Degree Program in Politics: Philosophy and Economics

Course of International Law

Cultural Genocide in International Law: A Controversial Concept

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Introduction

The initial inspiration for this thesis arose from a desire to understand how cultural repression and destruction can be manifested during war and armed conflict. In other words, a curiosity to explore how attacks on a country, or its population can be expressed by harming its cultural identity.

On this matter, the concept of "cultural heritage" is a crucial area of focus since it represents the essence of a nation's culture and is usually targeted during conflicts. Cultural heritage encompasses both tangible and intangible manifestations of human life that reflect peculiar worldviews and document their historical significance. According to the UNESCO Institute for Statistics (2009):

"Cultural heritage includes artifacts, monuments, groups of buildings and sites, museums, and other elements with symbolic, historic, artistic, aesthetic, ethnological, anthropological, scientific, and social value. This includes tangible heritage (movable, immovable, and underwater), as well as intangible cultural heritage (ICH) embedded in cultural and natural heritage artifacts, sites, or monuments. However, this definition excludes ICH related to certain cultural domains like festivals and celebrations but does include industrial heritage and cave paintings."

Moreover, the definition of a nation is closely related to the intangible aspect of cultural heritage, as it is defined as a human community united by a historical, cultural, linguistic, or religious identity. This includes not only the ideas that support new skills and knowledge but also traditional aspects of cultural life, such as behavioral patterns, which require protection. This comparison accentuates the potential impact of the destruction of cultural property in times of war and armed conflict and how it is employed against a population as a tool for psychological warfare.

Recently, the exposure of cultural heritage during conflicts has garnered significant international attention. In respect fundamental link to individual and community identity, international law aims to protect cultural heritage. Likewise, a community's right to develop and maintain its culture is considered as a fundamental aspect of self-determination.

Throughout the research and extensive literature review, the concept of "cultural genocide" emerged as an essential tool for understanding the cultural dimensions of conflict and its necessary acknowledgment in international criminal law.

A historical example that ultimately comes to mind as approaching the new concept is *Kristallnacht*, named the Night of Broken Glass. This episode refers to the glass debris scattered on the streets following the vandalism and destruction of Jewish businesses, synagogues, and homes. In Germany, Austria, and the Sudetenland, rioters destroyed hundreds of synagogues and Jewish institutions, with many burning throughout the night in full view of the public and the fire department, which had been ordered to intervene only if the flames threatened nearby buildings. While killing was not the primary goal, approximately 7,500 Jewish-owned businesses were vandalized and looted by the SA and Hitler Youth, and Jewish cemeteries were desecrated in numerous areas.

This World War II episode well illustrates his type of action, calling attention to both the deliberate targeting of cultural heritage and the deep humiliation and damage inflicted. Furthermore, the timing of Kristallnacht in 1938 suggests a precursor to the genocide that would later be fully realized after the Holocaust. Indeed, the Holocaust is particularly relevant as the term "genocide" originated in response to this atrocity, even if it was not the first instance of genocide in history.

Raphael Lemkin, a polish then American Jewish jurist advocated for the creation of a new crime during a period of significant development in international law and the formation of the United Nations, in 1948. The definition of genocide has proven complex and contentious, with cultural genocide being one of the key dimensions debated. Despite various efforts from Lemkin itself or countries, the concept of cultural genocide remains unrecognized as a distinct crime under international law and broadly defined, as evidenced by its exclusion from the 1948 Genocide Convention.

Although numerous scholarly articles have addressed the crime of genocide through the sight of the Convention or recent historical event, the challenge has been to identify and analyze the specific discussions and developments related to the concept of cultural genocide as this thesis aims to focus primarily on the cultural dimension of the term genocide. By exploring efforts to incorporate cultural genocide into international law and the reasons for its consequent rejection, this analysis aims to indicate the legal significance of protecting a nation's cultural heritage as a means of achieving justice, both in times of conflict and peace. The current limitation, which only focuses on cultural destruction in the context of war, prevents a more comprehensive understanding of the need to protect and recognize a broader cultural dimension.

In line with these objectives, the first chapter delves into the origins of the Convention on the Prevention and Punishment of the Crime of Genocide. This convention, framed by post-World War II reflections, arose after the Allies recognized the Holocaust and seek to hold its perpetrators accountable. While some leaders initially favored summary executions, the London Agreement resulted in the creation of an international military tribunal, where terms like "crimes against humanity" were defined, and the concept of "genocide" based on Lemkin's work became apparent. The Nuremberg Tribunal made provision for the Genocide Convention, which is examined in this chapter by analyzing its members, debates, and broader historical context, establishing the foundation of the discussion of cultural genocide.

The second chapter delves into the concept of cultural genocide. It covers the term's development through four key stages and three drafts during the Convention, emphasizing the debates that ultimately led to its rejection. This analysis shows the evolution of thought around the term and its exclusion from the final text.

Finally, the third chapter explores how, despite extensive debates, cultural genocide remains neither an independent crime nor a recognized legal term, as it is absent from the Rome Statute of the ICC. It examines how such recognition could safeguard cultural heritage and highlights the importance of establishing clear definitions and enforcement mechanisms. A review of ICTY cases and the ICC's Al-Mahdi case offers valuable insights to support this argument and address the key questions.

CHAPTER I: The formulation of the term genocide and its legal establishment

The emergence of the concept of Genocide should not be considered entirely in connection with the Convention on the Prevention and Punishment of the Crime of Genocide, but rather out from a broader historical and legislative evolution.

World War II had been a traumatizing period marked by violent occupation, repression, conflict and, most notably, the Holocaust. Therefore, this designation was contemplated in response to the shortcomings, weaknesses, and lack of authority of the terms previously used to describe mass atrocities.

States began to be held internationally accountable for treatment of their nationals and the atrocities committed by the Third Reich against civilians galvanized international opinion on rights protection. This altered the common international obligation of states regarding treatment of their own citizens and support the crime of genocide to become definite.

Exploring the historical context and the unique characteristics of the Nuremberg International Military Tribunal of 1945 is principal to clarify the origins of the Genocide Convention. The London Agreement, an intergovernmental deal made by the four main Allied Powers, was crucial since it established the Charter of the Nuremberg International Military Tribunal.

During this tribunal, a crucial concept was officially legally codified: the "crime against humanity". Although this term facilitated to describe what Winston Churchill had referred as a "crime without a name", it soon proved to be limited in capturing the full scope of the horrors that had been committed. Since the distinction between these two concepts can be unclear, examining their differences allows a better understanding of the efforts of scholars who sought to define and differentiate genocide. Notably, Raphael Lemkin, a Polish-Jewish lawyer, who expressed his objective to develop a more precise and impactful term is expressed in his 1944 book *Axis Rule in Occupied Europe*.[1]

Lemkin's advocacy did not end with the publication of his book. The groundwork laid by the lawyer in the 1930s and 1940s had a lasting impact on the development of international human rights law and the global effort to prevent and respond to mass atrocities.

His efforts eventually contributed to the creation of the United Nations Genocide Convention in 1948: The Convention on the Prevention and Punishment of the Crime of Genocides, one of the first United Nations conventions addressing humanitarian issues.

The Convention failed to meet a direct a broad consensus, as the geopolitical conflicts and domestic self-interests, both deeply influenced by the historical context of the Cold War, considerably limited its efficacy.

[1] Linden A. Mander, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress. By *Raphaël Lemkin*. [Publications of the Carnegie Endowment for International Peace, Division of International Law, Washington.] (New York: Columbia University Press. 1944. Pp. xxxviii, 674. $7.50.), *The American Historical Review*, Volume 51, Issue 1, October 1945, Pages 117–120, [You find the source here]

A. The Nuremberg International Military Tribunal

a) The London Agreement

Already during World War II, the American, British, French, and Soviet governments composing the Allied Powers articulated their aspiration to prosecute major war criminals.

On November 1943, Franklin D. Roosevelt, US President, Winston Churchill, British Prime Minister, and Joseph Stalin, Soviet leader, issued a joint declaration denouncing the war crimes perpetrated by the Nazis. The Moscow Conference was the first found expression of their determination to punish the war criminals of the European Axis. The Conference recognized in its official documents: the "necessity of insuring a rapid and orderly transition from war to peace and of establishing and maintaining international peace and security" and jointly declared that "their united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security".[2]

A further significant step towards establishing a legal framework for prosecution was the 1945 Yalta Conference where the same leaders agreed upon and explicitly mentioned the need for an international court to bring major war criminals to justice. The Allies were debating on a legal basis on which the prosecution of Nazi war crimes could proceed. The intention was to create a set of rules and procedures by which a formal military tribunal could be conducted.

These steps finally lead us to the London Agreement. In the days before Germany surrendered on May 8, 1945, President Harry S. Truman appointed Associate Supreme Court Justice Robert H. Jackson to be the chief prosecutor representing the United States in the proposed trials for the European Axis powers. Signed on August 8, 1945, the agreement formally established the International Military Tribunal (IMT) and solidified the Allied powers'commitment to prosecuting Nazi leaders for their crimes.

In London, between June 26 and August 8, 1945, the participants brought to the negotiations their own legal conceptions and the experiences of their respective legal systems: the common law, as it had evolved differently in the UK and the USA, Marxist conceptions of "legality" and the French civilist tradition.[3] The four nations, whose delegates sat down in London to reconcile their respective legal systems, represented the greatest divergence of legal concepts and traditions to be found among Western nations.

The Article 2 of the London Agreement delivered in a Charter an integral part of the intergovernmental agreement, determining the constitution, jurisdiction and sentencing power of the IMT. This Charter was bound by the international legal principles on occupation law and followed the international legal principles outlined in the Hague Convention of 1907, the 1929 Geneva Convention on the Treatment of Prisoners of War, and state practices. It enhances the expression of international law and the exercise of sovereign legislative power by the countries to which Germany had surrendered.[4]

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[2] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[3] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[4] Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, Journal of International Criminal Justice, Volume 2, Issue 1, March 2004, Pages 38–55, [You find the source here]

Furthermore, new provisions were introduced, three categories of crimes were defined in Article 6.

- Crimes Against Peace: "… planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

- War Crimes: "… violations of the laws or customs of war … murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

- Crimes Against Humanity: "… murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Consequently, only six months after the end of hostilities, the tribunal manifested a significant break with past practices in establishing legal principles and justice mechanisms for international crimes, profoundly influencing contemporary international law.[5]

b) The progression of the military tribunal and its main characteristics

Identifying and capturing the major war criminal to stand trial was the first concrete challenge in setting up the tribunal.

As the war was effectively lost, Admiral Karl Dönitz, Adolf Hitler'successor, focused on ensuring that German forces could surrender safely and, above all, avoid capture by Soviet troops, whom he feared would seek retribution. On May 4 and 5, 1945, Dönitz ordered a ceasefire for all German forces in Europe and authorized General Alfred Jodl to sign an unconditional surrender to the Allies. The war in Europe officially ended on May 8, 1945. However, key figures in the Nazi regime, including Hitler, Himmler, Goebbels, and Heydrich, were dead. The Allied task of collecting those who remained was not simple, but over the months that followed many prominent Nazis were captured by the military and assessed for their actions.[6]

The practical features of the trial primary highlight its unprecedented nature. The site was namely selected for its profound symbolic dimension, rather than chosen arbitrarily. Nuremberg, which was in ruins at the time, was once a prominent imperial city. Most notably, it was a central symbol of Nazism, where Hitler held his major rallies and enacted anti-Jewish laws in 1935.

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[5] Rajakovich E., *London Agreement & Charter, August 8, 1945*. Robert H Jackson Center. (2015, September) [You find the source here]

[6] Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, Journal of International Criminal Justice, Volume 2, Issue 1, March 2004, Pages 38–55, [You find the source here]

From its beginning on 20 November 1945 until on 31 August 1946, 236 witnesses had been questioned in total and 5,330 documents and 200,000 statements had been submitted as evidence. [7]Actually, these sources used to be at risk at the time the war began drawing to an inevitable conclusion. Berlin had issued direct orders to destroy all official archives containing government and military documentation. However, when the Allied forces swept inland from the Western Front, British and American troops were issued with instructions to collect official documents as they were found. Shortly after the German surrender, most of the paper evidence, from the earliest days of the Nazi regime to the fall of Hitler, was in the hands of the Allies.[8]

As agreed within the articles of the London Charter, each of the four prosecuting nations nominated one judge and one non-voting alternate; each also provided a prosecution team headed by a chief prosecutor.

