE INTERNATIONAL WAR CRIMES TRIAL BLOG, <http://law.case.edu/grotian-moment-blog/index.asp> (last visited Feb. 1, 2012).

<sup>59</sup> See, e.g., Atlantic Charter, Official Statement on Meeting Between the President and Prime Minister Churchill (Aug. 14, 1941), available at <http://avalon.law.yale.edu/wwii/atlantic.asp> (describing the “common principles” on which Franklin Roosevelt and Winston Churchill “base their hopes for a better future for the world”); Decl. by the U.N. (Jan. 1, 1942), available at [http://avalon.law.yale.edu/20th\\_century/decade03.asp](http://avalon.law.yale.edu/20th_century/decade03.asp) (committing to the Atlantic Charter); Moscow Decl. of the Four Nations on General Security (Oct. 30, 1943), available at <http://avalon.law.yale.edu/wwii/moscow.asp> [hereinafter Moscow Declaration] (“recogniz[ing] the necessity of establishing . . . a general international organization . . . for the international peace and security”); U.N. Charter pmbl., arts. 1-2, 39-51 (establishing arrangements aimed at collective security).

<sup>60</sup> See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 383; Barrett, *supra* note 12, at 38.

<sup>61</sup> Notably, a talent for language. See, e.g., *Raphael Lemkin, Genocide Foe, Dies*, N.Y. TIMES, Aug. 30, 1959 (Lemkin “was fluent in nine languages”).

<sup>62</sup> See generally JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2005).

<sup>63</sup> See POWER, *supra* note 9, at 61-78.

<sup>64</sup> See *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS ONLINE, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg\\_no=IV-1&chapter=4&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants) (last visited Feb. 1, 2012) [hereinafter UNTS Online] (adjusted for UN membership in 1959 (e.g., counting China and Vietnam as parties from the dates their “Republics” adhered, rather than the later dates of their “People’s Republics”).

## II. BITZER'S *RHETORICAL SITUATION*

Before examining Lemkin's coinage of *genocide* as rhetoric, we must pause to introduce the discipline of rhetoric, especially Bitzer's idea of the rhetorical situation.

In *On Rhetoric*, Aristotle defines his subject as "an ability . . . to see the available means of persuasion."<sup>65</sup> Accordingly, rhetoric is often described as the "practical art" of persuasion.<sup>66</sup> It is "an art of emphasis"<sup>67</sup> or a "science of human attention-structures."<sup>68</sup> It is "not concerned with permanence, nor yet with beauty. It is concerned with effect."<sup>69</sup> It "helps to produce or solicit judgments or decisions regarding practical issues and pressing public problems."<sup>70</sup> In the words of Francis Bacon, "The duty and office of rhetoric is to apply reason to imagination for the better moving of the will."<sup>71</sup> Accordingly, Bitzer observes, "[A] work of rhetoric is pragmatic; it comes into existence for the sake of something beyond itself; it functions ultimately to produce action or change in the world; it performs some task."<sup>72</sup>

Bitzer introduces the concept of the *rhetorical situation*.<sup>73</sup> He argues that this concept is crucial, because "a rhetorical situation must exist as a necessary condition of rhetorical discourse, just as a question must exist as a necessary condition of an answer."<sup>74</sup> He defines a rhetorical

<sup>65</sup> ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 2.1 (George Kennedy, trans., 1991). Kennedy explains that his translation renders "to grasp the meaning or utility of . . . what is inherently and potentially persuasive in the facts, circumstances, character of the speaker, attitude of the audience, etc." *Id.* at 36 n.34 (internal quotation marks omitted).

<sup>66</sup> See, e.g., RICHARD LANHAM, A HANDLIST OF RHETORICAL TERMS 132 (2d ed. 1991); cf. WHITE, *supra* note 2, at xi-xii, 28 (describing rhetoric as "that art by which culture and community and character are constituted and transformed," which includes but also exceeds "the art of persuading others").

<sup>67</sup> JAMES JASINSKI, SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY RHETORICAL STUDIES 12 (2001) (quoting Richard Weaver, *Language Is Sermonic*, in CONTEMPORARY THEORIES OF RHETORIC: SELECTED READINGS 173 (R.L. Johannesen ed., 1971)).

<sup>68</sup> LANHAM, *supra* note 66, at 134.

<sup>69</sup> JASINSKI, *supra* note 67, at 191 (quoting H.A. Wichelns, *The Literary Criticism of Oratory*, in STUDIES IN RHETORIC AND PUBLIC SPEAKING IN HONOR OF JAMES ALBERT WINANS, 209 (A. M. Drummond ed., 1925)).

<sup>70</sup> *Id.* at 192.

<sup>71</sup> LANHAM, *supra* note 66, at 131.

<sup>72</sup> Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 3-4 (1968).

<sup>73</sup> See JASINSKI, *supra* note 67, at 514.

<sup>74</sup> Bitzer, *supra* note 72, at 5-6. Bitzer originally presented the rhetorical situation as an objective fact to which speakers respond, but critics argued that speakers have a constitutive role in creating and defining the rhetorical situation, prompting Bitzer to acknowledge that a speaker's "thoughts" are "parts of historical reality," that is,

situation “as a complex of persons, events, objects, and relations presenting an actual or potential exigence[,] which can be completely or partially removed if discourse . . . can so constrain human decision or action as to bring about the significant modification of the exigence.”<sup>75</sup> Bitzer identifies the “three constituents of any rhetorical situation”: the exigence, the audience, and “the constraints which influence the rhetor and can be brought to bear upon the audience.”<sup>76</sup>

First, an exigence “is a defect, an obstacle, something waiting to be done, a thing which is other than it should be.”<sup>77</sup> It “is the necessary condition of a rhetorical situation. If there were no exigence, there would be nothing to require or invite change. . . . [T]he exigence provides motive.”<sup>78</sup> Not all exigences are rhetorical. Aristotle explains that the “political orator . . . does not deal with all things, but only with . . . [those matters] which we have it in our power to set going.”<sup>79</sup> Ralph Waldo Emerson concurs: “You [might be] a very elegant writer, but you can’t write up what gravitates down.”<sup>80</sup> Thus, to be rhetorical, an exigence must be capable of change (unlike death or gravity)—and discourse must be capable of effecting or assisting that change.<sup>81</sup> Bitzer identifies air pollution as a rhetorical exigence, because the reduction of pollution “strongly invites the assistance of discourse producing public awareness, indignation, and action of the right kind.”<sup>82</sup>

Second, a rhetorical audience “consists only of those persons who are capable of being influenced by discourse and of

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of the rhetorical situation. See Lloyd F. Bitzer, *Functional Communication: A Situational Perspective*, in *RHETORIC IN TRANSITION: STUDIES IN THE NATURE AND USES OF RHETORIC* 21, 25 (Eugene E. White ed., 1980) [hereinafter Bitzer, *Functional Communication*]; JASINSKI, *supra* note 67, at 516-17 (noting that “[m]ost rhetorical scholars” conclude that discourse both “responds to [and] creates situations”).

<sup>75</sup> Bitzer, *supra* note 72, at 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Bitzer, *Functional Communication*, *supra* note 74, at 26.

<sup>79</sup> JASINSKI, *supra* note 67, at 160 (quoting ARISTOTLE, *RHETORIC* 1359a31-1359a39 (W.R. Roberts trans., 1954)).

<sup>80</sup> *Id.* at 159 (quoting 8 RALPH WALDO EMERSON, *Eloquence*, in *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 109, 131 (1904)).

<sup>81</sup> See Bitzer, *supra* note 72, at 6-7. White illustrates the distinction in his discussion of Sophocles’ *Philoctetes*, in which Odysseus and Neoptolemus seek to retrieve Heracles’ magic bow from Philoctetes to satisfy a prophecy. See WHITE, *supra* note 2, at 3-27. They learn, however, that the prophecy requires not only the bow, but the voluntary participation of Philoctetes. *Id.* While force or trickery might obtain the bow itself, the owner’s free cooperation can be achieved only through discourse—thus presenting a rhetorical exigence. *Id.*

<sup>82</sup> Bitzer, *supra* note 72, at 6-7.

being mediators of change.”<sup>83</sup> The audience must have open minds and must be “capable of making the final decision” or “capable of influencing those with final decision-making authority.”<sup>84</sup> Following this distinction, in democratic politics, a rhetorical audience includes the public as a whole, because the public is capable of influencing the government’s agenda, priorities, and outcomes.

Third, rhetorical constraints are those “parts of the situation . . . [that] have the power to constrain decision and action needed to modify the exigence,” and they typically include “beliefs, attitudes, documents, facts, traditions, images, interests, motives and the like.”<sup>85</sup> Constraints are “circumstances that interfere with . . . an advocate’s ability to respond to an exigence. . . . Circumstantial constraints are, in effect, mini-exigences; they are secondary problems that an advocate must negotiate or deal with to resolve the dominant exigence.”<sup>86</sup>

Finally, just as circumstances may present obstacles for a speaker to overcome, they may also supply “material that can work to the advocate’s advantage.”<sup>87</sup> Accordingly, in later work, Bitzer adds rhetorical resources as another element of the rhetorical situation.<sup>88</sup>

As a simple example of a rhetorical exercise, children may attempt to persuade their parents (i.e., their rhetorical audience) to raise their allowances. In making this effort, the children will have to persuade their parents that there is an “exigence”—“a thing which is other than it should be.”<sup>89</sup> The children share this challenge—they must establish the existence of a problem as a precondition to persuading the audience to adopt a solution—with many advocates. “[D]efining the situation often is the most fundamental exigence faced by advocates. It is

<sup>83</sup> *Id.* at 8. Aristotle identifies three species of rhetoric depending whether the audience is a decision-maker or spectator (as in a eulogy) and, if the former, whether the decision concerns past events (as in a trial) or future events (as in policy deliberations). See ARISTOTLE, *supra* note 65, at 47; see also George Kennedy, *Introduction*, in ARISTOTLE, *supra* note 65, at 15.

<sup>84</sup> See JASINSKI, *supra* note 67, at 515 (discussing R.E. Crable & S.L. Vibbert, *Managing Issues and Influencing Public Policy*, 6 PUB. REL. REV. 3 (1985)).

<sup>85</sup> Bitzer, *supra* note 72, at 8.

<sup>86</sup> JASINSKI, *supra* note 67, at 516.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* More precisely, Bitzer came to acknowledge that “constraints” include “opportunities” as well as “limitations,” and that “[t]he rhetor’s central creative task is to discover and make use of proper constraints,” i.e., the available resources, in order to navigate the limitations and persuade the audience. Bitzer, *Functional Communication*, *supra* note 74, at 23-24.

<sup>89</sup> Bitzer, *supra* note 72, at 6-7.

virtually impossible to persuade an audience to adopt a policy proposal if audience members do not perceive a need.”<sup>90</sup> Rahm Emanuel expresses the same insight in his maxim: “You never want a serious crisis to go to waste. . . . [I]t’s an opportunity to do things you could not do before.”<sup>91</sup>

The children in our example likely enjoy many advantages often lacked by political advocates, such as direct access to the ultimate decision-makers; an ability to command the decision-makers’ attention; an audience well-disposed to the advocates (if not to their arguments); and a proposed solution that many decision-makers can implement without excessive burden. Political advocates act in a world with “simultaneous rhetorical situations,” which compete for the attention of the same audience at the same time.<sup>92</sup> Political advocates will struggle to persuade even sympathetic decision-makers and members of the public that their concerns warrant attention and action. In other words, political advocates will often find that their main obstacle is “inertia” and their main task is “to energize and activate audiences.”<sup>93</sup>

Our hypothetical children will likely assert that their current allowance fails to meet their needs and appeal, expressly or implicitly, to parental duty and desire to address their children’s needs. Our hypothetical parents, in turn, will likely give meaningful consideration to this value of helpfulness. But the parents will likely consider other values as well, such as the parental obligation to teach patience, thrift, and work ethic. Thus, the parents’ decision whether to raise the allowance requires “balancing or negotiating competing principles.”<sup>94</sup> Public matters that present similar tensions between competing principles, known as “prudential dilemmas,”<sup>95</sup> are often resolved by constructing “value hierarchies”; significantly, such hierarchies are not permanent, because later advocates may contest them with new circumstances, concepts, distinctions, or priorities.<sup>96</sup>

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<sup>90</sup> JASINSKI, *supra* note 67, at 158, 517.

<sup>91</sup> See David Leonhardt, *The Big Fix*, N.Y. TIMES, Feb. 1, 2009, (Magazine), at 22 (quoting “Rahm’s Doctrine”).

<sup>92</sup> See Bitzer, *supra* note 72, at 12.

<sup>93</sup> See JASINSKI, *supra* note 67, at 458, 519.

<sup>94</sup> *Id.* at 522.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 522, 597-98.



### III. LEMKIN'S EXIGENCE

Tehlirian's assassination of Talaat, as mentioned, sparked Lemkin's interest in developing an international legal regime for mass atrocity.<sup>97</sup> When Lemkin asked one of his professors why Talaat had not been prosecuted for Ottoman crimes against Armenians, the professor responded: "Consider the case of a farmer who owns a flock of chickens. He kills them and this is his business. If you interfere, you are trespassing."<sup>98</sup>

Lemkin's professor thus interposed the norms of sovereignty and nonintervention as a bar to external prosecution of crimes committed by a state within its territory against its own nationals. To achieve his objective of international criminalization, Lemkin had to overcome this bar. This was his rhetorical exigence. To understand it, this section will first introduce the concepts of sovereignty and nonintervention.

#### A. *A Brief Introduction to Sovereignty*

The International Court of Justice has called sovereignty "the fundamental principle . . . on which the whole of international law rests."<sup>99</sup> Its "core meaning" might be said to be "supreme authority within a territory."<sup>100</sup> Yet any such definition necessarily oversimplifies the extent to which the word's true content and significance have been (and remain) unclear, contested, and changeable.<sup>101</sup> Lassa Oppenheim traces the history of the word *sovereignty* from its introduction by Bodin in 1577, concluding "there is not and never was unanimity regarding this conception."<sup>102</sup> Some scholars thus

<sup>97</sup> See *supra* Part I.A.

<sup>98</sup> POWER, *supra* note 9, at 17.

<sup>99</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 263 (June 27).

<sup>100</sup> Dan Philpott, *Sovereignty*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer ed. 2010), available at <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>.

<sup>101</sup> Indeed, Philpott goes on to discuss historical and contemporary challenges to this definition. *Id.*

<sup>102</sup> L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 111-15 (2d ed. 1912); cf. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 9 (1995) (attributing difficulties with *sovereignty*, in part, to the word's emergence from "the misty antecedents of the modern international system" in "inter-prince relations" before Westphalia); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866 (1990) ("Since Aristotle, the term 'sovereignty' has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word."); James N. Rosenau, *Sovereignty in a Turbulent World*, in BEYOND

suggest that *sovereignty* is too vague a word, too steeped in myth and mysticism, for practical use in the modern world.<sup>103</sup>

To appreciate Lemkin's rhetorical situation, it is important to introduce *sovereignty* as it was seen between the world wars. Some indication can be found in the 1927 *Lotus* case, where France claimed that international law barred Turkey from asserting jurisdiction over French sailors on board a French ship for colliding with a Turkish ship on the high seas. The Permanent Court ruled for Turkey and declared,

The rules of law binding upon States . . . emanate from their own free will. . . . Restrictions upon the independence of States cannot therefore be presumed. . . . [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.<sup>104</sup>

The *Lotus* Court thus revealed a conception of sovereignty as freedom from external constraint—except only those international legal obligations consented-to by the state's "own free will." Robert Lansing, the U.S. Secretary of State during World War I, revealed a similar conception in his remark that "[t]he essence of sovereignty [is] the absence of responsibility."<sup>105</sup> Gareth Evans and Akhil Amar nicely capture this notion of sovereignty in their respective quips that "sovereignty is a license to kill"<sup>106</sup> and "[s]overeignty means never having to say you're sorry."<sup>107</sup>

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WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 191 (Gene M. Lyons & Michael Mastaduno eds., 1995) (proposing a "turbulence model" of constant competition along a "sovereignty continuum").

<sup>103</sup> See, e.g., HENKIN, *supra* note 102, at 10-12, 100-01 (proposing to abandon the word *sovereignty* in favor of a "decompose[d]" list of the "essential characteristics and indicia of statehood today"); W. Michael Reisman, *International Law and Organization for a New World Order: The Uppsala Model, General Report of JUS 1981*, in THE SPIRIT OF UPPSALA: PROCEEDINGS OF THE JOINT UNITAR-UPPSALA UNIVERSITY SEMINAR ON INTERNATIONAL LAW AND ORGANIZATION FOR A NEW WORLD ORDER 27, 31-32 (Atle Grahl-Madsen & Jiri Toman eds., 1984) ("I suggest we eschew the term [*sovereignty*] and address ourselves to the empirical questions which are really at issue."); Richard Lillich, *Sovereignty and Humanity: Can They Converge?*, in THE SPIRIT OF UPPSALA, *supra*, at 406 ("[T]he concept of sovereignty . . . is an idea whose time has come and gone.").

<sup>104</sup> S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) [hereinafter *The Lotus*]. Even here, however, the extent of contestation over *sovereignty* is revealed: the court split, six-to-six, with the judgment decided solely by a tie-breaking rule. See *id.* at 33.

<sup>105</sup> POWER, *supra* note 9, at 14.

<sup>106</sup> Evans, *supra* note 27, at 331.

<sup>107</sup> AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 336 (2005).

The *Lotus* decision and the Permanent Court itself should be seen in the context of the international political order created after the Great War. This order arose from the upheaval the War had wrought in the prior political order, including the collapse of the Austro-Hungarian, German, and Ottoman Empires; the Soviet Revolution; a radical new balance of power; the redrawing of European borders; and the emergence of new European states together with the modern vocabulary of self-determination.<sup>108</sup> And the new order aimed toward one paramount (and ultimately failed) objective: avoiding another world war.

Mark Janis describes the interwar period as a “time of state-centric high positivism.”<sup>109</sup> Norms emerged that favored consolidating notions of statehood, protecting weaker states, and encouraging cooperation amongst states. For example, the Inter-American Montevideo Convention of 1933 ascribes to each state the following rights: “integrity and independence”; juridical equality and “equal capacity” with other states; jurisdiction over all inhabitants within its territory (including foreign nationals); territorial inviolability; and the rights “to organize itself as it sees fit” and “to legislate upon its interests.”<sup>110</sup> It also provides, “No state has the right to intervene in the internal or external affairs of another.”<sup>111</sup>

Without defining *sovereignty*, the Montevideo Convention reveals its essential content—as seen by its authors during the interwar years. It regards nonintervention as vital to sovereignty. In this, it resonates with the *Lotus* decision: “Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power

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<sup>108</sup> See MARTIN GILBERT, *THE FIRST WORLD WAR: A COMPLETE HISTORY*, at xxi, 473-536, 580-82 (1994) (describing the end of the war and its effects on the twentieth century); WALTER CONSUALO LANGSAM, *THE WORLD SINCE 1914*, at 116-19 (5th ed. 1943).

<sup>109</sup> MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS, 1776-1939*, at 208 (2010).

<sup>110</sup> Montevideo Convention on Rights and Duties of States arts. 3, 4, 9, 11, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>111</sup> *Id.* art. 8. The American states reaffirmed this bar on intervention three years later. See Additional Protocol Relative to Non-Intervention, done at Buenos Aires, Dec. 23, 1936, 51 Stat. 41; see also R.J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 113 (1974) (“What was remarkable [about the Buenos Aires Protocol] was that the United States should bind herself by treaty to the observation of an apparently absolute rule of nonintervention, allowing none of the exceptions with which she had increasingly indulged herself.”).

in any form in the territory of another State.”<sup>112</sup> Schabas describes this view of sovereignty as “a form of *quid pro quo* by which States agreed, in effect, to mind their own business. What went on within the borders of a sovereign State was a matter that concerned nobody but the State itself.”<sup>113</sup>

Recalling the contested nature of *sovereignty*, however, some developments should be noted that pushed against the era’s dominant state-centric trend. The Treaty of Versailles obliged defeated states and new states, over their sovereignty-based objections, to respect the rights of minorities.<sup>114</sup> Versailles also created the International Labor Organization to address domestic labor conditions, premised in part on “sentiments of justice and humanity.”<sup>115</sup> The *Institut de Droit International* produced a Declaration of the International Rights of Man to constrain states’ treatment of their own nationals.<sup>116</sup> The International Law Association called for the establishment of an International Criminal Court with “jurisdiction over all offenses committed contrary to the laws of humanity and the dictates of public conscience”; this proposal generated enough state interest to produce a draft convention, which then withered in the face of war.<sup>117</sup> Successive editions of the Oppenheim treatise render a verdict on the limited impact these developments had on the

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<sup>112</sup> *The Lotus*, *supra* note 104, at 18; *accord* League of Nations Covenant art. 10 (protecting “territorial integrity and . . . political independence”); *id.* art. 15, para. 8 (barring the League from making any recommendations to settle a dispute found to “arise out of a matter which by international law is solely within the domestic jurisdiction of [one] party”); Anti-War Treaty of Non-Aggression and Conciliation (The Saavedra Lamas Treaty) art. II, Oct. 10, 1933, 49 Stat. 3363 (“[T]erritorial questions must not be settled by violence . . .”).

<sup>113</sup> SCHABAS, *supra* note 15, at 2.

