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Rethinking the Protected Object of Genocide: From Demographic Groups to Forms of Life

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Abstract

The Genocide Convention protects national, ethnical, racial, and religious groups defined in demographic terms. Yet Raphael Lemkin's original concept of genocide referred to a broader object: the destruction of a people's "national pattern," including the cultural and intergenerational forms through which collective existence is sustained. This article argues that the Convention's narrowing of the protected object produced a lasting mismatch between legal category and social phenomenon. That mismatch helps explain two persistent problems: the complaint that the Convention is too narrow to capture real cases of collective destruction, and the complaint that "genocide" has been rhetorically inflated in political usage. To address this, the article reconceives the protected object through the philosophical category of *form of life*, understood as an inherited, plural, and non-totalizable way of being together. Applied to Ukraine, Nagorno-Karabakh, and the Indigenous peoples of the United States, this reconception yields more determinate and symmetrical results. The article concludes that this recovery can be achieved through interpretation rather than treaty amendment.

Keywords: Genocide Convention; Raphael Lemkin; form of life; cultural genocide; international law; Ukraine.



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The warrant issued by the International Criminal Court in March 2023 charges the President of the Russian Federation and his Commissioner for Children’s Rights with the war crimes of unlawful deportation and unlawful transfer of Ukrainian children.¹ The fact pattern — the organized removal of children from one national group and their placement within another — corresponds, almost term for term, to Article II(e) of the Genocide Convention: forcibly transferring children of the group to another group. The Court nevertheless proceeded under the law of war crimes rather than under the Convention. The parallel provision of the instrument expressly designed for such conduct was not invoked. The gap between the conduct at issue and the legal category under which it has been prosecuted is a symptom of a structural feature of the Convention that this article identifies and proposes to address.

That structural feature is, in the first instance, a feature of the values the Convention carries. International law of the kind at stake here, with the law of the 1948 Convention, of the Responsibility to Protect endorsed at the 2005 World Summit,² and of the International Criminal Court, is the institutional form that a set of postwar civilizational commitments has taken. These commitments are what the postwar order, and the European project in particular, has learned to call values: human dignity, the rights of persons belonging to minorities, and the refusal to treat a state’s conduct toward the populations under its authority as a matter internal to that state. The European Union has named these values as constitutive of its own legal and political identity. Article 2 of the Treaty on European Union specifies “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” as the values on which the Union is founded; Articles 3(5) and 21 commit the Union to promoting these values in its external action.³ In institutional practice, the Union has been among the most consistent carriers of the atrocity-prevention framework that translates those values into international legal form: as financial and political backer of the ICC, as intervenor in *The Gambia v. Myanmar*, and as the political space in which the Responsibility to Protect has had its most sustained reception.

The argument of this article is that the protected object of the 1948 Convention, that is, the demographic group, specified by national, ethnical, racial, or religious membership, does not match the phenomenon the Convention was drafted to name. The original conception offered by Raphael Lemkin in 1944, and preserved in the Secretariat’s first draft, identified the object of protection as a people’s “national pattern,” understood as the interwoven fabric of language, memory, religion, law, and everyday practice through which a group transmits itself across generations.⁴ The narrowing of the object to its demographic

substrate, completed by the Sixth Committee's deletion of the cultural register from the draft in the autumn of 1948, produced a law whose precision was in substantial part a political bargain among states whose own conduct the cultural register would have named. The resulting mismatch between category and phenomenon is the common cause of two complaints that have accompanied the Convention's application: that the category is too narrow to reach events competent observers recognize as of the same kind as the paradigmatic cases, and that the category has become available for inflationary appropriation in settings where its juridical discipline does not apply. The remedy proposed here is the recovery of Lemkin's original conception through the philosophical category of form of life, developed in the article's fourth section.

This article is offered as a contestation of the international legal framework: an internal critique, not a rejection, of the values-based architecture on which the European Union's external action substantially rests. The critique is advanced in the conviction that the values whose realization the Union has committed itself to are best served by a legal architecture whose protected object matches what those values were always trying to protect. The argument does not call for new institutions, new treaties, or new political commitments. It calls for the recovery of a conception already present at the Convention's drafting, and for the interpretive shift through which the recovery can be operationalized within the instruments the international legal order already possesses.

This article proceeds in five further sections. Section 1 reconstructs the 1948 drafting bargain through which Lemkin's tripartite concept was narrowed to its demographic core. Section 2 argues that the two standing complaints about the Convention are symptoms of a single underlying mis-specification of the protected object. Section 3 develops the reconception, specifying what an inherited, plural, non-totalizable form of collective existence is and how it can be destroyed along each of its constitutive roots. Section 4 applies the reconceived criterion to three cases, namely, Ukraine, Nagorno-Karabakh, and the Indigenous peoples of the United States, selected to press the criterion at distinct seams and to preserve the article's analytical symmetry. The final section identifies the institutional developments in which the interpretive shift is already visible and specifies the constraints the shift places on the state.