America's primary judge was Francis Biddle, a noted legal mind who had been the United States Attorney General throughout the war. His alternate was circuit judge John J. Parker. Lord Justice Colonel Sir Geoffrey Lawrence was appointed as Britain's primary judge with Lord Oaksey was chosen by his peers as President of the Tribunal. The Soviet Union's primary judge was Major General Iona Nikitchenko. His alternate was Alexander Volchkov. Henri Donnedieu de Vabres represented France's interim post-war government along with his alternate, Robert Falco, one of the main authors of the London Charter. Likewise, each of the defendants was able to choose his own individual counsel, most of whom were prominent German civil or military lawyers. The main defense counsel was supported by a team of more than 70 lawyers, clerks, and assistants.[9]

On the first day of the trial, Sir Sydney Alderman, associate trial counsel for the United States, listed the names and organizations on trial and then proceeded with the first accusation:

"The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics ... hereby accuse as guilty, in the respects hereinafter set forth, of Crimes against Peace, War Crimes, and Crimes against Humanity, and of a Common Plan or Conspiracy to commit those Crimes ...", reading out 22 major Nazi criminals and also groups or organizations to which they belonged.[10]

The three crimes mentioned above where clearly stated and the individual responsibility was stressed. The charge further outlined the way in which the Nazi Party was central to the achievement of these human and legal violation, first providing background details of its creation, common objectives, and methods. The court emphasized the belief that those who joined the Party were fully aware of its goals. To ensure a rigorous examination, responsibility for proving the four indictments was divided among the four Allied prosecution teams. This division of labor underscored the seriousness of the charges and the collective effort

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[7] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[8] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[9] Bamford,The Nuremberg Trials: The National WWII Museum: New Orleans. The National WWII Museum | New Orleans. (n.d.). [You find the source here]

[10] *The trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany*. Avalon Project - Documents in Law, History and Diplomacy. (n.d.). [You find the source here

required to hold the accused accountable.[11]

An important consideration regarding the International Military Tribunal is that it did not claim to be an international court in the sense of having global legal jurisdiction. This signifies that the tribunal was established as a collaborative effort by the nations that signed the London Agreement, specifically to try war criminals after World War II. However, it was not an independent international court with its own legal authority. Instead, its legal power came from two sources: the laws governing military occupation and the penal laws of the defeated Nazi Germany.[12]

The only time the IMT itself commented on its formation, it essentially stated that the defendants had the right to challenge the legitimacy of the court's constitution, but nothing beyond that. Although it was a groundbreaking tribunal, the IMT was yet not the fully experienced international court that some later imagined.

Finally, the Nuremberg Charter introduced several innovative principles that redefined accountability under international law. One of the most significant changes was the affirmation of individual responsibility, meaning that people could be held personally accountable for their actions, even in the context of war. This marked a departure from the traditional idea that only states, not individuals, could be held responsible for breaches of international law.

Previously, soldiers could avoid punishment for war crimes by claiming they were merely following orders from their superiors, but this changed as individuals had now international obligations that go beyond the duty to obey their own state. This established a new legal precedent: individuals must act in accordance with international law, even if it means defying orders from their government.[13]

These principles from the Nuremberg Charter fundamentally altered the landscape of international law, establishing that individuals, including state leaders, could be held accountable for war crimes and crimes against humanity. It also reinforced the idea that moral and legal obligations to humanity can outweigh national loyalty and obedience. This shift laid the groundwork for modern international justice and conduct to a particular interest into the unprecedent crime of this trial discussed earlier: "crimes against humanity".

B. "Crime against humanity": unprecedent crime brought in during the Trial

a) The path of the legal concept into international law

The origins of the concept of crime against humanity is associated with the evolution of international law and specifically with the Nuremberg trial where it found its first official legal codification.[14]

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[11] Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, Journal of International Criminal Justice, Volume 2, Issue 1, March 2004, Pages 38–55, [You find the source here]

[12] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[13]Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

[14] Landsman, S. (2005). *Crimes of the Holocaust: The Law Confronts Hard Cases*. University of Pennsylvania Press. [You find the source here]

Anteriorly, the 1868 St. Petersburg Declaration condemned inhumane suffering inflicted on the enemy, including the use of explosive and incendiary projectiles, as contrary to the laws of humanity. Similarly, a decisive point of entry into the actual instruments of international law of part of the thinking behind crimes against humanity, if not of the expression itself, is the Martens Clause in the Hague Conventions of 1899 and 1907.[15]However, this was used specifically to condemn "war crimes" rather than "crimes against humanity". These new agreements paved the way for an impressive expansion of a universal rights discourse in the twentieth and twenty-first centuries.

The term "crime against humanity" appeared evidently during World War I, in a declaration dated May 24, 1915. The Triple Entente described the massacres committed by Turkey in Armenia as crimes against humanity and civilization. For the first time, the term was used to describe violence committed by a state against its own population. The Turkish government, in turn, accused the Entente powers of provoking these events by organizing the Armenian revolutionary movement to destabilize the country during wartime. Crimes against humanity were thus conceived in response to acts of inhumanity that were not simply military excesses, as in war crimes but deliberate actions targeting civilian populations considered inconvenient by those in power. The declaration served as a marker of the evolution of "human rights" from, and towards, a universal norm and the genocides of the Armenians and Jews were central to the development of this concept.[16]

After the end of the war, in January 1919, the Paris Peace Conference set up a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties who delved into breaches of the norms of war committed by Germany and its allies. The Commission's report, presented on 29 March 1919, did not include the term "crimes against humanity". Their dissent was on a point of some philosophical interest since the concept was considered as partial and changeful idea. On this matter, some scholars present at the Commission, including Robert Lansing and James Brown Scott, argued that the interpretation of what is deemed humane or inhumane can be influenced by the personal beliefs or conscience of individual judges or decision-makers.[17]

By including crimes against humanity, the Nuremberg Charter's framers sought to fill a void in international law. Specifically, they aimed to cover atrocious acts that didn't fit the strict legal definition of war crimes, such as inhumane acts against civilians who were not enemy nationals. Although these acts were clearly against the principles of public conscience and international law, they had not been adequately addressed by existing legal frameworks. By including crimes against humanity in the Charter, the framers established key elements that have since become central to the understanding and prosecution of such crimes.[18]

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[15] Jones, A. (2012). Crimes Against Humanity ([edition unavailable]). Oneworld Publications. [You find the source here] (Original work published 2012)

[16]Bussy, F. (2015, June 1). _Le crime contre l'humanité, une étude critique_. Témoigner. Entre histoire et mémoire. Revue pluridisciplinaire de la Fondation Auschwitz. [You find the source here]

[17] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

[18] Geras, Norman, *Crimes Against Humanity: Birth of a Concept* (Manchester, 2011; online edn, Manchester Scholarship Online, 19 July 2012), [You find the source here]

The Nuremberg Charter consequently contributed to establish direct international criminal responsibility under international law for atrocities committed in one country, even as between its citizens. It formed a new international legal category.

However, the term “crimes against humanity” first came into sight in a revised draft only, presented on 31 July, just two days before the Charter was finalized. Supreme Court Justice Robert Jackson, who was to be America’s Chief Prosecutor at Nuremberg, explained that three categories of offenses covered by the Charter : “the crime of war”, “war crimes” and “crimes against humanity” had been suggested to him by an eminent scholar of international law whom he met while in London, and Jackson found these categories to be a convenient way to classify the offenses.[19] This episode highlights an important point: the concept of "crimes against humanity" did not emerge out of nowhere. The Charter, and the history leading up to it, clearly trace their roots back to the Martens Clause.

After analyzing how the concept was integrated into the international community, a crucial question arises: If the Charter had already introduced a term to address the gaps in criminal categories, why was there still a need to create the concept of genocide and convene the Convention on the Prevention and Punishment of the Crime of Genocide?

b) Crime against humanity and genocide- two distinct crimes

Genocide and crimes against humanity are closely related legal concepts that emerged in response to the atrocities committed during World War II, particularly those perpetrated by the Nazis.

Turning back to the International Military Tribunal, its judgment can be summarized to the following points[20]:

- The German war criminals were punished for planning and waging a war of aggression.
- They were punished for certain war crimes or crimes committed during the war on the civilian population of occupied countries.
- They were punished for certain crimes committed against a civilian population during a war of aggression. These were called “crimes against humanity” and were made punishable only when they were committed in connection with other crimes that were subject to the jurisdiction of the Tribunal, namely crimes against peace, and war crimes.

In all, the crimes against humanity were reveal as a not an independent category. They were considered crimes only when their connection with other crimes could be established.

The International Military Tribunal reviewed that deliberately persecuting Jews, Poles and other ethnic, racial, national, or religious groups, alongside other categories of people, would constitute a crime against humanity. It esteemed those crimes as only committed in times of armed conflicts or in connection with the war of aggression.

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[19] Pruitt on Futamura, “war crimes tribunals and transitional justice: The Tokyo trial and the Nuremberg legacy.”* H. (n.d.) Contemporary Security Studies Series. London: Routledge, 2008. xii. [You find the source here]

[20] Rajakovich E., *London Agreement & Charter, August 8, 1945*. Robert H Jackson Center. (2015, September) [You find the source here]

Justice Birkett, the presiding British judge at Nuremberg, said that the "thing that sustains me is the knowledge that this trial can be a very great landmark in the history of International Law. There will be a precedent of the highest standing for all successive generations".[21]
The successful prosecution of individuals for the commission of crimes against humanity studied as one of the greatest achievements of the International Military Tribunal is yet today considered by many as a crime of genocide in the international community.

The several common critical elements between genocide and crimes against humanity explains the ambiguity of the two concepts. Professor Cassese notes that genocide and crimes against humanity share at least three elements:[22]

- *They encompass very serious offenses that shock our sense of humanity in that they constitute attacks on the most fundamental aspects of human dignity.*

- *They do not constitute isolated events but are instead normally part of a larger context, either because they are large-scale and massive infringements of human dignity or because they are linked to a broader practice of misconduct.*

- *Although they need not be perpetrated by State officials or by officials of entities such as insurgents, they are usually carried out with the complicity, connivance or at least the toleration of the authorities.*

Despite these mutual features, the IMT Charter's definition was linked to wartime context and did not address pre-war crimes. Important also was the crime extended to protect a state's own civilian population but the availability of ex post punishment for crimes was not covered by national law. These limitations led to the eventual recognition of genocide as a distinct and more specific crime, focusing solely upon the offender's intent and an underlying act against group members.[23]

Although genocide and crimes against humanity can overlap, they are governed by distinct legal frameworks that can be better understood by examining the key differences between the two terms.[24]

Genocide is characterized by the explicit intent to annihilate a national, ethnic, racial, or religious group, and it can be prosecuted as soon as this intent and corresponding actions against group members are identified. This proactive legal framework allows for early intervention and punishment, even before significant harm is inflicted, making it an inchoate offense that does

[21] Geras, Norman, *Crimes Against Humanity: Birth of a Concept* (Manchester, 2011; online edn, Manchester Scholarship Online, 19 July 2012), [You find the source here]

[22] Cherkassky L. *International Criminal Law*, by Antonio Cassese. Oxford: Oxford University Press, 2008, 2nd edn, li + 444 + (index) 11pp [You find the source here]

[23] Steven R. Ratner, *Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity*, 6 Wash. U. Global Stud. L. Rev. 583 (2007), [You find the source here]

[24] Nersessian, David, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity* (2007). Stanford Journal of International Law, Vol. 43, p. 221, 2007, [You find the source here]

not require actual injury to manifest before legal action is taken. The prohibition against genocide empowers international law to respond to such criminal violations at their inception.[25]

In contrast, crimes against humanity, including persecution, require that the acts be part of a widespread or systematic attack against civilians, with substantial harm already having occurred. [26]The scale and systematic nature of the attack are critical for prosecution, meaning that international concern and legal action typically arise only after significant harm has been inflicted. For crimes against humanity, the offender must be aware or intend that their actions contribute to a broader, coordinated attack, and prosecution at the international level is only possible after members of the targeted groups have suffered considerable injury. Moreover, certain groups, such as military personnel within political groups, are not covered by these protections, even though targeting a group's military forces is a recognized genocidal technique.[27]

The Holocaust could technically be described as "murder" but this term, even when expanded to "mass murder", fails to capture the full extent of the Nazi atrocities and the broader objectives of the Third Reich. Recognizing the inadequacy of existing terminology to fully express the enormity and specific nature of these crimes, the international community understood the need for a new term that could more accurately reflect the scale and intent behind such acts. Notably since the statutes of the International Military Tribunals did not require that war crimes or crimes against humanity be committed with such a specific destructive intent.[28] Moreover, while war crimes and crimes against humanity had to occur within the context of an armed conflict, this requirement did not apply to genocide.

Finally, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. This crime is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

A comprehensive examination of the boundaries of crimes against humanity and their distinctions from genocide sets the stage for a deeper exploration of the precise definition of genocide, tracing its development even before the adoption of the Convention, beginning with Raphael Lemkin's foundational work.

C. Lemkin's work: Axis Rule in Occupied Europe.

a) Lemkin's research trajectory

The Nuremberg judgment only partly relieved the world's moral tensions and the juridical

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[25] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[26]Geras, Norman, *Crimes Against Humanity: Birth of a Concept* (Manchester, 2011; online edn, Manchester Scholarship Online, 19 July 2012), [You find the source here]

[27] Nersessian, David, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity* (2007). Stanford Journal of International Law, Vol. 43, p. 221, 2007, [You find the source here]

[28] Terry Burrows (2019, October). *The Nuremberg Trials: Volume I by Terry Burrows. Arcturus* [You find the source here]

consequences of the trials soon appeared insufficient. The disputes and errors of the Allies that allowed Hitler to grow and become strong, survived these proceedings, and found expression in the Nuremberg Tribunal's refusal to establish a precedent against this type of international crime. No precedent applicable on the fact that even nations under attack could commit atrocities against civilian populations were found in the judgment. Still, one should note that nations that are attacked may also commit crimes against a civilian population. But on this point, the Tribunal was silent.