<sup>114</sup> *See, e.g.*, Treaty of Peace Between the Allied and Associated Powers and Germany art. 93, June 28, 1919, 2 Bevens 43 [hereinafter Treaty of Versailles] (obliging Poland to enter a treaty “to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language, or religion”). *See generally* I LASSA OPPENHEIM’S INTERNATIONAL LAW: A TREATISE 650-55 (Hersch Lauterpacht ed., 7th ed. 1948) [hereinafter LAUTERPACHT, I OPPENHEIM’S 7TH]; Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 783-85 (2006) (discussing interwar minority protections as precedent to modern human rights law).

<sup>115</sup> Constitution of the International Labour Organisation, pmb., June 28, 1919, 49 Stat. 2712.

<sup>116</sup> Institut de Droit International, Decl. of the Int’l Rights of Man, Oct. 12, 1929, reprinted in George Finch, *The International Rights of Man*, 35 AM. J. INT’L L. 662, 663-64 (1941); *see also* Phillip Marshall Brown, *The New York Session of the Institut de Droit International*, 24 AM. J. INT’L L. 126, 127 (1930) (describing the Declaration as “a revolutionary document” that “marks a new era which is more concerned with the interests and rights of sovereign individuals than with the rights of sovereign states”).

<sup>117</sup> JANIS, *supra* note 109, at 207-11.

state of the law: the treatise moved from dismissing “so-called rights of mankind” outright as nonexistent and inconsistent with the nature of *international law*<sup>118</sup> to acknowledging the existence of some relevant state practice that was “not without significance” but did not yet have “the legal effect of incorporating the fundamental rights of man as part of the positive law of nations.”<sup>119</sup>

### B. *A Brief Introduction to Nonintervention*

The nonintervention norm protects sovereignty.<sup>120</sup> Like sovereignty itself, it is contested. In the words of Louis Henkin, “[T]he norm against intervention . . . is difficult to define, to separate the permissible from the impermissible . . .”<sup>121</sup> Once again, time and politics have contributed to ambiguity and change. “The frontiers protected by the principle of nonintervention are unclear at any one time, they vary over time, and they are defined differently by different statesmen—Castlereagh or Palmerston, Theodore or Franklin Roosevelt, Khrushchev or Brezhnev.”<sup>122</sup>

Two issues arise about the interwar scope of the nonintervention norm. Did the norm extend beyond military intervention to prohibiting criticism and other nonmilitary *interference* (a word sometimes used to distinguish such acts from military *intervention*)? And was the norm limited so as to permit intervention for humanitarian purposes in certain circumstances? Ellery Stowell’s 1921 treatise on *Intervention in International Law* provides abundant evidence that both issues were contested.<sup>123</sup>

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<sup>118</sup> OPPENHEIM, *supra* note 102, at 367-69; I LASSA OPPENHEIM’S *INTERNATIONAL LAW: A TREATISE* 461-63 (Ronald F. Roxburgh ed., 3d ed. 1920) [hereinafter ROXBURGH, OPPENHEIM’S 3d].

<sup>119</sup> LAUTERPACHT, I OPPENHEIM’S 7TH, *supra* note 114, at 583-85.

<sup>120</sup> See VINCENT, *supra* note 111, at 14 (“The function . . . of nonintervention . . . [is] protecting the principle of state sovereignty.”); HENKIN, *supra* note 102, at 110 (“All states insist on the norm of non-intervention, but it is the favorite norm of the weak and the small, an expression of their equality as well as a safeguard of their independence and autonomy.”). See generally Philip Kunig, *Intervention, Prohibition of*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L., [www.mpepil.com/subscriber\\_article?script=yes&id/epil/entries/law-9780199231690-e1434&recno=1&author=Kunig%20%20Philip](http://www.mpepil.com/subscriber_article?script=yes&id/epil/entries/law-9780199231690-e1434&recno=1&author=Kunig%20%20Philip) (last visited Feb. 1, 2012).

<sup>121</sup> HENKIN, *supra* note 102, at 110.

<sup>122</sup> VINCENT, *supra* note 111, at 15-16; see also *id.* at 139 (“[I]t might be more accurate to refer to American doctrines of nonintervention than to one doctrine . . .”).

<sup>123</sup> See generally ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (1921). We know that Lemkin was familiar with Stowell’s work, at least by the 1950s, because he discusses it in an unfinished manuscript. See Raphael Lemkin, *Introduction*

First, Stowell gives examples showing that states sometimes overcome the pull of nonintervention to criticize internal affairs in other states. Even these examples demonstrate, however, that the nonintervention norm exerted some degree of influence. The norm manifested itself in the (predictable) reactions of the criticized states and in the ways that the criticizing states calibrated,<sup>124</sup> justified, and portrayed their comments. For instance, in 1882, the U.S. government authorized a diplomat to “express the hope” that Russia “will find means . . . to cease” the mistreatment of its Jewish population, but no more and only that much “with all proper deference” and “if a favorable opportunity offers” in the diplomat’s “wide discretion.”<sup>125</sup> By contrast, these instructions continued, if U.S. citizens are injured by Russian persecution, “you will feel it your duty to omit no effort to protect them.”<sup>126</sup>

Second, Stowell argues for a humanitarian limit on the norm of nonintervention.<sup>127</sup> He lists authorities supporting humanitarian intervention (including Grotius) and opponents (including Vattel).<sup>128</sup> He describes “Turkey’s persecutions of the Armenians” as an instance when “the United States has felt constrained by the obligations of a common humanity to intervene diplomatically.”<sup>129</sup> Even as Stowell presents it, however, the U.S. comments were limited to “merely . . . informing Turkey that the American people already [we]re so stirred by the reported massacres that a continuance of the atrocities might [have] result[ed] in a break in the friendly relations between the two peoples,” because the reports “caus[ed] unfriendly criticism among the people of the United States.”<sup>130</sup> A fuller picture shows the ways in which the nonintervention norm (together with the U.S. interest in staying neutral in World War I) constrained the

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*to the Study of Genocide* 60-64, published in STEVEN JACOBS, LEMKIN ON GENOCIDE (forthcoming 2011) (manuscript on file with author) [hereinafter Lemkin, *Introduction*].

<sup>124</sup> Cf. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 26 (1974) (“Do we believe that the behaviour of a man travelling 65 miles an hour on a super-highway with a 60-mile speed-limit was not constrained by law?”).

<sup>125</sup> STOWELL, *supra* note 123, at 73-76 (internal quotation marks omitted) (printing the instructions given to the American Chargé at St. Petersburg).

<sup>126</sup> *Id.* at 76 (internal quotation marks omitted).

<sup>127</sup> See *id.* at 51-62. Stowell argues that intervention, even the “reliance upon force,” may be allowed “for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.” *Id.* at 53 (citation omitted).

<sup>128</sup> *Id.* at 53-59.

<sup>129</sup> *Id.* at 80.

<sup>130</sup> *Id.* at 81-82 (quoting a report printed in the N.Y. EVENING POST, Oct. 5, 1915).

U.S. response. Ambassador Henry Morgenthau, Sr. led the push for U.S. action that “may possibly have the effect of checking [Turkey’s] Government and certainly provide an opportunity for efficient relief,” notwithstanding “the principles of non-interference with the internal affairs of another country.”<sup>131</sup> Washington approved a limited criticism of Ottoman atrocities, but no actions capable of effectively “checking,” or providing “efficient relief” from, those atrocities.

Stowell considers humanitarian intervention legal and criticizes states that fail to embrace it.<sup>132</sup> By contrast, Oppenheim writes that, although supported by “[m]any jurists” and some instances of state practice, “whether there is really a rule of the Law of Nations which admits such [humanitarian] interventions may well be doubted.”<sup>133</sup> The debate about the existence of a humanitarian exception to the nonintervention norm formed part of Lemkin’s rhetorical situation.

### C. *Lemkin’s Exigence: Bounding Sovereignty*

World War II ultimately made plain the need for a new international legal order. The dominant interwar conception of absolute sovereignty attracted its share of blame for the war. Philip Jessup denounced this “archfiction” as “the quicksand upon which the foundations of traditional international law are built.”<sup>134</sup> Robert Jackson condemned the “anarchic concept” of

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<sup>131</sup> POWER, *supra* note 9, at 6-8 & 519 nn.13 & 20 (quoting statements of Henry Morgenthau, July 10 & Aug. 11, 1915).

<sup>132</sup> See, e.g., STOWELL, *supra* note 123, at v, 51-52. In a passage about British and French actions in the 1830s concerning Russian mistreatment of Poles, Stowell writes:

Notwithstanding these attempts to find a ground of justification more satisfactory than humanity, the intervening powers did, withal, concurrently and sometimes incidentally, refer to considerations of humanity. But they did it hesitatingly—almost shamefacedly—as though this, the only juridical basis upon which their action could be defended, was not one which they cared to present as the real justification of their intervention.

*Id.* at 110-11 (citation omitted); see also *id.* at 187 n.88 (discussing actions taken by a U.S. consul in Peru, “We note here an embarrassment evidently due to the unfortunate and unfounded belief that intervention upon the ground of humanity is not justifiable in international law. We find this same erroneous opinion expressed by Secretary Knox . . .”).

<sup>133</sup> OPPENHEIM, *supra* note 102, at 194; accord ROXBURGH, OPPENHEIM’S 3d, *supra* note 118, at 229 (same). Oppenheim adds, “[I]t may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interest of humanity are admissible” when done collectively. OPPENHEIM, *supra* note 102, at 194-95.

<sup>134</sup> PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 2, 12 (1948); cf. Robert Keohane, *Political Authority After Intervention: Gradations in Sovereignty*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL

absolute sovereignty: "It would be hard to devise an intellectual discipline that would do more to encourage international lawlessness and aggression."<sup>135</sup>

Lemkin too censures the prevailing conception of sovereignty, highlighting its role in the failure of the interwar legal order to constrain domestic atrocities. He writes, "[T]he genocide policy begun by Germany on its own Jewish citizens in 1933 was considered as an internal problem which the German state, as a sovereign power, should handle without interference by other states."<sup>136</sup> Lemkin also criticizes as unjustified and "isolationist" the "opinion" that "a state's treatment of its own nationals is an internal matter and of no concern to other states."<sup>137</sup> He argues that international law imposes a duty on each state not to "menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind."<sup>138</sup>

Lemkin begins another article by situating *genocide* squarely in the sovereignty debate:

The practices of the National Socialist Government in Germany . . . gave impetus to a reconsideration of certain principles of international law. The question arose whether sovereignty goes so far that a government can destroy with impunity its own citizens and whether such acts of destruction are domestic affairs or matters of international concern.<sup>139</sup>

Indeed, according to his unfinished memoir, Lemkin engaged with the sovereignty debate from the very start of his rhetorical

DILEMMAS 275, 298 (J.L. Holzgrefe & Robert Keohane eds., 2003) (criticizing the "Westphalian fetish of total autonomy from external authority").

<sup>135</sup> Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 813 (1949), reprinted in PERSPECTIVES ON THE NUREMBERG TRIAL 354, 355 (Guénaél Mettraux ed., 2008).

<sup>136</sup> Raphael Lemkin, *Genocide—A Modern Crime*, 4 FREE WORLD 39, 43 (1945), available at <http://www.preventgenocide.org/lemkin/freeworld1945.htm> [hereinafter Lemkin, *Modern Crime*]; cf. Raphael Lemkin, Letter to the Editor, *Genocide Before the U.N.*, N.Y. TIMES, Nov. 8, 1946, at C22 (objecting that mass murder and mass sterilization were regarded as an "internal concern" or "internal affair").

<sup>137</sup> Raphael Lemkin, *The Legal Case Against Hitler, Part II*, NATION, Mar. 10, 1945, at 268 [hereinafter Lemkin, *Legal Case II*]. Echoing Stowell, Lemkin lists "instances of states expressing their concern about another state's treatment of its own citizens" and treaties concerning such treatment. *Id.* at 268-69; see also Lemkin, *Introduction*, *supra* note 123, at 65-66 (listing ten "Persecutions as Grounds for Humanitarian Intervention").

<sup>138</sup> Lemkin, *The Legal Case II*, *supra* note 137, at 269 (quoting "a study published in 1944 under the auspices of the Carnegie Endowment for International Peace").

<sup>139</sup> Lemkin, *AJIL*, *supra* note 53, at 145-46.



project. In his college anecdote,<sup>140</sup> Lemkin opposed an absolutist view of sovereignty:

I felt that a law against . . . racial or religious murder must be adopted by the world . . . I discussed the matter with my professors. They evoked the argument about sovereignty of states. “But sovereignty of states,” I answered, “implies conducting an independent foreign and internal policy, building of schools, construction of roads, in brief, all types of activity directed towards the welfare of people. Sovereignty,” I argued, “cannot be conceived as the right to kill millions of innocent people.”<sup>141</sup>

On the absolutist vision, sovereignty is an end—perhaps even *the* end, the “*Letztbegründung* (first principle)”<sup>142</sup>—of international legal order. This passage from Lemkin’s memoir suggests he held a radically different vision of sovereignty as means; the end is human welfare.<sup>143</sup>

To make the move from sovereignty as end to sovereignty as human-serving means, one must accept both substantive limits on the freedom of states vis-à-vis their populations and mechanisms of accountability for states that exceed these limits.<sup>144</sup> *Barbarity, vandalism*, and ultimately *genocide* thus acted as Lemkin’s tools in his effort to bound sovereignty, both substantively and with mechanisms of accountability. His approach to accountability centers on criminalization and prosecution. This prosecutorial approach reflects Lemkin’s own background in criminal law. In 1933, when he first proposed criminalizing barbarity and vandalism, Lemkin was working as a prosecutor, an instructor of comparative criminal law, and the Secretary General of the

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<sup>140</sup> See *supra* text accompanying note 98.

<sup>141</sup> Lemkin, *Totally Unofficial Man*, *supra* note 7, at 371 (emphasis added).

<sup>142</sup> See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 514-15 (2009) (arguing that humanity has ousted sovereignty as the first principle of international law, such that sovereignty “has a legal value only to the extent that it respects human rights, interests, and needs”); cf. Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 347 (2009) (arguing that “a state’s claim to sovereignty, properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power”).

<sup>143</sup> Cf. Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT’L L. 61, 65 (2011) (“The general law for supreme sovereigns is this: Let the people’s welfare be the supreme law.” (quoting SAMUEL PUFENDORF, ON THE LAW OF NATIONS AND OF NATURE 737 (1672)) (internal quotation marks omitted)); Reisman, *supra* note 103, at 40 (“[H]uman rights, most broadly understood, [should be] the major goal and the major justification of world order.”).

<sup>144</sup> Cf. *Yale Commentary*, *supra* note 31, at 1150 n.61 (“Establishment of [an international court to prosecute genocide] would, of course, limit the nebulous concept of sovereignty.”).

Polish section of the International Association of Penal Law.<sup>145</sup> In his proposal—sent to the Madrid “Conference for the Unification of Penal Law”—Lemkin argues that barbarity and vandalism should be recognized as “offenses against the law of nations” subject to the “principle of universal repression,” under which they would be “prosecuted and punished independently of the place where the act was committed and of the nationality of the author.”<sup>146</sup> Lemkin brings to *genocide* this focus on criminal prosecution<sup>147</sup>—mainly prosecution by other states,<sup>148</sup> but he also raises the possibility of “trial by an international court” to be established for that purpose.<sup>149</sup> Far from the view that sovereignty entails freedom even from external criticism, Lemkin envisions an international legal order in which states and the international community could—and should—prosecute officials of other states for (certain) domestic acts.<sup>150</sup>

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<sup>145</sup> See Vrdoljak, *supra* note 6, at 1175-77.

<sup>146</sup> Lemkin, *Madrid Proposal*, *supra* note 41, at 2 (proposed art. 7); see also Lemkin, UN BULLETIN, *supra* note 7, at 70 (“[U]niversal repression’ . . . makes the soil burn under the feet of . . . offenders” who try to flee.). The “principle of universal repression” is better known today as “universal jurisdiction.” See generally THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001).

<sup>147</sup> See, e.g., LEMKIN, AXIS RULE, *supra* note 3, at 93 (“An international multilateral treaty should provide for the introduction, not only in the constitution but also in the criminal code of each country, of provisions protecting minority groups . . . Each criminal code should have provisions inflicting penalties for genocide practices.”).

<sup>148</sup> See, e.g., *id.* at 93-94 (“[T]he principle of universal repression should be adopted for the crime of genocide.”); Lemkin, UN BULLETIN, *supra* note 7, at 70 (same).

<sup>149</sup> See Lemkin, *Legal Case II*, *supra* note 137, at 269 (“Allied military courts should conduct the trials.”); Lemkin, *Modern Crime*, *supra* note 136, at 43 (“[O]ffenders should be subject to trial by an international court.”).

<sup>150</sup> Lemkin sometimes comments that *genocide* legitimizes “humanitarian intervention”—by which he means diplomatic objections. See, e.g., Lemkin, AJIL, *supra* note 53, at 146 & n.1, 150 (describing two diplomatic communications as instances of humanitarian intervention); Lemkin, *Madrid Proposal*, *supra* note 41, at 2 (“diplomatic actions on behalf of the victims of such violations (humanitarian interventions)”; Lemkin, UN BULLETIN, *supra* note 7, at 71 (“[T]he organs of the United Nations will have the right to intervene or otherwise to express their concern.”).

Although discussions today about humanitarian intervention equate it with the use of military force, I have seen nothing in Lemkin’s published writings to suggest this is how he conceived it. Cf. POWER, *supra* note 9, at 58 (“[N]either the [Genocide Convention] nor [its] drafters discussed the use of force. It was a large enough leap to convince a state’s leaders to denounce or punish the crimes of a fellow state.”). Indeed, the only publication I have seen in which Lemkin may have addressed military intervention is the *Yale Commentary*, *supra* note 31, at 1148, 1149 n.54, which dismisses the “theoretical[]” possibility of the Security Council authorizing force to stop genocide as “negligible,” “difficult to conceive,” and “very unlikely.” On the other hand, in an unfinished manuscript, Lemkin briefly discusses humanitarian intervention in a way that suggests he shares Stowell’s view that intervention may take a variety of forms up to and including military force. See Lemkin, *Introduction*, *supra* note 123, at 60-66.

D. *War, Peace, Crime, Punishment, and Lemkin's Exigence*

Lemkin first published his new word after the Allies had begun to debate how to punish Axis leaders after the War. Churchill, Roosevelt, and Stalin had committed in the Moscow Declaration of 1943 to punish the "Hitlerite forces" responsible for "atrocities, massacres and cold-blooded mass executions."<sup>151</sup> The Moscow Declaration specified that most perpetrators would be "judged and punished" in "the countries in which their abominable deeds were done," while reserving to the Allies to "punish by joint decision" the Nazi leaders (i.e., those "German criminals whose offenses have no particular geographical localization").<sup>152</sup>

One key issue under debate was whether to punish atrocities committed by Germans in Germany against German citizens—notably, but not only, German Jews. As revelations about Nazi horrors emerged, Allied leaders declared their intent to punish those responsible, but these pronouncements often skirted what might be called the jurisdictional question. For example, in December 1942, soon after receiving Jan Karski's report, the Allies "condemn[ed] in the strongest possible terms [the Nazis'] bestial policy of cold-blooded extermination" of Jews.<sup>153</sup> Yet, this Joint Declaration was actually worded to focus only on crimes committed in "occupied countries":

[T]he German authorities, not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended, the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe. From all the occupied countries Jews are being transported in conditions of appalling horror and brutality to Eastern Europe. In Poland, which has been made the principal Nazi slaughterhouse, the ghettos established by the German invader are being systematically emptied of all Jews . . . .<sup>154</sup>

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<sup>151</sup> Moscow Declaration, *supra* note 59, Statement on Atrocities.

<sup>152</sup> *Id.*

<sup>153</sup> Joint Declaration, Dec. 17, 1942, reprinted in *11 Allies Condemn Nazi War on Jews*, N.Y. TIMES, Dec. 18, 1942, at 1.

<sup>154</sup> *Id.*; see also Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 184 (1946) ("[T]his statement, in its careful wording, is restricted to crimes committed . . . in . . . occupied countries . . ." (internal quotation marks omitted)). Other wartime documents reflect similar jurisdictional tensions. See generally SCHABAS, *supra* note 15, at 35-42. Schabas quotes the British Lord Chancellor, who distinguished between "atrocities committed against the Jews . . . in occupied territories," which "come within the territory of war crimes," and similar acts "committed in enemy territory," which "raise serious difficulties." *Id.* at 37-38 (quoting UNWCC Doc. C.78, Feb. 15, 1945) (emphasis added).

After achieving Victory in Europe, the Allies met in London to negotiate what came to be known as the Nuremberg Charter.<sup>155</sup> The Charter established an International Military Tribunal with jurisdiction over three crimes: crimes against peace, war crimes, and crimes against humanity.<sup>156</sup> It defined the last, the most relevant here,<sup>157</sup> as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war[,]<sup>158</sup> or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>159</sup>

In his landmark article on crimes against humanity, Egon Schwelb observes that the Charter's definition "has, from the very beginning, caught the imagination of international lawyers."<sup>160</sup> Phrases like "before or during the war," "against any civilian population," and "whether or not in violation of the domestic law of the country where perpetrated" appeared to herald a new balance between the international and the domestic.<sup>161</sup>

Schwelb shows, however, that the promise of these phrases gave way to other language confining *crimes against humanity* to those acts taken "in execution of or in connection with any [other] crime within the jurisdiction of the Tribunal," namely, crimes against peace and war crimes.<sup>162</sup> This language reflected the Allies' decision in London to adopt a jurisdictional approach that "insisted upon a nexus between the war itself

<sup>155</sup> Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

<sup>156</sup> *Id.* art. 6.