1. The 1948 Bargain: How the Protected Object Was Narrowed

The concept of genocide as Lemkin developed it in *Axis Rule in Occupied Europe* (1944) identified a single phenomenon operating across three registers. The physical register consisted of the direct killing of a group's members and the imposition of conditions calculated to produce their death. The biological register consisted of measures that prevented births and forcibly interrupted generational continuity. The cultural register consisted of the suppression of language, the destruction of religious and intellectual institutions, the looting of libraries and archives, and the prohibition of the cultural practices through which a people transmits itself across generations.⁵ For Lemkin, these three registers were not alternative modalities of a single crime but aspects of a single phenomenon: the coordinated attack on what he termed a people's "national pattern," understood as the interwoven fabric of language, memory, religion, law, and everyday practice constitutive of a group's continued collective existence. The possibility that a people could be destroyed while its individual members remained alive was the analytical provocation of the term.⁶

The tripartite structure was preserved in the Secretariat's first draft of the Convention, issued as document E/447 on 26 June 1947 under the supervision of Henri Donnedieu de Vabres, Vespasian Pella, and Lemkin.⁷ The Ad Hoc Committee on Genocide, meeting at Lake Success in April and May 1948, narrowed the cultural register substantially while retaining it as a distinct category.⁸ By the autumn of 1948, when the draft reached the Sixth Committee of the General Assembly, cultural genocide remained in the text as a defended sub-category, but a coalition had formed against it. The historical record of the coalition and its formation has been reconstructed in the standard drafting-history scholarship, on which the account that follows draws.⁹

The coalition's composition warrants specific attention, because it bears on the diagnostic argument developed in the following section. The Soviet Union opposed the cultural provision in the context of its own ongoing program of forced population transfer, which between 1941 and 1949 deported, in whole or in substantial part, the Volga Germans, the Karachays, the Kalmyks, the Chechens and Ingush, the Balkars, the Crimean Tatars, the Meskhetian Turks, and further populations including Baltic peoples and ethnic Greeks and Armenians of the Crimean and Black Sea regions.¹⁰ The United States opposed the provision with reference to the continuing regime of racial segregation and to the federal Indian boarding school system, whose operating doctrine had been articulated by its principal architect, Richard Henry Pratt, in the terms "kill the Indian in him, and save the man," and

which remained in active federal operation at the moment of the drafting.¹¹ Canada opposed the provision on substantially identical grounds, its residential school system then still in its last phase of expansion.¹² Australia opposed it in the context of the child-removal policies subsequently documented as the Stolen Generations.¹³ South Africa opposed it as the legislative apparatus of apartheid was being consolidated by the newly elected National Party government. France opposed it in the context of the *mission civilisatrice*, then still the organizing doctrine of its empire in Algeria and Indochina. The United Kingdom opposed it during the violent middle years of its imperial withdrawal. New Zealand opposed it. Sweden entered reservations. The coalition was composed of states whose domestic or colonial practices, at the moment of the vote, instantiated conduct that the cultural provision would have criminalized.¹⁴

The objections offered in the Sixth Committee debates were heterogeneous. Several delegations argued that the concept of cultural destruction was insufficiently determinate for criminal law; others argued that cultural protection belonged in a separate instrument on minority rights; still others argued that the inclusion of cultural genocide would dilute the moral weight of the physical register.¹⁵ Each objection was advanced by delegations that had reason to find it congenial. Each was answered in committee by delegations that supported retention. On 25 October 1948, the Sixth Committee voted by twenty-five to sixteen, with four abstentions, to strike the cultural provision from the draft.¹⁶ A single element of the excised cultural register was preserved: the forcible transfer of children of the group to another group, retained as Article II(e). The provision was retained because no delegation was prepared to be recorded as opposing it, and because it was formally classifiable as a biological rather than a cultural offense, consistent with the physical-biological emphasis of the narrowed definition. The Convention was adopted by the General Assembly as Resolution 260 A (III) on 9 December 1948, the day before the Universal Declaration of Human Rights.¹⁷

Two analytical consequences follow from this drafting history, and both bear on the argument of the sections that follow. The first is that the Convention's demographic precision was in substantial part a political bargain, not a conceptual refinement. The coalition that struck the cultural provision was not a coalition of legal minimalists or philosophical skeptics; it was a coalition of states whose own conduct the provision would have reached. The Convention's definitional boundaries were drawn, in part, to exclude that conduct from the category the instrument created. The second consequence is structural. The forms through which collective existence is actually carried, i.e., language, liturgy, pedagogy, archive,

landscape-relation, and the structures of kinship and transmission, were removed from the protected object. Only the physical substrate of collective existence and the biological mechanism of its generational renewal remained inside it. Article II(e) stands in the adopted text as a textual hinge between the excised cultural register and the retained physical-biological one, preserving in miniature a conception of the protected object that the Convention as a whole had rejected. The juridical and political consequences of that asymmetry have developed across seventy-seven years of the Convention's application, and they are the subject of the following section.