In this context, it is essential to introduce the scholar Raphael Lemkin and his work. The term "genocide" echoes with the crime that the British Prime Minister Churchill could not name. It was the brainchild of Raphael Lemkin, a Polish lawyer who himself narrowly escaped persecution, and who spent the war working in Washington, analyzing Nazi occupation policy.

Indeed, drawing from terms like tyrannicide, homicide, and infanticide, Lemkin combined the Greek word *genos* referring to the people with the Latin suffix *cida* meaning to kill.[29]

In the 1930s, he was internationally recognized as a scholar in international criminal law, actively participating in and contributing to conferences across Europe, such as in Paris, Madrid, Budapest, Copenhagen, The Hague, Amsterdam, and Cairo. Lemkin's efforts to criminalize genocide under international law offer a compelling and informative case study.
He left behind approximately 20,000 pages of writings, many of which were nearly lost to history when his belongings were auctioned off in 1948 due to an unpaid storage bill. Already in 1942, during the war, he was advocating for the adoption of a treaty that would establish genocide as a crime: the "crime of crimes", that nations worldwide would recognize and enforce. Reflecting on his struggle in 1942 to raise awareness, he remarked in his autobiography: "Genocide is so easy to commit because people don't want to believe it until after it happens".[30]

After World War II, Lemkin returned to Europe and served as an advisor to Justice Robert H. Jackson, the chief prosecutor at the Nuremberg trials. However, he saw the trials as only a partial success. While they did hold some Nazi leaders accountable for genocide against European Jews, the indictments focused on the broader charge of "crimes against humanity", without emphasizing the Jewish identity of the victims. Genocide had yet to be recognized as a distinct legal crime.[31]

Consequently, following the trials, Lemkin dedicated himself to convince the United Nations to adopt an international treaty that would define genocide as an international crime and provide for its prevention and punishment in both peace and wartime.

b) Sovereignty stand

Even today, the sovereignty of states remains one of the most sacred and protected principle

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[29]Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

[30] Leon Hartwell; Raphael Lemkin: The Constant Negotiator. *Negotiation Journal* 2021; 37 (2): 221–247. [You find the source here]

[31] Klamberg, Mark, *Raphaël Lemkin in Stockholm – Significance for His Work on 'Axis Rule in Occupied Europe'* (April 30, 2019). Genocide Studies and Prevention: An International Journal, volume 13(1), 2019, 64-87, [You find the source here]

of international law. It is defined as the right of a state to govern itself and to exercise. The indicative quote: "to the exclusion of any other state, the functions of a state"[32] refers to this situation in which the functions or powers of a state are exclusively exercised by that state, without any interference or participation from other states. This could imply sovereignty or jurisdiction over certain matters, where only one state has the authority to act or make decisions in a specific area.

However, in light of the genocides Lemkin studied and the atrocities committed during and leading up to World War II, he argued that: "Sovereignty cannot be conceived as the right to kill millions of innocent people."[33] This proposal was revolutionary because it challenged the traditional notion of state sovereignty, advocating for the international community's right to intervene in cases of mass atrocities.

Although the Nuremberg Trial episode is emblematic of the frustrations and challenges that deeply concerned the scholar Raphael Lemkin, it is not the only cause.

In 1920, while studying philology at the University of Lwów, Lemkin was fascinated by the 1921 trial in Berlin of Soghomon Tehlirian, who was accused of assassinating Talaat Pasha, the former Turkish Minister of the Interior. Talaat Pasha was seen as one of the principal architects of the Armenian massacre. Lemkin questioned why the Armenians had not pursue the arrest of Talaat Pasha for this mass atrocity, rather than focusing on Tehlirian's act of vengeance. He believed that it was Pasha, not Tehlirian, who should have been held accountable in court for mass murder.[34] When Lemkin asked this question to one of his professors, the response was discouraging. The professor explained that there was no existing legal framework to charge a government official like the Turkish Minister for such crimes. He proposed a statement who reflects a view on property rights and individual autonomy, suggesting that as long as the actions do not violate any laws or broader ethical norms, the owner's decisions about his property, referring to chickens in his example should not be interfered with by others. Lemkin found this comparison deeply flawed and dismissed. Indeed, he found it absurd that while an individual could be tried for the murder of another person, governments could annihilate entire groups with no legal repercussions.

This realization drove Lemkin to dedicate himself to the creation of the new legal concept of genocide. It was this conviction that brought his shift from the study of languages to the study of law, culminating in his earning a doctorate in law in 1926.[35]

c) Axis Rule in Occupied Europe

For the 1933 Madrid conference, Lemkin prepared a draft report, which suggested outlawing the acts of "barbarism" and "vandalism" by identifying them as international crimes.

On one hand, the crime of barbarity consisted of "destroying a national or religious collectivity" and the other hand the crime of vandalism was defined as "destroying works of culture, which

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[32] Bardo Fassbender, The state's unabandoned claim to be the center of the legal universe, *International Journal of Constitutional Law*, Volume 16, Issue 4, October 2018, Pages 1207–1214, [You find the source here]

[33] Frieze, Donna-Lee, ed. *Totally Unofficial: The Autobiography of Raphael Lemkin*. Yale University Press, 2013. [You find the source here]

[34] Frieze, Donna-Lee, ed. *Totally Unofficial: The Autobiography of Raphael Lemkin*. Yale University Press, 2013. [You find the source here]

[35] Leon Hartwell; Raphael Lemkin: The Constant Negotiator. *Negotiation Journal* 2021; 37 (2): 221–247. [You find the source here]

represented the specific genius of these national and religious groups".[36] Lemkin wanted to preserve both the physical existence and the spiritual life of these collectivities. The proposal on outlawing barbarism and vandalism were of relevance for genocide because of their focus on group protection. The basic idea of the proposal, as Lemkin subsequently formulated, was that "an international treaty should be negotiated declaring that attacks upon national, religious and ethnic groups should be made international crimes, and that perpetrators of such crimes should not only be liable for trial in their own countries but, in the event of escape, could also be tried in the place of refuge, or else extradited to a the country where the crime was committed". [37]

Lemkin's proposal was innovative in its focus on the protection of groups, rather than just individuals, under international law. He believed that safeguarding both the physical existence and the cultural and spiritual identity of national and religious communities was crucial for preserving the diversity and richness of human civilization.

His work at the Madrid Conference laid the foundation for his later, more comprehensive efforts to criminalize genocide. He expanded on these ideas in his seminal 1944 work, *Axis Rule in Occupied Europe*, where he detailed the atrocities committed by Nazi Germany in the territories it occupied. [38]This book, supported by the Carnegie Endowment for International Peace, meticulously documented the systematic nature of Nazi crimes across different countries, highlighting the coordinated effort to annihilate entire populations and erase their cultural heritage.

Lemkin collected material in Stockholm which mainly consisted of legal decrees that the Nazis had issued in each of the countries they occupied.[39] It is unlikely that he received direct access to confidential documents and written reports. It had been in fact possible thanks to other scholars who smuggled from Poland on behalf of the Polish resistance. Lemkin received valuable help for instance from Karl Schlyter and Gösta Eberstein, who helped him to escape Nazi ruled Europe and re-establish himself as a scholar.[40]

The structure of *Axis Rule in Occupied Europe* illustrates Lemkin's unique investigation of first identifying the various "techniques" of genocide in the various fields of life: political, social, cultural, economic, biological, physical, religious, moral. Then, he theorizes a new holistic crime of "genocide" to encompass them.[41] The second part of the book offers a state-by-state analysis of the various stages taken in each occupied state, and the third part compiles the various decrees collected by Lemkin.

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[36] Frieze, Donna-Lee, ed. *Totally Unofficial: The Autobiography of Raphael Lemkin*. Yale University Press, 2013. [You find the source here]

[37] Leon Hartwell; Raphael Lemkin: The Constant Negotiator. *Negotiation Journal* 2021; 37 (2): 221–247. [You find the source here]

[38] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

[39] Klamberg, Mark, *Raphaël Lemkin in Stockholm – Significance for His Work on 'Axis Rule in Occupied Europe'* (April 30, 2019). Genocide Studies and Prevention: An International Journal, volume 13(1), 2019, 64-87, [You find the source here]

[40] Klamberg, Mark, *Raphaël Lemkin in Stockholm – Significance for His Work on 'Axis Rule in Occupied Europe'* (April 30, 2019). Genocide Studies and Prevention: An International Journal, volume 13(1), 2019, 64-87, [You find the source here]

[41] Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

As studied and developed in the first part, Lemkin's assessment of the moral import of the Nuremberg Trials was perhaps accurate: the punishment of the leaders of Nazi Germany sent a clear message to the world that even crimes perpetrated by top state officials would be penalized. On the other hand, the trials failed to deliver on the score of legislation, and the judgments rendered did not create a precedent which would prevent a similar tragedy from occurring again. Therefore, he continued to actively push for the adoption of legal frameworks that would make genocide a punishable offense in the international arena.

D. Convention on the Prevention and Punishment of the Crime of Genocide

a) Challenges and obstacles to obtain the formulation of the Convention

The analysis of the Nuremberg Trials revealed that Raphael Lemkin's ideas did not find widespread acceptance within legal circles. Despite enjoying strong support, Lemkin persisted in his efforts to influence the legal community by promulgating the concept through scholars and conferences. His attempt relied on lobby among lawyers.

Once he learned about the continuation of the first session of the UN General Assembly in the United States in 1946, Lemkin went directly to New York. During this session, a broad range of issues was on the agenda, and he had already drafted a resolution on the crime of genocide.[42] He secured the backing of several smaller states that felt threatened by their neighbors leading to the proposal being signed by Panama after Lemkin's conversation with Ricardo Alfaro, and then by Cuba. In all, Cuba, Panama, and India introduced a draft resolution with two key objectives: to declare that genocide was a crime punishable both in peacetime and wartime, and to establish that genocide was subject to universal jurisdiction, meaning it could be prosecuted by any state, regardless of territorial or personal links.

On December 11, 1946, General Assembly Resolution 96 (I) was adopted, affirming that genocide is a crime under international law condemned by the civilized world. The resolution yet did not clarify whether genocide could be committed during peacetime, and while it recognized genocide as a crime of international concern, it did not address the issue of jurisdiction. The resolution also called for the preparation of a draft convention on the crime of genocide.[43]

Determined, Lemkin continued his campaign, carefully adapting his presentations to align with the traditions of each country he sought to persuade. He eventually obtained the approval of Andrey Vyshinsky, the head of the Soviet delegation. The reasons for Moscow's shift in position remain unclear, as it seems improbable that Vyshinsky, a staunch Stalinist, would have been influenced by a lighthearted comment from Jan Masaryk, who humorously likened the scholar's efforts to the discovery of penicillin.

Lemkin faced an increasingly challenging task as he lobbied for the inclusion of genocide as a crime under international law. His resources were limited, and he was further burdened by financial and professional difficulties. By mid-1947, he had resigned from his stable position at the War Department, concluding that he needed to relocate to New York, where the crucial decisions regarding his proposal would be made.

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[42] Leon Hartwell; Raphael Lemkin: The Constant Negotiator. *Negotiation Journal* 2021; 37 (2): 221–247. [You find the source here]

[43] Lewis, Mark A., 'The Genocide Convention: The Gutting of Preventative Measures, 1946–48', *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Oxford Studies in Modern European History (Oxford, 2014; online edn, Oxford Academic, 16 Apr. 2014),accessed 19 Sept. 2024. [You find the source here]

After spending a month and a half in Geneva, Lemkin traveled to Paris to attend the third session of the United Nations General Assembly.[44] The international climate was deteriorating as Cold War tensions escalated. The initial draft of the convention was being prepared by the Human Rights Department at the United Nations Secretariat, with Lemkin, Vespasian Pella, and Henri Donnedieu de Vabres serving as experts. They may have drawn on a draft prepared by Emile Giraud, who also worked at the Secretariat. Before the war, all three had been advocates for a peace based on international law, administered by proper international judicial bodies. However, not all members of these circles were unanimous in their support for Lemkin's model.

b) *The establishment and the active members of the Convention*

After the war, his search for obtaining recognition of his concept of genocide became an obsession. The recently active United Nations appeared as the main point of reference for Lemkin’s actions.

The Convention of December 9, 1948 was clearly as a culmination of a long process which, since the end of the 19th century, has seen jurists striving in various academic and diplomatic forums to make gross violations of basic human rights an international offence.

Based on a preliminary draft prepared by the Secretariat, a draft convention was drawn up by a Special Committee on Genocide, attached to ECOSOC, considering the comments made by the Member States of the United Nations.[45] Forwarded to the General Assembly, it was unanimously adopted on December 9, 1948, not without provoking lively discussion in the 6th Committee.

Understanding the influence of the Catholic Church in certain countries, Lemkin reached out to its clergy to garner support. When he thanked the authorities of Lebanon for ratifying the convention, he mentioned the persecutions of Muslim scholars in medieval Spain. Another avenue he explored was non-governmental organizations. Some of the focal points of his lobbying efforts were the National Conference of Christians and Jews, founded in the United States in 1927, and, first and foremost, the United States Committee for a United Nations Genocide Convention.[46] The Committee, formed in 1948, was headed by James N. Rosenberg and comprised more than 45 organizations of various types like social, professional, or legal, whose aim was to drum up support first for the adoption of the convention, and then its ratification by the United States. The international network of people and NGOs acquired thanks to the Committee exert constant pressure on the UN with their petitions. They were an efficient instrument of persuasion, with 166 organizations from 28 countries ready to invoke the support of the 200 millions of their members.