<sup>157</sup> Lemkin's word is not found in the Nuremberg Charter, but his concept resonates with the Charter's definition of *crimes against humanity* to such an extent as to allow the word itself to appear in the Nuremberg indictment: "They conducted deliberate and systematic *genocide*, viz., the extermination of racial and national 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, and Gypsies and others." Indictment of Hermann Goering, et al., Count 3, § VIII(a), (Oct. 6, 1945) (emphasis added), available at <http://avalon.law.yale.edu/imt/count.asp>. The indictment's mention of *genocide* pleased Lemkin. See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 367 ("I went to London and succeeded in having inscribed the charge of genocide against the Nazi war criminals in Nuremberg."); see also Barrett, *supra* note 12, at 44-46.

<sup>158</sup> This comma appeared in the original Russian text, but had been a semi-colon in the original English and French texts. See *infra* note 165.

<sup>159</sup> Nuremberg Charter, *supra* note 155, art. 6(c).

<sup>160</sup> Schwelb, *supra* note 154, at 178.

<sup>161</sup> See *id.* at 178-79.

<sup>162</sup> See *id.* at 203-05, 218.

and the atrocities committed by the Nazis against their own Jewish populations.”<sup>163</sup> The nexus requirement minimized the extent of the Charter’s jurisdictional innovation. The Allies sought not to rewrite the borders between the international and domestic but rather to extend the international modestly from established war crimes to similar crimes connected to the war effort—even if they occurred before the war began.<sup>164</sup> The Allies later amended the Charter to bolster the nexus requirement.<sup>165</sup> In the end, the Nuremberg Tribunal found ample evidence of wartime crimes against humanity,<sup>166</sup> but it concluded that the

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<sup>163</sup> SCHABAS, *supra* note 15, at 40. Schabas quotes Robert Jackson in London:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business, that is to say, the way Germany treats its inhabitants . . . is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews . . . becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. . . . We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.

*Id.* (quoting Report of Robert H. Jackson 331, 333 (1945)).

<sup>164</sup> Schabas criticizes “Jackson’s narrow view,” *id.* at 41, once calling it “hypocritical.” See William Schabas, *Semantics or Substance? David Scheffer’s Welcome Proposal to Strengthen Criminal Accountability for Atrocities*, 2 GENOCIDE STUDIES & PREVENTION 31, 33 (2007). By contrast, Bassiouni argues that the Allies’ approach reflected a “trade-off . . . [intended] to strengthen the validity” of *crimes against humanity* by more firmly entwining the new crime with settled law. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 29-30 (2d rev. ed. 1999).

<sup>165</sup> See Protocol Rectifying Discrepancy in the Charter, done at Berlin, Oct. 6, 1945, available at <http://avalon.law.yale.edu/imt/imtprot.asp>. The Charter definition of *crimes against humanity* had a semi-colon in the English and French texts, but a comma in Russian. The Allies agreed that “the Russian text is correct” and amended the punctuation in the other texts accordingly (while also making other changes to the French wording only). *Id.* Schwelb describes this change as having “considerable importance, *inter alia*, because it entails that the qualification contained in the second part of the paragraph, and expressed by the words ‘in execution of or in connection with any crime within the jurisdiction of the tribunal’, refers to the whole text of Article 6(c).” Schwelb, *supra* note 154, at 188, 193-95.

Lemkin criticizes the punctuation change as “the rectification of an *alleged* error.” Lemkin, *AJIL*, *supra* note 53, at 148 (emphasis added). Roger Clark likewise expresses “the nagging doubt . . . that there had been a change of position.” See BASSIOUNI, *supra* note 164, at 29 (quoting Roger Clark, *Crimes Against Humanity at Nuremberg*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 190-92 (George Ginsburgs & Vladimire Kudriavtsev eds., 1990)). Bassiouni argues, however, that the drafters “always intended” to apply the limiting words in the second part of the definition to the entire definition to effect the necessary “trade-off” discussed *supra* note 164. *Id.* at 29-30.

<sup>166</sup> See “Persecution of the Jews” in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1946), available at [http://avalon.law.yale.edu/subject\\_menus/judcont.asp](http://avalon.law.yale.edu/subject_menus/judcont.asp) [hereinafter *Nuremberg Judgment*] (holding that the Nazis had subjected Jews to “consistent and systematic inhumanity on the greatest scale”).

prosecutors largely failed to prove the necessary connections between prewar atrocities and the War.<sup>167</sup>

Lemkin might have been expected to take some comfort from Nuremberg's historic convictions of Nazi leaders responsible for the deaths of millions, including his own parents.<sup>168</sup> In fact, however, the prosecutor Henry King recalls seeing Lemkin "very upset" a few days after the judgment: "He was concerned that the decision . . . did not go far enough in dealing with genocidal actions. This was because the [Tribunal] limited its judgment to wartime genocide and did not include peacetime genocide."<sup>169</sup> Lemkin explains, "From the point of view of international law, . . . acts committed before the war by Germany on its citizens were more significant. Had the Tribunal punished such acts a precedent would have been established to the effect that a Government is precluded from destroying groups of its own citizens."<sup>170</sup>

In his unpublished memoir, Lemkin adds, "For years, I tried to establish genocide as [an] international crime both in time of war and peace, and what I obtained in Nuremberg was

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<sup>167</sup> The Tribunal explained:

The persecution of Jews [before the war started in 1939] is established beyond all doubt. . . . The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any [crime within the jurisdiction of the Tribunal]. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter . . . .

*Id.* at "The Law Relating to War Crimes and Crimes Against Humanity"; *see also* International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, principle VI (1950) (limiting its definition of *crimes against humanity* to acts "done . . . in execution of or in connection with any crime against peace or any war crime"). Although the Tribunal declined to make a "general declaration" linking prewar acts to the war, it did treat prewar acts in Austria and Sudetenland as crimes against humanity, finding that Germany had acquired control over those places through illegal acts of aggression. *See* Schwelb, *supra* note 154, at 204-05.

<sup>168</sup> *See* POWER, *supra* note 9, at 49, 528 n.7 ("In Nuremberg [Lemkin] met up with his older brother, Elias; Elias's wife; and their two sons. They told him that they were the family's sole survivors. At least 49 others, including his parents, . . . had perished . . .").

<sup>169</sup> Henry King, *Genocide and Nuremberg*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 29, 29 (Ralph Henham & Paul Behrens eds., 2007). *But see* Barrett, *supra* note 12, at 52-53 (contending that Lemkin had left Nuremberg before the verdict and that King misremembered the timing in his essay written sixty years later).

<sup>170</sup> Lemkin, *AJIL*, *supra* note 53, at 148; *cf.* Lemkin, *Legal Case II*, *supra* note 137 (advocating trials "to clarify the standards by which international society can live").

fragmentary treatment of the problem.”<sup>171</sup> Lemkin considers Nuremberg’s outcome incomplete, because it penalized offenders already apprehended without “establish[ing] a rule of international law that would prevent and punish future crimes of the same type.”<sup>172</sup> Because of the limitations of the wartime nexus requirement, Lemkin regards the Nuremberg approach as achieving only “an advance of 10 or 20 percent’ toward outlawing genocide.”<sup>173</sup>

Lemkin’s exigence was bounding sovereignty. This entailed the necessity of establishing genocide as inherently a matter of international concern, always eligible for what might be termed “prosecutorial interference.” Lemkin wanted recognition that Germany’s mistreatment of its own citizens is “[c]learly . . . not Germany’s private concern.”<sup>174</sup> To this end, he wanted Nuremberg to establish a “precedent . . . to the effect that a Government is precluded from destroying groups of its own citizens.”<sup>175</sup> He could achieve his goal only if nations recognized genocide as a crime in peacetime, because nations

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<sup>171</sup> Lemkin, *Totally Unofficial Man*, *supra* note 7, at 368; *see also id.* at 384 (“[T]he purely juridical consequences of the [Nuremberg] trials were wholly insufficient . . .”).

<sup>172</sup> *Id.* at 384; *cf.* Schwelb, *supra* note 154, at 225-26 (concluding that “[t]he idea of external judicial interference within the area of exclusive domestic jurisdiction has certainly made some progress,” but is restricted in various ways such that “[t]he task of making the protection of human rights general, permanent, and effective still lies ahead”).

<sup>173</sup> *Anti-Genocide Gains Termed Significant*, N.Y. TIMES, Dec. 20, 1947, at 8 [hereinafter *Anti-Genocide Gains*] (quoting Lemkin); *cf.* *Yale Commentary*, *supra* note 31, at 1146 (“the legal impotence of Nuremberg”).

In discussing the limitations of Nuremberg (and Lemkin’s reactions thereto), I do not wish to unduly criticize it. Progress is often incremental, and the Nuremberg Charter surely “took a step forward in the form of a jurisdictional extension when it provided that the victims of the same types of conduct which constitutes war crimes, were protected without the requirement that they be of a different nationality than that of the perpetrators,” even with the requirement of a nexus to the war. BASSIOUNI, *supra* note 164, at 72. Bassiouni describes well the pressures and hurdles faced by the Allies, each with different interests and legal systems, as they established a novel mechanism capable of collectively adjudicating difficult issues in a short time; such an effort “necessarily requires political and legal compromises that may not be entirely sound.” *Id.* at 6-19. Bassiouni nicely conveys this perspective on Nuremberg with his epigraph from Machiavelli’s *The Prince*: “There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.” *Id.* at 1.

<sup>174</sup> Lemkin, *Legal Case II*, *supra* note 137, at 269.

<sup>175</sup> Lemkin, *AJIL*, *supra* note 53, at 148; *accord* COOPER, *supra* note 31, at 72 (quoting a letter Lemkin wrote to Trygve Lie on May 20, 1946, which predicted that “[a] precedent will be set [at Nuremberg] for the intervention in internal affairs of other countries on behalf of persecuted minorities”).

had always accepted international war as a matter of international concern.<sup>176</sup>

Disappointed with the Nuremberg Tribunal, Lemkin turned to a different forum: the UN General Assembly. He “returned hastily . . . to New York and arranged, within a couple of days, that the governments of Cuba, India, and Panama sponsor [a] resolution [which Lemkin drafted] that genocide is a crime under international law, without any limitations to war or peace.”<sup>177</sup> When the General Assembly passed a resolution against genocide, without any limitation to wartime,<sup>178</sup> Lemkin exulted in the triumph of his concept over absolutist sovereignty: “[B]y making [genocide] a problem of international concern, . . . the resolution . . . changes fundamentally the . . . responsibilities of a government toward its citizens.”<sup>179</sup> The Genocide Convention, in turn, expressly declares genocide an international crime regardless “whether committed in time of peace or in time of war.”<sup>180</sup>

Nuremberg thus played a dual role in Lemkin’s rhetorical project. It clearly marked an historic step toward international criminal accountability for perpetrators of crimes against humanity (including, for this purpose, genocide). Yet its limitations also spurred Lemkin to pursue—and the United

<sup>176</sup> The concept of peacetime genocide runs through Lemkin’s writings. See, e.g., LEMKIN, *AXIS RULE*, *supra* note 3, at xiii (advocating a treaty to prohibit “extermination attempts and oppression in time of peace”); *id.* at 93 (“genocide is a problem not only of war but also of peace”); Lemkin, *Modern Crime*, *supra* note 136, at 42; Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227, 230 (1946) [hereinafter Lemkin, *Genocide*] (specifying that a treaty must “provid[e] for [genocide’s] prevention and punishment in time of peace and war”). Although the peacetime theme originates in *Axis Rule*, it had not yet become the priority later evidenced by Lemkin’s criticisms of Nuremberg. This treatise, after all, focuses on Axis rule “in Occupied Europe.” It concerns German occupation practices, not domestic policies. Even its chapter on persecution of Jews is, like the Allies’ Joint Declaration, limited to “Jews in the occupied countries.” See LEMKIN, *AXIS RULE*, *supra* note 3, at 77.

<sup>177</sup> Lemkin, *Totally Unofficial Man*, *supra* note 7, at 368.

<sup>178</sup> See G.A. Res. 96 (I), *supra* note 13. The final resolution exceeds Lemkin’s draft, which did not definitively declare genocide to be an international crime and a subject of international concern, but only called for a study and “a report on the possibilities” of such a declaration. See U.N. Doc. A/BUR/50, *reprinted in* 1 THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 3 (Hirad Abtahi & Philippa Webb eds., 2008) [hereinafter THE GENOCIDE CONVENTION].

<sup>179</sup> Lemkin, *AJIL*, *supra* note 53, at 150; see also Lemkin, *UN BULLETIN*, *supra* note 7, at 70 (“From [the resolution] follows a most important consequence: the destruction of [listed] groups is no longer an internal affair of the country involved but a matter of international concern.”); *Anti-Genocide Gains*, *supra* note 173, at 8 (quoting Lemkin as describing the resolution as “a real revolution in international law, in that it tries to reconcile the interests of all human beings everywhere with the principle of sovereignty”); *Yale Commentary*, *supra* note 31, at 1156 (“In contemplating eventual international court jurisdiction over individuals in time of peace, the genocide treaty introduces a completely new international law concept.”).

<sup>180</sup> Genocide Convention, *supra* note 14, art. I.



Nations to make—a clearer assertion that genocide is inherently and always a matter of international concern.<sup>181</sup> Lemkin's reaction to Nuremberg both confirms the central importance of sovereignty-bounding to his exigence and illustrates one key aspect of the norm he sought to impose: genocide is a crime warranting punishment in both war and peace.

### E. Genocide as Boundary

If Lemkin means *genocide* to bound sovereignty, the next question is exactly what boundary he intends to draw.

From the start, Lemkin's conception of *genocide* concerned the destruction of groups. Lemkin insists that this focus distinguishes *genocide* from "inadequate" preexisting concepts like "denationalization" and "Germanization."<sup>182</sup> Although some details shift as Lemkin's word moves from conception to Convention, his emphasis always remains on groups.

For Lemkin, "mass killing" is one "technique" of genocide.<sup>183</sup> It is not synonymous with *genocide* and is neither necessary nor sufficient to constitute genocide.<sup>184</sup> Rather, Lemkin describes a variety of other techniques for pursuing genocide: political, social, cultural, economic, biological, physical, religious, and moral.<sup>185</sup> Mass killing only qualifies as

<sup>181</sup> See Raphael Lemkin, Letter to the Editor, *For Punishment of Genocide*, N.Y. TIMES, June 12, 1947, at L24 ("The Nuremberg judgment decided that crimes against humanity are punishable only when committed during a war of aggression. For punishing the destruction of human groups in time of peace another legal machinery had to be sought."); Raphael Lemkin, *War Against Genocide*, CHRISTIAN SCI. MONITOR MAG., Jan. 31, 1948, at 2 ("[T]he crimes established in Nuremberg apply only in relationship between a conqueror and a conquered country. Crimes applicable in time of peace, in relations among sovereign states, are a completely different matter."); see also SCHABAS, *supra* note 15, at 642 ("If the law of Nuremberg had recognized what Raphael Lemkin called 'peacetime genocide', there would probably have been no General Assembly resolution and no Convention. Neither would have been necessary. There would have been no . . . gap to fill.")

<sup>182</sup> LEMKIN, AXIS RULE, *supra* note 3, at 79-80 (criticizing words that failed to capture the "destruction of the biological structure" of the target group). Lemkin also faults "Germanization," "Italianization," and "Magyarization" for failing to establish "the common elements of one generic notion . . ." *Id.* at 80.

<sup>183</sup> *Id.* at 88-89.

<sup>184</sup> See, e.g., Lemkin, AJIL, *supra* note 53, at 147 ("Mass murder or extermination wouldn't apply in the case of sterilization."); Lemkin, *Modern Crime*, *supra* note 136, at 39 ("[T]he term [*genocide*] does not necessarily signify mass killings although it may mean that. More often it refers to a coordinated plan aimed at destruction of the essential foundations of the life of national groups so that these groups wither and die like plants that have suffered a blight.")

<sup>185</sup> LEMKIN, AXIS RULE, *supra* note 3, at 82-90. Lemkin distinguishes between biological and physical techniques. The former focuses on reducing the birth rate of the target group (e.g., by separating men and women) and increasing that of the dominant

genocide when it “aim[s] at the destruction of essential foundations of the life of national groups.”<sup>186</sup> Lemkin thus conceives of genocide not as murder, but—by analogy to murder—as the destruction of a group.<sup>187</sup>

By treating mass killing as a technique of genocide, Lemkin shows that his exigence focuses on peoples more than persons. Lemkin displays this group focus throughout his work. As early as his Madrid proposal in 1933, Lemkin argues for criminalizing *barbarity* on the ground that:

The goal of the [perpetrator] is not only to harm an individual, but, also to cause damage to the collectivity to which the later belongs. Offenses of this type bring harm not only to human rights, but also and most especially they undermine the fundamental [sic] basis of the social order.<sup>188</sup>

For Lemkin, then, the harm to groups both distinguishes *barbarity* from other offenses and makes it an appropriate subject of international concern. His concern was “most especially” with “social order” rather than “human rights.”

Lemkin carries this group focus into his work on *genocide*, which “is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of

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group (e.g., by subsidizing procreation), while the latter involves causing physical harm to individual members of the target group. *Id.* at 86-89. Lemkin identifies mass killing as one of three physical techniques, together with “[r]acial [d]iscrimination in [f]leeing” and “[e]ndangering of [h]ealth.” *Id.* at 87-89.

<sup>186</sup> *Id.* at 79.

<sup>187</sup> See Lemkin, *Genocide*, *supra* note 176, at 229 (arguing that criminalizing *genocide* implies that “every national, racial and religious group has a natural right of existence,” as *homicide* does for individuals). Lemkin displays a tendency to describe groups in anthropomorphic terms: they have a “life,” a “biological structure,” and a “natural right of existence.” *Id.*; see also *supra* notes 182-87 and accompanying text. He praises a draft of the Convention for treating “[t]he human group . . . as a living entity.” Lemkin, *War Against Genocide*, *supra* note 181. Accordingly, A. Dirk Moses describes Lemkin’s concept as “groupism, . . . the tendency to treat ethnic groups, nations, and races as substantial entities to which interests and agency can be attributed, that is, to regard them as internally homogenous, external bounded groups, even unitary collective actors with common purposes.” A. Dirk Moses, *Raphael Lemkin, Culture, and the Concept of Genocide*, in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 19, 22 (Donald Bloxham & A. Dirk Moses eds., 2010) [hereinafter THE OXFORD HANDBOOK] (quoting Rogers Brubaker, *Ethnicity Without Groups*, in FACING ETHNIC CONFLICTS: TOWARDS A NEW REALISM 35 (Andreas Wimmer et al. eds., 2004)) (internal punctuation omitted). Moses further locates Lemkin in the traditions of “Polish romantic nationalists,” who “belie[ved] in the unique role of each people in the ‘symphony of nations’”; Jewish Bundists, who “believed in multiethnic states with minority protection”; and liberal imperialists, who supported imperialism as long as it served the goal of civilization, but opposed extreme violence. *Id.* at 23-28.

<sup>188</sup> Lemkin, *Madrid Proposal*, *supra* note 41, at 5.

the national group.”<sup>189</sup> He argues for prohibiting genocide to fill a gap in the Hague Regulations,<sup>190</sup> which “are silent regarding the preservation of the integrity of a people.”<sup>191</sup> He points to rising “interest in national groups as distinguished from states and individuals” in the recent “evolution of international law” and thus situates his word with the interwar concern for protecting minority groups.<sup>192</sup>

In the opening passage of *Axis Rule*'s chapter on genocide, Lemkin identifies four possible groups capable of being victimized by genocide: nations, ethnic groups, races, and tribes.<sup>193</sup> He later adds religions<sup>194</sup> and tends to omit tribes. He sees these groups as special, writing in an unpublished manuscript that they are “based on the formula of the human cosmos. This cosmos consists of four basic groups: national, racial, religious and ethnic.”<sup>195</sup>

The common thread among Lemkin's groups is culture. He seeks to protect those groups he sees as creators and preservers of culture, “the spiritual resources of mankind.”<sup>196</sup> He evidences his concern for culture as early as his 1933 proposal to outlaw *vandalism*, the “destruction of the culture and works of art.”<sup>197</sup> Cultural concerns persist in Lemkin's work on *genocide*. *Axis Rule* states: “[N]ations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national

<sup>189</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79.

<sup>190</sup> Lemkin refers to the Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) of 1907. *See id.* at 14 n.17.

<sup>191</sup> *Id.* at 90.

<sup>192</sup> *See id.* at 90-91 (referencing the Treaty of Versailles, “specific minority treaties,” and constitutions and penal codes promulgated after 1918); Lemkin, *Modern Crime*, *supra* note 136, at 43 (associating his project with “[t]he principle of the international protection of minorities . . . proclaimed by post-Versailles minority treaties,” while criticizing those treaties as “inadequate” in several respects); *see also supra* notes 114, 147.

<sup>193</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79.

<sup>194</sup> *See, e.g.,* Lemkin, *Genocide*, *supra* note 176, at 228 (“national, racial or religious groups”).

<sup>195</sup> Lemkin, *Introduction*, *supra* note 123, at 1; *cf.* Lemkin, *War Against Genocide*, *supra* note 181 (“In its essential ideological and biological foundations, the history of mankind is centered more around the human group (genos) than around the state . . .”).

<sup>196</sup> Lemkin, *Introduction*, *supra* note 123, at 1.

