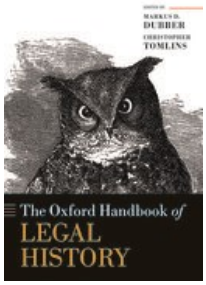

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CHAPTER

56 Cultural Genocide: Between Law and History

Leora Bilsky, Rachel Klagsbrun

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Abstract

This chapter attempts to depict in broad brushstrokes the development of the term 'cultural genocide', its connection to the term 'genocide', and what this can teach us about the relationship between law and history. The puzzle that the crime of genocide posits, in a nutshell, is this: how is it that a crime that was originally designed to deal with a new historical occurrence—a systemic attempt to completely erase a cultural group—turned from an encompassing concept of genocide to one limited to its physical and biological aspects? How was the cultural essence of genocide reduced to attack on 'cultural heritage' and then detached from the international crime of genocide and relegated to human rights and minority law under the control of nation-states?

Keywords: legal history, cultural genocide, law, cultural heritage, cultural groups

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TODAY, when one thinks about the term 'cultural genocide', the immediate thought is of indigenous peoples, whose culture has been erased over decades and centuries by white colonial settlers. Immediate suspects are Canada, Australia, and South America. This particular wrong adds to other wrongs wrought by the West/North on the East and South and is part of the continuous discourse, ever since de-colonization started, about the history of colonization. Specifically, this wrong is claimed by the survivors of colonization practices who term the disappearance of their cultures and languages 'cultural genocide'. Yet, as a legal claim, this is still a contentious one. The discussion that ensued during the debates around the drafting of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) is a case in point. A draft article that included the thorny words was eventually amended to exclude them. The arguments were legal in nature, mainly claiming that such term was not defined in international law.

This chapter sets out to depict in broad brushstrokes the development of the term ‘cultural genocide’, its connection to the term ‘genocide’, and what this can teach us about the relationship between law and
p. 1082 history. The puzzle that the crime of genocide ↳ posits, in a nutshell, is this: how is it that a crime that was originally designed to deal with a new historical occurrence—a systemic attempt to completely erase a cultural group—turned from an encompassing concept of genocide to one limited to its physical and biological aspects? How was the cultural essence of genocide reduced to attack on ‘cultural heritage’ and then detached from the international crime of genocide and relegated to human rights and minority law under the control of nation states?

In order to answer this puzzle, this chapter lets go of a binary approach positing law and history opposite each other. First, it adopts an approach that sees the plurality in law: litigation, legislation, international conventions, both international and national. This pluralistic view allows us to deviate from the conventional understanding that sees history as a complex and flexible discipline—one that can study long-term processes, take account of myriad of motives, and go beyond legal definitions of protected groups to account for hybrid groups—as opposed to law, which is regarded as rigid, doctrinal, and procedural. For these reasons, law restricts the crime of genocide to the most serious acts and by that, limits genocide to the physical and biological aspects, requiring a special intent or a plan directed at the destruction of a group as such and affording protection to only limited classes of groups. Instead, the authors examine the dialectics between law and history to show the occasions when law becomes the main tool to address a new historical phenomenon, and those times in which law’s categories and doctrines obscure the novelty in history and force new practices into familiar boxes. The chapter adopts a critical approach to law—one that brings the political dimensions to the centre of the discourse and claims that we cannot understand the tension between law and history as one detached from politics. Conversely, it claims that politics alone—without understanding precedents and legal doctrines or historical traditions and methodologies—cannot explain the transformations in the meaning of genocide.