After several legal battles, the General Assembly of the United Nations passed the Convention for the Prevention and Punishment of the Crime of Genocide on December 9, 1948. The vote was unanimous.

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[45] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

[46] Frieze, Donna-Lee, ed. *Totally Unofficial: The Autobiography of Raphael Lemkin*. Yale University Press, 2013. [You find the source here]

Three scholars from the interwar movement to build international criminal law were reunited to write the first draft of the Genocide Convention: Lemkin, Pella, and de Vabres. [47]All three were well-versed in debates about universal jurisdiction, state versus individual responsibility, and national courts versus international courts. All shared the idea that the impartial mechanism of justice would ensure public security and international peace.[48] Yet their trajectories during World War Two were very different, causing them to alter their interwar ideas in individual ways.

Both Henri Donnedieu de Vabres, a professor at the Sorbonne and a judge who served on the Nuremberg Tribunal, and Vespasian Pella, the President of the International Penal Law Association, were distinguished figures in their fields. However, Raphael Lemkin, who invented the concept of genocide and deeply contemplated its history and implications in international law, was said to have aroused envy and antagonism among his older colleagues, leading to a strained relationship.[49]

In the late 1930s, Henri Donnedieu de Vabres analyzed how totalitarian regimes like the Italian fascists, Nazis, and Soviets manipulated their legal systems to advance social goals and political repression. During the Nuremberg Trials, he strongly opposed the American concept of conspiracy, which did not exist in French law. He disagreed with the notion that a single, overarching Nazi conspiracy had begun in 1933 and included all the crimes of the regime. Instead, he argued for a more limited interpretation, linking conspiracy only to the planning and execution of aggressive war, not to a broader range of crimes, particularly those committed before the war. This perspective led the judges to reject the prosecutors' broad claims, resulting in many pre-war Nazi actions being excluded from the classification of crimes against humanity under the tribunal's charter.

De Vabres was also skeptical of the legal definition of genocide, believing it to be too vague and open to political misuse. He preferred to focus on crimes against humanity, which he viewed as offering a clearer and more precise legal framework, especially when not tied exclusively to wartime contexts. Despite his reservations, De Vabres attended the Genocide Convention as a way to contribute to the development of international law and influence the direction and content of the emerging legal frameworks. As a key figure in international law, he felt it was his duty to engage in these critical discussions, regardless of his personal preferences, to ensure that the resulting conventions were well-founded and just.

On the other hand, the atrocities of the First World War drove Vespasian Pella to dedicate his life to advancing what he termed the international criminal law of the future. He pursued this through his scholarship, diplomacy, and advocacy in organizations like the Association International de Droit Pénal and the Bureau International pour l'Unification du Droit Pénal.

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[47] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

[48] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[49] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

Pella quickly built a professional consensus on previously controversial issues such as universal jurisdiction and corporate criminal liability. However, despite the attention received by his ideas within the legal profession, the political support necessary to realize his vision never materialized, either before or after the Second World War. [50]

Regarding the relationship between Pella and Lemkin, Pella still referred to Lemkin as "my dear friend" in a letter dated December 15, 1947, and later reminded Lemkin that he had introduced him to the international arena in the 1930s and supported Lemkin's proposals for the repression of genocide on both national and international levels. [51]Therefore, Pella pushed Lemkin's ideas forward.

For Pella, writing before the Nuremberg Judgment was announced, the Nuremberg Charter showed that the concept of an international court had matured, and he believed that a permanent one needed to be established immediately for the cause of peace.[52] However, for Lemkin, the judgment was a grave disappointment, as it contained a glaring omission: because the judges decided that Nazi crimes committed before the war, including those against German nationals, were not international crimes under the Tribunal's Charter, the judgment could not serve as a precedent for future genocide.

As much as it was crucial to explore the initial ideas and perceptions of its drafters to easily understand the dynamics of the Genocide Convention, it is equally important to clearly restore the historical context that highlights the international relations during this period.

This foundation will allow us to delve deeper into the disagreements that arose during the convention itself.

c*) The Cold War: a crucial historical context of the Convention*

The Allies attempted to consolidate their joint efforts on the battlefield in a new world organization. In fact, the Genocide Convention has raised as one of the first major documents of international law negotiated within the pluralistic environment of the United Nations. The assembly effectively became a battleground for the emerging superpowers, the Soviet Union and the United States.

Chapter 4 of the UN Charter obliged the General Assembly to propose recommendations contributing to the progressive development and codification of international law. Essentially, it was a compromise decision aiming to placate the states that opposed conferring legislative power on the United Nations. From the outset, the Soviets were less than enthusiastic about the prospect of codifying international law.

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[50] Mamolea, A. (2020, December 20). _*Vespasian v. Pella: International Criminal Justice as a safeguard of Peace, 1919-1952*_. *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents*. [You find the source here]

[51] Quigley, John B. Review of *Raphael Lemkin and the Struggle for the Genocide Convention*, by John Cooper. *Holocaust and Genocide Studies*, vol. 31 no. 2, 2017, p. 325-327. *Project MUSE*, [You find the source here]

[52] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

There was, thus, no consensus on which body should draft the text regarding the Genocide Convention. Several countries preferred the Human Rights Commission, but USSR proposed a special committee to work with the UN Secretariat. Growing international tensions suggested that the USSR might deliberately slow down the drafting process, reflecting its broader strategy of caution and self-interest.[53]

Both sides of the East/West confrontation heavily influenced negotiations infused the debates with their political ideologies, each attempting to block provisions favored by the other. The tensions started early.[54] For instance, on June 5, 1947, the U.S. announced the Marshall Plan, offering aid for European reconstruction, including to Central and Eastern European states and Stalin instructed those countries to reject the offer. In October, the Cominform was established to coordinate the activities of eight communist countries, signaling the end of coalition governments between Social Democrats and Communists in Eastern Europe by the close of 1947. [55]

In reality, the Soviet Union was trying to balance cooperation with the Western powers while remaining suspicious of their intentions. The Soviets were particularly concerned about being dominated and marginalized in the United Nations General Assembly.[56]Stalin believed that reaching agreements with the West was possible, but he knew it would involve tough negotiations.

The USSR's stance on the codification of international law was highly active. Although they were traditionally skeptical of international law, considered as a tool of Western powers, they recognized that participating in the process of codifying international law could still be beneficial to them. Moreover, they understood that any recommendations made by the UN General Assembly regarding international law were not binding, meaning the Soviet Union could ignore them if they chose to.

On the other hand, as the world's leading power, a major geopolitical player, and a state that considered itself as the world's greatest democracy, the United States was quick to take a stand on the concept of genocide and its uses. As early as the Second World War, it played an active role in the conceptualization of the crime of genocide.[57]

The U.S. delegation was led by Ernest A. Gross, an assistant secretary of state. He made it absolutely clear to all UN delegations that the decision was urgent and immediate action was required. According to him, the United States was eager to see the Genocide Convention

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[53] Amy E. Randall, ANTON WEISS-WENDT. *The Soviet Union and the Gutting of the UN Genocide Convention.*, *The American Historical Review*, Volume 124, Issue 2, April 2019, Pages 632–634, [You find the source here]

[54] Quigley, John B. Review of *Raphael Lemkin and the Struggle for the Genocide Convention*, by John Cooper. *Holocaust and Genocide Studies*, vol. 31 no. 2, 2017, p. 325-327. *Project MUSE*, [You find the source here]

[55] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

[56]Amy E. Randall, ANTON WEISS-WENDT. *The Soviet Union and the Gutting of the UN Genocide Convention.*, *The American Historical Review*, Volume 124, Issue 2, April 2019, Pages 632–634, [You find the source here]

[57] Julien Zarifian. Les États-Unis et le concept de génocide. Esquisse d'une relation difficile.. Cahiers d'histoire. Revue d'histoire critique, 2022, 155, pp.109-123. [You find the source here]

adopted during this session of the Assembly and signed by all member states before the conclusion of their work here.[58]

The powerful nation was, thus, a key player in drafting the treaty, with American legal principles heavily influencing its text, especially the requirement that intent to commit genocide must be clearly proven, a cornerstone of U.S. criminal law.

In the general multilateral negotiations that followed, the Soviet Union saw a strategic advantage in emphasizing certain key principles: the importance of state sovereignty, the right to self-determination, and the fight against fascism. These principles aligned with Soviet interests and provided a framework for the USSR to assert its influence in the international arena.[59]

Regarding the 1948 Genocide Convention, the Soviet Union opposed to political groups as targets of genocide, alongside national, ethnic, racial, or religious groups, arguing that political groups lacked the permanent, unchangeable characteristics that defined the others. This argument was influenced by the Soviet history of Stalinist mass repression in the 1930s and the postwar Communist takeover of Eastern Europe, where the regime employed practices like property confiscation and forced labor. They resisted labeling these actions as genocidal because they were central to the country's policies, such as forced agricultural collectivization, the exile of "kulak" peasants to "special settlements" and running the Gulag labor camps.

Furthermore, they proposed amendments that could lead to genocide charges against colonial powers and the U.S. for their histories of racial discrimination and violence. For instance, the Soviet delegate from Ukraine suggested extending the convention to cover "non-self-governing" and dependent territories. The Soviet Union also leveraged the U.S. Civil Rights Congress's publication *We Charge Genocide*, accusing the U.S. government of committing genocide against African Americans, to highlight the connections between American racism and Nazi antisemitism and to promote the superiority of communism.[60]

Consequently, U.S. negotiators faced intense opposition during the debates. Supreme Court Justice Robert Jackson, representing the U.S., expressed reluctance to interfere in a state's handling of its own population, citing America's own history with ethno-racial minorities.[61]

Critics of the convention in the U.S. were concerned about its potential implications for domestic and international law, particularly the fear that it could be used to challenge America's treatment of African Americans.

It demonstrates how the U.S. Senate's ratification of the Genocide Convention was delayed for decades, largely due to fears that Article II of the convention which presents the clear definition

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[58] Julien Zarifian. Les États-Unis et le concept de génocide. Esquisse d'une relation difficile.. Cahiers d'histoire. Revue d'histoire critique, 2022, 155, pp.109-123. [You find the source here]

[59] Amy E. Randall, ANTON WEISS-WENDT. *The Soviet Union and the Gutting of the UN Genocide Convention.*, *The American Historical Review*, Volume 124, Issue 2, April 2019, Pages 632–634, [You find the source here]

[60] Amy E. Randall, ANTON WEISS-WENDT. *The Soviet Union and the Gutting of the UN Genocide Convention.*, *The American Historical Review*, Volume 124, Issue 2, April 2019, Pages 632–634, [You find the source here]

[61] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

of genocide could be applied to racial violence in the U.S. This concern was shared by conservative leaders and organizations like the American Bar Association, as well as by those worried about potential accusations of genocide during the Vietnam War.[62] Additionally, the treatment of Native Americans, though less frequently mentioned, also contributed to the reluctance to ratify the convention. This hesitation persisted through the 1960s and 1970s, reflecting ongoing tensions between America's international human rights rhetoric and its domestic realities.

The Soviet Union surprisingly ratified the Genocide Convention in 1954. Not to omit that it would have never ratified the text if the Convention had mentioned, for example, the deliberate starvation of the Ukrainian countryside by Stalin in the years before World War II. The so-called "Holodomor", Ukrainian term for "death by starvation", refers a deliberate act of genocide by Stalin's regime with the intention of wiping out the peasantry. Stalin's campaign of forced "collectivization" seized grain and other foodstuffs and left millions to starve.

While both Cold War'superpowers were hesitant to commit, this was a calculated act of political and moral competitive superiority. Soviet Union intended to embarrass the U.S. and challenge its international legitimacy.[63]

The drafting of the UDHR was also influenced by these ideological tensions. Since it was created during the same period and in response to World War II, it raises the examination of why these subjects were treated separately, what did they had in common along their writing and whether this separation helped or refrained the effectiveness of the Genocide Convention.

b) UDHR and the convention

The Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights (UDHR), both adopted by the United Nations General Assembly in December 1948, emerged as pivotal documents in the post-World War II human rights landscape.[64]

On one hand, the UDHR was planned to establish a broad and inclusive framework of human rights applicable to all individuals globally. It encompassed a wide range of civil, political, economic, social, and cultural rights, reflecting a vision of universal human dignity and equality.[65]In contrast, the Genocide Convention focused specifically on defining and criminalizing genocide where the broader human rights issues are not really faced but rather a specific atrocity with legal precision.

During the drafting process, the Cold War context exacerbated the debate of both assemblies. As mentioned above, the United States and the Soviet Union were engaged in a global struggle

[62] Documents on the Genocide Convention from the American, British, and Russian archives.* (n.d.). Bloomsbury Academic, 2018. [You find the source here]

[63] Hill, Suzanne (2020) "The Cold War and the Genocide Convention: A History of the United States' Refusal to Ratify," The Macksey Journal: Vol. 1 , Article 193. [You find the source here]

[64] A review of the meaning and importance ... (n.d.-a).