<sup>197</sup> Lemkin, *Madrid Proposal*, *supra* note 41, at 7. Lemkin elaborates: “An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed . . .” *Id.*

groups. . . . The destruction of a nation, therefore, results in the loss of its future contributions to the world . . . .”<sup>198</sup>

Lemkin later elaborates, by force of example:

Cultural considerations speak for international protection of national, religious and cultural groups. Our whole heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.<sup>199</sup>

Lemkin captures the heart of his idea with the words “[g]enocide is essentially an ethnico-cultural concept.”<sup>200</sup>

This “ethnico-cultural” conception of *genocide* explains various aspects of Lemkin’s approach. It explains why he believes mass killings do not constitute genocide absent targeting a protected group.<sup>201</sup> It explains why he omits political, social, and other groups from his list of protected groups.<sup>202</sup> It explains the breadth of techniques—especially cultural techniques, like destroying museums and libraries or restricting artists and musicians—he deems capable of effecting genocide.<sup>203</sup>

<sup>198</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 91.

<sup>199</sup> Lemkin, *Genocide*, *supra* note 176, at 228.

<sup>200</sup> Lemkin, Letter to the Editor, *For Punishment of Genocide*, N.Y. TIMES, June 12, 1947, at L24. Lemkin used the same phrase in a letter to Sir Hartley Shawcross on July 8, 1947. See COOPER, *supra* note 31, at 94-95. Similarly, in a letter to Eleanor Roosevelt in 1946, Lemkin described genocide as “a term I coined for the concept of killing nations and obliterating their cultures.” *Id.* at 51 (quoting Lemkin).

<sup>201</sup> See, e.g., Lemkin, *AJIL*, *supra* note 53, at 147 (“[M]ass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.”).

<sup>202</sup> In this regard, Lemkin often discusses Jews, Roma, and Slavs as victims of Nazi genocide. See, e.g., Lemkin, *Genocide*, *supra* note 176, at 227; Lemkin, *War Against Genocide*, *supra* note 181. By contrast, I see no mention in his 1944-1948 writings of such other victim groups as the disabled and homosexuals. These groups generally received little attention in the early years after the war. See, e.g., Nuremberg Indictment, *supra* note 157, Count 3 (charging genocide against “Jews, Poles, and Gypsies and others”); Dorthe Seifert, *Between Silence and License: The Representation of the National Socialist Persecution of Homosexuality in Anglo-American Fiction and Film*, 15 HIST. & MEMORY 94, 94 (2003) (“Public knowledge and awareness of the persecution of homosexuality in National Socialist Germany remained limited until 1979 . . . .”). Even with knowledge, however, Lemkin might well have considered these groups beyond his “ethnico-cultural concept[ion]” of genocide. Cf. SCHABAS, *supra* note 15, at 153-71 (arguing that violence targeting these groups, among others, should be regarded as crimes against humanity but not genocide).

<sup>203</sup> See, e.g., LEMKIN, *AXIS RULE*, *supra* note 3, at 84-85; Lemkin, *War Against Genocide*, *supra* note 181 (arguing that it is “especially important” to protect “houses of worship, objects of religious cult, schools, treasures of art and culture” because

### F. *Other Exigences*

Advocates often must persuade the audience that there is a problem in need of a solution. This is “often . . . the most fundamental exigence faced by advocates,” because “[i]nertia is a powerful force in human affairs.”<sup>204</sup>

Lemkin failed at this task in Madrid in 1933. He could not persuade his audience that barbarity and vandalism presented sufficient risks to warrant adding them to the short list of international crimes.<sup>205</sup> For *genocide* to succeed where its predecessors had failed, Lemkin had to show the audience that genocide was a real and recurring phenomenon.<sup>206</sup> Even the horrors of the Holocaust might not have sufficed to criminalize genocide if the international community had perceived Nazi atrocities as a unique, isolated instance unlikely to be repeated.<sup>207</sup> In presenting his word, therefore, Lemkin takes care both to associate it with the compelling, contemporaneous case of the Nazis and to establish a pattern of genocide dating back to antiquity. *Axis Rule* describes *genocide* as a “new word . . . to denote an old practice in its modern development.”<sup>208</sup> In another article, Lemkin quotes Hitler’s statement that “[i]n former days it was the victor’s prerogative to destroy tribes, entire peoples” and then responds, strikingly, “Hitler was right.”<sup>209</sup>

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“[r]eligion can be destroyed within a group even if the members of the group continue to subsist physically”).

<sup>204</sup> See *supra* notes 89-93.

<sup>205</sup> See POWER, *supra* note 9, at 21-23 (quoting one delegate who thought barbarity happened “too seldom to legislate”).

<sup>206</sup> Cf. Lemkin, *Introduction*, *supra* note 123, at 68 (“Only experiences, and in this particular field we are sorry to say, only great disasters, can convince nations to give up more of their sovereignty in order to achieve bigger international goals.”).

<sup>207</sup> See, e.g., Lemkin, *War Against Genocide*, *supra* note 181 (“The Soviet delegate argued ‘genocide was committed only by the Nazis; since Germany is destroyed, there is no more danger of genocide.’”).

<sup>208</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79. To illustrate his claim that genocide dates to antiquity, Lemkin lists “[t]he most widely known cases of genocide” before Hitler:

the destruction of Carthage, the destruction of the Albigenses and Waldenses, the Crusades, the march of the Teutonic Knights, the destruction of the Christians under the Ottoman Empire, the massacres of the Herreros in Africa, the extermination of the Armenians, the slaughter of the Christian Assyrians in 1933, the destruction of the Maronites, and the pogroms against the Jews in Czarist Russia and Rumania.

Lemkin, UN BULLETIN, *supra* note 7.

<sup>209</sup> Lemkin, *Modern Crime*, *supra* note 136, at 39. Lemkin and Hitler part ways (of course) about whether past events constitute precedents to be followed or crimes to be condemned.

Lemkin's challenge, then, was to establish among the countless incidences of humanity's inhumanity a recurring subset deserving of criminalization. The preexisting words *barbarity* and *vandalism* had failed to reveal a sufficient pattern. Lemkin coined his word to help the international community see old crimes in new ways.<sup>210</sup>

Likewise, advocates often must persuade the audience to care about the problem. It is not enough to establish the existence of *a* problem, even a recurring problem. The problem must be important—worthy of a claim on the audience's attention, empathy, energy, resources, and time.<sup>211</sup> And the advocate must meet this burden not in a vacuum, but in a world filled with other problems making competing claims on the audience. In short, the advocate must overcome indifference.

Neville Chamberlain exemplifies indifference in his infamous description of Hitler's threat to Czechoslovakia as "a quarrel in a far-away country between people of whom we know nothing."<sup>212</sup> Elie Wiesel describes eloquently the "perils of indifference":

Indifference . . . is more dangerous than anger and hatred. Anger can at times be creative. One writes a great poem, a great symphony, [does] something special for the sake of humanity because one is angry at the injustice that one witnesses. But indifference is never creative. . . . Indifference is not a response.

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<sup>210</sup> In this regard, Jasinski discusses the scholarly literature on the ways language and "social knowledge" help to "make the world visible." See JASINSKI, *supra* note 67, at 185, 525. Naming a phenomenon can help humans to recognize and understand it. See *id.* at 120. It is social knowledge, for example, that helps a viewer to see a series of physical movements by individuals *as* a play conducted by a football team. See *id.* at 120, 525. Of course, depending on the name and definition selected, they may serve to mystify rather than clarify. See *id.* at 120, 185, 378.

<sup>211</sup> Cf. Bitzer, *Functional Communication*, *supra* note 74, at 32 ("An exigence will generate more interest if its likely consequences are numerous and of great significance . . .").

<sup>212</sup> See *Neville Chamberlain*, WIKIQUOTE, [http://en.wikiquote.org/wiki/Neville\\_Chamberlain](http://en.wikiquote.org/wiki/Neville_Chamberlain) (quoting *Prime Minister on the Issues*, TIMES (London), Sept. 28, 1938, at 10). Chamberlain's quotation centers on the problem of indifference across national borders, but humanity must also struggle against borders of "race, color, or creed":

When Claude Lanzmann was filming *Shoah*, he asked a Polish peasant whose fields abutted a death camp what he felt when he saw human ash from the crematoria chimneys raining down on his fields. The peasant replied: "When I cut my finger, I feel it. When you cut your finger, you feel it."

Michael Ignatieff, *Lemkin's Word: The Danger of a World Without Enemies*, NEW REPUBLIC, Feb. 26, 2001, at 25.

Indifference is not a beginning, it is an end. And, therefore, indifference . . . benefits the aggressor—never his victim, whose pain is magnified when he or she feels forgotten.<sup>213</sup>

Wiesel concludes that indifference denies the victims' humanity and thus "betray[s] our own."<sup>214</sup> His speech recalls John Donne's famous lines: "No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee."<sup>215</sup>

Lemkin sought a word able to toll a bell for mankind. He wanted "THE WORD" to convey "MORAL JUDGEMENT."<sup>216</sup> He wanted *genocide* "to chill listeners and invite immediate condemnation."<sup>217</sup> Indeed, the heart of Lemkin's project was to establish *genocide* as "a matter of international concern."<sup>218</sup> Where "[i]ndifference . . . is an end," concern is a start.

Lemkin offers many reasons to care about genocide. Prominent among them are the cultural losses genocide inflicts on all humanity.<sup>219</sup> More broadly, Lemkin argues that genocide's targeting of groups jeopardizes "social order"<sup>220</sup> and "the very moral and legal foundations of constitutional government" everywhere.<sup>221</sup>

<sup>213</sup> Elie Wiesel, *The Perils of Indifference: Lessons Learned from a Violent Century*, Remarks at the White House (Apr. 12, 1999) (transcript available at [http://clinton4.nara.gov/WH/EOP/First\\_Lady/html/generalspeeches/1999/19990412.html](http://clinton4.nara.gov/WH/EOP/First_Lady/html/generalspeeches/1999/19990412.html)).

<sup>214</sup> *Id.*

<sup>215</sup> Bassiouni aptly quotes these lines as the epigraph to the first edition of his book. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW*, at x (1992).

<sup>216</sup> POWER, *supra* note 9, at 42 (quoting Lemkin's handwritten notes).

<sup>217</sup> *Id.*

<sup>218</sup> G.A. Res. 96 (I), *supra* note 13 (emphasis added).

<sup>219</sup> See *supra* Part III.E; cf. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (Prosecutor v. Krstic), Case No. ICTY-98-33-A, Appeal Judgment, ¶ 36 (Apr. 19, 2004) (Genocide "deprive[s] humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.").

<sup>220</sup> See *supra* text accompanying note 188.

<sup>221</sup> Lemkin, *Modern Crime*, *supra* note 136, at 42-43 (allowing genocide in one country threatens "the very moral and legal foundations of constitutional government" everywhere, because all states have "[m]inorities of one sort or another" who depend on "the constitutional order of the state" for protection). Lemkin adds several other reasons for concern about genocide, including: tolerating internal aggression invites external aggression, *id.*; internal disturbances, especially "[a]rbitrary and wholesale confiscations" of property, disrupt the conditions needed for international trade, *id.*; and oppression of minority groups "result[s] in international disturbances, especially in the form of disorganized emigration of the persecuted," LEMKIN, *AXIS RULE*, *supra* note 3, at 93.

## IV. COMPLETING LEMKIN'S SITUATION

A. *Lemkin's Audience*

In the summer of 1942, the U.S. Board of Economic Warfare retained Lemkin as a consultant.<sup>222</sup> His unfinished autobiography reports: "In my agency, I found complete unawareness that the Axis planned destruction of the people under their control. My first attempts to educate my office were discouraging. The problem I tried to bring up appeared too theoretical and even fantastic to them."<sup>223</sup> Lemkin felt similarly frustrated when President Roosevelt rejected his proposal for the urgent negotiation of a treaty to "make genocide a crime—the crime of crimes"—and counseled "patience" instead.<sup>224</sup> The need to educate, to make the full import of Nazi actions less fantastic and more urgent, underpins *Axis Rule*.<sup>225</sup> In particular, Lemkin sought to educate "the Anglo-Saxon reader, who, with his innate respect for human rights and human personality, may be inclined to believe that the Axis régime could not possibly be as cruel and ruthless as it has been hitherto described."<sup>226</sup>

*Axis Rule*, as noted already, consists largely of a country-by-country litany of German actions in nineteen occupied territories, supported by English translations of key laws.<sup>227</sup> This is preceded by a shorter "synthesis,"<sup>228</sup> which ends with a chapter titled "Genocide."<sup>229</sup> This structure evidences Lemkin's intent to encapsulate in a single, understandable word the essence of all the Nazi actions catalogued through the rest of the book.<sup>230</sup> It is

<sup>222</sup> See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 382.

<sup>223</sup> *Id.* at 382-83.

<sup>224</sup> *Id.* at 383.

<sup>225</sup> Cf. Samantha Power, *Introduction* to LEMKIN, *AXIS RULE*, *supra* note 3, at iii, iv ("With *Axis Rule*, Lemkin set out to make the unbelievable believable."). I do not suggest that Lemkin was moved to write *Axis Rule* by his experiences in Washington, as he had started writing it in Sweden in 1940. See LEMKIN, *AXIS RULE*, *supra* note 3, at xiv. But those experiences in Washington must have shaped the way Lemkin finished the book, and the memoir passage reflects a determination to educate people about the true nature of Nazi rule, which must have driven Lemkin throughout his work on *Axis Rule*. Indeed, Power points to a different passage in the memoir to suggest that *Axis Rule* may have been motivated by Lemkin's frustration that so many Jews stayed in occupied Poland, because they could not see that Nazi rule would be so much worse than the pogroms they had endured until then. See Power, *Introduction*, *supra*, at iii, iv.

<sup>226</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at ix.

<sup>227</sup> See *supra* Part I.B.

<sup>228</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at ix.

<sup>229</sup> *Id.* at 79.

<sup>230</sup> Cf. Henry Bernhardt, *Book Review*, 30 CORNELL L.Q. 521, 523 (1945) ("The author's presentation culminates in his discussion of 'genocide,' where 'he succeeds in showing the Germans at their worst.');" Ignatieff, *supra* note 212, at 26 ("Lemkin was



the forest, the rest trees. It reveals the pattern, which informs all the details but might be lost among them.<sup>231</sup> A generic word like “denationalization” or a case-specific word like “Germanization” would not do, because neither could make visible to the audience the true nature of the Nazi regime.

Lemkin says in his unfinished autobiography that he wrote *Axis Rule* to “appeal directly to the American people” rather than “rely[ing] on statesmen alone.”<sup>232</sup> This seems implausible. *Axis Rule* is 674 pages long, dense, and difficult.<sup>233</sup> A book review in the *New York Times* does a better job than Lemkin himself of capturing his audience:

[*Axis Rule*] is . . . a technical legal treatise and a source and reference work . . . It will prove an indispensable handbook for scholars and historians and for those authorities of the [Allies] charged with undoing, as far as possible, the effects of Axis domination. But in a sense it is a pity that its nature precludes a larger audience for this book. For out of its dry legalism there emerge the contours of the monster that now bestrides the earth.<sup>234</sup>

This review thus identifies a limited audience that includes, importantly, Allied governments. Other reviews likewise note the book’s value to readers responsible for “the making of plans

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the first scholar to work out the logic of [Nazi] jurisprudence . . . [T]he wholesale extermination of groups was not an accidental or incidental cruelty . . . It was the very essence of the occupation . . .”).

<sup>231</sup> The preface seems to confirm this reading of *genocide*’s significance in the book’s structure. There, Lemkin introduces each chapter of Part I in order, but inserts the following before Chapter IX:

The picture of coordinated German techniques of occupation must lead to the conclusion that the German occupant has embarked upon a gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations for many years to come. The objective of this scheme is to destroy or to cripple the subjugated peoples . . . The practice of extermination of nations and ethnic groups as carried out by the invaders is called by the author ‘genocide’ . . .

LEMKIN, *AXIS RULE*, *supra* note 3, at xi. This passage suggests that the first eight chapters depict a “gigantic scheme” to destroy subjugated peoples, while Chapter IX names that scheme.

<sup>232</sup> See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 383.

<sup>233</sup> Luban describes it as “an obscure, largely unread, and nearly unreadable law book.” See Luban, *supra* note 26, at 307.

<sup>234</sup> Otto D. Tolischus, *Twentieth-Century Moloch*, N.Y. TIMES, Jan. 21, 1945, at 1; accord Thornton Terhune, *Book Review*, 20 TUL. L. REV. 153, 153 (1945) (“This book, albeit an excellent one, is definitely not for the casual reader . . .”). But see Ramsay Moran, *Book Review*, 31 VA. L. REV. 730, 733 (1945) (“[T]his work is not intended for use by legal scholars alone; it is not technical in its language or in the few personal conclusions of its author. It is, rather, a sober presentation of facts which should become more widely known to the American people . . .”).

for restoration and reparation.”<sup>235</sup> In other words, the audience includes the very people with whom Lemkin worked and interacted in the U.S. government. Indeed, *Axis Rule* was published in Washington, D.C., by the Carnegie Endowment for International Peace, an influential think tank.<sup>236</sup>

As Lemkin strove to embed *genocide* into the law as a limit on sovereignty, government officials remained at the core of his audience. In late 1944, “an advance copy of” *Axis Rule* circulated “[i]nside the War Department,” where Lemkin’s “description of Nazism as organised criminality became a basis for the plan . . . to try Nazi leaders and their organizations before an international tribunal for the crime of conspiracy.”<sup>237</sup> Two days after Justice Jackson’s appointment as chief U.S. negotiator for what became the Nuremberg Charter, Lemkin wrote to call his attention to *Axis Rule*.<sup>238</sup> Lemkin went on to work for Jackson’s team. He met with prosecutors, drafters, negotiators, and decision-makers in Geneva, London, New York, Nuremberg, Paris, and Washington.<sup>239</sup> And he worked the halls of the United Nations.<sup>240</sup>

Lemkin also appealed to constituencies likely to influence his ultimate audience, such as foreign-policy elites, international lawyers, and liberal intellectuals. His writings at this time appeared in publications read by such an audience, including the *American Journal of International Law*, *American Scholar*, *Christian Science Monitor*,<sup>241</sup> *Free World*,<sup>242</sup>

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<sup>235</sup> Arthur Kuhn, *Book Review*, 39 AM. J. INT’L L. 360, 361 (1945) (“source-material of inestimable value in the making of plans for restoration and reparation, as well as for the practitioner and the historian”); accord Merle Fainsod, *Book Review*, 58 HARV. L. REV. 744, 744 (1945) (“source material for [a history of the Axis occupation]”); *id.* at 746 (“those charged with the responsibility of disentangling the spider web of Axis legislation”); Moran, *supra* note 234, at 733 (“a great amount of material from which indictments . . . can be drafted”).

<sup>236</sup> The director of the Carnegie Endowment’s international law division describes *Axis Rule* in terms that reveal an audience of policy-makers: “a contribution toward the restoration of peace based upon justice,” which “gives in readily accessible form in the English language the basic documents and essential factual information from authentic sources that will be urgently needed when the process starts of untangling the spider web of Axis legislation.” George Finch, *Foreword*, in LEMKIN, *AXIS RULE*, *supra* note 3, at vii, viii.

<sup>237</sup> See Barrett, *supra* note 12, at 38.

<sup>238</sup> *Id.* at 36-37.

<sup>239</sup> See POWER, *supra* note 9, at 27, 49-60.

<sup>240</sup> See Rosenthal, *supra* note 1, at A31.

<sup>241</sup> An editor’s “inside” account of the *Monitor*, dated 1958, describes it in terms that suggest its appeal to Lemkin. It had a large circulation among governmental elites in the United States and “120 lands”; the U.S. Government often distributed excerpts to foreign news services; it was “read carefully on Capitol Hill,” where “legislators introduce[d] material from the *Monitor* with great frequency in the

and the *United Nations Bulletin*. Lemkin likewise cultivated the media. Journalists recount stories of Lemkin's constant efforts: "he would run after [journalists], tie flopping in the air, genocide story at the ready."<sup>243</sup> Weeks after *Axis Rule* was published, Lemkin persuaded the publisher of the *Washington Post* to run the world's first editorial about *genocide*.<sup>244</sup> He published letters to the editor in the *New York Times*.<sup>245</sup> And he made certain to credit the media for their leadership on the issue.<sup>246</sup>

### B. *Lemkin's Constraints*

Like many advocates of major policy changes, Lemkin had to navigate countless constraints. Many of his constraints are obvious: the war, its aftermath, and the start of the Cold War; a fledgling United Nations, not yet even located at its permanent headquarters; favorable but unspecific language on human rights in the UN Charter,<sup>247</sup> proclaimed in apparent

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Congressional Record, usually with a pleasant compliment"; it was "widely subscribed to by libraries, universities, institutions, public officials, offices, organizations, professional men" and "read by more newspapermen than any other"; and it "may well [have been] the most widely quoted newspaper in the world." See ERWIN D. CANHAM, COMMITMENT TO FREEDOM: THE STORY OF THE CHRISTIAN SCIENCE MONITOR, at xiii-xxiii, 396-403 (1958).

<sup>242</sup> *Free World* magazine was published monthly in New York from late 1941 to 1946 by a group of "well-known intellectuals and political figures" with a "liberal and international outlook." Helmut Pfanner, *The Contributions by German and Austrian Exiles in Free World Magazine*, TRANS INTERNET-ZEITSCHRIFT FÜR KULTURWISSENSCHAFTEN, [http://www.inst.at/trans/15Nr/05\\_02/pfanner15.htm](http://www.inst.at/trans/15Nr/05_02/pfanner15.htm) (last visited Feb. 1, 2012). A "preponderance" of its essays concerned the war and "the general threat of totalitarianism to free humanity." Famous names on its "honorary board" included Albert Einstein, Fiorello LaGuardia, Thomas Mann, and Reinhold Niebuhr. *Id.* *Free World* published works by such familiar figures as Charles de Gaulle, Ernest Hemingway, Eleanor Roosevelt, Bertrand Russell, Carl Sandburg, Henry Wallace, and Orson Welles, as well as many European émigrés. *Id.*

<sup>243</sup> POWER, *supra* note 9, at 51 (quoting Kathleen Teltsch of the *New York Times*); see also *id.* at 52 (quoting A.M. Rosenthal, "I don't remember how I met [Lemkin], but I remember I was *always* meeting him.").