Prior to the involvement of states and their political considerations, it was mostly the endeavour of one man, Raphael Lemkin, that gave rise to the idea of genocide in the first place. What influenced Lemkin in devising his theory of genocide is the subject of many historical-legal researches. Among other influences writers have identified the Armenian genocide; the South American *conquistadors*; the Zionist movement; the trial of Sholem Shvartsbard; his academic work as a comparative criminal lawyer; and his own personal experiences during the Second World War—as leading factors.[1] For the authors, what is missing in this
p. 1083 debate about the origins ↳ of Lemkin’s concept of genocide, is a discussion of the method he employed in identifying and mapping the new historical phenomenon. This refers to Lemkin’s rigorous collection of legislation—orders, decrees, and laws—enacted by the Nazis in every country they have occupied—which later became the basis to his book *Axis Rule in Occupied Europe* (1944). This method—that we term ‘legal philology’—allowed Lemkin to expose the grand plan of the Nazis: not just physical annihilation of individuals—and long before such was executed—but a systemic and holistic dispossession of entire groups, through legislation that applies to every aspect of life: from the right to freely use trams or parks to the right to possess real estate and other property; from the right to employ Arian help to the right to freely marry or to have intimate relations; from the obligation to wear a yellow star, to the obligation to add the name Sarah to one’s identity card. By collecting and amassing these decrees one by one, Lemkin came to realize the depth of the Nazi plan and how it had targeted groups. He understood that people were not persecuted because any individual trait they might have—other than their belonging to a certain group that was a target of persecution. The ingenuity of this approach, explains Philippe Sands, lies in its piecemeal method: ‘Individually, each decree looked innocuous, but when they were taken together and examined across borders, a broader purpose emerged.’[2]

For Lemkin, what was most disturbing was the way the Nazis sought to destroy these groups’ cultures: by enforcing German as the formal language of daily life and as a teaching language; by enforcing Nazi

curriculum to the exclusion of local or liberal ones; and by destroying synagogues and confiscating libraries. Culture, the glue that keeps a group together, was being destroyed, and this led to the destruction of the group. This need not necessarily be accompanied with physical destruction—although in the case of the Holocaust it was. But as opposed to current understanding of the terms physical genocide and cultural genocide—as different 'types' of genocide—Lemkin saw all the varied ways in which the Nazis employed their plan as 'techniques' of genocide. In his book he enumerated eight of these techniques—political, social, cultural, economic, biological, physical, religious, and moral.[3] These are not 'degrees' of genocide: for Lemkin the cultural technique was as bad as any of the others. It was an aim in itself and not a by-product of another technique. Another important aspect of this proposition is that these techniques are what differentiates between genocide and mass murder: following Lemkin, one can say that if the phenomenon could be reduced to mass murder, a new crime would not have to be defined, as such a crime is already prohibited by national and international legislation and the only problem it presents is
p. 1084 jurisdictional, owing to ↳ state immunity. This problem can be solved by creating an international or universal jurisdiction to adjudicate such a crime and does not necessitate the definition of a new crime. But if one understands the crime as targeting a group as such then the protected value is different and a different solution is called for.

Another important aspect that Lemkin learned from his meticulous work was that genocide has two stages: a 'negative' one, which is the destruction and annihilation of a national group inhabiting a conquered land; and a 'positive' one, which is the imposition of the national pattern of the oppressor on the oppressed—the people (if they are worthy of it) or their land. This analysis led him to see the insufficiency of law as it stood at the time—and to a large extent as it stands today. This is the first moment in our account where we meet law as a limiting, obscuring force, that lacks the adequate tools to catch new historical phenomena because of its rigid distinctions. International law is very much a statist project: states are immune from intervening in their internal affairs, and international humanitarian law was manifestly lacking in its treatment, as the Hague Regulations only protect individuals and not groups and do so only during wartime; civilians attacked by their own states are left unprotected. Moreover, the war crimes approach favours a discrete approach that prohibits certain crimes without presenting the link between them. What Lemkin saw as the essence of the crime was left untreated by current legal protection.

We see that in the 'discovery' of genocide, law played a dual role, both as an aiding tool in revealing the crime (legal philology) and as a limiting and obscuring factor (i.e.—statist bias of international law). As to the former, what is interesting for us in terms of understanding the link between law and history is the fact that Lemkin developed his sophisticated understanding of genocide by mostly studying legal documents, without having access to minutes of secret meetings or the subjective state of mind of the leaders. The law itself reveals the system, because the system *needs* the law in order to operate: since the target is a group and since every aspect of group life is affected, a coordination must be achieved between all arms of government and private sectors to create a total exclusion, disintegration and eventually—annihilation of a group.