2. Two Complaints, One Cause

The Convention, as adopted, has attracted, in the decades since 1948, two sustained criticisms that are typically treated as opposed to each other. The first holds that the Convention's definition of genocide is too narrow to encompass a substantial portion of events that competent observers recognize as of the same kind as the paradigmatic cases the instrument was designed to address. The second holds that the category has undergone inflationary appropriation in political usage, detaching the term's moral charge from the juridical discipline of its application. The argument of this section is that these two criticisms are not opposed in the way their holders have taken them to be. They are symptoms of a single structural feature of the Convention: the misspecification of the protected object identified in the above section.

The narrowness complaint rests on the conjunction of two elements of Article II as jurisprudentially interpreted: the demographic specification of the protected group, and the specific-intent requirement, the *dolus specialis* of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The jurisprudential hardening of the specific-intent requirement has been well documented. In *Prosecutor v. Krstić*, the International Criminal Tribunal for the former Yugoslavia treated the coordinated destruction of the Bosnian Muslim community's cultural and religious fabric as probative of genocidal intent but expressly declined to treat such destruction as itself constitutive of the crime.¹⁸ The International Court of Justice, in *Bosnia and Herzegovina v. Serbia and Montenegro* and again in *Croatia v. Serbia*, narrowed the specific-intent standard to the point where, outside the Srebrenica finding itself, the Court recognized almost no modern perpetrator as having satisfied it.¹⁹ A parallel construction operated in the specification of the protected group. In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda classified the Tutsi as

a protected ethnical group notwithstanding the scholarly debate over whether the Tutsi-Hutu distinction is properly characterized as ethnic or as a social-class distinction stabilized by colonial administration.²⁰ The classification was defensible on the evidentiary record, but it illustrated the constructive character of the Convention's group categories: the demographic specification is not given in advance of the adjudicative context but is stabilized within it. The cumulative effect of this jurisprudence has been, as Schabas has characterized it, the progressive narrowing of the Convention's operative reach.²¹ The narrowness complaint, in its developed form, holds that the set of events legally recognizable as genocide has contracted to a range substantially smaller than the range of conduct the Convention's purpose plausibly encompasses.

The elasticity complaint runs in the opposite direction and is principally concerned not with Article II itself but with the rhetorical and political deployment of the term outside the Convention's formal application. The doctrinal development at issue is the Responsibility to Protect (R2P), endorsed by heads of state at the 2005 World Summit and articulated at paragraphs 138 and 139 of the Summit Outcome.²² R2P was developed, in part, as a response to the problem the narrowness complaint registers: its architects recognized that the Convention's high evidentiary threshold was poorly suited to atrocity prevention, and they proposed to widen the operative frame by treating four atrocity categories as collectively triggering a structured international response.²³ The widening was analytically disciplined within the doctrinal framework. Its secondary consequence, not adequately insulated against, was the migration of the genocide term from juridical into extra-juridical usage, in which the term's moral charge was retained while the disciplines of its legal application were not. Political actors and state propagandists acquired the capacity to deploy the term in settings lacking the Convention's evidentiary apparatus, relying on its rhetorical force to mobilize action or legitimize policy. The most prominent recent instance is the Russian Federation's characterization of events in Donbas as "genocide" in the period preceding the February 2022 invasion of Ukraine, a characterization for which no evidentiary record of the kind the Convention requires has been offered, but which was deployed in the official justifications of the invasion of Ukraine itself.²⁴ The elasticity complaint, advanced in varying forms by Schabas, by A. Dirk Moses, and by others, holds that the category is undergoing a process of conceptual wear: the retention of the term's moral charge in public usage, combined with the relaxation of its legal discipline, threatens over time to drain the category of its juridical traction.²⁵

The two complaints have typically been advanced by constituencies that view one another as responsible for the defect each registers. The narrowness critics have argued that restrictive interpretation underwrites the juridical insufficiencies they diagnose; the disciplinarians have argued that broadening the category produces the rhetorical inflation the elasticity complaint identifies. The apparent opposition is analytically misleading. Both complaints are products of a single structural feature of the 1948 text, which is that the protected object of Article II does not match the phenomenon the Convention was drafted to name. The mismatch produces two distinct pressures on the legal category. The first operates on the category's reach: a protected object under-specified relative to its phenomenon will fail to cover a proportion of the phenomenon's instances, and users confronted with uncovered instances will respond either by accepting the narrowness as the cost of precision or by extending the category through constructive interpretation. Both responses entail recognizable costs — jurisprudential conservatism on the one hand, the constructive permissiveness exemplified by the Srebrenica and Akayesu group constructions on the other.²⁶ The second pressure operates on the category's conceptual integrity: an under-specified protected object is available for rhetorical appropriation by users who recognize the term's moral weight but are not bound by its juridical discipline. The Russian deployment of the genocide term in 2022 is the form this pressure has taken in its most consequential recent instance.