<sup>244</sup> See *id.* at 44 (discussing *Genocide*, WASH. POST, Dec. 3, 1944).

<sup>245</sup> See Raphael Lemkin, Letter to the Editor, *Genocide Before the U.N.*, N.Y. TIMES, Nov. 8, 1946, at C22; Raphael Lemkin, Letter to the Editor, *For Punishment of Genocide*, N.Y. TIMES, June 12, 1947, at L24.

<sup>246</sup> See, e.g., Lemkin, AJIL, *supra* note 53, at 149 n.10 ("An important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries," listing "[e]specially remarkable contributions" by eight newspapers in four countries); Elder, *supra* note 34, at 485 (quoting Lemkin crediting "the UN correspondents who 'did the most remarkable job in explaining the complicated issue to the world'").

<sup>247</sup> See U.N. Charter pmbl. ("human rights, . . . dignity and worth of the human person," "tolerance," "economic and social advancement of all peoples"); *id.* art. 1, para. 1 ("principles of justice and international law"); *id.* art. 1, para. 2 ("equal rights and self-determination of people"); *id.* art. 1, para. 3 ("human rights

tension with language on nonintervention,<sup>248</sup> neither yet elaborated with experience;<sup>249</sup> “realist” doubts about the utility of a treaty outlawing genocide; and Lemkin’s lack of funding and institutional support.<sup>250</sup>

The most fundamental constraint upon Lemkin flows from the very nature of international law. States are the dominant actors in making and changing international law. State consent is sometimes regarded as the *sine qua non* of international legal obligation; in the words of the *Lotus* Court, “The rules of law binding upon States . . . emanate from their own free will . . . .”<sup>251</sup> Even if the *Lotus* formulation is overstated, it remains clear that state consent plays a vital role in the creation of international legal obligation—most obviously in the case of treaties, but also custom and general practices.<sup>252</sup> Lemkin could not hope to succeed in bounding sovereignty with *genocide* except with the support of many states. Yet, states are inherently self-interested in conceptions of sovereignty broad enough to shield themselves from unwanted outside interference.<sup>253</sup> This tension permeated Lemkin’s situation.<sup>254</sup>

Last, the basic need to convey his “[n]ew conception[]” to other humans also acted as a constraint on Lemkin. He concluded that he needed a “new term[].”<sup>255</sup> In this, Lemkin was

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and . . . fundamental freedoms for all without distinction as to race, sex, language, or religion”); *id.* art. 55 (“universal respect for, and observance of,” same); *id.* art. 56 (pledging “joint and separate action” to achieve “the purposes set forth in Article 55”). Articles 13(1)(b), 62(2), and 68 empower the General Assembly and Economic and Social Council to make commissions, studies, and recommendations to promote human rights. For an example of Lemkin appealing to the Charter’s principles, see Lemkin, *Genocide*, *supra* note 176, at 228.

<sup>248</sup> See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

<sup>249</sup> See generally Buergenthal, *supra* note 114, at 785-91 (explaining how the “intentionally vague Charter provisions on human rights” gained significance through UN practice, including the “gradual[] reject[ion] by a majority of the UN membership” of objections based on Article 2(7)).

<sup>250</sup> See POWER, *supra* note 9, at 52-60, 77-78.

<sup>251</sup> *The Lotus*, *supra* note 104, at 18.

<sup>252</sup> See generally Jutta Brunée, *Consent*, in MAX PLANCK ENCYCL. PUB. INT’L L., *supra* note 120.

<sup>253</sup> Cf. Lemkin, *Introduction*, *supra* note 123, at 61 (“[T]he enforcement of international law is entrusted . . . to the very government most interested in the pursuit of national policies.”).

<sup>254</sup> See, e.g., SCHABAS, *supra* note 15, at 212 (“It was clear that the issue [of cultural genocide] had hit a nerve with several countries who were conscious of problems with their own policies towards minority groups . . . .”); cf. SCHABAS, *supra* note 15 (discussing similar concerns at the London Conference).

<sup>255</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79; see also Lemkin, *Introduction*, *supra* note 123, at 24-25 (“New words are always created when a social phenomenon

governed by semantics, defined by Michel Bréal as “the laws that preside over the transformation of meaning, the choice of new expressions, the birth and death of locutions.”<sup>256</sup> Language is a social institution.<sup>257</sup> Accordingly, would-be neologists are constrained by the need to ensure their innovations are intelligible to the audience. Brigitte Nerlich explains,

[T]he individual will is free, we can choose and innovate, but we are not pre-eminent, we cannot act autocratically over language. Our freedom has certain limits. The constraints on the democratic process of word-making are . . . the already existing material and usages of speech and most importantly the already existing analogies, the preferred models of language-making.<sup>258</sup>

Lemkin seems to acknowledge this constraint, conceding that the “individual creator” only succeeds at propagating a new word “if, and in so far as, it meets popular needs and tastes.”<sup>259</sup>

We have already seen that Lemkin faced the burdens of establishing that he had identified a real, recurring, and

strikes at our conscience with great force . . . [L]ike poetry they are essentially the reply of man to a social need.”). Thomas Jefferson expressed the same idea, albeit in a more optimistic context:

Had the preposterous idea of fixing the language been adopted by our Saxon ancestors . . . , the progress of ideas must have stopped with that of the language . . . [A]s we advance in the knowledge of new things, and of new combinations of old ones, we must have new words to express them.

JASINSKI, *supra* note 67, at 194 (quoting 14 WRITINGS OF THOMAS JEFFERSON (AE Bergh ed., 1905) (letter to Joseph Milligan, Apr. 1816)); *cf.* HENRY HITCHINGS, THE SECRET LIFE OF WORDS: HOW ENGLISH BECAME ENGLISH 5 (2008) (“A new word is a solution to a problem.”).

This utilitarian conception of neologism existed at least as long ago as ancient Rome. Michel Bréal, who himself coined the word “semantics,” quotes the Roman poet Lucretius: “*Utilitas expressit nomina rerum*”—i.e., “The pressing need has created the name of things.” See BRIGITTE NERLICH, CHANGE IN LANGUAGE: WHITNEY, BRÉAL, AND WEGENER 90, 118-19 (1990). Yet, necessity is neither necessary nor sufficient to ensure that neologisms will prosper. Compare MICHEL BRÉAL, THE BEGINNINGS OF SEMANTICS: ESSAYS, LECTURES AND REVIEWS 158 (George Wolf ed. & trans., 1991) (“[L]anguage is not addressed solely to reason: it seeks to move, to persuade, to please. Thus we find new images arising for very old things . . .”), with STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 304-05 (2007) (“Many gaps in the language simply refuse to be filled,” such as “[a] collective term for one’s nieces and nephews.”).

<sup>256</sup> NERLICH, *supra* note 255, at 118-19 (quoting Bréal).

<sup>257</sup> *Id.* at 101-02 (discussing the views of William Whitney).

<sup>258</sup> *Id.* at 102 (discussing the views of Whitney); *see also id.* at 131 (discussing the views of Bréal, “But language as a *system of signs* [i.e., words] and a *system of analogies* allows the creation of new signs by the analogical application of old material to new uses according to traditional models. In this way creativity is not entirely free, not an irrational outburst, but a systematic exploitation of the possibilities provided by language.”).

<sup>259</sup> Lemkin, *Introduction*, *supra* note 123, at 32.

important problem worthy of states' attention and concern. To these can be added the further challenges of making his proposed solution both intelligible to the public and palatable to the very states whose dominion it would curtail.

### C. *Lemkin's Resources*

Just as situations confront advocates with challenges, they also often offer "material that can work to the advocate's advantage."<sup>260</sup> These resources display the same variety as rhetorical constraints except that they favor the advocate's position. The relationship between constraints and resources may be illustrated briefly: in a legal dispute that turns on the meaning of a statute, if a traditional interpretive maxim favors the plaintiff but the legislative history favors the defendant, what is a constraint for one party is an equal and opposite resource for the other.

As Lemkin navigated constraints in pursuit of his objective, the situation also presented him with resources.

#### 1. Etymology

Like other neologists, Lemkin had a variety of strategies available to assure the intelligibility of his word. He chose etymology.<sup>261</sup>

Immediately upon introducing his word, Lemkin highlights its etymology: "This new word . . . is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing) . . ."<sup>262</sup> Lemkin frequently repeats this etymology,<sup>263</sup> successfully persuading others of its significance.<sup>264</sup>

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<sup>260</sup> JASINSKI, *supra* note 67, at 516.

<sup>261</sup> Lemkin also relies on analogy, another common technique of word formation. See text accompanying *supra* note 258. He notes that his word "correspond[s] in its formation to such words as tyrannicide, homicide [sic], infanticide, etc." LEMKIN, *AXIS RULE*, *supra* note 3, at 79; see also *id.* at xi ("by way of analogy, see homicide [sic], fratricide").

<sup>262</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 79. In this, Lemkin's coinage follows (quite literally) Henry Morgenthau Sr.'s phrase "race murder." See POWER, *supra* note 9, at 6.

<sup>263</sup> See, e.g., Lemkin, *AJIL*, *supra* note 53, at 147; Lemkin, *Genocide*, *supra* note 176, at 228. But see Lemkin, *UN BULLETIN*, *supra* note 7 (omitting etymology).

<sup>264</sup> For one of the many endorsements of *genocide* featuring its etymology, see Editorial, *Genocide*, *N.Y. TIMES*, Aug. 26, 1946. Lemkin can even be seen on YouTube, where a television interviewer introduces him by relaying the etymology of his word. Quincy Howe, *The Genocide Word by Raphael Lemkin*, *YOUTUBE* (Apr. 11, 2010), <http://www.youtube.com/watch?v=HFPch5OILfU>.

Lemkin's appeal to the classics is common in word formation,<sup>265</sup> especially among scientists and others seeking to imbue their coinages with prestige.<sup>266</sup> This practice has its critics, notably George Orwell: "Bad writers, and especially scientific, political, and sociological writers, are nearly always haunted by the notion that Latin or Greek words are grander than Saxon ones . . . . The result, in general, is an increase in slovenliness and vagueness."<sup>267</sup>

Linguists offer a different critique. They reject the value of etymology to word meanings, notwithstanding its popular appeal, because "[u]nstoppage change is the great given in linguistics . . . ."<sup>268</sup> Nevertheless, precisely because of its public appeal, neologists may invoke etymology to render their coinages intelligible to the audience. Likewise, where word meanings are contested, etymology may be a useful resource for advocates on one side.<sup>269</sup>

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<sup>265</sup> The practice of deriving English words from Greek has been so common for so long that the number of such words is "greater than the total number of ancient Greek words known actually to have existed . . . ." HITCHINGS, *supra* note 255, at 182.

<sup>266</sup> *Id.* at 183. The two main "motivations for borrowing" words from another language are "need" and "prestige," with prestige often driving "Graeco-Latin borrowings." As a result, such words tend to convey an "educated/technological register," which strikes many English speakers as "high-falutin." See HANS HENRICH HOCK, *PRINCIPLES OF HISTORICAL LINGUISTICS* 408-09, 425 (2d ed. 1991).

<sup>267</sup> George Orwell, *Politics and the English Language* (1946), reprinted in GEORGE ORWELL, *A COLLECTION OF ESSAYS* 156, 161 (1981); accord WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 77 (4th ed. 2000) ("Anglo-Saxon is a livelier tongue than Latin, so use Anglo-Saxon words."); *THE ECONOMIST STYLE GUIDE* 62-63 (1996) ("Short words. Use them. They are often Anglo-Saxon rather than Latin in origin.").

<sup>268</sup> PINKER, *supra* note 255, at 149; see also D. CONNOR FERRIS, *UNDERSTANDING SEMANTICS* 10 (1983) ("[V]irtually all specialists in semantics agree that we do not need etymology in order to understand particular meanings, or meaning in general . . . . [T]he meaning associated with a form can change, and change very dramatically, through time."); F.R. PALMER, *SEMANTICS* 11 (2d ed. 1981) ("Etymology for its own sake is of little importance, even if it has curiosity value, and there really should be no place for a smattering of it in dictionaries."); NERLICH, *supra* note 255, at 76, 81, 88, 131-33 (discussing the views of Bréal, Whitney, and Ferdinand de Saussure).

<sup>269</sup> See JASINSKI, *supra* note 67, at 153-54. For invocations of Lemkin's etymology in legal and political discourse, see, for example, *Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 91, ¶ 193 (Feb. 26) [hereinafter *Bosn. & Herz.*] (arguing that the etymology supports construing the Convention to require that a group of victims "must have particular positive characteristics . . . and not the lack of them"); SCHABAS, *supra* note 15, at 157 (describing Belgian argument that the etymology supported excluding political groups from the Convention's protected groups).

## 2. Associations with the Holocaust

As awareness about the Holocaust<sup>270</sup> spread during the war,<sup>271</sup> public revulsion proved a powerful resource for Lemkin. He deployed this resource in several recurring strands of his rhetoric.

### *a. Churchill's Atlantic Charter Address*

Churchill met Roosevelt in August 1941, when the President of the still-neutral United States took a significant step toward allying with England by agreeing to the Atlantic Charter's "common principles" for the "better future" they hoped would follow "after the final destruction of the Nazi tyranny."<sup>272</sup> On August 24, upon his return to England, Churchill gave a radio address about the Atlantic Charter. In this broadcast, Churchill recites German conquest of a long list of countries then turns to the German invasion of Russia:

The Russian armies and all the peoples of the Russian Republic have rallied to the defence of their hearths and homes . . . For the first time in [Hitler's] experience mass murder has become unprofitable. He retaliates by the most frightful cruelties. As his armies advance, whole districts are being exterminated. Scores of thousands . . . of executions in cold blood are being perpetrated by the German police-troops upon the Russian patriots who defend their native soil. Since the Mongol invasions of Europe in the sixteenth century, there has never been methodical, merciless butchery on such a scale. And this is but the beginning. Famine and pestilence have yet to follow in the bloody ruts of Hitler's tanks. We are in the presence of a crime without a name.<sup>273</sup>

Lemkin seizes on Churchill's speech. Titling the introduction to an article "A crime without a name," Lemkin

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<sup>270</sup> Not yet known by that name, which did not come into use until the 1950s. See COMPACT OXFORD ENGLISH DICTIONARY 315 (2d ed. 1991) [hereinafter OED] (attributing the specific application of *The Holocaust* to "historians during the 1950s," while recognizing that this usage "had been foreshadowed by contemporary references [during the 1940s] to the Nazi atrocities as a 'holocaust'" in the sense of "a great slaughter or massacre").

<sup>271</sup> See generally MARTIN GILBERT, AUSCHWITZ AND THE ALLIES (1981) (describing the course of revelations about Nazi atrocities); see also Edward Ward, *Buchenwald Concentration Camp* (BBC Radio Broadcast Apr. 1, 1945), available at <http://www.bbc.co.uk/archive/holocaust/5107.shtml> (last visited Feb. 1, 2012) (recordings of the BBC's radio broadcasts during April 1945 upon the liberation of the Belsen, Buchenwald, and Zutphen camps).

<sup>272</sup> See Atlantic Charter, *supra* note 59. On the history of the Atlantic Charter, see, for example, MARTIN GILBERT, 6 WINSTON S. CHURCHILL: FINEST HOUR, 1939-1941, at 1161-64 (1983).

<sup>273</sup> Winston Churchill, The Atlantic Charter, Aug. 24, 1941, in VI WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 6472, 6474 (R.R. James ed., 1974).



proceeds to expressly reference Churchill's broadcast.<sup>274</sup> He continues, "Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations. . . . Genocide is the crime of destroying national, racial or religious groups."<sup>275</sup> With this, Lemkin successfully ties his word to Churchill's great cause.<sup>276</sup>

Yet, it is not apparent from the face of Churchill's text that he had in mind Lemkin's conception of *genocide*. Churchill's entire speech conspicuously omits any mention of Nazi persecution of the Jews.<sup>277</sup> Churchill refers to no motives other than retaliation, no intent to destroy Russians as a group. Instead, he stresses the unprecedented volume of blood shed by Hitler. If Churchill intended the last sentence of the quoted passage to signify anything more than a nice oratorical flourish, it may well be something like, "We are in the presence of a crime of unspeakable magnitude."

On the other hand, it is well to remember that Churchill himself was engaged in the rhetorical project of his life—stiffening British resolve and building alliances with the Americans and Russians toward the eventual defeat of Hitler. Churchill too faced rhetorical constraints. It is even possible that Churchill may have meant to include Nazi persecution of

<sup>274</sup> Lemkin, *Genocide*, *supra* note 176, at 227.

<sup>275</sup> *Id.* at 227-28. In some tellings, Lemkin claims Churchill's speech as the direct inspiration for his effort to coin the word *genocide*. See, e.g., Elder, *supra* note 34, at 523 n.7 ("Lemkin said [in 1951] that during WWII he heard a radio broadcast given by Churchill in which he stated that the Nazis 'commit[ed] a crime without a name.' This, according to [Lemkin], led him on the search for the word genocide.").

<sup>276</sup> See, e.g., Editorial, *Genocide*, N.Y. TIMES, Aug. 26, 1946 (associating *genocide* with Churchill's "crime without a name"); POWER, *supra* note 9, at ch. 2 ("A Crime Without a Name"); *id.* at ch. 3 ("The Crime *With* a Name").

Churchill himself may have welcomed Lemkin's effort to connect their causes. According to A.M. Rosenthal, Churchill "backed" Lemkin's nomination for the Nobel Peace Prize in the 1950s. Rosenthal, *supra* note 1, at A31. I have not been able to find any further evidence of Churchill's support or any explanation for it. The Nobel archives have no correspondence from Churchill in the Lemkin file. E-mail from Nobel Institute to author (May 10, 2011) (on file with author). Sir Martin Gilbert has searched the Churchill archives for materials about Lemkin, but found none. Telephone interview with Sir Martin Gilbert, honorary fellow, Merton College, Oxford (Mar. 10, 2011). Steve Jacobs has searched the Lemkin archives (which are incomplete) for correspondence from Churchill, but found none. Telephone Interview with Steve Jacobs, Associate Professor, University of Alabama, Department of Religious Studies (Mar. 21, 2011).

<sup>277</sup> Churchill had addressed Nazi persecution of Jews in other comments, public and private, dating back at least as far as 1933. For example, on December 21, 1937, Churchill said, "[I]t is a horrible thing that a race of people should be attempted to be blotted out of the society in which they have been born." 5 MARTIN GILBERT, WINSTON S. CHURCHILL: THE PROPHET OF TRUTH, 1922-1939, at 889 (1977); see also *id.* at 448, 459, 486, 680-81, 800, 954; GILBERT, *supra* note 272, at 99, 1004.

the Jews within his “crime without a name,” but was constrained from expressly saying so. Sir Martin Gilbert believes the most important constraint on Churchill at that time was the need to preserve the secrecy of the British spying program that provided all his intelligence about anti-Jewish atrocities.<sup>278</sup> Churchill also may have been constrained, to some extent, by the BBC’s reluctance to broadcast atrocity stories, particularly where the victims were Jewish.<sup>279</sup>

Lemkin thus draws on Churchill’s speech as a resource and characterizes it in a way that is plausible (if contestable). In so doing, Lemkin positions *genocide* as a solution to a problem important enough to be raised by one of the leaders of the Free World, linking his word with Churchill’s fame and reputation.

### b. *The Murder of Millions*

Lemkin also directly invokes the scale of the Nazi horrors. “While society sought protection against . . . crimes directed against individuals, there has been no serious endeavor hitherto to prevent and punish the murder and destruction of millions.”<sup>280</sup> Also, “when one man is murdered, it is murder. We cannot accept the proposition that organizing the murder of millions is less than murder.”<sup>281</sup>

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<sup>278</sup> Telephone Interview with Sir Martin Gilbert, *supra* note 276; accord MARTIN GILBERT, CHURCHILL AND THE JEWS: A LIFELONG FRIENDSHIP 186-87 (2007) (Churchill “had to be careful not to reveal his source, for fear of alerting the Germans to the fact that their most secret communications . . . were being read by the code-breakers at Bletchley Park.”).

<sup>279</sup> See Jeremy Harris, *Broadcasting the Massacres: An Analysis of the BBC’s Contemporary Coverage of the Holocaust*, 25 YAD VASHEM STUD. 65 (1996). Harris offers several explanations for this reluctance, including anti-Semitism among BBC officials and influential civil servants; concern about stirring “latent antisemitism” in the British public; anxiety that the British public would regard atrocity stories as propaganda, a problem exacerbated by revelations that the BBC had in fact broadcast some propaganda about German atrocities during the First World War; and “the fact that the British people were simply not interested in hearing more gloomy reports.” *Id.*; cf. GILBERT, AUSCHWITZ, *supra* note 271, at 15 (“[O]n 25 July 1941, a Ministry of Information Document had warned British policymakers . . . [that discussion of Nazi atrocities] ‘must be used very sparingly and must deal always with indisputably innocent people . . . And not with Jews.’”).

<sup>280</sup> Lemkin, *Genocide*, *supra* note 176, at 227.

<sup>281</sup> Raphael Lemkin, *The Legal Case Against Hitler, Part I*, NATION, Feb. 24, 1945, at 205, 206 [hereinafter Lemkin, *Legal Case I*]; see also Raphael Lemkin, Letter to the Editor, *Genocide Before the U.N.*, N.Y. TIMES, Nov. 8, 1946, at C22 (“gassing millions of human beings”).