How did genocide and cultural genocide fair in the courtroom? The next significant stop in our journey is the International Military Tribunal (IMT) at Nuremberg. Although Lemkin (as well as Jewish organizations) tried to influence the design of the indictment (and even suggested a separate trial be dedicated to the Jewish Holocaust), eventually the aggressive war paradigm persisted in a way that prevented a significant change in the capacity of law to cope with the new type of criminality that unfolded. Significant for cultural genocide was the fact that the required link to aggressive war (through art. 6(c) of the London Charter) meant that most of the acts considered by Lemkin to be techniques of genocide were left outside the temporal scope of the indictment (1939–1945). And so we are left with a legacy of international criminal law
p. 1085 that cannot release itself from ↳ legalistic constraints of precedents and the criminal law rule of *nullum crimen sine lege*. Yet law alone cannot explain the difficulty of addressing the new historical phenomenon of

genocide because one can find behind the legalistic considerations a deeper, political concern about creating a precedent that will undermine state sovereignty. Such was Robert Jackson's concern regarding interference in a state's internal affairs (the U.S. treatment of its black population, for instance).[4]

Another factor raised by legal historians to account for the blindness of the trial in relation to genocide is the absence of victims' testimonies from the Nuremberg proceedings, a fact that some scholars have connected with the perceived marginality of genocide in Nuremberg. New historical research reveals the many attempts of Jewish organizations to join the process, not only as witnesses but also as prosecutors, *amici curiae*, and as the ones that suggested to designate a special crime 'against the Jewish people' or even dedicating a separate trial to the Holocaust.[5] The underlying assumption of such revisionist history is that had the victims participated in the trials in a meaningful way, genocide would have taken a more central place. Yet recent historical research reveals a process by which law has gradually grasped the centrality of genocide, as the trial progressed and new evidence was revealed—despite the relative lack of survivor witnesses.

Such research reveals that the Holocaust was not entirely absent from the proceedings. To give a few examples: Kim Priemel shows that it was very much present in the deliberations as they are reflected in the trial sessions' transcripts and that it had influenced sentencing. Lawrence Douglas shows that in the subsequent trials by the Nuremberg Military Tribunal (NMT), crimes against humanity was the prevalent category: as the facts of the magnitude of Nazi criminality unfolded, law was being adapted; Control Council Law No. 10 severed the link to aggressive war and provided a more comprehensive definition of crimes against humanity than the London Charter. Regarding cultural genocide in Nuremberg, Alexa Stiller studied the NMT trials and, specifically, the Race and Settlement Main Office of the SS (*Rasse- und Siedlungshauptamt der SS*, RuSHA) trial. She shows that the prosecution was well aware of Lemkin's theory, quoted from his book, and specifically dedicated the trial to the 'positive' aspect of genocide—positing it as a complementary to the IMT, which dealt with the 'negative' aspect. Yet these efforts did not bear the hoped fruit: the judges were not persuaded that the crime of genocide was indeed part of international law and hence did not use it as a legal category. Instead, they particularized the Germanization plan into discrete war crimes. Likewise, the mass murder of the Jews underwent de-contextualization—from a broad Nazi
p. 1086 policy ↳ executed in stages and by various techniques to a narrow perception of murder only, perpetrated by SS men. Again, the available legal tools and legal imagination were inadequate to capture the realities of the atrocities that pervaded Europe only a few years earlier.[6]

Was the fact that almost no Jewish survivors have testified at the IMT a decisive factor in the tribunal's comprehension of the essence of genocide as mass murder? Historians believe that the tribunal was not disposed to hearing testimonies about the cultural destruction that befell European Jewry.[7] This is especially evident in the testimony of one of the only Jewish survivors, who was summoned by the Russian prosecution to give testimony. Abraham Sutzkever, the famous Jewish-Lithuanian Yiddish poet who lost most of his family, also had a central role in the efforts to rescue Jewish cultural property in Vilna during and immediately after the war. Despite this unique role in relation to the Jewish cultural genocide, Sutzkever's testimony focused on the collective murder, and he was not asked about the cultural destruction nor his efforts in cultural rescue.[8] One remote echo for the cultural side of the genocide appeared in Sutzkever's request to testify in Yiddish—the language of most of the murdered Jewish victims—a request that was denied as Yiddish was not one of the four official languages of the trial, and hence no translator from this language was available.[9]