The analytical implication that follows is that neither complaint can be answered on its own terms. The narrowness complaint cannot be resolved by further interpretive expansion of the demographic definition, because such expansion either reproduces the constructive permissiveness already identified or extends the category without a principled stopping point, thereby validating the elasticity complaint. The elasticity complaint cannot be resolved by disciplinary restriction of the term's usage, because restriction leaves the narrowness complaint in place and supplies no principled ground on which extra-juridical appropriations can be refused except on authority. What both complaints require is a re-specification of the protected object that matches the phenomenon the Convention was drafted to name: a specification that can bear the weight both complaints place upon it without producing the failure modes each registers. Such a specification is available and has been available since 1944: it is the specification Lemkin advanced in *Axis Rule*, that the Secretariat preserved in E/447, and that the Sixth Committee removed from the draft in October 1948. The task of the following section is to recover it and to develop it into a form adequate to the legal and philosophical pressures now placed upon it.

3. Forms of Life: Reconceiving the Protected Object

The recovery proposed here begins from a single phrase in Lemkin's 1944 text. What genocide destroys, for Lemkin, is the "national pattern of the oppressed group": the interwoven fabric of language, memory, religion, law, pedagogy, kinship, labor, and landscape-relation through which a collective existence is composed and transmitted.²⁷ This phrase, viewed through a philosophical lens, does more analytical work than its unassuming vocabulary suggests. A pattern, in Lemkin's usage, is neither a quantity of persons nor a set of ascribed traits. It is the way a collective existence is constituted: the tacit socio-ontological architecture within which the members of a group become legible to one another and capable of transmitting themselves to successors. Destroy a sufficient number of that group's members, and one has killed many people. Destroy the pattern, and one has produced a categorically different result: the condition that there is no longer a group for the survivors to be members of. The Convention, as adopted, recognized the first destruction and, with one exception, removed the second from its protected object.

The task of re-specifying that object in a vocabulary adequate to contemporary philosophical and legal discussion requires a term of art. The term proposed here is a form of life. The choice requires a brief note on philosophical inheritance. Ludwig Wittgenstein used *Lebensform* in the *Philosophical Investigations* to refer to the shared, unspoken background of practices within which a language is used, and its utterances are made intelligible.²⁸ The philosophical reception of the phrase has been extensive, and much of it has been quietist: forms of life are what one does not question, what one simply inherits and lives within. That register is not the one this article requires. The register required here is political, and for that the inheritance runs not through the *Investigations* but through twentieth-century political philosophy, through Hannah Arendt's analysis of plurality as the condition of politics, through Claude Lefort's account of the dissolution of the "markers of certainty" in democratic modernity, through Cornelius Castoriadis' theory of the social-imaginary institution of society, and through Achille Mbembe's critique of the colonial destruction of lifeworlds.²⁹ For reasons of compression, the present argument draws on two of these lenses in the body of the text: Arendt's on plurality and Mbembe's on the non-provincial scope of the concept. The others enter only insofar as they support the development of the principal argument.

A form of life, in the usage proposed here, is an inherited, plural, non-totalizable way of being together. Each adjective carries analytical weight. The form is inherited: it is not

chosen by its members in any ordinary sense, nor is it produced by contract; it is received from predecessors and, if genocide is not involved, transmitted to successors. The form is plural: it is composed of many elements (e.g., linguistic, religious, pedagogical, economic, ecological, jurisprudential, affective), none of which is master of the others. And the form is non-totalizable: it does not fit inside a single doctrine, a single narrative, or a single authoritative description. It exceeds every attempt, from within or without, to specify it exhaustively. This excess is what distinguishes a form of life from an ideology, which is precisely the attempt to close a form of life into a self-identical system, and from a worldview, which is the subjective residue of having been formed within one. A form of life is what an ideology seeks to replace and what a worldview remembers.

Two philosophical observations develop the concept in directions the legal argument requires. The first is Arendt's. Plurality, in *The Human Condition*, is the fact that the world is inhabited by persons who are each distinct and who can each act into a common world.³⁰ Plurality is the condition of politics. Totalitarianism, on Arendt's analysis, is the project of ending plurality by rendering human beings interchangeable and reducing the world from many to one. The destruction of plurality in the twentieth-century camps operated, as Arendt saw, not only at the level of persons but at the level of the forms of life within which persons become distinct. A language murdered is a loss of plurality of exactly the kind Arendt described, accomplished on the stratum of collective existence rather than on the stratum of individual members of a group. It is the same destruction performed on a different material. The extension of Arendt's analysis from persons to forms of life is not a departure from her argument; it is an application of it.