Lemkin’s unpublished works press this theme as well. See Lemkin, *Totally Unofficial Man*, *supra* note 7, at 367 (“When I studied law, . . . I felt that if the killing of one man was a crime . . . , the destruction of millions of people should also be a crime, and, moreover, it should be an international crime . . .”); *id.* at 371

The rhetorical power of this argument is plain. Yet, in drawing from this rhetorical resource, Lemkin suggests a conception of *genocide* as mass-murder at odds with his own “ethnico-cultural concept[ion].”<sup>282</sup>

*c. The Advocate’s Foresight*

The advocate’s own reputation is often a valuable resource. If the audience accepts that the advocate has desirable attributes (e.g., wisdom), that may persuade the audience to pay greater attention to the advocate’s arguments or to give those arguments the benefit of the doubt. For example, if the audience accepts that the advocate has been correct in the past in important and relevant respects, that provides a resource for the advocate’s current argument.<sup>283</sup> In cases where the advocate’s reputation is not known to or fully appreciated by the audience, the advocate may establish it in the audience’s mind by self-credentialing.

Lemkin deploys this resource in staking claim (justifiably)<sup>284</sup> to being the first to diagnose the horrific nature of the Nazi regime. In the author’s note to one article, Lemkin describes himself: “RAPHAEL LEMKIN is Polish but his

“Sovereignty, I argued, cannot be conceived as the right to kill millions of innocent people. . . . Why is the killing of a million a lesser crime than the killing of a single individual?” (internal quotation marks omitted).

<sup>282</sup> Cf. COOPER, *supra* note 31, at 58 (“There must be a hierarchy of values in human society and the preservation of life must be on the top of this hierarchy.” (quoting a letter Lemkin wrote on April 19, 1949)).

<sup>283</sup> In a similar vein, Aristotle argues that a speaker should “construct a view of himself as a certain kind of person,” particularly as someone who possesses “practical wisdom . . . and virtue . . . and good will,” because character (*ethos*) “is almost . . . the controlling factor in persuasion.” ARISTOTLE, *supra* note 65, at 38, 120. Aristotle believes, however, that “this should result from the speech, not from a previous opinion that the speaker is a certain kind of person.” *Id.* at 38. Kennedy explains:

Aristotle thus does not include in rhetorical *ethos* the authority that a speaker may possess due to his position in government or society, previous actions, reputation for wisdom, or anything except what is actually contained in the speech and the character it reveals. Presumably, he would regard all other factors, sometimes highly important in the success of rhetoric, as inartistic; but he never says so.

*Id.* at 38 n.43; see also *id.* at 311 (describing the *Rhetoric*’s “fail[ure] to recognize the great role of the authority of a speaker as already perceived by an audience” as one of its “limitations”).

<sup>284</sup> See Ignatieff, *supra* note 212, at 26-27 (“To appreciate Lemkin’s achievement, we must see it not as the ratification of easily available common sense, but as a counterintuitive leap of the imagination beyond the realm of what common sense deemed possible. . . . Lemkin [had] the intelligence and the courage to have identified an abominable new intention when others saw only immemorial cruelty . . .”).

viewpoint is international and his understanding of the nazi [sic] menace is of more than recent date. . . . At the Madrid Conference of 1933 he introduced the first proposal ever made to outlaw nazism [sic] by declaring it a crime.”<sup>285</sup> Lemkin also attributes various harms to the rejection of his Madrid proposal to outlaw barbarity and vandalism. For example, *Axis Rule* states: “If the punishment of genocide practices had formed a part of international law . . . since 1933, there would be no necessity now to issue admonitions to neutral countries not to give refuge to war criminals.”<sup>286</sup>

Lemkin likewise claims that the rejection of his Madrid proposal complicated the Nuremberg prosecutions<sup>287</sup> and even, rather implausibly, that it was “one of the thousand reasons why . . . [American] boys are fighting and dying in [World War II].”<sup>288</sup>

By attributing such grave consequences to the failure to heed his previous advice, Lemkin credentials himself as someone with unique insight into genocide and whose diagnosis of and prescription for it are therefore due an additional measure of respect.<sup>289</sup> Other Lemkin statements may also be seen in this light. For example, Lemkin prefaces his congressional testimony advocating war crimes prosecutions with the remark, “I base my observations on actual experiences in this war. I was subject myself to war crimes. . . . I have observed war crimes.”<sup>290</sup> More striking is Lemkin’s description of a childhood conversation with his mother, after reading the Polish novel *Quo Vadis?* about Romans killing Christians, as

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<sup>285</sup> Lemkin, *Modern Crime*, *supra* note 136, at 43; *cf.* LEMKIN, *AXIS RULE*, *supra* note 3, at 91 (noting that he had proposed, “[a]s far back as 1933,” outlawing conduct that “would amount to the actual conception of genocide”); Lemkin, *War Against Genocide*, *supra* note 181 (“Dr. Raphael Lemkin has crystallized the concept of genocide and given it its name.”).

<sup>286</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 92.

<sup>287</sup> *See, e.g.*, Lemkin, *AJIL*, *supra* note 53, at 146-47 (“Sir Hartley Shawcross . . . declared that the failure of this [1933 Madrid] proposal made it impossible to punish some of the serious Nazi crimes.”).

<sup>288</sup> POWER, *supra* note 9, at 44 & n.43.

<sup>289</sup> Lemkin also persuaded other supporters of his *genocide* project to credential him in this manner. *See, e.g.*, Editorial, *Genocide Under the Law of Nations*, *N.Y. TIMES*, Jan. 5, 1947, at E11 (“As far back as 1933 Professor Lemkin submitted . . . a draft of a measure which was to permit the apprehension of a genocidist . . .”).

<sup>290</sup> Lemkin Statement, *supra* note 55, at 61.

“the day I began to crusade” against genocide<sup>291</sup>—a narrative that conveys a sense of destiny.<sup>292</sup>

### 3. Preexisting International Crimes

Advocates for change often must demonstrate that their proposals are feasible.<sup>293</sup> Precedent is a powerful resource against charges of windmill-chasing. If something similar has been done before, the advocate can establish a greater likelihood that it may be done again.

From the start, in his Madrid proposal, Lemkin invokes preexisting international crimes as precedent. He lists seven recognized international crimes: piracy, counterfeiting of currency, terrorism, and trade in slaves, women and children, narcotics, and obscene publications.<sup>294</sup> He mentions that this list is not fixed but changes over time.<sup>295</sup> He identifies in the existing list a theme supporting the prohibition of “general (transnational) danger” and then explains how *barbarity* and *vandalism* fit within that theme.<sup>296</sup>

Lemkin, however, also invokes the precedents in a more troublesome way. Striving to appeal to the common-sense notion that the greater threat deserves priority over the lesser, Lemkin appears to belittle some of the existing offenses. In his draft of General Assembly Resolution 96(I), he contrasts “the very serious crime of genocide” with “crimes of a relatively lesser importance.”<sup>297</sup> The General Assembly omitted this unfortunate language from the final resolution.

<sup>291</sup> KOREY, *supra* note 37, at 5 (quoting Lemkin).

<sup>292</sup> Cf. Lemkin, *Totally Unofficial Man*, *supra* note 7, at 381 (recalling that a colleague at Duke once told him, “I have no doubt that you were saved . . . for a special purpose . . . It is bigger than you are, or than any of us—wait and you will see.” (internal quotation marks omitted)).

<sup>293</sup> Cf. Bitzer, *supra* note 72, at 33 (“A person who believes his response [to an exigence] could not in any way modify it is not likely to respond, even though the exigence is urgent . . . As modification capability increases, readiness to respond increases.”). Similarly, Jasinski observes that advocates for change must prove that “there is a better way to do things”—in other words, beyond establishing the existence of a problem, they must show that they have a solution that is affordable, effective, feasible, etc. See JASINSKI, *supra* note 67, at 458.

<sup>294</sup> Lemkin, *Madrid Proposal*, *supra* note 41, at 2; accord LEMKIN, *AXIS RULE*, *supra* note 3, at 94 (listing “so-called *delicta juris gentium*,” including “white slavery and trade in children, piracy, trade in narcotics and in obscene publications, and counterfeiting of money”).

<sup>295</sup> Lemkin, *Madrid Proposal*, *supra* note 41, at 2-3.

<sup>296</sup> *Id.* at 3-4.

<sup>297</sup> U.N. Doc. A/BUR/50, *reprinted in* 1 THE GENOCIDE CONVENTION, *supra* note 178, at 3 (“Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the

## V. ASSESSING LEMKIN'S RHETORICAL STRATEGY

### A. *Rhetorical Success*

Any assessment of Lemkin's rhetorical strategy must begin with its amazing success. Lemkin persuaded the United Nations to devote its first human rights treaty to eliminating the "odious scourge"<sup>298</sup> he identified, named, and publicized.

The Genocide Convention encapsulates not only Lemkin's word, but his sovereignty-bounding purpose. It follows his vision in many key respects. It accepts his conception of *genocide* as the destruction of a group. Only "national, ethnical, racial or religious group[s]" qualify;<sup>299</sup> the Convention omits Resolution 96(I)'s broader reference to "political and other groups."<sup>300</sup> The Convention "confirm[s]" that genocide "is a crime under international law,"<sup>301</sup> subject to prosecution by the courts where it occurs or by such "international penal tribunal" as may be established.<sup>302</sup> The Convention's thrust is prosecutorial; although aimed at both the

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judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern;"; accord Raphael Lemkin, Letter to the Editor, *Genocide Before the U.N.*, N.Y. TIMES, Nov. 8, 1946, at C22 ("It seems inconsistent with our concepts of civilization that selling a drug to an individual is a matter of worldly concern, while gassing millions of human beings might be a problem of internal concern. It seems also inconsistent with our philosophy of life that abduction of one woman for prostitution is an international crime while sterilization of millions of women remains an internal affair of the state in question.").

<sup>298</sup> Genocide Convention, *supra* note 14, pmb1.

<sup>299</sup> See *id.* art. II. See generally SCHABAS, *supra* note 15, at 117-71.

<sup>300</sup> G.A. Res. 96 (I), *supra* note 13 ("racial, religious, political and other groups . . . whether the crime is committed on religious, racial, political, or other grounds"). For a time after passage of Resolution 96 (I), Lemkin adapted his public comments to the Resolution's broader conception of *genocide*. See, e.g., Lemkin, AJIL, *supra* note 53, at 145-46 ("human groups"); Lemkin, UN BULLETIN, *supra* note 7 ("racial, national, religious" and other human groups, plus "linguistic, and political groups"). Nevertheless, in UN deliberations, Lemkin favored excluding political groups from the definition of *genocide*. See Secretariat Comments on Draft Convention, U.N. Doc. E/447, reprinted in 1 THE GENOCIDE CONVENTION, *supra* note 178, at 209, 230 (describing Lemkin's opposition on the grounds that "political groups have not the permanency and the specific characteristics of the other groups" and including them would be controversial and unnecessary); Lemkin, *Totally Unofficial Man*, *supra* note 7, at 391 ("I myself thought that the destruction of political opponents should be treated as the crime of political homicide, but not as genocide. Every revolutionary regime comes to power by destroying some of its opponents."); SCHABAS, *supra* note 15, at 61, 160 ("The exclusion of political groups . . . corresponded to Raphael Lemkin's vision of the nature of the crime of genocide." (citations omitted)).

<sup>301</sup> Genocide Convention, *supra* note 14, art. I.

<sup>302</sup> *Id.* art. VI.

“prevention and punishment” of genocide,<sup>303</sup> the Convention’s provisions on prevention are notably underdeveloped.<sup>304</sup>

Lemkin achieved his ambition to bound sovereignty with *genocide* and make it an international concern—indeed, an international crime—regardless of traditional notions of territoriality and nationality. And he achieved it to an extent that must have seemed quixotic in 1944: twenty states adhered to the Convention within two years of its adoption, bringing it into force in January 1951;<sup>305</sup> sixty years later, that number has grown to 141 states.<sup>306</sup> Beyond these numbers, moreover, in a series of groundbreaking decisions, the International Court of Justice has pronounced that the prohibition of genocide is custom, *jus cogens* and *erga omnes*,<sup>307</sup> and that states party to

<sup>303</sup> This is reflected in both the formal title of the Genocide Convention, *supra* note 14, and in Article I, where the parties “undertake to prevent and to punish” genocide.

<sup>304</sup> The Convention provides only, “Any Contracting Party may call upon the competent organs of the United Nations to take such action . . . as they consider appropriate for the prevention and suppression of acts of genocide . . .” Genocide Convention, *supra* note 14, art. VIII. *See generally* SCHABAS, *supra* note 15, at 520-92. Scholars disparaged the weakness of this provision for decades. *See, e.g.*, Van Schaack, *supra* note 27, at 1137-39 (criticizing the Convention’s language on prevention as “frustratingly indeterminate,” “irresolute,” and “anemic”). *But see infra* note 308 and accompanying text.

Lemkin plainly cared—deeply and energetically—about preventing genocide. But his writings display a curious lack of attention to the ways in which his word, and the resulting Convention, would achieve his goal. This may reflect, given Lemkin’s own background as a criminal prosecutor, a belief that punishment *is* prevention, per ordinary deterrence theories of criminal law. *But see* U.N. Doc. E/447, reprinted in 1 THE GENOCIDE CONVENTION, *supra* note 178, at 247-48 (“All criminal law has a preventive effect. The fact that there is a law tends to deter and prevent action by persons who might be tempted to commit a crime. Experience shows, however, that the preventive effect of threats is limited, since these do not stop certain criminals . . . . In the international field even more than in the national, it is essential to exercise constant vigilance . . .”). Alternatively, it may reflect faith that the newfound United Nations—or, perhaps, individual states—would have the will and capacity to “prevent[] and suppress[]” genocide effectively if they understood his concept and the facts of a particular situation. *But see* KOREY, *supra* note 37, at 31-32 (suggesting that Lemkin proposed privately that the UN establish an office devoted to genocide prevention, but dropped this proposal when others counseled him that it was unrealistic).

<sup>305</sup> *See* Genocide Convention, *supra* note 14, art. XIII (bringing the Convention into force ninety days after the twentieth ratification or accession); UNTS Online, *supra* note 64.

<sup>306</sup> *See* UNTS Online, *supra* note 64; *cf.* Lauren Walsh, *A Conversation with Oscar Schachter*, 91 AM. SOC’Y INT’L L. PROC. 343, 344 (1997) (“In 1948, . . . the architects planning the future headquarters asked me how many seats they should make in the General Assembly . . . . An international lawyer would be expected to know how many sovereign states existed and were potential members. I confidently answered the architects . . . that they could safely add twenty seats to the fifty-one [members at that time]. It did not take long for my estimate to be mistaken and for costly renovations to be needed.”).

<sup>307</sup> *See* Reservations to the Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (the Convention’s “principles . . . are recognized by civilized nations as binding on States, even without any

the Convention have an “obligation,” which is “both normative and compelling,” “to employ all means reasonably available to them . . . to prevent genocide so far as possible.”<sup>308</sup>

Substantively, then, Lemkin produced what Cass Sunstein calls a “norm cascade,” a “rapid shift[] in norms.”<sup>309</sup> He developed the concept of *genocide* as a distinct phenomenon, he named it, he proposed (and later helped to draft) a treaty outlawing it, and he persuaded the nations of the world to promulgate and ratify a treaty adopting his word and, to a considerable extent, his definition and his remedy. Lemkin is a “norm entrepreneur”<sup>310</sup> who succeeded through energy, persistence, even self-sacrifice.<sup>311</sup>

Lemkin’s rhetorical strategy deserves credit. His original idea languished until his turn to *genocide* in 1944. *Genocide* proved potent, filling a felt social need for a new word to address Nazi horrors. Lemkin adroitly affirmed and satisfied this need, positioning his word as the solution to Churchill’s “crime without a name.”<sup>312</sup>

Luban praises Lemkin’s coinage: “Lemkin’s word eventually conquered the world. It became one of the most powerful in any language, and it reshaped the moral landscape of the world . . . . In doing so, it also reshaped our consciousness

conventional obligation”); *Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6, ¶ 64 (July 6) (the “prohibition of genocide” is “assuredly” *jus cogens*); *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) (“the outlawing of acts of . . . genocide” is *erga omnes*).

<sup>308</sup> *Bosn. & Herz.*, *supra* note 269, ¶¶ 427-30.

<sup>309</sup> Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) [hereinafter Sunstein, *Social Norms*]. Sunstein argues that social norms influence behavior by tapping “wellsprings of shame and pride,” thus affecting the “self-conception” and “reputation” of individuals within a community. *Id.* at 916-17, 952. Sunstein elsewhere notes the power of law *qua* expression, even without significant risk of enforcement, to change social norms. See Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031-32 (1996). He writes: “[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms. If we see norms as a tax on or a subsidy to choice, the law might attempt to change a subsidy into a tax, or vice versa.” *Id.* at 2034. This description of law’s social power seems particularly apt when applied to the criminalization of genocide, where the lack of effective enforcement persists as a tragic problem, but where there nevertheless is a meaningful sense that social norms in the international community now impose a considerable “tax” on states that commit genocide and even on states that tolerate its commission by others. Cf. POWER, *supra* note 9, at 514 (“[T]he word ‘genocide’ . . . has acquired a potent moral stigma. The vows of U.S. policymakers to never again allow the crime and the lengths to which they have gone, while allowing genocide, to deny its occurrence is in itself testament to the stigma.”).

<sup>310</sup> Sunstein, *Social Norms*, *supra* note 309, at 909.

<sup>311</sup> Cf. Editorial, *Raphael Lemkin: Crusader*, N.Y. TIMES, Aug. 31, 1959, at 20 (Lemkin’s “crusade . . . was a heavy burden, and last Friday it killed him . . . . Death in action was his final argument . . .”).

<sup>312</sup> See *supra* Part IV.C.2.a.



and, to some extent, it reshaped our culture as well.”<sup>313</sup> Luban does not specify how *genocide* “reshaped our consciousness” or which “culture” it “reshaped.” I would specify that *genocide* reshaped, at the least, the culture of international law and our consciousness of that law—our consciousness, that is, of the proper relationships between states; among individuals, peoples, and states; and among states, law, and justice. *Genocide* helped to move our consciousness beyond the narrow confines of (most) traditional diplomacy toward a wider dialogue about the concerns of a common humanity with meaningful participation by nonstates. *Genocide* helped to start what Philip Jessup first called “a modern law of nations”<sup>314</sup> and then “transnational law.”<sup>315</sup>

In striving to bound sovereignty, Lemkin assaulted the citadel. Sovereignty was “the fundamental principle . . . on which the whole of international law rests.”<sup>316</sup> In terms of rhetoric scholarship, *sovereignty* was (and is) an ideograph of the international community, a “term[] we use [in public discourse] to impart value, justify decisions, motivate behavior, and debate policy initiatives.”<sup>317</sup> Common ideographs in U.S.

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<sup>313</sup> Luban, *supra* note 26, at 307.

<sup>314</sup> See JESSUP, *supra* note 134, at 2. Jessup argues that “international law, like national law, must be directly applicable to the individual,” calling this one of the two “keystones of a revised international legal order.” *Id.* Writing before the adoption of the Genocide Convention, he describes Resolution 96 (I) as “[a] major step” toward accepting individuals as subjects of international law. *Id.* at 183; accord *Text of Truman’s Letter Transmitting His Report on U.N.*, N.Y. TIMES, Feb. 6, 1947, at 4 (praising the Resolution as having “profound significance to the state” because of its progress “toward the application of international law to individuals as well as to states”). Given Jessup’s emphasis on making international law apply directly to individuals, his decision to revive the old phrase “the law of nations” was apt. See JANIS, *supra* note 109, at 13 (showing that “the law of nations” traditionally included individual rights and obligations, but when Jeremy Bentham coined “international law” he limited his conception “exclusively [to] the rights and obligations of states *inter se*”).

<sup>315</sup> See PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956) (arguing that the traditional term *international law* fails to capture “all law which regulates actions or events that transcend national frontiers”). Jessup adds, “Having argued in 1948 that [recognizing individuals as subjects of international law] was a desirable position . . . , I am prepared to say it is now established.” *Id.* at 3 & n.6; cf. Lemkin, *Introduction*, *supra* note 123, at 60 (criticizing the “half-truth” that “states alone” are the subjects of international law, because “the law of nations is a law of individuals enforced through . . . governments”).

<sup>316</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 263 (June 27); see also Peters, *supra* note 142.

<sup>317</sup> JASINSKI, *supra* note 67, at 309 (citation omitted). Jasinski also compares ideographs to Weaver’s idea of “ultimate terms,” the “terms to which the very highest respect is paid.” *Id.*

public discourse include *liberty* and *national security*, as well as *sovereignty* itself.<sup>318</sup>

The meaning of ideographs is often contested, because they are inherently abstract and enjoy unique importance in the political vocabulary.<sup>319</sup> “Questions involving the meaning of political words lie at the very foundation of political society, and accordingly as they are settled in one way or another, the whole fabric must assume a different shape and character.”<sup>320</sup> Given the centrality of *sovereignty* in international society, the very fabric of that society changes with the content and import of that word. Lemkin thus challenged “the whole fabric” of the international legal order by contesting the absolutist vision of *sovereignty* as end. He sought to reconstitute that order, with *sovereignty* redefined, reimagined as means to human-centered ends, and subordinated to his new concept of *genocide* in the hierarchy of values.<sup>321</sup>

Lemkin’s success in reprioritizing international legal values is shown whenever allegations of genocide arise. No state asserts a sovereign right to commit genocide. States instead deny the factual allegations, deny their legal characterization as genocide, or both.<sup>322</sup> In some cases, to be sure, these denials are

<sup>318</sup> For one famous example of argumentation in the name of *sovereignty*, see *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936) (reasoning that the constitutional doctrine of enumerated powers “is categorically true only in respect of our internal affairs” because “the United States is not completely sovereign” if the federal government lacks any power held by other nations with regard to external relations).