The IMT and NMT were not the only trials that dealt with the Nazi atrocities. Soon after the war, Poland had established a tribunal to judge major Nazi criminals active in Poland during the occupation, in accordance with international and Polish criminal law. Being a national tribunal of the persecuted group, it was much more sensitive to the cultural destruction and Germanization that set upon Poland and the Polish population. This was manifested in the trial of Gauleiter Artur Greiser, where the tribunal found that the

German occupation in Poland was manifested, among other things, in religious and cultural repression—
p. 1087 both termed 'genocidal' and both found to be part of the Germanization of Poland. Moreover, both negative
↳ and positive aspects of Nazi persecution were considered by the tribunal, following Lemkin's structural analysis of the crime. We see then that in this case, cultural genocide came to the fore, inter alia, due to the willingness of the court to hear survivor witnesses, to introduce historians as expert-witnesses (expanding the narrow understanding of eyewitness), and adopting Lemkin's theory of genocide, notwithstanding the official mandate to investigate 'war crimes.' Again, it was not only law or history that played a role in revealing cultural genocide, but to no small account, also the political will of the Polish authorities.

Can we assume then that national courts of the victims' group are more favourable towards the prosecution of cultural genocide? Not necessarily so.

Another famous national trial was that of Adolf Eichmann in 1961, in Israel. Although here, too, the trial was conducted by the victim group, and the testimonies of survivors were given centre stage, the narrative that came out of this trial was very different. To understand that, we need to listen to the voices that were not heard and to the voices that were heard but were dismissed and forgotten. The poet Abraham Sutzkever—whom we met as a witness at Nuremberg—was not called to the stand in the Eichmann trial (although by that time he had already moved to Israel). The historian Salo Baron of Columbia University testified at length as expert historian, but his testimony, which was rather long, is not etched into the collective memory of the trial. Rachel Auerbach, a prominent figure among survivors, testified to the cultural destruction and cultural and spiritual resistance at the Warsaw ghetto, but her testimony, too, did not resonate in the judgment or collective memory of the trial. What is common to these three individuals that can explain such forgetfulness? We claim that their prominence in the domain of cultural salvage and rejuvenation made them less attractive in the eyes of the Israeli prosecution. The latter had a very clear view of the trajectory of the story which can be summarized in the motto 'from Holocaust to Revival' (*Mi'Shoa le'Tkuma.*) The narrative centred on the importance of the establishment of the state of Israel, and the trial emphasized the physical aspect of both parts: physical genocide and military resistance.

Apart from his cultural salvage efforts during and after the war, in Israel, Sutzkever was a leading Yiddish poet and publicist. To him, the fact that Yiddish was absent from the trial—the proceedings were not simultaneously translated into the language that many survivors and families of victims spoke—was a lamentable fact, as he saw the Yiddish itself as another victim of the Nazis. This—as well as the marginal place of cultural genocide in the trial—was criticized by other survivors as well.[10]

Professor Baron, who testified at length to the destruction of Jewry in Europe, tried also to convey the enormous cultural destruction: libraries and collections that were compiled throughout many generations
p. 1088 erased with one throwing of ↳ a torch. To him, the genocide was not less cultural than it was physical, and the revival, too, needs to be achieved on both planes. In his testimony, Baron tried again and again to bring up cultural genocide and referred to the organized Jewish campaign for cultural restitution and reconstruction. By doing so he produced a subversive narrative of the Jewish genocide, in competition with that promoted by the prosecution, as for him revival could also be achieved outside Israel. Significantly, one of the only times he mentions the term genocide is in reference to the plunder of Jewish libraries for the purpose of 'scientifically' proving their inferiority.[11]