[65] Mayers, D. (2015). Humanity in 1948: The Genocide Convention and the Universal Declaration of Human Rights. Diplomacy & Statecraft, 26(3), 446–472. [You find the source here]

for ideological influence, and their conflicting views on human rights mirrored their broader geopolitical rivalry.

The ideological differences, along with the Genocide Convention, were highly evident and played a significant role in shaping the declaration. The United States, a leading proponent of the UDHR, emphasized civil and political rights, such as freedom of expression, freedom of religion, and the right to a fair trial, which aligned with its democratic values and constitutional principles. However, the U.S. was cautious about endorsing extensive economic and social rights, fearing that such provisions could justify significant state intervention and potentially infringe upon individual freedoms and capitalist principles.

The Soviet Union, in other ways, prioritized the inclusion of economic and social rights in the UDHR, arguing that without such rights, civil and political freedoms could not be fully realized. The Soviet perspective was rooted in its socialist ideology, which emphasized collective well-being and state responsibility for ensuring social and economic equality. This stance led to tension with the United States and its allies, who were concerned about the implications of such rights for individual freedoms and market economies.[66]

In all, the U.S. wanted to promote a human rights agenda that reflected its values of individual liberty and democracy, while the Soviet Union aimed to advance a vision that supported collective rights and state intervention in economic matters.[67]

The outcome involved substantial negotiations and compromises. The UDHR ultimately included both civil-political and economic-social rights but did so in a way that allowed for flexible interpretation, aiming to bridge the gap between differing visions. The Soviet Union and its allies, when pushing for broader social rights, had to accept a document that reflected a more balanced approach, which sometimes diluted their demands.[68]

The decisive UDHR integrated a range of rights but was often phrased in general terms to accommodate diverse interpretations. Meanwhile, the Genocide Convention remained focused on a specific issue, reflecting the urgent need to address the most egregious violations of human rights directly.

Moreover, the episode of the Holocaust was the main start for the Convention, while over weeks of debate around the Universal Declaration in the UN General Assembly, the genocide of the Jews went unnoticed, despite the frequent invocation of other dimensions of Nazi barbarity to justify specific items for protection, or to describe the consequences of leaving human dignity without defense. Indeed, contrary to conventional assumptions, there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it. The Universal Declaration was a response to an experience, it was essentially to an experience of depression and war, not one of atrocity and genocide.[69]

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[66] Hill, Suzanne (2020) "The Cold War and the Genocide Convention: A History of the United States' Refusal to Ratify," The Macksey Journal: Vol. 1 , Article 193. [You find the source here]

[67] Hill, Suzanne (2020) "The Cold War and the Genocide Convention: A History of the United States' Refusal to Ratify," The Macksey Journal: Vol. 1 Article 193. [You find the source here]

[68] A review of the meaning and importance ... (n.d.-a).

[69] Morsink, J. (2019). The Universal Declaration of Human Rights and the Holocaust ([edition unavailable]). Georgetown University Press. [You find the source here]

. Conclusion

The existence of the crime of Genocide took some time to be recognized and accepted by the international community. Lemkin fought all his life to dissociate this crime from the three already developed in international law during trial as the analyzed Nuremberg Military Trial in 1945.

In comparison to the contemporary concept of "crimes against humanity", it has been analyzed that for genocide, victimization of human beings is necessary but not the only element. The acts committed against individuals must be carried out with the intent to destroy the group to which the direct victims belong. Regardless of how culpable the perpetrator is toward these immediate victims; this additional element is required. The act against the direct victims must also demonstrate a culpable state of mind concerning the group as a whole.
Thus, genocide encompasses a dual mental element. the crime could also happen in a non-war period and above all, countries could not hide under their sovereignty and thus attack their population as they could.

However, if Lemkin had a very peculiar idea of the definition of genocide, it was threatened by conflicts among countries in a context a Cold War that confronted two main ideologies. In other words, the debates during the drafting of the Genocide Convention reflected deep tensions between the desire to prevent atrocities and concerns about sovereignty, political interests, and the practicalities of enforcement. These altercations have continued to influence the application and interpretation of the convention in the decades since its adoption.

Consequently, the recognition and acceptance of the crime of genocide by the international community took considerable time. Lemkin dedicated his life to distinguishing this crime from the other three already established in international law.

Finally, the simultaneous drafting of the UDHR and the Genocide Convention exposes the cultural dimension of genocide. Adopted just one day apart, the documents had notable omissions, cultural genocide was excluded from the Genocide Convention, and minority rights from the UDHR. Delegates believed cultural genocide should be addressed in the UDHR. However, USSR delegate Platon Morozov contended that cultural genocide, similar to biological genocide, deserved recognition and questioned why it was not explicitly incorporated into the Genocide Convention.

CHAPTER II: The controversial nature of the concept of "cultural genocide" and its exclusion from the genocide convention

To procced on the occurring Genocide Convention, the General Assembly resolution 96(I) recommended the Economic and Social Council (ECOSOC) to study and draft a convention. After research, in 1947, a mobilized Secretary-General, composed with Lemkin as a consultant for the creation of the first draft of the Convention, stated three types of genocide: physical, biological, and cultural. Notably, a distinct regard on the last dimension effectively demonstrates Lemkin's research and struggle during the assembly.[70]

Indeed, at the early stage of his thinking, the scholar was already drawing attention to the prominence of assaults on a group's culture as an essential element of genocide. The essence of genocide was, thus, cultural.

The idea arose from the previous German occupation of his native Poland. In particular, he came to witness how horribly symbiotic the combination of physical and cultural destruction could evolve. Despite its relevance as a concept and its presence in the first drafts, cultural genocide was not approved in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

What led to this almost total inversion of the original meaning of genocide, from a holistic concept of genocide to one limited to its physical and biological aspects? What was the fate of cultural genocide under the Genocide Convention?

To address these questions, an initial analysis of cultural terms will be conducted, covering the definition of culture and Lemkin's specific approach on cultural genocide's concept. Subsequently, the various drafts and the evolution of the Convention will be examined, including the divisions among the drafters. Finally, the reasons behind the juridical refusal to include cultural aspects in the definition of genocide will be investigate.

A. The original conceptualization by Lemkin

a. The general definition of the term culture and the cultural aspect of genocide

In seeking to create a cultural genocide law, the term of culture must be defined and understood by its own. The difficulty to define cultural genocide flows from its main core element "culture" which has itself greatly evolved throughout the centuries. It is, therefore, essential to understand what culture is and its components in order to consider laws that protect such an abstract concept.

The concept of culture has been the focus of a significant amount of research in the nineteenth and twentieth centuries, including dissertations, books, and scholarly articles. This rich body of

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[70] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

work makes this overview relevant since one's notion of what constitutes cultural genocide is dependent upon one's definition of culture.

First, regarding its etymology, the term "culture" derives from the Latin *cultura*, from *colere*, meaning "to cultivate". It originally referred to the land, but gradually acquired figurative meanings, requiring a complement, such as culture of the arts or else human culture. For a long time, the word culture has been used to describe the training of the mind, or what is commonly referred to as general culture. [71]Every person, rule, and institution have a cultural profile. If culture is defined in many ways, the central notions almost constantly relate to behavior, beliefs, experiences, understandings, and values.

This concept is not even fully defined in international law nor is there a standard definition in anthropology. Definitions of culture in anthropology vary widely, encompassing everything from morals and values to entire societal institutions. Some anthropologists argue that culture is learned exclusively, while others emphasize genetic influences. Additionally, some view culture as only ideas, while others believe it includes both ideas and their related activities. These differing views within anthropology highlight the ambiguity of the concept of culture. The absence of a uniform definition not only complicates its understanding but also supports the idea of culture as an intellectual abstraction.

Remarkably, law frequently interprets culture in a narrow sense. For instance, when it comes to a book, law might treat it as an object subject to legal actions such as censorship or banning. This view limits culture to specific items or expressions that can be directly regulated.

On the other hand, a broader definition of culture includes all social practices and norms, not just individual items. This broader perspective sees culture as encompassing the entire range of social activities and institutions, including how law operates within society. In this view, law is not just a tool for regulating specific cultural artifacts but is also an integral part of the cultural framework, influencing and being influenced by social practices and norms.

Although culture remains an undefined term and varies widely, Lemkin provided some tools of study for understanding the more specific concept of cultural genocide. His book *Axis Rule in Occupied Europe* offers valuable insights and clarifications on this topic.

b) The presence of culture in the genocide definition's proposition

Cultural genocide was key to Lemkin's definition of genocide. This notion refers to the destruction of the unique cultural, linguistic, and religious characteristics of a group. The attacks from the later destruction were both tangible and intangible cultural structures, including the prohibition of the use of national or native language, the strict control of cultural activities and the destruction of cultural monuments. [72]

His focus on culture is connected to his view of genocide as a crime with both "negative" and "positive" aspects, which are linked and manifested in various techniques of genocide, to be analyzed later. He highlights a two-phase process: "First, the destruction of the national pattern of the oppressed group [the negative aspect]; second, the imposition of the national pattern of

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[71] Yvon Pesqueux. La culture nationale en sciences de gestion. Doctorat. France. 2024. [You find the source here]

[72] Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

the oppressor [the positive aspect].” This process targets not just states and armies but also entire peoples. [73]

Although Chapter I covered the main intention of *Axis Rule in Occupied Europe*, the cultural dimension also had an appealing position. In his essay, it is written that “Genocide is effected through a synchronized attack on different aspects of life of the captive peoples.”[74] From this statement, he enumerated the techniques of genocide in eight fields representing a complex, almost scientific system developed to an unprecedented degree by any nation.

- Political
- Social
- Cultural
- Economic
- Biological
- Physical
- Religious
- Moral

In the cultural field, he introduced several measures, including: “banning or dismantling cultural institutions and activities; replacing liberal arts education with vocational training to stifle humanistic thinking, which the occupier deems dangerous for its promotion of national consciousness.”[75]

He also listed cultural techniques such as prohibiting the use of a group’s language; imposing German education; replacing liberal arts education with vocational schools; tightly controlling all cultural activities; including the arts and destroying national monuments, libraries, archives, museums, and galleries.

Lemkin did not equate the destruction of culture with genocide itself, rather, he argued that genocide against a group could be executed through cultural methods. He observed that in the occupied territories, the local population was prohibited from using their own language in schools and printed materials. Decrees mandated that German teachers replace local educators to ensure that youth were indoctrinated with National Socialist ideals. Public dancing was banned in Poland unless it was officially sanctioned as sufficiently German. In every occupied area, individuals involved in the arts were required to obtain a license from the Reich Chamber of Culture to prevent the expression of national identity through these mediums. In Poland, authorities organized the destruction of national monuments and systematically dismantled libraries, archives, and museums, preserving what they wanted and burning the rest.[76]

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[73] Quigley, John B. Review of *Raphael Lemkin and the Struggle for the Genocide Convention*, by John Cooper. *Holocaust and Genocide Studies*, vol. 31 no. 2, 2017, p. 325-327. *Project MUSE*, [You find the source here]

[74] Linden A. Mander, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress. By *Raphaël Lemkin*. [Publications of the Carnegie Endowment for International Peace, Division of International Law, Washington.] (New York: Columbia University Press. 1944. Pp. xxxviii, 674. $7.50.), *The American Historical Review*, Volume 51, Issue 1, October 1945, Pages 117–120, [You find the source here]

[75] Tavaras, T. (2011).*The case for cultural genocide: the formulation of a working definition* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain. [You find the source here]

[76] Klamberg, Mark, *Raphaël Lemkin in Stockholm – Significance for His Work on 'Axis Rule in Occupied Europe'* (April 30, 2019). Genocide Studies and Prevention: An International Journal, volume 13(1), 2019, 64-87, [You find the source here]

Some scholars interpret Lemkin's analysis as creating a hierarchy or division between different types of genocide, particularly between physical and cultural genocide. However, this interpretation may misunderstand Lemkin's broader intent. For Lemkin, genocide was not primarily about the physical annihilation of a group. Instead, he emphasized the importance of cultural genocide, defined as the deliberate destruction of a group's cultural heritage, language, religion, and ways of life, as equally significant.

By prioritizing the physical aspects of genocide over the cultural, one risks reverting to older conceptions of genocide that focus narrowly on mass murder, thereby missing the full scope of what Lemkin sought to address.

Lemkin's rationale for defining genocide was deeply rooted in the protection of cultural diversity. He argued that protecting a group was crucial not only for the survival of that group but also for the preservation of humanity's cultural diversity. This idea reflects Lemkin's belief in the intrinsic value of cultural diversity as part of the human experience.

c) The notion of group in favor of a cultural dimension within the definition

Although there may be varied interpretations of the specifics of culture, there is a consensus on its fundamental aspects and how it appears within groups. The culture understood as a way of life, encompassing the patterns of behavior and social practices that shape and regulate interactions appear in a specific situation, within a community.[77]

The way of life in question has its basis in ideas that are transmitted between people: this is the way the culture spreads and eventually guides an entire group of people. The combination of these things creates a complex whole that include all beliefs, artifacts, and products of human activity as determined by these habits. This point of view on culture is valuable because it explains how cultural practices impregnate a group. Additionally, it offers a foundational framework for exploring culture's role in shaping group identities and informs the development of cultural and genocide laws.