The second observation is Mbembe's, and it is a necessary corrective against the provincial reading of the argument. The colonial enterprise, as Mbembe has shown, was among other things a sustained destruction of African, Asian, and Indigenous forms of life, including languages and rites, pedagogies and sovereignties, or relations to land and to ancestors.³¹ The destruction did not require the evidentiary forms of a *Final Solution* to be total in its ambition; it required only the patient substitution of the colonizer's pattern for the colonized pattern, conducted, in varying times and places, through combinations of all three of Lemkin's original registers. The concept of form of life advanced here must be capacious enough to name what was done in the metropole and what was done in the colony, or it will reproduce in philosophical form the provincialism the 1948 drafters built into the Convention. This consideration, as I show in the next section, bears directly on the case selection through which the reconceived criterion is tested.

The key analytical claim of the reconception can now be stated. A form of life is polyrhizic.³² Its being is distributed across many roots, for example, in language, or kinship, archive, or economic practice, or land-relation, and none of these roots is the form's center, because a polyrhizic being has no center. A form of life can therefore be destroyed in the manner of a rhizomatic plant: not by the removal of a single locus, which it does not have, but by the severance of its roots, sequentially or in parallel, until the conditions for the form's continued existence are gone. The roots are many; the techniques of severance are many; the result is one. This was the phenomenon Lemkin described when he wrote of the Nazi project as a coordinated operation using mass killing, forced sterilization, language prohibition, the looting of archives, and the interruption of intergenerational transmission in a configuration that could not be properly understood by treating the elements as separate offenses that happened to co-occur.³³

The reconception implied here is ontological. The protected object of the law against genocide is not a demographic category, and it is not a set of persons sharing ascribed traits. It is a form of life: an inherited, plural, non-totalizable way of being together, polyrhizically composed and therefore destroyable along each of its constitutive roots.

Two standing worries should be met before they compromise the argument. The first is that the concept of form of life freezes what it names. If the form is what is inherited, does protecting it not privilege tradition over the ordinary revisions through which every living form renews itself? The worry is real, and the answer is structural: the form of life as specified here is, by its non-totalizable character, not identical to any given specification of itself. What is protected is the plural, inherited, revisable fabric, including its capacity for revision. A form of life that has ceased to revise itself has ceased in the relevant sense. The concept protects continuation, which requires change; it does not protect stasis. The second worry is that the concept invites relativism. If what is protected is plural forms of life, does the argument not abandon the universalist ground on which the postwar human-rights framework was built? The answer is that the universal invoked here is not a uniform human substance but plurality itself — the fact of there being many forms of life, and the refusal of any single form to claim the authority to abolish the others. This is what I have previously called differential universalism: universal because it applies without exception, differential because it does not presume a single content that universalization would propagate.³⁴ It is the universal that protects the many against the one.

4. The Criterion Applied: Three Cases

The reconception developed in the above section establishes a criterion for applying the genocide category. An act constitutes genocide, on the reconceived account, if and only if three conditions are jointly satisfied: the act targets the conditions of a plural, inherited form of collective existence as such; the act is accompanied by the intent that this form of existence cease; and the act, or the coordinated pattern of acts, occurs at a scale sufficient to threaten the continuation of the form. Each clause operates as a filter: cultural assimilation under economic pressure, language shift across generations, the ordinary political repression of a movement or faction, and episodic violence without coordination, each of which fails at least one of the three clauses. The criterion, by its own architecture, rules out most of what the contested uses of the term in recent political discourse have sought to cover. It is, in that respect, tighter than the jurisprudentially interpreted demographic definition of Article II. What follows applies it to three cases, chosen to press it at distinct seams while preserving analytical symmetry. The verdicts in each case are offered as applications of the criterion, not as findings of fact; the claim of this article is philosophical, not prosecutorial.

Ukraine. The Russian project in the territories of Ukraine occupied since 2014, and in the larger territories occupied since February 2022, presents an unusually legible case for the reconceived criterion. The *Russkii mir* doctrine articulated by the Russian state names, as its explicit objective, the absorption of Ukrainian national existence into a larger Russian form, a doctrine reiterated in presidential essays, state media, educational programs, and the operational orders of the occupation administrations.³⁵ On the occupied ground, the pattern is familiar to anyone who has read Lemkin: the suppression of the Ukrainian language in schools and public administration; the replacement of Ukrainian curricula with Russian curricula rewritten for the purpose; the forcible transfer of children to Russian families and institutions under the Article II(e) pattern that opened this article; the destruction or expropriation of Ukrainian libraries, archives, and religious institutions; the prosecution and killing of Ukrainian-speaking clergy, intellectuals, and civic leaders. UNESCO's verified damage to Ukrainian cultural sites had exceeded five hundred as of early 2026.³⁶ Each element is a severance of a specific root, be it pedagogical, archival, liturgical, or generational, and the doctrine names the whole as coordinated rather than incidental. The three clauses of the criterion are satisfied: the target is the Ukrainian form of collective existence as such; the intent that this form cease has been declared, not merely inferred; and the scale is sufficient to threaten continuation within the territories where the project is

operative. The demographic definition of Article II reaches this case obliquely, through the child-transfer clause and through the arguable ethnic targeting of specific categories of victim. The reconceived criterion reaches it directly. A complicating observation is appropriate: the securitization of politics and cultural policy during a protracted war can produce incidental pressures on forms of life within the defending state's own territory, and the Ukrainian state's wartime administration has not been exempt from these pressures.³⁷ Recognition of this does not qualify the application of the criterion to the Russian project; it does mark that the criterion is symmetrical in its operation.