Another fascinating testimony was that given by Rachel Auerbach, who was also a prominent figure among the survivors and who has dedicated her life to the recording of testimonies from the Holocaust. In fact, she had already begun this enterprise during the war, in the Warsaw ghetto, and continued it after the war in the Central Jewish Historical Commission in Poland[12] and later in Israel, in Yad VaShem (the central Holocaust memorial institute in Israel). Auerbach, who was a journalist, was a careful observant of Jewish life in Warsaw from the 1920s until after the war. This span allowed her to witness first the vibrant and rich Jewish life that existed in Warsaw prior to the war and then the Nazi attempts to obliterate it. Her testimony offers

a shrewd understanding of the goal the Nazis had tried to achieve by issuing edicts prohibiting religious, educational, and cultural activities: 'Coinciding with the administrative and economic restrictions designed to cut us off from all sources of livelihood, *they wanted to break us from the spiritual point of view.*' This understanding shares with Lemkin's holistic notion of genocide: '*this was also a prelude to physical destruction, to humiliate us and to convince their own people and the world at large that this was a nation of parasites who were not fit to live in the world*, that they were a kind of gypsies'. Auerbach also testified at length to the creative activities that were happening in the ghetto (in which she played an active role), despite the prohibitions—and probably with an urgency owing to them.[13] During her testimony, the prosecution did relate to these activities as 'keep[ing] together body and soul of the Jews' but in the judgment the emphasis is on the 'inconceivable feats of heroism performed by ghetto-fighters, by those who mutinied in the camps, and by Jewish partisans'. One wonders whether this extends also to the
p. 1089 activities of spiritual resistance of the kind Auerbach ↳ described, which she viewed as equal to military resistance and an important counter-measure to cultural genocide.

Thus we see that although the occasion for highlighting cultural genocide was present in the Eichmann trial, it was nevertheless marginalized, mainly because it did not fit the hegemonic-ideological perception advanced by the trial.

Perhaps the fact that the *crime against the Jewish people* which Eichmann was indicted of was based on the model of the *Convention on the Prevention and Punishment of the Crime of Genocide* was a factor in the prosecution's ignorance of cultural genocide, although it is important to mention that the Israeli law was broader than the Convention in respect to cultural genocide and included subsections: (5) forcibly transferring Jewish children to another national or religious group; and (6) destroying or desecrating Jewish religious or cultural assets or values.[14] Yet, Eichmann was not charged with any of these.

The Genocide Convention in its final form presents only an echo of the attempt to include cultural genocide, i.e. the prohibition of 'Forcibly transferring children of the group to another group' (Art. II, para. e). Yet cultural genocide was the subject of several debates during the drafting of the Convention. This is no surprise, as Lemkin was appointed as one of the three legal experts to help design the Convention. Not only because what was for him a disappointing outcome of the IMT, Lemkin had always believed that a concerted international effort was needed in order to prevent the destruction of groups.[15] Loyal to his view, he, of course, endorsed the inclusion of cultural genocide as one technique of destroying a group among others. But his position was opposed to from the beginning, first by the other two experts. They opined what later became a recurrent theme in the objection to the inclusion of cultural genocide in a treaty to prevent genocide: cultural genocide is an undue extension of 'pure' genocide and is just an attempt to revive the (failed) pre-war minorities protection regime. Cultural genocide nevertheless entered the draft they had proposed, together with the other seven techniques enumerated by Lemkin, grouped under three categories —physical (causing death), biological (preventing births), and cultural (destroying a group's specific characteristics).[16]

p. 1090 A later draft devoted a separate article to cultural genocide, and this draft was debated and voted on by the Sixth Committee of the UNGA. These debates show a clear chasm between the supporters of the inclusion and the objectors to it. And although the claims were cloaked with legalist arguments, the fault line between the two groups lies very much in the path of the historical experience of the countries these delegates represented. In the supporters group, we can thus find, for example, the delegates of Czechoslovakia and Pakistan, whose arguments were that a group can be destroyed by destroying its cultural foundations; or even that not only were physical and cultural genocide intrinsically linked, cultural genocide was the aim, whereas physical genocide was the means. The arguments of the objecting delegates reveal their fear that actions that their states routinely do and see as perfectly benign and required—such as assimilation practices—even forced ones—of minorities or indigenous groups living within their territory, or efforts made overseas, in the colonies—be captured by the Convention and be regarded as criminal.[17]