<sup>319</sup> See JASINSKI, *supra* note 67, at 309-10. If it is “the customary office of a word to cover, not a point, but a territory, and a territory that is irregular, heterogeneous, and variable,” NERLICH, *supra* note 255, at 117 (quoting Whitney), ideographs cover a larger swath than most words, strategically located and hosting rich resources. For a more cynical take on the same phenomenon of contestation, see ORWELL, *supra* note 267, at 161 (“Many political words are similarly abused. The word *Fascism* has now no meaning except in so far as it signifies ‘something not desirable.’ The words democracy, socialism, freedom, patriotic, realistic, justice have each of them several different meanings which cannot be reconciled with one another.”). But see MICHAEL WALZER, ARGUING ABOUT WAR 131 (2004) (“When communist Bulgaria called itself a ‘people’s democracy,’ only fools were fooled.”).

<sup>320</sup> JASINSKI, *supra* note 67, at 194 (quoting an anonymous writer, 1833).

<sup>321</sup> *Cf. id.* at 522 (“Prudential dilemmas sometimes are resolved by creating distinctions or by introducing new concepts that help to describe the world in a different way. An innovative concept such as ‘marital rape,’ for example, restructures how we think about gender relations and the tension between public obligations and private rights.”).

<sup>322</sup> For example, although Serbia & Montenegro contended that it was not bound by the Genocide Convention, it did not claim a right to commit genocide, but instead defended on the grounds that “the acts alleged . . . have not been committed at all” and, “if some have been committed,” they neither were done with the intent required by the Convention nor were attributable to the state. See *Bosn. & Herz.*, *supra* note 269, ¶¶ 65-66 (summarizing the parties’ contentions); see also *id.* ¶ 80 (summarizing Serbia & Montenegro’s position that it had not succeeded to the Socialist Federal Republic of Yugoslavia’s adherence to the Convention).

disingenuous—“the tribute that vice pays to virtue.”<sup>323</sup> Even so, such tributes make and reinforce international law, confirming *genocide*’s place in its normative hierarchy.

Indeed, *genocide prevention*—perhaps best expressed by the maxim “Never again!”—may even have come to qualify itself as an ideograph of the international community. This objective fits comfortably with the human rights purposes of the United Nations,<sup>324</sup> especially when that organization is viewed in the historical context of its founding in 1945. Institutionally, embarrassed by its failures in (at the least) Rwanda and the former Yugoslavia, the United Nations established the Office of the Special Advisor on the Prevention of Genocide,<sup>325</sup> as well as the ad hoc criminal tribunals. The first Special Advisor has declared that “preventing genocide is a principle of international law so fundamental that no nation may ignore it.”<sup>326</sup>

Of course, if *genocide prevention* is an ideograph, it is, like other ideographs, ambiguous and subject to contestation. Broadly put, *genocide prevention* begs the questions captured in “who has what obligations when?” It invites debate about the meaning of both *genocide*<sup>327</sup> and *prevention*,<sup>328</sup> and about whether *prevention* entails a ceiling as well as a floor. Uncapped, *genocide prevention* would permit each state to use force to stop genocide in any other state by acting unilaterally, without express authorization by the Security Council, and presumably on its own assessment of the facts and legal characterization thereof. The palpable conflict between *genocide prevention* and the outlawing of (most) force<sup>329</sup> must be

<sup>323</sup> WALZER, *supra* note 319, at 4 (describing disingenuous claims about just war).

<sup>324</sup> See *supra* note 247.

<sup>325</sup> See generally Juan Méndez, *The United Nations and the Prevention of Genocide*, in THE CRIMINAL LAW OF GENOCIDE, *supra* note 169, at 225 (describing his work as the first Special Advisor).

<sup>326</sup> *Id.* at 226.

<sup>327</sup> Proposals to amend the Convention’s definition have been made since at least 1952, when the Republic of China proposed changing the official Chinese-language text to language “roughly interpreted as meaning ‘to cause harm to or to destroy human groups in a ruthless manner.’” *Chinese Will Ask U.N. to Redefine Genocide*, N.Y. TIMES, Dec. 5, 1952, at 8 (noting Lemkin’s opposition). Schabas identifies at least twelve states that depart from the Conventional definition in their domestic statutes. See SCHABAS, *supra* note 15, at 130, 161-71. Meanwhile, unofficial definitions abound. See JONES, *supra* note 25 (compiling sixteen “scholarly definitions” proposed 1959-2003).

<sup>328</sup> In particular, it has been argued that *prevention* requires no action beyond the preventative impact of punishment or beyond a state’s own territory—positions both rejected by the I.C.J. See *Bosn. & Herz.*, *supra* note 269.

<sup>329</sup> See U.N. Charter art. 2, para. 4 (“All Members shall refrain . . . from the threat or use of force . . .”). The Charter expresses only two exceptions: self-defense

settled (like other prudential dilemmas) with a hierarchy fixing the relative priority to be given to these two high-order values of international society. This settlement affects not only the legality of unilateral humanitarian intervention in the modern military sense of the term but also the “shape and character” of the international legal order: it determines whether that order is characterized by independent initiative or collective action, whether it prefers to risk over- or underenforcement.

### B. *Some Qualifications*

In assessing Lemkin's rhetorical success, some important qualifications are needed.

The Convention sometimes diverges from Lemkin's path. Notably, it omits cultural techniques from the list of prohibited acts and focuses mainly on physical harm.<sup>330</sup> This

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and actions authorized by the Security Council “to maintain or restore international peace and security.” *Id.* art. 51, ch. VII.

<sup>330</sup> The Convention's definition of *genocide* includes five *actus rei*: (a) killing; (b) causing serious injury; (c) “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”; (d) “[i]mposing measures intended to prevent births within the group”; and (e) “[f]orcibly transferring children of the group to another group.” See Genocide Convention, *supra* note 14, art. II. See generally SCHABAS, *supra* note 15, at 172-240. Acts (a)-(c) are physical techniques in Lemkin's taxonomy, while (d) is biological. See LEMKIN, AXIS RULE, *supra* note 3, at 86-89; William Schabas, *The Law and Genocide*, in THE OXFORD HANDBOOK, *supra* note 187, at 124, 135 (concluding, in light of the Convention's negotiating history, that “the words ‘to destroy’ [should be read] as if they are modified by ‘physically’ and ‘biologically’”). On the distinction between biological and physical techniques, see *supra* note 185.

The Convention generally omits cultural techniques of genocide. See generally SCHABAS, *supra* note 15, at 207-13, 220, 646. Although central to Lemkin's vision, the idea of prohibiting “cultural genocide” lacked support among many governments. The United States led the opposition, arguing: “The decision to make genocide a new international crime was extremely serious, and the United States believed that the crime should be limited to barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide.” *Id.* at 209 (quoting U.N. Doc. E/AC.25/SR.14 (Apr. 21, 1948), at 10); see also Moses, *supra* note 187, at 38 (noting that the Netherlands opposed prohibiting cultural genocide on the ground that it would involve “a lack of logic and of a sense of proportion to include in the same convention both mass murder in gas chambers and the closing of libraries”). A Soviet proposal to add cultural techniques to the *actus rei* was defeated by a vote of 14-31 with 10 abstentions. See SCHABAS, *supra* note 15, at 213 & n.243.

Act (e) is arguably an exception. *Axis Rule* does not specifically address it, but it seems to have both biological (“depopulation”) and social elements. See LEMKIN, AXIS RULE, *supra* note 3, at 83, 86. UN discourse abbreviated Lemkin's long list of techniques to three (physical, biological, and cultural), and Act (e) appears in the Convention notwithstanding that some deemed it cultural in nature. See, e.g., Draft Convention on the Crime of Genocide, U.N. Doc. E/447, in 1 THE GENOCIDE CONVENTION, *supra* note 178, at 232, 235; cf. SCHABAS, *supra* note 15, at 201 (discussing whether Act (e) is biological or cultural in nature).

important defeat saddened Lemkin,<sup>331</sup> as it was tantamount to excluding his idea of vandalism from the Convention.<sup>332</sup> The Convention also omits universal jurisdiction.<sup>333</sup> And it does not require perpetrators to aim at the complete destruction of a protected group, but only the intent to destroy the group “in whole or in part.”<sup>334</sup> The words “in part” are necessary from a practical perspective, but they also weaken Lemkin’s cultural rationale, for a group destroyed in part also survives in part and may therefore retain the ability to preserve and generate unique cultural contributions.<sup>335</sup>

In addition, *genocide*’s significance should not be overstated. Although *genocide* helped to start the “modern law of nations” of which it is characteristic, it does not rise to the *sine qua non* of that law. Other notables who sought to displace absolutist sovereignty in the postwar legal order included René

<sup>331</sup> Lemkin’s unpublished memoir records his disappointment:

This idea was very dear to me. I defended it successfully through two drafts. It meant the destruction of the cultural pattern of a group, . . . the shrines of the soul of a nation. But there was not enough support for this idea in the Committee. After having overcome so many hurdles and with the end of the Assembly in sight, I questioned the advisability of engaging in still another battle. Would it not endanger the passage of the Convention? So with a heavy heart I decided not to press for it.

Lemkin, *Totally Unofficial Man*, *supra* note 7, at 393; *cf.* Lemkin, UN BULLETIN, *supra* note 7, at 71 (anticipating this trade-off by mentioning, in a passage about cultural genocide, that “the draft convention is drawn up in such a way that its structure remains valid even if parts should be removed or changed”).

<sup>332</sup> See Moses, *supra* note 187, at 38. Lamenting the decision to drop the provision on cultural genocide, Lemkin once described it as “the soul of all the convention.” See COOPER, *supra* note 31, at 159 (quoting a letter Lemkin wrote on October 20, 1948, to the future Pope John XXIII).

<sup>333</sup> See Genocide Convention, *supra* note 14, art. VI (providing for prosecution founded on the more traditional bases of territoriality and consent). See *generally* SCHABAS, *supra* note 15, at 409-16.

<sup>334</sup> See Genocide Convention, *supra* note 14, art. II (emphasis added). See *generally* SCHABAS, *supra* note 15, at 273-86.

<sup>335</sup> As Luban writes:

The problem is that once the definition is modified [with “in part”], it loses its mooring in the group-pluralist theory of value. . . . [G]enocide by destroying part of a group no longer removes that group from “the family of man.” . . . [I]t loses the special moral-philosophical quality that requires singling it out from all other mass killings and mass atrocities. In this way, Lemkin’s definition of genocide was compromised from birth: to make the crime prosecutable in a world of territorial states, where genocide might occur only in one state . . . , the law drifted away from the pure group-pluralist vision that drove him to distinguish genocide as a crime different from all others.

Luban, *supra* note 26, at 313 (footnote omitted).

Cassin,<sup>336</sup> Robert Jackson,<sup>337</sup> and Hersch Lauterpacht.<sup>338</sup> The Nuremberg trials would have been essentially the same had *genocide* never been mentioned there; one can even imagine that the Rwanda trials would be substantially the same as well—not in their elements and evidence, but in the persons charged and the larger moral and political functions served. The Allies, following Roosevelt's Four Freedoms Speech,<sup>339</sup> declared "preserv[ing] human rights" as a war aim within weeks after Pearl Harbor<sup>340</sup> and later put the language of human rights in the UN Charter.<sup>341</sup> There is no reason to believe the Universal Declaration—and the ensuing network of human rights conventions—would have failed but for the earlier UN actions against genocide. And traditional notions of sovereignty have been challenged by an array of pressures often summarized with the shorthand "globalization."<sup>342</sup>

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<sup>336</sup> See POWER, *supra* note 9, at 76. In support of the Universal Declaration of Human Rights, Cassin used language strikingly like that of Lemkin: "The right of interference is here; it is here. Why? Because we do not want a repetition of what happened in 1933, where Germany began to massacre its own nationals, and everybody . . . bowed, saying 'Thou art sovereign and master in thine own home.'" *Id.*; see also SCHABAS, *supra* note 15, at 525 (quoting Cassin). The parallel is all the more striking in light of Lemkin's later opposition to the human rights covenants. See POWER, *supra* note 9, at 74-75.

<sup>337</sup> See Jackson, *supra* note 135, at 354-55 (arguing that sovereignty should be bound by restrictions on the use of force).

<sup>338</sup> See Vrdoljak, *supra* note 6, at 1168, 1174 (discussing Lauterpacht's objections to the "deification" of the state and the "dogma of sovereignty").

<sup>339</sup> Franklin Roosevelt, The Four Freedoms Speech, State of the Union Address (Jan. 6, 1941), available at <http://ourdocuments.gov/doc.php?doc=70> ("Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them.").

<sup>340</sup> See Decl. by the U.N., *supra* note 59, pmbl. ("Being convinced that complete victory over their enemies is essential . . . to preserve human rights and justice in their own lands as well as in other lands . . .").

<sup>341</sup> See *supra* note 247. See generally Jan Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447 (1992) (discussing the contributions of international lawyers, NGOs, H.G. Wells, and Franklin Roosevelt that led to the inclusion of human rights language in the U.N. Charter).

<sup>342</sup> For an intriguing new argument that the trend to redefine and constrain sovereignty has gone too far, see Koskenniemi, *supra* note 143. Koskenniemi objects that essentially political matters are treated instead as technocratic, subject to managerial one-size-fits-all solutions without regard to community preferences that may vary over time and space. *Id.* at 67-70. He concludes that "sovereignty articulates the hope of experiencing the thrill of having one's life in one's own hands"—that a community, and an individual within it, may be "for better or for worse, the master of one's life." *Id.* at 70. Koskenniemi does not address genocide or crimes against humanity, but his argument must not allow sovereignty to shield such horrors, because the victims are (to say the least) excluded from the very community, and denied the very hope, that Koskenniemi celebrates. Cf. WALZER, *supra* note 319, at 81 ("[T]he norm is not to intervene in other people's countries; the norm is self-determination. But not for *these* people, the victims of tyranny, ideological zeal, ethnic hatred, who are not determining anything for themselves, who urgently need help from outside.").

Without *genocide*, the broad shape of modern international law would look much the same.

The Genocide Convention is, therefore, better seen as a start than an end. It enjoys chronological primacy in the postwar move away from absolutist sovereignty toward international legal protection of individuals. But it did not alone suffice to prevent genocide or even to punish it. The Convention has required numerous procedural elaborations—including the ad hoc tribunals and the International Criminal Court, the advancement of universal jurisdiction in customary law, the Responsibility to Protect, and the UN's early warning system—just to make a start toward fulfilling the Convention's promise “to liberate mankind from such an odious scourge.”<sup>343</sup> Substantively, the international community has had to supplement *genocide* with other bounds on absolutist sovereignty. Modern international law treats genocide as a pivot between domestic and international, tolerable and intolerable, legal and illegal—but not as *the* pivot. All human rights law does the same.<sup>344</sup> Nor does genocide stand alone in dividing the ordinary and extraordinary. For both international prosecution<sup>345</sup> and justification for military humanitarian intervention,<sup>346</sup> the line between domestic and international is not drawn at genocide, but at genocide-plus.<sup>347</sup>

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<sup>343</sup> Genocide Convention, *supra* note 14, pmb1.

<sup>344</sup> See, e.g., Reisman, *supra* note 103, at 40 (“[A] key concern . . . [is] making human rights effective by limiting the atavistic conception of state sovereignty, subjecting it to an international human rights jurisdiction . . .”).

<sup>345</sup> See, e.g., Rome Statute of the International Criminal Court art. 5, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (listing the crimes within the jurisdiction of the Court).

<sup>346</sup> See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT ¶¶ 4.19-4.20 (2001) [hereinafter R2P] (arguing that “military intervention for human protection purposes is justified . . . in order to halt or avert . . . large scale loss of life, actual or apprehended, with genocidal intent or not”); 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-40, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (endorsing R2P); S.C. Res. 1674, ¶¶ 4, 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (same); see also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art. 8, para. 1, *opened for signature* Oct. 23, 2009 (not yet in effect), available at <http://au.int/en/treaties> (“The African Union shall have the right to intervene in a Member State . . . in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity . . .”).

<sup>347</sup> ICISS proposed to draw the intervention line at both genocide-plus and genocide-minus, omitting instances of Conventional genocide not threatening “large scale . . . loss of life.” R2P, *supra* note 346, ¶ 4.20. When the General Assembly and Security Council endorsed R2P, however, they did not adopt this limiting language, demonstrating the pull of *genocide* on the international community. See *supra* note 346.

The meaning and use of *genocide* has always been criticized and contested. Many advocates simply deploy *genocide* as they themselves define it, often as something akin to extermination.<sup>348</sup> Words are invented by individuals, but they are used by the community. Semantic contestation is normal, especially for ideographs and other politically important words.

Still, it should be recognized that Lemkin's rhetorical strategy might have contributed to public confusion of *genocide* with *extermination*. Lemkin repeatedly associated his word with Hitler's "murder of millions."<sup>349</sup> He also linked it to Churchill's "crime without a name" when Churchill had stressed the scale of Nazi murders.<sup>350</sup> A degree of association between *genocide* and the Holocaust was inevitable—and perhaps even necessary for Lemkin's word to succeed as it did. Nevertheless, Lemkin's appeal to public revulsion against the Holocaust amplified aspects of the Holocaust more akin to extermination than to Lemkin's own "ethnico-cultural concept[ion]" of genocide. Lemkin further obscured his own conception by incorporating into his writings, for a time, the General Assembly's 1946 addition of "political groups" to the definition of genocide. Even Lemkin's cultural arguments sometimes analogize genocide to murder in a way that appears to equate the two. For example, in the midst of a passage about culture, Lemkin writes, "The destruction of a nation . . . offends our feelings of morality and justice in much the same way as does the criminal killing of a human being: the crime in the one case as in the other is murder, though on a vastly greater scale."<sup>351</sup> In all these respects, then, Lemkin allowed some tension between his conception of *genocide* and the rhetoric he used to promote it.

Lemkin relied on etymology to anchor his word to his conception.<sup>352</sup> Etymology, however, is much less weighty than Lemkin seems to have thought. Even where etymology correlates with a word's first definition, it need not remain fixed there: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary

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<sup>348</sup> See *supra* notes 24-30, 327.

<sup>349</sup> See *supra* Part IV.C.2.b.

<sup>350</sup> See *supra* Part IV.C.2.a.

<sup>351</sup> LEMKIN, *AXIS RULE*, *supra* note 3, at 91.

<sup>352</sup> See *supra* Part IV.C.1.



greatly in color and content according to the circumstances and the time in which it is used.”<sup>353</sup>

General critiques of etymology aside, Lemkin also misjudged his own etymology. *Genos*, despite its credentials in ancient Greek, is not strongly connected in modern English with race (or tribe, nation, or ethnicity, let alone religion). No English words begin with *genos*- and very few with *geno*-, none obviously sharing the sense of *genos* as race.<sup>354</sup> English has many more *gen*- words, which derive mostly from *genos*, but they display a startling variety of meanings, obscuring their common root, which in any event is not the racial sense of *genos*.<sup>355</sup> Simply put, there is no reason to believe that an educated English reader who saw Lemkin’s word for the first time could have drawn from knowledge of other *gen*- or *geno*- words to define it correctly.<sup>356</sup>

By contrast, *-cide* words abound in English and they are firmly linked with killing. *Homicide* is more than six hundred years old.<sup>357</sup> *Fratricide*, *matricide*, *parricide*, *patricide*, and *regicide* date to the sixteenth century, and *deicide*, *infanticide*, *suicide*, and *tyrannicide* to the seventeenth century.<sup>358</sup> Farmers and hunters have given us such words as *felicide*, *ovicide*, *tauricide*, and *vulpicide*<sup>359</sup>—and even such “jocose nonce-words”

<sup>353</sup> *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) (holding that the word “income” may have a different meaning in tax law than in the U.S. Constitution). For more on the lightness of etymology, see *supra* Part IV.C.1.

<sup>354</sup> The *OED* lists the following words starting with *geno*-, plus some variants: *Genoa*, *genosophis*, *genotype*, *genouillere*, and a few words (several obsolete) relating to *gene* (*genoblast*, *genologe*, *genome*, *genomere*, and *genonema*). Three of these words have no discernible nexus to *genos*: *Genoa*, *genosophis* (a sect of ancient Hindu philosophers of ascetic habits), and *genouillere* (a flexible piece of armor to cover the knee, from the French for knee). The other words are traceable to *genos*, but in the sense of birth, offspring, or family—not race. See *OED*, *supra* note 270.

<sup>355</sup> Examples in the *OED*, *supra* note 270, include: *gender*, *general*, *generate*, *generic*, *genesis*, *genetic*, *genial*, *genie*, *genital*, *genius*, *genre*, *gentle*, *genuflect*, *genuine*, and *genus*. *Genie* comes from the Arabic *djinn* and *genuflect* from the French for “to bend” and “knee.” The other examples may be traced to *genos*, but in the sense of birth, offspring, or family. Even this connection is sometimes obscure: *gentle*, for example, originally referred to noble birth, a sense that survives today mainly in *gentlemen*. *Id.* None of these examples offers any hint of *genos* as race.

<sup>356</sup> *Cf.* Barrett, *supra* note 12, at 44-45 (quoting Sidney Alderman, a U.S. negotiator for the Nuremberg Indictment, “The British particularly thought [*genocide*] was too fancy a word to put in a legal document, and some of their graduates of Oxford University said that they couldn’t understand what the word meant.”).