Nagorno-Karabakh. The case of the Armenians of Nagorno-Karabakh presents a different seam. Here, the form of life was destroyed by the combination of population displacement and the subsequent destruction of its material infrastructure in the emptied territory. Following the nine-month Azerbaijani blockade of the Lachin corridor beginning in December 2022 and the military operation of September 2023, the entire Armenian population of the enclave was displaced within days. The International Court of Justice, responding to Armenia's application under the *Convention on the Elimination of All Forms of Racial Discrimination*, ordered Azerbaijan in November 2023 to ensure the safe return of those who wished to return and to protect the cultural heritage they had left behind.³⁸ The subsequent record has included the demolition and renaming of Armenian churches and khachkars, the substitution of Azerbaijani toponyms for Armenian ones, and the erasure of the cemeteries and archives through which the community's memory was carried. On the reconceived criterion, the case is legible in a way the demographic definition struggles to achieve: a plural, inherited form of collective life, carried for centuries by a specific population in a specific landscape, was ended in that landscape by the coordinated combination of population displacement and the destruction of the form's material supports. The intent to have the Armenian form of collective existence in Nagorno-Karabakh cease has been, if not declared, unmistakably enacted; the scale threatens the continuation of the form in the only place it had persisted in continuous presence. The case satisfies the criterion. Historical symmetry warrants a further observation: the Nagorno-Karabakh Armenians' displacement followed the displacement of Azerbaijani populations from the surrounding regions during the first Karabakh war of 1992–1994.³⁹ The criterion applies symmetrically across both displacements and takes no position on contested questions of historical priority; its purpose is to name what kind of harm each event constitutes.

The Indigenous peoples of the United States. The historical record of atrocities against the Indigenous peoples of the United States, across the long nineteenth century and

into the twentieth, is a record of coordinated destruction along each of the roots the reconceived criterion specifies. The killing and displacement of populations during the Indian Wars; the forced marches and concentrations of the removal era, of which the Cherokee Trail of Tears is the best-known instance; the federal Indian boarding school system, operated from 1819 until its phased closure in the twentieth century and acknowledged by the Department of the Interior's 2022 and 2024 reports as a program of cultural and linguistic destruction;⁴⁰ the allotment policy of the Dawes Act (1887), which broke up collective land tenure and the forms of kinship, labor, and law that tenure carried; the suppression of religious practices under successive federal policies; and the systematic substitution of the settler pattern for the Indigenous patterns across the North American interior, each is a severance along a specific root, and the sum is the coordinated pattern the criterion specifies. The United States was among the states whose opposition helped remove cultural genocide from the Convention; the boarding school system remained in federal operation at the moment of the drafting. The selection of this case is therefore not incidental to the article's argument. On the reconceived criterion the historical record satisfies each of the three clauses at scale.

The three cases, applied to the criterion with analytical symmetry, yield three determinate verdicts. The criterion does not turn every mass atrocity into genocide, and it does not make every historical wrong actionable in the present. It names what is at stake in the paradigmatic cases; it preserves the difficulty of the hard ones; and it does not exempt from its application the states whose draftsmanship shaped the Convention in 1948.

5. The Third Step: Interpretation Without Amendment

The reconception developed in previous sections does not require an amendment to the 1948 Convention. Treaty amendment on a question of this sensitivity is, at present, politically unavailable, and the argument of this article does not depend on its availability. What the argument requires is an interpretive shift: a reading of Article II in the light of the conception Lemkin brought to the Convention in 1944, and in the light of the jurisprudence the Convention has already generated along the seams where its demographic definition has proven insufficient. The shift is underway in practice, if not yet in doctrine, and its operational foundations can be identified in the existing case law.

Three institutional developments mark the current trajectory of the interpretive shift. The first is The Gambia's 2019 invocation of Article IX of the Convention against Myanmar, and the International Court of Justice's subsequent orders of provisional measures and