Eventually the article fell, with the formal reasoning that the Genocide Convention was not the adequate instrument. Rather, an instrument dedicated to the protection of human rights (such as the protection of language, religion, and culture under the Universal Declaration of Human Rights) or the respective national constitutional and criminal legislation protecting national minorities are more suitable. This, in fact, brought an end to the effort to establish an international criminal prohibition on cultural genocide. For us, what is fascinating about this endeavour is the way this exclusion shapes our understanding of genocide as we know it today: genocide is a plan of a rogue, authoritarian regime to exterminate a group within its control. Actions taken by a democratic state within its borders, or in its colonies, which do not amount to systemic killing but that nevertheless destroy whole groups, do not amount to genocide, and the legal treatment—if any—is left to other instruments.

Where in law today can we nevertheless find treatment of cultural destruction? Today, cultural destruction can be prosecuted as a war crime in and of itself (as was recently done in the ICC's *Al-Mahdi* case), and it can serve as an evidentiary tool to prove the special intent needed to commit genocide in international criminal law trials.[18] Current international criminal law also allows for compensation, through the system of the ICC: art. 75 of the Rome Statute envisions compensation to victims, and art. 79 established the Trust Fund for
p. 1091 Victims (TFV) whose mandate is inter alia to implement Court-Ordered reparations. Yet the ↳ earlier exclusion of cultural genocide means that compensation—if given—will be limited to physical genocide.[19]

Conclusion

This chapter explored the relations between law and history by following the transformations in the concept of cultural genocide in the period of its inception during the 1940s. While many claim that the difficulty to understand the varied histories of genocide comes from a 'definitionalist' approach that tries to fit the historical case to a strict legal definition, it points to the creative potential of the law and how it was initially used to understand the novelty of genocide as a crime targeting a group. The chapter showed that both at Nuremberg and during the Convention deliberations, the struggle was simultaneously an attempt to recognize a new crime and also to keep it in strict boundaries so that it will not be used to review the discriminatory policies of democratic states against domestic minorities and indigenous peoples. Since the concept of cultural genocide undermined the clear distinction between authoritarian states and democratic states, it is no wonder that the opposition to its inclusion both in the Nuremberg trial and in the Convention was very strong. However, when the victim group managed to conduct criminal domestic trials, there was more room for cultural genocide.

In conclusion, mention must be made of a recent case argued before the ICC that demonstrates law's continuous struggle to recognize cultural genocide. In September 2016, the ICC rendered its first verdict that deals entirely with cultural destruction, *Prosecutor v. Al Mahdi.*[20] The decision was lauded for its recognition of the link between an attack on a group's culture and its destruction and for the precedential value of such recognition in international criminal law. As one commentator noticed: 'The courts have been slow to recognize this, but there is a clear link between crimes committed against people and attacks on their
p. 1092 cultural heritage.'[21] However, in so doing, the court did not invoke the crime of genocide that ↳ deals with the destruction of groups and indicted the accused for the more limited war crime of destruction of cultural property.[22] We thus find that despite the growing public recognition in the importance of the prohibition of cultural genocide—for instance, in relation to the wars in Iraq and Syria, as in the struggles of indigenous peoples to recognize their cultural genocide—the law is still struggling to adjust itself to deal with the historic phenomenon of cultural genocide.

Moreover, lately the process for compensation in the Al-Mahdi case has started: 135 applications for reparations were submitted, and two documents of observations have been filed: one by *Fédération*