As analyzed earlier, genocide is distinguished from other serious crimes by the element of intent. For genocide, victimization of human beings is a necessary, but not the unique element. Acts directed against human beings must be committed with an intent to destroy a group to which the immediate victims belong.

The intent to destroy a group had to include the destruction of their way of life. Otherwise, the horrific task would be incomplete. Attacks on culture, in his view, usually came first. In other word, physical and biological genocide seem to be always preceded by cultural genocide or by an attack on the symbols of the group or by violent interference with religious or cultural activities.

Furthermore, the perpetrator of genocide targets two types of legally protected assets: one collective and the other individual. [78]In this context, harm to individual legal rights occurs only

[77] Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

[78] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

because the victims belong to the targeted group.

However, the concept of "existence" varies depending on whether genocide is viewed narrowly or broadly. In the narrow view, community existence is understood in a biological sense, meaning the group is considered to exist only through its members; if they disappear, the community inevitably perishes with them. In the broader view, community life encompasses a cultural and identity dimension. The group is seen as having its own distinct existence and way of life. It ceases to exist when the specific cultural elements that define it are eradicated, even if its members remain biologically alive. To determine whether genocide has occurred, the key question is whether the perpetrator must intend the physical or biological destruction of the group members, or whether the aim can also be to eliminate the group's existence as a social entity through the dissolution of its communal identity.

Culture, in Lemkin's definition, was a functional, structural force that integrated individuals into social groups. He recognized that nations did not actually have concrete linkages that united them through history; rather, he believed it was the social construction of these linkages that mattered. In Lemkin's thought, there were certain aspects of culture, like common rituals, music, arts, practices, and shared beliefs, that integrated individuals into national groups and allowed them to form the "family of mind". [79]

If the destruction of culture is closely linked to the destruction of nations, since erasing culture can weaken a nation's very existence, this connection acts in the interest and as a key argument of including cultural destruction in the definition of genocide.

As was observed, Lemkin's treatment of cultural genocide is somehow complex. At times, he views it as a potential step toward genocide, at other times as a component of the genocide itself, part of one of its techniques, and occasionally as the primary aim of the crime. This ambiguity may help explain why, as we will discuss later, cultural genocide was one of the most controversial topics during the preparatory work for the Genocide Convention.

B. The debate of the integration of "cultural genocide" along the drafting process of the Genocide Convention.

For a clear understanding of the progression of the Convention, it is useful to have a general view of its main steps and their corresponding dates:

- **June 1947**: The first draft of the Genocide Convention was completed by the United Nations Secretariat.
- **April-May 1948**: The Ad Hoc Committee on Genocide, established by the United Nations Economic and Social Council (ECOSOC), worked on revising the draft and produced a revised version of the Convention.
- **August 1948**: The Sixth Committee of the United Nations General Assembly began discussions on the draft Convention.
- **November 1948**: The final draft of the Genocide Convention was presented to the United Nations General Assembly.

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[79] Tavaras, T. (2011).*The case for cultural genocide: the formulation of a working definition* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain. [You find the source here]

- **December 9, 1948**: The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide
- **January 12, 1951:** The Convention came into effect.

a) The Secretariat's Draft

The Secretary-General, under the guidance of the Secretary-General Trygve Lie, formulated the preliminary draft convention with the help of experts in international law, in accordance with the resolution adopted by the General Assembly. [80] In May 1947, Lie invited Lemkin and two other international jurists, Professor Donnedieu de Vabres and Professor Vespasian Pella.

As already stated in the first Chapter, Lemkin, Pella, and Donnedieu de Vabres were assigned the task of drafting the initial proposal. Lemkin was selected due to his reputation as the "godfather" of the genocide concept, Pella served as the president of the International Association of Penal Law, and de Vabres represented France on the UN's Committee for the Progressive Development of International Law and its Codification.

In his instructions, the Secretary-General made it clear that he did not intend to advocate for one political solution over another. Instead, the experts were tasked with producing a comprehensive draft convention that should, as much as possible, include all the points likely to gain acceptance, leaving it to the organs of the UN to remove whatever they deemed necessary. By this means, the Secretary-General aimed to create an inclusive and balanced working basis embracing a wide range of proposals. [81]
This approach favored neutrality and cooperation, leaving it to the UN bodies to select and adjust the elements of the draft in order to reach a consensual agreement. However, their draft was hindered by intellectual disagreements and ambiguous preventive measures, revealing that the jurists had divergent objectives for the project.

First, the preamble articulate that: "genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the Unites Nations."[82]

Moreover, along the drafting process, Lemkin defended that erasing a group's culture would be just as effective in destroying the group's existence as physically destroying it. In all, he asserted that a group's survival relied on "its spirit and moral unity" and that cultural destruction was "as catastrophic for civilization as the physical destruction of nations".[83]
However, his counterpart, De Vabres and Pella, disagreed while arguing that the protections for group language, publications, and culturally significant objects, monuments, and documents, to

[80] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

[81] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[82] Fussell, J. (n.d.). The genocide convention - secretariat (1947) and Ad Hoc Committee(1948) drafts - - prevent genocide international. [You find the source here]

[83] Johnson Petri, R. (2019). _ *The Death of a Culture – A Critical Analysis of the Concept of Cultural Genocide in International Law*. FACULTY OF LAW Lund University [You find the source here]

be either minor compared to other acts prohibited as genocide, or more appropriately addressed under the League of Nations'minority protections.[84] In this thinking, they doubted whether cultural genocide practices had any place in the convention under preparation, as they constituted an "an undue extension of the notion of genocide".

The jurists managed to complete a draft by June 1947, but they were unable to reach a consensus or present a unified perspective in their proposal. Instead of agreeing on a single approach, they suggested that it would be more beneficial for the Assembly to have a variety of ideas and options to consider. This argument actually demonstrates why the cultural dimension remained present despite the controversy.

Finally, the Secretariat Draft was completed. The second point of Article I defined cultural genocide as one of the three forms of genocide, alongside physical and biological genocide.

However, the primary criticism of the Secretariat Draft was that it "lacked realism". State representatives believed that for the convention to gain governmental acceptance, it needed to consider political realities, which they felt they were better equipped to address than the Secretariat and its appointed experts.[85] Consequently, ECOSOC assigned an Ad Hoc Committee, consisting of seven Member States, to create a new draft that addressed the issues raised during the debates, including the contentious inclusion of cultural genocide.

b) Draft by the Ad hoc committee on genocide

In the primary Secretariats draft, the cultural genocide was defined as:

"The destruction of the specific character of the targeted group(s) through destruction or expropriation of its means of economic perpetuation; prohibition or curtailment of its language; suppression of its religious, social or political practices; destruction or denial of access to its religious or other sites, shrines or institutions; destruction or denial of use and access to objects of sacred or sociocultural significance, forced dislocation; expulsion or dispersal of its members; forced transfer or remove of its children, or any other means."[86]

This definition of cultural genocide is rather expansive and thusly many states were adamantly opposed including the United States, for fear of being prosecuted for genocidal acts they may have committed. So once the drafting of the convention was passed to ECOSOC, the debate continued as many voiced their disapproval of the inclusion of cultural genocide. [87]

On the basis, the Ad Hoc Committee was made up of representatives from each member States: United-States; France; Sovietic Union ; Poland, China ; Libanon; Venezuela.

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[84] Hamilton, Martin, 'The Concept of Cultural Genocide', in Claire Finkelstein, Derek Gillman, and Frederik Rosén (eds), *The Preservation of Art and Culture in Times of War*, Ethics, National Security, and the Rule of Law (New York, 2022; online edn, Oxford Academic, 22 Sept. 2022), [You find the source here]

[85] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[86] Fussell, J. (n.d.). The genocide convention - secretariat (1947) and Ad Hoc Committee(1948) drafts - - prevent genocide international. [You find the source here]

[87] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

During this second step of the Convention, the Committee voted six to one in favor of retaining the prohibition of cultural genocide. Two competing arguments emerged from the negotiations and resulted in a compromise. They echo with the primary debate among the drafters. One argument was that a group could be exterminated through either its physical destruction or the destruction of the culture that defines the group and with which the group's identity is entwined. The opposing argument was that a convention prohibiting genocide should be restricted to the most severe acts, and the protection of cultures and minority rights could be dealt with by U.N. organs concerned with human rights and discrimination against minority groups. [88]

Therefore, as the discussion grew more polarized, the Committee's members agreed, as a compromise, to retain cultural genocide, but insert it in a separate article. Cultural genocide was now included in Article III in the Ad Hoc Committee Draft, while physical and biological genocide were included in Article II.

- *Article III [Cultural' genocide]*

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:[89]

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

This tactical move aimed to easy the progress. The concept of cultural genocide changed since it was no longer perceived as an integral part of genocide but, rather, as protecting the cultural products of a group and, thus, somehow less serious than physical or biological genocide. In effect, the holistic approach advocated by Lemkin shifted towards one that resembles the more limited humanitarian law tradition. [90]

Ultimately, this change allowed the member states to claim that the correct place for such protection is under human rights instruments and not under a convention for the prevention of genocide. In fact, the possibility to have a separate article shifted the focus from modifying the term to whether to retain or remove it entirely, which made it more vulnerable.

c) Final Draft Sixth Committee: the final decision rejecting the term

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[88] Luck, E. C. © 2018 Los Angeles, J. Paul Getty Trust _Cultural genocide and the protection of Cultural Heritage_.[You find the source here]

[89] Fussell, J. (n.d.). The genocide convention - secretariat (1947) and Ad Hoc Committee(1948) drafts - - prevent genocide international. [You find the source here]

[90] Quigley, John B. Review of *Raphael Lemkin and the Struggle for the Genocide Convention*, by John Cooper. *Holocaust and Genocide Studies*, vol. 31 no. 2, 2017, p. 325-327. *Project MUSE*, [You find the source here]

On October 25, 1948, the discussion within the Sixth Committee of the United Nations General Assembly surely demonstrated the deep divide between the one who supported, and the others opposed to the inclusion of cultural genocide in the Genocide Convention.

In 1948, the Sixth Committee of the United Nations was composed of all member states of the UN at that time. The UN had 58 member states in 1948, so each of these countries was entitled to send representatives to participate in the work of the Sixth Committee. Some of the key member states involved during the drafting involved the United States, the Soviet Union, the United Kingdom, France, China, and other countries from various regions, including Latin America, Africa, Asia, and Europe. [91]

On one hand, the one in favor claimed that were the destruction of a group's cultural foundations could lead to the group's overall destruction, and that cultural genocide was not only inherently linked to physical genocide but often served as its precursor. According to them, the exclusion of cultural genocide from the Convention could severely undermine efforts to prevent physical genocide, as the two were seen as inseparable in both intent and effect. [92]

On the other hand, the opponents argued that such matters were more appropriately addressed through instruments designed to protect minority rights, such as national constitutions, civil codes, or the Universal Declaration of Human Rights, which safeguarded freedoms of expression, language, religion, and culture. The complexity of the member states will be studied separately in a later stage

Notably, the Drafting Committee's version of the Genocide Convention did not include any reference to an international criminal court. This omission occurred because, during the article-by-article review of the Ad Hoc Committee Draft, the USSR and several other states succeeded in removing the mention of a "competent international tribunal". These countries were opposed to the idea of an international court having jurisdiction over genocide cases. However, countries such as Canada, Pakistan, the Philippines, Uruguay, and the United States argued that including a reference to an international criminal court was essential for the Convention's effectiveness. They believed that without such a mechanism, the Genocide Convention would lack a crucial tool for ensuring international legal accountability and enforcement.[93]

Ultimately, the focus on protecting groups, which was showed as central to the idea of cultural genocide, conflicted with the primary focus on individual rights, as outlined in the already mentioned Universal Declaration of Human Rights and highlighted in the judgments of the International Military Tribunal.

Instead, it listed five specific prohibitions, including the forcible transfer of children from one group to another in the Article 2, paragraph e, which experts consider to be the only remaining trace of cultural genocide in the Convention. Notably, the ILC considered this point as biological genocide, meaning it threatens the group's existence. However, biologically, the group could still survive if the children reproduce in a different area. The real harm is cultural, as the children are assimilated into a new community with different cultural norms, leading to

[91] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

[92] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

[93] Quigley, J. B. (2016). The genocide convention: An international law analysis. Routledge. [You find the source here]

the loss of the original group's cultural identity. The core issue is the distinction between biological and cultural genocide.[94]

In this regard, culture can be destroyed through education, particularly state controlled public education. Public education can shape history in such a way that it excludes parts that it deems inappropriate or even reinforce negative stereotypes about cultures and emphasize their supposed inferiority to get rid of the culture completely. [95]

This concession yet diminished the crucial understanding that the destruction of a group's collective identity and culture is the fundamental driving force behind genocidal actions aimed at eradicating the group as such.