jurisdictional ruling.⁴¹ What the case has established, independent of its eventual merits disposition, is that the Convention's obligation *erga omnes partes*, long asserted in doctrine, is operative in practice: the community of states parties can act through the Court to protect groups none of whose members are their nationals. The Rohingya pleadings include, alongside the killings and deportations, the coordinated destruction of villages, religious institutions, and the social fabric of intergenerational transmission; the Court, when it reaches the merits, will be asked to consider the case in its full scope. The second development is the International Criminal Court's jurisprudence on cultural heritage, developed in *Prosecutor v. Al Mahdi* and extended in the Office of the Prosecutor's 2021 Policy on Cultural Heritage.⁴² The Court in *Al Mahdi* treated the destruction of Timbuktu's religious and cultural sites not merely as property damage but as an attack on the collective identity of the community whose sites they were. The reasoning is adjacent to the criterion developed in this article; it does not yet articulate that criterion, but its principled extension into the Convention's interpretation is a short step. The third development is the International Court of Justice's November 2023 order in *Armenia v. Azerbaijan*, which required the protection of Armenian cultural heritage in the evacuated enclave alongside the safe return of its population.⁴³ The case was brought under the *Convention on the Elimination of All Forms of Racial Discrimination* rather than the *Genocide Convention*, a jurisdictional choice dictated by Azerbaijan's reservations rather than by the substance of the harm. The substance of the harm, which was the coordinated destruction of the material supports of an Armenian form of collective life in the territory where it had persisted, was what the Court ordered protected. A court that orders the protection of cultural heritage as an incident of preventing racial discrimination has, in practice, recognized what the reconceived criterion names, even where the applicable treaty does not yet have the vocabulary to name it directly.

Each of these developments shows the international legal order reaching, within the instruments it has, for the object that the reconceived criterion specifies. What is missing is the conceptual consolidation that would allow the Convention itself to carry the full weight of the reading Lemkin originally proposed. That consolidation is the task of courts, of commissions of inquiry, of the UN Special Adviser on the Prevention of Genocide, and of the scholarly community that supplies the law with its concepts. The European Union, as the principal institutional carrier of the atrocity-prevention framework in the present order, has a particular stake in the consolidation: the values the Union has committed itself to protect in its external action, named in Article 2 of the Treaty on European Union and operationalized through the Union's support of the International Criminal Court and its intervention in *The*

Gambia v. Myanmar,⁴⁴ rest on a legal architecture whose protected object is currently mis-specified relative to what those values were always trying to protect. The reconception proposed here completes that architecture by finally supplying the specification that the 1948 drafting withheld.

The implication for the relationship between the state and the law, the question this article began from, and the question that has traveled through its argument under the figure of the Leviathan, can now be stated in its full form. The Convention of 1948 established, against the resistance of the great powers of the day, that a state's treatment of the populations under its authority is not a matter exclusively domestic. *The Responsibility to Protect*, adopted in 2005, extended that principle from punishment to prevention and protection. The interpretive shift proposed here completes the principle by naming what the state is constrained from doing: a state's sovereignty does not include the authority to abolish the forms of life over which it is exercised. This is a constraint on the power of the Leviathan that does not require a larger Leviathan to enforce. It requires only that the law name what genocide actually destroys, and that the courts charged with applying the law be willing to read it in the light of what it names.

The recovery proposed in this article is neither institutional expansion nor doctrinal revolution. It is the completion of a conceptual repair that has been deferred since 1948, and the cases of the present century have made further deferral impossible. A people is destroyed not only through the destruction of its persons but through the breaking of the pattern by which its persons become members of the people they were born into. The pattern has many roots in different forms of cultural presence and creativity, and a coordinated state project that severs each of these roots, at sufficient scale, destroys a form of collective existence that the Convention was drafted to protect but has learned to name only in part. The twentieth century, viewed from its end, was the century that discovered what a people is by discovering how many ways there are to destroy one. The law that emerged from that discovery named the destruction of persons and made itself deaf to the destruction of the forms of life through which persons become a people. The cases of the present century have made the incompleteness unsustainable. What is required is neither a new crime nor a new tribunal. What is required is the recognition that the crime the Convention already names is larger than the definition through which the Convention names it. Lemkin coined the term genocide to name the destruction of a people's pattern of life. The Convention kept the word and discarded the pattern. The third step is the one that picks it back up.