internationale des ligues des droits de l'Homme and *Association malienne des droits de l'Homme*, the other by the defence. The former points to a vast array of victims, starting from the mausoleums' guardian families and extending to the people of Mali, and discusses material as well as mental harm, referring to the point made by the Chamber regarding the bond between the people of Timbuktu and its mausoleums. The defence's document lays down the principles for reparations, pointing to the fact that 'the attacked mausoleums neither had their own legal personality, nor were they the property of determined natural persons', and that 'Mr Al Mahdi's liability and capacity cannot be measured against those of a State', eventually asking that collective reparations shall be set. We see in these both an attempt to view cultural property as intrinsic to the group's self perception and central to its identity (in the first document), as well as a recent demonstration of the 'reparations gap' in ICL (in the second document). The fact that the buildings that were ruined are also valuable to the common heritage of mankind is evident in the restoration work performed through UNESCO.[23] In August 2017, the ICC has rendered its Reparations Order in this case.[24] It appears to be an understanding by the Court that protection of culture is intrinsically linked to the protection of groups, as the Court favours collectivist compensation over individual one. Two main factors hinder the Court's action, though: the first is that the indictment was for War Crimes (and not genocide), and the second is that the Rome Statute's framework is an individualistic one—and moreover, criminal and not civil. Therefore, the Court devised a dual model, by which direct victims who suffered exclusive harm (such as those whose livelihood exclusively depended on the buildings, or those whose ancestors were
p. 1093 buried in the destroyed graves) are ↳ entitled to individual compensation. As to other victims—whose claims the Court has accepted as belonging to the wider circles of harm—the Court ordered they should be collectively compensated. Thus, in this recent case, it is revealed how almost seventy years after the adoption of the Genocide Convention, international law is still struggling with the concept of cultural genocide, trying to fit it to the available rubrics of state, individual, and humanity. Lost is the earlier understanding of the need to recognize the cultural group or the heritage community by allowing for a more participatory model of engaging the persecuted group in the struggle to bridge the gap between law and history.

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Notes

1 See, inter alia, Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (2016) 20–1 ff; Alexa Stiller, 'Semantics of Extermination: The Use of the New Term of Genocide in the Nuremberg Trials and the Genesis of A Master Narrative', in K. C. Priemel, Alexa Stiller (eds.), *Reassessing The Nuremberg Military Tribunals* (2012) 104, 106 ff; Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006) 168 ff; Ana Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2009) 20(4) *European Journal of International Law* 1163 ff; James Loeffler, 'Becoming Cleopatra: The Forgotten Zionism of Raphael Lemkin' (2017) *Journal of Genocide Research* 340; A. Dirk Moses, 'Lemkin, Culture, and the Concept of Genocide', in Donald Bloxham, A. Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (2010) 19 ff; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (2016).

2 Sands (n. 1) 168–9 ff.

3 For an elaboration of each of these techniques see Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944) 82–90 ff.

4 Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001) 50 ff.

5 This demand for a 'Holocaust trial' stood in opposition to the functional/structural approach of the prosecution in the NMT (devoting different trials to the involvement of various sectors.) Mark Lewis devotes a chapter in his book to the World Jewish Congress' (WJC) efforts to instigate a 'new justice' paradigm; Mark Lewis, *The Birth of the New Justice* (2014) 150–80 ff.

6 Lawrence Douglas, 'Crimes of Atrocity, the Problem of Punishment and the Situ of Law', in Predrag Dojčinović (ed.), *Propaganda, War Crimes Trials and International Law* (2012) 269, 271, 272 ff; Kim Priemel, 'Beyond the Saturation Point of Horror: The Holocaust at Nuremberg Revisited', in Daniel Hedinger, Daniel Siemens (eds.), *The Trials of Nuremberg and Tokyo revisited* (2016) 522 ff; Alexa Stiller, 'Semantics of Extermination: The Use of the New Term of Genocide in the

Nuremberg Trials and the Genesis of A Master Narrative', in K. C. Priemel, A. Stiller (eds.), *Reassessing The Nuremberg Military Tribunals* (2012) 104 ff.

7 Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (2001).

8 *Nuremberg Trial Proceedings* Vol. 8, 27 February 1946, 301–7 ff. Despite the focal point of the testimony being the physical destruction, Sutzkever did not fail to mention by name a few figures of Jewish cultural life—a scientist, the president of the Jewish Society of Vilna, a historian, and a writer—that were murdered by the Nazis in Vilna, so as to hint at the grave cultural destruction obscured by the sheer number of murdered victims (Ibid., 303, 305).