Furthermore, during the negotiations over articles and definitions as United Nation's member states sought to finalize the Genocide Convention, Raphael Lemkin eventually acquiesced. He had to face several doubts and fights to finally give away this specific dimension that he fought yet during the precedent drafts in order to not compromise the ratification of all Convention. He chose instead to focus on securing a consensus among the majority of delegations on including provisions for prosecuting genocide through a competent international tribunal, as reflected in Article VI of the final Convention.[96]

To conclude, the third and final draft of the Convention encountered significant resistance when it came to the question of whether to include Article III on cultural genocide. The opposition was fervent, with many delegations expressing strong objections. It soon became clear that the Sixth Committee was unlikely to reach a compromise on the issue. Consequently, a final vote was held and resulted in the exclusion of cultural genocide from the Convention. The results of the votes appear tight, counting twenty-five votes in favor of exclusion, sixteen against, with four abstentions and thirteen delegations absent. In order to understand these votes, it is relevant to explore the underlying concerns of member states and the fears that motivated the debate and ultimately led to their refusal.

C. The fate of cultural genocide

a) The main arguments leading to the refusal

As introduced before, the states participating to the Sixth Committee feared that the inclusion of cultural genocide in the Convention would open the door to international interference in what they regarded as domestic affairs. The concern was particularly strong among those who worried that their assimilationist policies, which aim to homogenize the population and to reduce cultural diversity, could be interpreted as "cultural genocide", exposing them to international inspection and condemnation.[97]

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[94] Micol Sirkin, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L. REV. 489 (2010). [You find the source here]

[95] Krieken, Robert. "Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation." *Oceania*, vol. 75, no. 2, 2004, pp. 125–51. *JSTOR*, [You find the source here]

[96] Quigley, John B. Review of *Raphael Lemkin and the Struggle for the Genocide Convention*, by John Cooper. *Holocaust and Genocide Studies*, vol. 31 no. 2, 2017, p. 325-327. *Project MUSE*, [You find the source here]

[97] Tavaras, T. (2011).*The case for cultural genocide: the formulation of a working definition* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain. [You find the source here]

Before delving into specific country's motivation, three main arguments can be synthesized to understand the final decision regarding the Genocide Convention.

First, the concept of cultural genocide was simply too imprecise, recalling the criticism of the Secretariat's draft for its lack of realism. This case arose from a common fear that if the Convention produced a definition of genocide too broad, states would refuse to ratify it.

In fact, the initial idea was to create a minimally intrusive convention with universal appeal to ensure widespread ratification. A wide definition would exceed the scope of U.N.G.A. Resolution 96(I), while a narrower one would be easier to agree upon and would enhance the Convention's effectiveness. This argument assumes that legal texts should be precise and unambiguous, so they leave no room for interpretation. Therefore, the term cultural genocide received critics because it was perceived as too vague, even if the fear that such laws could be used to hold powerful states accountable should not be dismissed.[98]

The second reason was the comparative lack of severity of the physical harm. The gap between the severity of mass murder and the closure of libraries was just too large: cultural genocide is not "as bad" as physical genocide.[99] This is an undeniable fact, as human life is not directly endangered by the banning of books or the suppression of languages to the same extent as physical violence. However, such prohibitions pose a significant threat to the foundations of society, culture, and communities, diminishing the quality of life and eroding individual and collective identity. Obviously, acts of mass murder and physical violence are tangible and directly threaten human life, which makes them more immediate and visible concerns for international law.

The third reason was the impression that cultural destruction could be handled within the framework of minority protection or human rights law, rather than international criminal law. In this regard, issues of cultural genocide are more about human rights and should be addressed through treaties or declarations focused on minority rights. [100]For example, the United States argued that, given the gravity of creating a new crime of genocide, only the most severe acts should qualify as genocide.[101]The main issue with this argument is that it ignores the need for a system of punishment to ensure that human rights are effectively protected.

b) State's opinions and motivations

The argument for including cultural genocide in the Genocide Convention was robustly supported by a group of nine member states, predominantly from the developing world and the Soviet bloc. [102]These supporters saw cultural genocide as an integral component of the broader

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[98] Gilbert, Jérémie, 'Perspectives on Cultural Genocide: From Criminal Law to Cultural Diversity', in Margaret M. deGuzman, and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (New York, 2018; online edn, Oxford Academic, 18 Jan. 2018), [You find the source here]

[99] Gilbert, Jérémie, 'Perspectives on Cultural Genocide: From Criminal Law to Cultural Diversity', in Margaret M. deGuzman, and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (New York, 2018; online edn, Oxford Academic, 18 Jan. 2018), [You find the source here]

[100] Landsman, S. (2005). *Crimes of the Holocaust: The Law Confronts Hard Cases*. University of Pennsylvania Press. [You find the source here]

[101] Durham, NC: Duke University Press. (1991, January 1). _*The United States and the genocide convention*: Leblanc, Lawrence J: Free download, borrow, and streaming_. Internet Archive. [You find the source here]

[102] Amy E. Randall, ANTON WEISS-WENDT. *The Soviet Union and the Gutting of the UN Genocide Convention*., *The American Historical Review*, Volume 124, Issue 2, April 2019, Pages 632–634, [You find the source here]

concept of genocide, emphasizing that the destruction of a group's cultural heritage is as crucial as physical extermination in the context of genocidal acts.

Among the most ardent proponents was the Pakistani delegate, who argued passionately that safeguarding the physical existence of a group was a significant humanitarian achievement but protecting the cultural and spiritual essence of that group was equally vital.[103] Pakistan's stance was that genocide should encompass not only the physical destruction of people but also the eradication of their cultural identity. This view was supported by delegates from several Eastern European countries, including Byelorussia and Czechoslovakia. Their own painful experiences during World War II fueled their support since several countries from the East were victim of the German occupation which led to the systematic destruction of their cultural heritage. In such way, their statement was aligned with the arguments presented by Raphael Lemkin, who had initially coined the term "genocide" and included cultural destruction as a critical element of the crime.

The support for Article III, dedicated entirely to the inclusion of cultural genocide was mainly influenced by a political context. Many of these supporters were from nations that had experienced or were experiencing similar forms of cultural oppression and saw the inclusion of cultural genocide as essential for a comprehensive legal framework to protect all aspects of group identity.

On the other hand, the opposition emerged from a coalition of influential member states, who generally had significant historical and political interests at risk. The United States, along with France, Denmark, and the Netherlands, were vocal opponents of the inclusion. These countries argued that the Convention should be limited to acts that "shock the conscience of mankind", such as mass murder, rather than including the more ambiguous concept of cultural genocide.

France, the United Kingdom, and other colonial and settler states opposed the inclusion of cultural genocide, fearing that it could be used as a political tool against them. France, for instance, was concerned that the inclusion could have negative implications for its policies in non-self-governing territories and its treatment of indigenous populations.[104] Before 1945, there was little general international concern with colonial issues, and still less with the progress of colonized peoples to self-government.

The British delegate shared the same fears given its territorial situation. It denounced the inclusion of cultural genocide as a shift of the Convention into a political weapon rather than a legal instrument. Similar concerns were expressed by Canada, Sweden, Brazil, Australia, and New Zealand, all of them had their own assimilationist practices and were careful regarding a potential legal or political repercussions.[105]

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[103] Hamilton, Martin, 'The Concept of Cultural Genocide', in Claire Finkelstein, Derek Gillman, and Frederik Rosén (eds), *The Preservation of Art and Culture in Times of War*, Ethics, National Security, and the Rule of Law (New York, 2022; online edn, Oxford Academic, 22 Sept. 2022), [You find the source here]

[104] Zagorac Jasmina . (2022, April 30). _Le Génocide Culturel : UN crime Oublié du Droit International ? – soutenance de thèse – 25 mai 2021 (17h00 – 20h00) – en ligne_. Thesis, University of Lausanne [You find the source here]

[105] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

Critics, including the Netherlands, questioned whether all cultures, including those considered "barbarous", deserved protection and whether the concept could be used to challenge legitimate state actions which aimed at achieving national unity.

Moreover, the political dynamics of the time played a significant role. The early years of the United Nations were marked by intense geopolitical manipulation, with former colonial powers and settler states seeking prevent any measures that might threaten their sovereignty or hold them accountable for past injustices. The debate over cultural genocide was thus intertwined with broader issues of decolonization and international relations.

c) The substantial role of the United States

The long-standing US hegemony not only predates the end of the Cold War but goes back to the end of World War II. Indeed, it is largely accurate to point out, as those who see the United States as hegemon frequently do, that during the early years of the Cold War the United Nations remained a frequently used instrument of US foreign policy.[106]After the war, United States was the only remaining superpower and thus maintained a great deal of influence at the United Nations, as it does in world affairs more generally.

This, notably, has been very much the case about international public policies emanating from the United Nations, its associated specialized agencies, and the managing institutions of the global economy. In analyzing patterns of output and outcome from global organizations during the past several decades, it can be reliably predicted that international organizational behavior aligns with American preferences. This prediction becomes even more reliable when observing U.S. opposition in the initial period, which often leads to international organizational inaction in the subsequent period.

United States leadership was particularly impressive in the drafting of the text of the Convention on Prevention and Punishment of the Crime of Genocide and equally important, the lobbying that brought about a unanimous vote for the treaty at the General Assembly meeting in Paris at the Palais de Chaillot on December 9, 1948. This powerful nation was the principal actor in the drafting process, while Anglo-American legal theory was the principal source for the text. [107]

One of the primary concerns for the United States was the potential legal exposure that could arise from acknowledging cultural genocide. Historically, the U.S. had implemented policies that could be construed as cultural genocide, particularly towards Native American populations. For example, the forced assimilation of Native American children into boarding schools.[108] The country coordinated a system of prohibition from the speaking of their languages to the practice of their cultures. Moreover, the country established boarding schools and forced Indian children to attend. According to a report by the National Native American Boarding School Healing Coalition, there have been altogether 367 boarding schools throughout the United States. By 1925, 60,889 Indian children had been forced to attend boarding schools. In 1926,

[106] Julien Zarifian. Les États-Unis et le concept de génocide. Esquisse d'une relation difficile.. Cahiers d'histoire. Revue d'histoire critique, 2022, 155, pp.109-123. [You find the source here]

[107] Schabas, W. A. (2017, February 27). _The genocide convention: The travaux préparatoires. by Hirad Abtahi and Philippa Webb. Leiden, Boston: Martinus Nijhoff Publishers, 2008.vol. 1: Pp. XXXVIII, 1252. vol. 2: Pp. XV, 965 (1253–2217). index. $585, €411 (SET).: American Journal of International law_. Cambridge Core. [You find the source here]

[108] Julien Zarifian. Les États-Unis et le concept de génocide. Esquisse d'une relation difficile.. Cahiers d'histoire. Revue d'histoire critique, 2022, 155, pp.109-123. [You find the source here]

83% of Indian children were enrolled. Indian children suffered immensely at school, and some died from starvation, disease, and abuse.[109]

Guided by the idea of "Kill the Indian, Save the Man", the United States banned Indian children from speaking their native language, wearing their traditional clothes, or carrying out traditional activities, thus erasing their language, culture and identity.

While these policies revealed a clear attempt to dismantle indigenous cultures, recognizing cultural genocide in the Genocide Convention was inappropriate, since it could have opened the door to accusations and international condemnation of their own practices.[110] This risk of legal and moral accountability was a significant motivator for the U.S. to oppose the inclusion of cultural genocide.

Moreover, the U.S. was deeply concerned about the broader implications for its sovereignty.[111]The post-World War II era was marked by the emergence of international institutions and agreements that sought to hold states accountable for human rights abuses. However, the U.S. was cautious about committing to international standards that could be used to scrutinize or intervene in its domestic policies. By excluding cultural genocide from the Convention, the U.S. sought to limit the scope of the treaty, thereby reducing the potential for international legal challenges to its internal affairs.[112]

The U.S. insisted that the Genocide Convention should require clear evidence of intent to destroy a group, as outlined in Article 2.

This emphasis on intent was not just a legal technicality but a deliberate move to constrain the definition of genocide to acts of physical destruction, thereby excluding cultural practices that could be considered genocidal under a broader interpretation.[113]

The United States'position was further strengthened by the support of other Western nations with colonial histories.[114] If it initially first opposed to this further dimension, countries like France, Canada, Australia, and New Zealand shared similar concerns about the implications of recognizing cultural genocide. As analyzed above, these nations had their own legacies of cultural suppression and assimilation policies towards indigenous populations, and like the U.S., they feared that the inclusion of cultural genocide could lead to international criticism and legal repercussions. This alignment of interests among Western democracies created a powerful bloc that successfully pushed for the exclusion of cultural genocide from the final text of the Convention.

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[110] Korey, W. (2012, September 28). _The United States and the Genocide Convention: Leading Advocate and leading obstacle: Ethics & International Affairs_. Cambridge Core. [You find the source here]

[111]Durham, NC: Duke University Press. (1991, January 1). _*The United States and the genocide convention*: Leblanc, Lawrence J: Free download, borrow, and streaming_. Internet Archive. [You find the source here]

[112] Hill, Suzanne (2020) "The Cold War and the Genocide Convention: A History of the United States' Refusal to Ratify," The Macksey Journal: Vol. 1 , Article 193. [You find the source here]

[113] Hamilton, Martin, 'The Concept of Cultural Genocide', in Claire Finkelstein, Derek Gillman, and Frederik Rosén (eds), *The Preservation of Art and Culture in Times of War*, Ethics, National Security, and the Rule of Law (New York, 2022; online edn, Oxford Academic, 22 Sept. 2022), [You find the source here]

[114] Hill, Suzanne (2020) "The Cold War and the Genocide Convention: A History of the United States' Refusal to Ratify," The Macksey Journal: Vol. 1 , Article 193. [You find the source here]

In summary, the U.S. rejection of cultural genocide in the 1948 Genocide Convention was driven by a combination of legal strategies, concerns about sovereignty, and geopolitical calculations. By shaping the Convention to focus on the physical destruction of groups and requiring proof of intent, the U.S. not only protected itself from potential accusations but also set the stage for a narrower interpretation of genocide in international law. This decision has had lasting implications for how genocide is defined and prosecuted, with cultural aspects of genocide often remaining on the margins of legal and political discussions.