Notes

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- ¹ International Criminal Court, “Situation in Ukraine,” 17 March 2023.
- ² *2005 World Summit Outcome*, UN General Assembly Resolution 60/1, 24 October 2005, paras. 138–39.
- ³ European Union, *Consolidated Version of the Treaty on European Union*.
- ⁴ Raphael Lemkin, *Axis Rule in Occupied Europe*, 79–95.
- ⁵ Lemkin, *Axis Rule*, 79–95.
- ⁶ Lemkin, *Axis Rule*, 79.
- ⁷ *Draft Convention on the Crime of Genocide*, UN Doc. E/447, 26 June 1947. For the Secretariat draft’s substantive content, see William A. Schabas, *Genocide in International Law*, 59–76.
- ⁸ UN Ad Hoc Committee on Genocide, *Report of the Ad Hoc Committee on Genocide*, UN Doc. E/794, 24 May 1948. For analysis, see Schabas, *Genocide in International Law*, 77–101.
- ⁹ Schabas, *Genocide in International Law*, 207–21; Johannes Morsink, “Cultural Genocide, the Universal Declaration, and Minority Rights,” 1010–22; Elisa Novic, *The Concept of Cultural Genocide*, 17–56.
- ¹⁰ On the Soviet deportations of this period, see J. Otto Pohl, *Ethnic Cleansing in the USSR, 1937–1949*, and Timothy Snyder, *Bloodlands*, 313–37.
- ¹¹ Richard H. Pratt, “The Advantages of Mingling Indians with Whites,” 260–71. On the federal Indian boarding school system in the drafting period, see U.S. Department of the Interior, *Federal Indian Boarding School Initiative Investigative Report*, 21–47.
- ¹² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 3–7.
- ¹³ Human Rights and Equal Opportunity Commission, *Bringing Them Home*.
- ¹⁴ Morsink, “Cultural Genocide, the Universal Declaration, and Minority Rights,” 1010–1017.
- ¹⁵ Schabas, *Genocide in International Law*, 207–21; Novic, *Concept of Cultural Genocide*, 17–56.
- ¹⁶ UN General Assembly, Sixth Committee, *Summary Record of the 83rd Meeting*, UN Doc. A/C.6/SR.83, 25 October 1948.
- ¹⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, UN General Assembly Resolution 260 A (III), 9 December 1948; *Universal Declaration of Human Rights*, UN General Assembly Resolution 217 A (III), 10 December 1948.
- ¹⁸ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, §§ 25–33.
- ¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, §§ 277–97, 377–415; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, §§ 139–48, 439–42.
- ²⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, §§ 510–16. For scholarly discussion of the ethnic-versus-class characterization, see Nigel Eltringham, *Accounting for Horror*, 1–33.
- ²¹ Schabas, *Genocide in International Law*, 177–206.
- ²² *2005 World Summit Outcome*, §§ 138–39.
- ²³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*. For subsequent doctrinal elaboration, see Alex J. Bellamy, *The Responsibility to Protect*.
- ²⁴ On the Russian genocide allegation and its relationship to the invasion, see Iryna Marchuk and Aloka Wanigasuriya, “Beyond the False Claim of Genocide,” 827–52.
- ²⁵ Schabas, *Genocide in International Law*, 642–49; A. Dirk Moses, *The Problems of Genocide*, 1–26.
- ²⁶ For the Srebrenica construction, see *Krstić* (Appeals), §§ 6–22; for the Tutsi construction, *Akayesu*, §§ 510–16.
- ²⁷ Lemkin, *Axis Rule*, 79.
- ²⁸ Ludwig Wittgenstein, *Philosophical Investigations*, §§19, 241.
- ²⁹ For the philosophical lineage, see Hannah Arendt, *The Human Condition*; Claude Lefort, *Democracy and Political Theory*; Cornelius Castoriadis, *The Imaginary Institution of Society*; Achille Mbembe, *Necropolitics*.
- ³⁰ Arendt, *Human Condition*, 7–9, 175–81.
- ³¹ Mbembe, *Necropolitics*, 10–40, 66–92.
- ³² On polrhazia see Mikhail Minakov, “Roots in More than One Soil”.
- ³³ Lemkin, *Axis Rule*, 79–95.
- ³⁴ On differential universalism, see Mikhail Minakov, “The Home of the Nomad: Polyrhazia and Differential Universalism”.

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- ³⁵ The *Russkii mir* doctrine is most explicitly articulated in Vladimir Putin, “On the Historical Unity of Russians and Ukrainians.” For scholarly analysis, see Marlene Laruelle, *Russian Nationalism*, 44–59.
- ³⁶ UNESCO, “Damaged Cultural Sites in Ukraine Verified by UNESCO [March 2026].”
- ³⁷ For analysis of the wartime pressures on cultural and linguistic policy in government-controlled Ukraine, see, among recent assessments, the OSCE/ODIHR *Opinion on the Ukrainian Law on the State Language* (2019), and the subsequent periodic assessments of the Venice Commission.
- ³⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order on Provisional Measures, 17 November 2023, §§ 50–67. For an argument that the conditions also satisfied the Genocide Convention, see Luis Moreno Ocampo, *Genocide against Armenians in 2023*.
- ³⁹ or the 1992–1994 displacements and their aftermath, see Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*.
- ⁴⁰ U.S. Department of the Interior, *Federal Indian Boarding School Initiative Investigative Report*; *Federal Indian Boarding School Initiative Investigative Report*.
- ⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on Provisional Measures, 23 January 2020; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment on Preliminary Objections, 22 July 2022.
- ⁴² *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence, 27 September 2016; International Criminal Court, Office of the Prosecutor, *Policy on Cultural Heritage* (June 2021).
- ⁴³ *Armenia v. Azerbaijan*, Order on Provisional Measures, 17 November 2023, §§ 50–67.
- ⁴⁴ European Union, “Declaration of Intervention Submitted by the European Union,” filed in *The Gambia v. Myanmar*, 15 November 2023. On the broader EU institutional support for the ICC, see Council of the European Union, *EU Strategy on the International Criminal Court* (2023).

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