<sup>357</sup> See *OED*, *supra* note 270, at 332.

<sup>358</sup> See I HISTORICAL THESAURUS OF THE OXFORD ENGLISH DICTIONARY 127, 128 (Christian Kay et al. eds., 2009) (under “(n.) Killing of type of person”) (with updates for *patricide* and *regicide* available online at [www.oed.com](http://www.oed.com), last visited Feb. 1, 2012).

<sup>359</sup> See *id.* (under “(n.) Killing of animals”).

as *birdicide*.<sup>360</sup> Chemists have invented a variety of “preparations destructive of animal or vegetable life, [such] as algicide, fungicide, germicide, insecticide, pesticide.”<sup>361</sup> The pattern is both clear and (chillingly) familiar: the word *X-cide* refers to killing X. In this circumstance, etymology may indeed help the educated reader understand an unfamiliar *-cide* word. If someone were to invent a new product called *arachnocide*, many readers would readily deduce its purpose. This points back to the trouble with *genos*. A reader unfamiliar with *genocide* might well think, “It means ‘killing *geno*,’ but what’s a *geno*?”<sup>362</sup>

There is also a second difficulty arising from *-cide* itself. In every one of the *-cide* examples given here, the killing is literal.<sup>363</sup> But Lemkin does not limit his idea of *genocide* to literal killing, “physical” killing in his typology. *Genocide* is not only coinage by analogy to existing words, but also coinage by metaphor; it is metaphorical death for a people, whether or not it involves physical death for any person.<sup>364</sup> Introducing a novel metaphorical sense to a suffix with such a settled physical sense must be difficult under any circumstances, all the more so (again) given the obscurity of *genos* in modern English.

## VI. THE VALUE OF RHETORICAL SITUATION ANALYSIS

### A. *Lemkin’s Rhetorical Situation and the Genocide Convention*

Bitzer’s *rhetorical situation* provides a lens to refract history, a means to see what Lemkin wished to achieve, the circumstances in which he acted, and the decisions he made. Bitzer thus lets us consider the cards Lemkin held to better appreciate how well he played his hand.

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<sup>360</sup> OED, *supra* note 270, at 213 (under *-cide*).

<sup>361</sup> *Id.*

<sup>362</sup> Even a reader familiar with *genos* and the many English words derived from its familial senses, *supra* notes 354-55, might reasonably infer that *genocide* means “killing a family” or “killing a relative”—an inference supported, sadly, by the many *-cide* words our language needs to describe the murder of relatives.

<sup>363</sup> The only counterexamples I have been able to identify in common English are *coincide* and *decide*. The first is technically not a *-cide* word, because it derives from the prefix *co-* (with) and the Latin root *incidare*, meaning “to occur,” as in *incident*. Only *decide* suggests a metaphorical use of *-cide*, as it originates in the idea that “to decide” is “to cut off” deliberations.

<sup>364</sup> Cf. LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 84-90 (2010) (discussing Claudia Card’s argument that individuals who physically survive genocide suffer “social death,” but arguing that “social loss” or “social injury” are better metaphors).

The Bitzer lens also makes visible Lemkin's core priorities. Lemkin's views are not merely of historical interest; they have legal import. They contribute to the proper construction of the Genocide Convention.<sup>365</sup> For one salient example, consider this passage, where the UN Commission of Inquiry on Darfur applied (and implicitly construed) the intent requirement of Article II<sup>366</sup>:

Some elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked

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<sup>365</sup> The Genocide Convention should, of course, be construed in accordance with the applicable rules of international law, such as the customary rules codified in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, although the Vienna Convention itself does not apply retroactively to the Genocide Convention. *See id.* art. 4. I do not suggest here that Lemkin's personal views should be given more weight than is consistent with international law—but, rather, that his work is relevant under the applicable principles of international law. For example, General Assembly Resolution 96 (I) provides:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial . . . results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

G.A. Res. 96 (I), *supra* note 13. This language, originally drafted by Lemkin and so resonant of his views, forms part of the “context” of the Convention as it is referenced in the Convention's preamble. It also evidences both the Convention's “object and purpose” and the existence of “relevant rules of international law applicable in the relations [among] the parties.” *See* Vienna Convention, *supra*, art. 31; *see also* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 427-28 (2009) (“[T]eleological interpretation has traditionally played a part in the interpretation of . . . multilateral, ‘legislative’ conventions. The object and purpose also plays a particular part in the interpretation of human rights treaties.”).

Even apart from Resolution 96 (I), there may be particular issues where “[r]ecourse may be had” to Lemkin's views as a “supplementary means of interpretation.” *See* Vienna Convention, *supra*, art. 32. First, the “preparatory work” of the Convention (even limiting that concept to formal UN documents) includes some contributions by Lemkin himself, as well as references to his views by other drafters and negotiators. Second, and perhaps most controversially, given Lemkin's unique role in bringing about the Convention, his views form an important part of “the circumstances of its conclusion.” *Id.*; *see also* VILLIGER, *supra*, at 445 (“These [circumstances] include the political, social and cultural factors—the *milieu*—surrounding the treaty's conclusion.”); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 141 (2d ed. 1984) (Article 32 “emphasi[z]es the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated . . .”).

<sup>366</sup> *See* Genocide Convention, *supra* note 14, art. II (“[G]enocide 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 . . .”).

and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element . . . .

[T]he intent of the attackers was not to destroy an ethnic group as such . . . . Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population.

Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. . . . [T]he living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. . . .

. . . .

[O]ne inhabitant of the Jabir Village . . . . stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butt of their guns. . . . [H]is young brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and had been shot dead. Clearly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being only motivated by the desire to appropriate cattle . . . . Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.

[O]ne crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.<sup>367</sup>

The Commission of Inquiry transformed the Convention's intent requirement from "the intent to destroy [a protected group] as such" into something approaching "the

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<sup>367</sup> Int'l Comm'n of Inquiry on Darfur, Report to the United Nations Secretary-General, ¶¶ 513-18 (Jan. 25, 2005), [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

intent to destroy [i.e., kill] every single member of the group.” This transformation is evident thrice:

- First, in the argument that “had the attackers’ intent been to annihilate the group, they would not have spared *one* of the brothers,”<sup>368</sup> the Commission uses *annihilate* in the sense of “reduce to non-existence, blot out of existence”—literally “to nothing.”<sup>369</sup> The arguments that the “attackers refrained from exterminating the *whole* population”<sup>370</sup> and that survivors “are not killed outright, so as to eradicate the group”<sup>371</sup> reveal the same search for nothingness.

- Second, in the argument that forced displacement into camps disproves the presence of genocidal intent as long as conditions in the camps are minimally adequate to sustain physical survival there, the Commission introduces a criterion irrelevant to the destruction of the group as a group (i.e., “as such”).<sup>372</sup> The same is true of the argument that a government lacks genocidal intent when it aims to quash a rebellion through counter-insurgency warfare.

- Most of all, the transformation is evident in what the Commission *did not say*. Wholly absent is any mention of the intent to prevent the Fur, Masaalit, and Zaghawa from surviving *as peoples* (i.e., “as such”).

The Commission’s approach cannot be squared with the ordinary meaning of the words “as such.” Schabas (who defends the Commission)<sup>373</sup> concedes elsewhere that his reading of “as such” depends on the *travaux préparatoires*.<sup>374</sup> Schabas contends that this phrase is meant, idiosyncratically, to import into the Convention a motive requirement specifying that a group must be destroyed “on the grounds of nationality, race, ethnicity, or religion.”<sup>375</sup> In other words, for Schabas, killing every single member of a protected group is not enough to constitute genocide. Rather, all that killing must be done for a

<sup>368</sup> *Id.* ¶ 517 (emphasis added).

<sup>369</sup> OED, *supra* note 270, at 484. *Annihilate* derives from the Latin “*ad* to + *nihil* nothing.” *Id.* at 483-84. *Annihilate* also has the sense of “[t]o destroy the collective or organized existence of anything, by reducing it to its elements; to put an army to utter rout, etc.,” *id.* at 484, but the Commission is plainly not using this sense, because the survival of one soldier does not disprove the “utter rout” of an army.

<sup>370</sup> Int’l Comm’n of Inquiry on Darfur, *supra* note 367, ¶ 513 (emphasis added).

<sup>371</sup> *Id.* ¶ 518.

<sup>372</sup> *See id.*

<sup>373</sup> *See* William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1705-06, 1714-16 (2006).

<sup>374</sup> SCHABAS, *supra* note 15, at 271.

<sup>375</sup> *Id.* at 306.

particular motive. In Schabas' view, destroying a group to seize their land or "for purposes of counter-insurgency warfare"<sup>376</sup> is a crime against humanity, but not genocide.<sup>377</sup>

Lemkin's views inform this debate in several ways. First, he identifies the destruction of Carthage, for example, as genocide.<sup>378</sup> He accepts Roman actions as enough to support this conclusion, without pausing to consider whether the Romans were motivated by ethnic (or national, racial, or religious) animus—or by the desire for farmland, to prevent a Fourth Punic War, or other political or military objectives. Second, let us turn to the Nazi invasion of Poland—the central experience of Lemkin's life and the crucible in which he coined *genocide*.<sup>379</sup> Germany invaded, at least in part, to gain *Lebensraum*.<sup>380</sup> This goal did not preclude Lemkin from concluding that the Nazis had committed genocide against Slavs<sup>381</sup>—indeed, from pressing for genocide against Poles to be included in the Nuremberg indictment and judgment.<sup>382</sup> This point is buttressed if we restate the facts in the Commission's Darfur report in terms familiar to Lemkin: If Nazi Germany had invaded Poland, slaughtered thousands of Polish men, raped thousands of Polish women, burnt hundreds of Polish villages, beaten and robbed survivors, and forced the survivors into displacement camps where the living conditions were terrible but not so terrible as "to be calculated to bring about the extinction" of the people made to live there, the harm that so motivated Lemkin—the destruction of a group capable of making cultural contributions to the world, capable of producing "a Copernicus, a Chopin, a Curie"—would have come to pass.<sup>383</sup> The Nazis would have executed "a coordinated plan aimed at destruction of the essential foundations of the life of [a] national group[] so that [the] group[] wither[s] and die[s] like plants that

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<sup>376</sup> Int'l Comm'n of Inquiry on Darfur, *supra* note 367, ¶ 518.

<sup>377</sup> See SCHABAS, *supra* note 15, at 306 ("The crime must . . . be motivated by hatred of the group. The purpose of criminalizing genocide was to punish crimes of this nature, not crimes of collective murder prompted by other motives.").

<sup>378</sup> See, e.g., Lemkin, *Genocide*, *supra* note 176, at 227; LEMKIN, AXIS RULE, *supra* note 3, at 80 n.3.

<sup>379</sup> See generally LEMKIN, AXIS RULE, *supra* note 3; cf. Lemkin, AJIL, *supra* note 53, at 151 ("Germany's practices actually provided the basis for developing the concept of genocide . . .").

<sup>380</sup> See, e.g., A.J.P. TAYLOR, THE ORIGINS OF THE SECOND WORLD WAR xxiv-xxvi, 105-06 (2005 ed.) (discussing the extent to which *Lebensraum* moved Germany to war).

<sup>381</sup> See, e.g., Lemkin, *Genocide*, *supra* note 176, at 227; Lemkin, *War Against Genocide*, *supra* note 181.

<sup>382</sup> See *supra* note 157.

<sup>383</sup> Lemkin, *Genocide*, *supra* note 176, at 228.

have suffered a blight.”<sup>384</sup> The Nazis would have destroyed the Poles *as a people*, and they would have done so intentionally.

Lemkin’s writings point to a better construction than that applied by the Commission and advocated by Schabas: the intent inquiry should ask whether the perpetrator intended to destroy a protected group *as a group*. This approach is truer to the ordinary meaning of the textual “as such.” It also treats respectfully the cultural concerns underpinning *genocide* when such concerns are made manifest by one of the *actus rei* listed in Article II, thus giving meaningful consideration to the idea animating the Convention.<sup>385</sup>

### B. Genocide and New Rhetorical Situations

The Bitzer lens also helps us to focus on *genocide’s* continuing value to our public discourse, because Lemkin’s innovation remade the rhetorical situation for later advocates. *Genocide* figures especially prominently in contemporary discourse about humanitarian intervention. Love it or hate it, advocates and decision-makers in most public debates about humanitarian intervention must deal with *genocide*. It shapes their options and strategies, creating or helping some moves while hindering or even precluding others. It influences their audience, affecting which events are deemed worthy of attention by the media, policy-makers, and the public. It forces debate about whether particular events should be characterized as *genocide*, whether the Conventional definition should expand, whether *genocide* does or should trigger a right or duty of humanitarian intervention, and whether another trigger should supplement or replace *genocide*. On this last point, *genocide’s* hold on the language further acts as both resource and constraint for the neologists who coin words to advance their new concepts. *Democide*, *ethnocide*, *gendercide*,

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<sup>384</sup> Lemkin, *Modern Crime*, *supra* note 136.

<sup>385</sup> Schabas objects to this approach on the ground that it would capture within *genocide* circumstances where “incidental” killings occur during implementation of a policy limited to acts (such as forced displacement) not listed in Article II. *See* SCHABAS, *supra* note 15, at 271. This objection does not speak to Darfur, however, where the murders, rapes, and other acts “[c]ausing serious bodily or mental harm” cannot fairly be dismissed as “incidental.” Should an appropriate case arise, it would be open to the decision-maker to determine whether the “incidental” covered acts (perhaps even acts by one individual) are too remote from the policy aiming at group destruction by other means to warrant a finding of *genocide* in that particular case. In the meantime, I agree with Schabas that we should not be distracted by hypotheticals unlikely to impact policy or to be prosecuted by the ICC. *See* Schabas, *supra* note 373, at 1711.

*humancide*, *humanicide*, *omnicide*, and *politicide* all testify to the power of *genocide* in this field of discourse.<sup>386</sup>

Ultimately, *genocide's* role in shaping new rhetorical situations matters most today. To the extent *genocide* helps advocates of worthy actions to prevent and punish atrocities, it deserves its prominence in our language and our hierarchy of values. On the other hand, to the extent *genocide* helps advocates of unworthy actions or hinders advocates of worthy actions, it deserves to be redefined, reprioritized, or even retired.

*Genocide* properly bounds sovereignty, because governments are instituted among us to secure our rights and safety,<sup>387</sup> so no rule of law worthy of the name should enable governments to destroy groups of the very people they exist to serve.<sup>388</sup> Sovereignty, like other governmental constructs, must yield to "elementary considerations of humanity."<sup>389</sup> These considerations are "intransgressible,"<sup>390</sup> for humanity "is the *raison d'être* of any legal system."<sup>391</sup> But *genocide* itself also must be tested against the needs of humanity. The priorities of international law, and the ideographs of international discourse, must be those that best serve humanity.<sup>392</sup> This requires

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<sup>386</sup> See generally R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994) (regarding *democide*); C.C. Tennant & M.E. Turpel, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination*, 59 *NORDIC J. INT'L L.* 287 (1990); MARY ANNE WARREN, *GENDERcide: THE IMPLICATIONS OF SEX SELECTION* (1985); Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 *LOY. L.A. INT'L & COMP. L.J.* 183 (1986); PIETER NICHOLAS DROST, 1 *THE CRIME OF STATE: HUMANICIDE* (1959); LISL J. MARBURG GOODMAN & LEE ANN HOFF, *OMNICIDE: THE NUCLEAR DILEMMA* (1990); Jordan Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 *CASE W. J. INT'L L.* 283 (1986).

<sup>387</sup> Cf. *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

<sup>388</sup> Cf. Criddle & Fox-Decent, *supra* note 142, at 365-66 (arguing that "the Kantian fiduciary model [of sovereignty requires] an absolute prohibition" of genocide and other policies that "constitute a gross infringement of secure and equal freedom").

<sup>389</sup> *Corfu Channel* (U.K. v. Alb.), 1949 *I.C.J.* 4, 22 (Apr. 9) (holding that Albania had a duty under customary law to warn British ships crossing through the channel, and to notify international shipping generally, of the existence of a minefield in Albanian territorial waters).

<sup>390</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 *I.C.J.* 226, 257 (July 8). Strictly speaking, the Court's statement addresses only certain "rules of humanitarian law applicable in armed conflict," but only a slight extension reaches *genocide* and other norms "fundamental to the respect of the human person and 'elementary considerations of humanity.'" *Id.*

<sup>391</sup> Lillich, *supra* note 103, at 406; cf. Lemkin, *Legal Case I*, *supra* note 281, at 205 ("International law should be an instrument for human progress and justice, not an obstacle to them.").

<sup>392</sup> I say this without prejudice to those circumstances where other considerations, such as animal welfare and environmental preservation, warrant our respect independent of their benefits for humanity, a subject beyond the scope of this Article.



continuous reexamination of *genocide*, as with other vital aspects of our discourse, laws, politics, priorities, and values.

## CONCLUSION

“Some words are confined to their history; some are starting points for history.”—Felix Frankfurter.<sup>393</sup>

*Genocide* is a starting point for history. Lemkin coined *genocide* to “build the law.”<sup>394</sup> He succeeded quickly, with the Genocide Convention. This accomplishment cannot be dismissed as a mere “piece of paper,”<sup>395</sup> a fading rose.<sup>396</sup> It generated domestic criminal statutes, functioning international institutions, investigative teams, NGO watchdogs, political movements—even jail cells. People have been charged with, tried for, convicted of, and punished for genocide. This is law, however narrowly one defines it.

*Genocide* also built customary international law. Beyond its own recognition as custom, *genocide* contributed to the development of some of the foundational principles of modern international law: peremptory norms (*jus cogens*) exist and they constrain states;<sup>397</sup> states have responsibilities as well as rights, responsibilities owed to individuals, even to their own nationals,<sup>398</sup> as well as to other states, perhaps even all other states (*erga omnes*); individuals, even high government officials, may be held accountable for gross offenses in court (domestic, foreign, international, or mixed).<sup>399</sup> *Genocide* also helped to modernize other aspects of custom: expanding universal jurisdiction beyond traditional crimes like piracy, for

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<sup>393</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

<sup>394</sup> See Rosenthal, *supra* note 1.

<sup>395</sup> *Id.*

<sup>396</sup> Charles de Gaulle is said to have said that treaties “are like roses and young girls; they last while they last.” See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 304 (1977).

<sup>397</sup> See HENKIN, *supra* note 102, at 39 n.\*, 176-77 (crediting the Genocide Convention with “helping to launch the concept of *jus cogens*,” a concept that “derogates *pro tanto* from state autonomy and the principle of consent”).

<sup>398</sup> *Id.* at 176-77 (“Subordinating state values to human values, [the Genocide Convention] established that, in principle and in one respect at least, how a state treated its own inhabitants was a legitimate, appropriate subject of international law.”).

<sup>399</sup> Cf. JESSUP, *supra* note 134, at 2 (describing the “keystones of a revised international legal order”).

example, and updating the law of treaty reservations for the age of major multilateral conventions.<sup>400</sup>

*Genocide*, moreover, built law in James Boyd White's deeper sense of law as language and community. It changed the conversation among states. It provides states a new "range of things to say to each other."<sup>401</sup> It empowers states with "a set of things they may say"<sup>402</sup> to object to (certain) atrocities occurring in another state. The UN instruments enable states to say that genocide is "a matter of international concern," "a crime under international law," and an "odious scourge"—and that it is "contrary to the spirit and aims of the United Nations," it "has inflicted great losses on humanity," and it must be combated with "international cooperation."<sup>403</sup> This language simultaneously inhibits a state accused of genocide "from saying other things."<sup>404</sup> It cannot say, "Genocide is good" or even "Genocide is bad, but outweighed by other priorities." And it cannot say, "Mind your own business" or "Pay no attention to the men suffering behind the curtain." *Genocide* deprives an accused state of the absolute sovereignty defense. The state is obliged instead to deny the factual allegations or their legal characterization as *genocide*. It has to converse about *genocide*, engaging in a discourse structured by the Genocide Convention. *Genocide* thus facilitates interstate conversations on subjects that previously had been difficult to raise and easy to dismiss. By changing the conversation in this way, *genocide* reconstituted the community of nations: it moved the community from one devoted (almost) exclusively to interstate relations to one concerned as well with (certain of) a nation's own internal acts. The new community became transnational, rather than *international*, in nature.

For all its historic significance, it must be acknowledged that *genocide* stands accused of making history in another sense as well. The charge is that *genocide* enables mass atrocities (including genocide itself) by interfering with effective efforts to

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<sup>400</sup> See Vienna Convention, *supra* note 365, arts. 19-23 (following the ICJ's Advisory Opinion on *Reservations to the Genocide Convention*).

<sup>401</sup> WHITE, *supra* note 2, at xi.

<sup>402</sup> *Id.* at 95-96 ("The law is literally and deliberately constitutive: it creates roles and relations, places and occasions on which one may speak; it gives to the parties a set of things that they may say, and prohibits them from saying other things; it makes a real social world.").

<sup>403</sup> See G.A. Res. 96 (I), *supra* note 13; Genocide Convention, *supra* note 14, pmbl., art. I.

<sup>404</sup> WHITE, *supra* note 2, at 95-96.

stop them.<sup>405</sup> To the extent this is true, *genocide* must yield to new definitions, new priorities, or new terms. It might be changed, supplemented, or replaced altogether—that is, it might be “confined to [its] history.” The Bitzer prism applied here can contribute to that assessment of *genocide*’s future by making visible *genocide*’s impact on the rhetorical situation of advocates for worthy actions against atrocity.

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<sup>405</sup> See *supra* Part V.B.