9 Laura Jockusch, 'Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany' (2012) 19(1) *Jewish Social Studies* 107, 108 ff.

10 Gali Drucker Bar-Am, 'The Holy Tongue and the Tongue of the Martyrs: The Eichmann Trial as Reflected in Letste Nayes' (2014) 28(1) *Dapim: Studies on the Holocaust* 17 ff.

11 Testimony of Salo Baron, Session no. 13 (24 April 1961) 158 ff (English translation available from <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-013-01.html>, accessed 2 February 2017).

12 Laura Jockusch, 'Historiography in Transit: Survivor Historians and the Writing of History in the Late 1940s', *Leo Baeck Institute Year Book* vol. 58, (2013) 75–94 ff. [Immediately after the war Jews in fourteen countries established historical commissions for the purpose of researching the recent annihilation of European Jews. The Jewish historical commission in Poland was headed by historian Philip Friedman, and Rachel Auerbach joined it.]

13 Testimony of Rachel Auerbach, Session no. 26 (3 May 1961) 361 ff (English translation available from <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-026-01.html>, accessed 10 July 2017).

14 The Nazis and Nazi Collaborators (Punishment) Law 5710-1950 [Nazis Punishment Law]. The preparation work of the Nazis Punishment Law shows that the drafters were aware that the cultural element was absent from the Convention and wanted to rectify such omission by adding sub-para. 6. See Orna Ben-Naftali and Yogev Tuval, 'Punishing International Crimes Committed by the Persecuted' (2006) 4 *Journal of International Criminal Justice* 128, 133 ff.

15 This is present in his 1933 attempt to advocate for the international prohibition on the crimes of 'vandalism' (attacks on culture and heritage) and 'barbarity' (the destruction of groups) and the application of universal jurisdiction on them. Raphael Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations', *Additional Explications to the Special Report Presented to the 5th Conference for the Unification of Penal Law in Madrid (14–20 October 1933)* available at <http://www.preventgenocide.org/lemkin/madrid1933-english.htm> (accessed 29 January 2017).

16 UN Doc. E/447 26 June 1947 Draft Convention on the Crime of Genocide, Art. I, para. II, sub-ss. 1, 2, and 3. Cultural genocide was explained in the draft as consisting 'not in the destruction of members of a group nor in restrictions on birth, but in the destruction by brutal means of the specific characteristics of a group'. Ibid., 26 ff.

17 UN Doc. A/C.6/SR Third Session of the General Assembly, Sixth Committee, Eighty-Third Session 25 October 1948 193–207.

18 See Schabas' review of this point in William Schabas, *Genocide in International Law: The Crime of Crimes* (2009) 2nd edn., 216–19 ff.

19 This, without relating to the 'reparations gap' identified by scholars, by which reparations are not 'a natural dimension of criminal law' and that it is almost impossible for victims of convicted perpetrators to receive compensation in civil courts. Novic (n. 1) 203–4 ff.

20 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence (27 September 2016).

21 Marlise Simons, *Extremist Pleads Guilty in Hague Court to Destroying Cultural Sites in Timbuktu*, *New York Times*, 23 August 2016, at A8, citing Andras Riedlmayer, a scholar of Islamic art and architecture at Harvard. This article is also available online at <http://www.nytimes.com/2016/08/23/world/europe/ahmed-al-mahdi-hague-trial.html?_r=0> (accessed 6 May 2018).

22 Al Mahdi was convicted of a war crime under the Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 38544, Art. 8(2)(e)(iv). Art. 8(2)(e) refers to war crimes committed in the context of a non-international armed conflict. Para. (iv) criminalizes acts: 'Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.'

23 'Reconstruction of Timbuktu mausoleums nears completion' 30 June 2015 <http://whc.unesco.org/en/news/1307/> (accessed 29 June 2017).

24 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Reparations Order (17 August 2017).

* This essay grew out of a research project on the history of cultural genocide. For a comprehensive and extended elaboration of our findings see, L. Bilsky, R. Klagsbrun, 'The Return of Cultural Genocide?' (forthcoming *European Journal of International Law*, 2018).