. Conclusion

Lemkin was deeply devoted in defining and shape the term "genocide" with a specific regard on the inclusion of cultural aspects. He succeeded in the first two drafts of the Genocide Convention to maintain this dimension despite skepticism and resistance from his academic peers.

However, his critical error occurred when he accepted the compromise during the final assembly to allow cultural genocide to be relegated to a separate, Article III. Consequently, the separation weakened the cultural dimension by distancing it from the physical and biological aspects of genocide, implicitly creating a hierarchy that suggested genocide could be considered without addressing the destruction of a group's identity and culture.

The debate over cultural genocide was not just an academic dispute but also became a contentious issue among member states. The Sixth Committee was strongly divided, with the debate extending beyond scholars to national delegates. The discussion no longer revolved around the pursuit of justice but also reflected concerns over national sovereignty, as well as the diverse experiences and historical contexts of the participating countries.

The USSR and its allies strongly advocated for the inclusion of cultural genocide in the Convention, recognizing that cultural and political dimensions were essential to fully understand and address genocidal acts. In contrast, the United States and its Western allies sought to limit the scope of the Convention, largely to prevent setting precedents that could be used against them in the contexts of decolonization and civil rights movements.

The failure of the international community to protect cultural rights and ensure cultural survival is not just disappointing but also hypocritical, especially considering the other rights that nations have supported and enumerated. The Genocide Convention was drafted by states prioritizing their self-interest, resulting in a document that does not fully guarantee the protection of all individuals' rights. This shortcoming highlights the necessity of ongoing debate about the Convention's effectiveness, as it allows for identifying its failures and fosters dialogue on the changes needed to strengthen it.

Ultimately, the combined efforts of powerful states led to the exclusion of cultural genocide from the final text of the Convention. The debate over this exclusion revealed a complex interplay of historical legacies, political interests, and differing perspectives on human rights and international law. While these states offered various justifications for excluding cultural genocide—such as concerns about vagueness and enforceability—it was clear that their primary motivation was to avoid the risk of being accused of genocide themselves. For example, the U.S. and its allies argued that minority rights could be better protected through other international instruments, like the Universal Declaration of Human Rights. However, these

efforts were similarly undermined by political considerations, leading to the exclusion of minority protection provisions from the UDHR as well.

In the end, the Genocide Convention, shaped by these political and historical dynamics, left the issue of cultural genocide unresolved within the framework of international criminal law.

This episode did not mark the end of the consideration of cultural genocide in international criminal law. On the opposite, some cases such as one brought up by the ICC allowed a revival of the debate and the concept is still making it path to be legally recognized.

CHAPTER III: The ongoing debate on cultural rights and genocide in International Criminal Law

The concept of cultural genocide faces difficulties in its implementation since civil, political, economic, and social rights have traditionally been prioritized over cultural rights. The perception that cultural rights were less urgent contributed to the belief that they were secondary, or a "luxury" compared to fundamental human rights.

The perceived lesser severity of cultural genocide in comparison to physical genocide has contributed to its marginalization and a lack of legal and societal recognition of the devastating impact that erasing a cultural identity can have on a people, even without acts of killing. On this matter, when courts and tribunals prosecute physical genocide, cultural genocide is often covered within it, and thus punished as part of it. The present then fails to sufficiently address the gravity and the seriousness of the harm so it is not adequately addressed through the prosecution of physical genocide alone.

Despite the various discussions the term cultural genocide has produced, the concept is neither an independent crime nor a recognized legal term. Indeed, it is not included in the Rome Statute of the International Criminal Court (ICC) and remains largely theoretical.

This chapter will therefore explore the critical issue of fully implementing cultural law as a protected matter under International Criminal Law. A key focus is the need to codify these crimes in the ICC Statute. Holding individuals criminally liable before the ICC, as a permanent international court, could offer effective protection for cultural heritage by deterring such crimes through the threat of punishment and providing an enforcement mechanism, at least in some cases.

The creation of an independent crime with a clear and concrete definition would help establish a consensus on what acts should be punishable as international crimes, ensuring they are treated with the appropriate level of severity.

Various international treaties and declarations have incorporated references to cultural rights, mainly as human rights but none have ever re-articulated the concept of cultural genocide.

To examine the evolution of the concept, it is interesting to analyze the recognition of cultural rights more generally in key legal cases and identify its limitations. A first analysis of the ICTY's rulings is necessary, as they established that the destruction of cultural heritage constitutes a crime under international customary law. The ICTY also determined that systematic attacks on cultural heritage can be qualified as crimes against humanity. Then, explore why these rulings did not extend to recognizing cultural genocide.

On the other hand, the 1998 Rome Statute of the International Criminal Court established a permanent and autonomous court, unlike the ICTY. The Rome Statute included genocide as one of the international crimes under its jurisdiction. Although there was hope that the re-evaluation of the term "genocide" might lead to an expanded definition, it ultimately did not result in such an extension. Additionally, the Ahmad al-Faqi al-Mahdi case serves as a clear example of the unfulfilled expectations regarding the extension of the definition of genocide.

The finest way to conclude the study is to review and scrutinize the development of the international law and project its evolution into the future regarding cultural genocide.

A. The International Criminal Tribunal for the former Yugoslavia's jurisprudence and its contribution to the evolution of cultural rights recognition

a) The ICTY's purpose and its approach to crimes involving cultural dimension

The Balkan conflict of the early 1990s was centered on ethnic and religious grounds, and therefore the destruction of important cultural and religious buildings was considerable. In response, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993, a process that permanently altered the field of international humanitarian law. [115]The ICTY provided victims with a platform to testify about the atrocities they witnessed and endured.

In accordance with its Statute, the ICTY had jurisdiction over the territory of the former Yugoslavia from 1991 onwards and over individual persons but not organizations, political parties, army units, administrative entities, or other legal subjects.

The Tribunal is empowered to prosecute individuals for four categories of offenses: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.

Over the course of almost twenty-five years, the ICTY developed an extensive and diverse body of jurisprudence addressing individual criminal responsibility for the destruction of tangible cultural heritage.[116] Charges addressing the destruction of cultural heritage as a war crime under Article 3.d were frequently connected with related charges of persecution as a crime against humanity.

Article 3 : Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

[115] Zagorac Jasmina . (2022, April 30). _Le Génocide Culturel : UN crime Oublié du Droit International ? – soutenance de thèse – 25 mai 2021 (17h00 – 20h00) – en ligne_. Thesis, University of Lausanne [You find the source here]

[116] Johnson Petri, R. (2019). _ *The Death of a Culture – A Critical Analysis of the Concept of Cultural Genocide in International Law*. FACULTY OF LAW Lund University [You find the source here]

This strategy reflected the relationship between the intentional destruction of cultural heritage and associated systematic attacks against civilian populations. However, Article 4, which addresses the definition and prosecution of genocide, omitted the cultural dimension.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group

While a full account of the ICTY's jurisprudential legacy can hardly be captured, several seminal cases demand attention.

b) Key Cases Highlighting the Treatment of Cultural Crimes

The first recognition manifesting that the targeting and destruction of religious and cultural heritage could be classified as persecution came in the *Blaškić case.* The Trial Chamber in fact determined that "persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind." This understanding included confiscation or destruction of private dwellings or businesses, symbolic buildings, or means of subsistence.[117]

The tribunal afterwards judged the *Kordić and Čerkez case* and addressed charges related to the destruction and plunder of Bosnian Muslim property, including institutions dedicated to religion or education. It considered whether attacks on religious and cultural property could be classified as persecution. It concluded that such acts, when carried out with the necessary discriminatory intent, constitute an attack on the very religious identity of a people. The Trial Chamber thus found that the destruction of institutions related to Muslim religion or education, combined with discriminatory intent, could amount to persecution.[118]

Moreover, in *the Krstić case*, involving the fall of Srebrenica in 1995, the Trial Chamber reconsidered whether acts directed at the cultural aspects of a group amounted to the crime of genocide in international law. It noted that: "[O]ne may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[119]

Overall, these pronouncements from different cases represent one of the closest instances in international criminal law to addressing what Raphael Lemkin, who, as studied, first coined the term "genocide", referred to as "cultural genocide" or "vandalism." By prosecuting the destruction of cultural heritage as persecution, the ICTY was able to contextualize these attacks

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[117] Chechi and M.-A. Renold (eds.) (2017), *Cultural Heritage Law and Ethics: Mapping Recent Developments*, Zürich [or alternatively: Schulthess Verlag]. [You find the source here]

[118] Luck, E. C. © 2018 Los Angeles, J. Paul Getty Trust _Cultural genocide and the protection of Cultural Heritage_.[You find the source here]

[119119] Chechi and M.-A. Renold (eds.) (2017), *Cultural Heritage Law and Ethics: Mapping Recent Developments*, Zürich [or alternatively: Schulthess Verlag]. [You find the source here]

within a broader pattern of conduct aimed at eradicating key aspects of a group's religious and cultural identity. [120]Such attacks are typically part of a systematic campaign against the significant markers of a distinct group's identity, rather than isolated incidents.

c) Limits of the jurisdiction regarding the crime of cultural genocide

This is undeniable that by recognizing the destruction of cultural heritage as potential evidence of the *mens rea*, the intent to destroy, to commit genocide, the ICTY considered and opened again an important discussion about cultural genocide. It invited a re-examination of the normative evolution regarding the concept of cultural genocide within international law.

Furthermore, the ICTY recognized that persecution could include acts designed to destroy a group's cultural or social foundations, not just its physical existence. This opened the door to viewing cultural heritage destruction as persecution, although the tribunal maintained that such acts still fall short of genocide.

However, despite this extension, the Chamber ultimately stopped short of fully embracing the concept of cultural genocide as an independent crime. It reaffirmed a strict interpretation of genocide and emphasized that systematic attacks on cultural heritage alone, even when part of a broader campaign to eradicate a group's cultural identity, do not meet the legal threshold for genocide. The Appeals Chamber confirmed this, stressing that neither the Genocide Convention nor customary international law had evolved to include cultural destruction as a genocidal act.

It is essential to note that the ICTY was an ad hoc tribunal, set up by the United Nations to deal specifically with the crimes committed during the Yugoslav conflict who closed in 2017. Its limited mandate and jurisdiction were adapted to that particular situation, which constrained how far it could push the boundaries of international law. In contrast, the International Criminal Court, as a permanent and autonomous court, offers a different perspective.[121] The ICC follows a more comprehensive and chronological approach to investigations, and while it has jurisdiction over genocide, it has not yet fully embraced the concept of cultural genocide either.

B. Addressing cultural genocide under the International Criminal Court - Rome Statute: Legal Gaps

a) Debates and Omissions of cultural genocide in the Drafting of the Rome Statute

On July 17, 1998, a conference involving 160 States established the International Criminal Court, the first permanent international criminal court. The treaty adopted at this conference, known as the Rome Statute, created the ICC as an independent body, with jurisdiction over individuals responsible for the most severe international crimes, without the need for a mandate from the United Nations.

One key debate during the Rome Statute's treaty focused on whether the ICC would adopt the Genocide Convention's existing definition of genocide or expand it to reflect recent developments in international criminal law, particularly from the International Criminal

[120]J Johnson Petri, R. (2019). _ *The Death of a Culture – A Critical Analysis of the Concept of Cultural Genocide in International Law*. FACULTY OF LAW Lund University [You find the source here]

[121] Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 *Penn St. Int'l L. Rev.* 857 (2005). [You find the source here]

Tribunal for the former Yugoslavia and other ad hoc tribunals. Despite discussions, the delegates opted not to modify the original definition of genocide from the Genocide

Convention.[122] Only Cuba proposed incorporating new elements, but this suggestion was met with little support.[123]

Therefore, the Rome Statute maintained the same limitations as the Genocide Convention, excluding the concept of cultural genocide. This decision marked another missed opportunity to address deficiencies in how international law tackles genocidal acts targeting cultural identity. As with the ICTY, the Rome Statute avoided classifying the systematic destruction of cultural identity as a form of genocide.

However, the Rome Statute did borrow from the ICTY's statute regarding crimes against cultural property. It criminalized attacks on protected objects, such as buildings dedicated to religion, education, art, and historical monuments, treating these as war crimes in both international and non-international conflicts. While not fully recognizing cultural genocide, the ICC included the destruction of cultural institutions under its jurisdiction for war crimes, allowing some degree of accountability for attacks on cultural heritage.[124]

The Rome Statute does not fully recognize cultural destruction as genocide, though it allows the possibility of using evidence of cultural heritage destruction to establish genocidal intent. Even so, the physical-biological framework continues to dominate.

Although it includes several provisions that offer a degree of protection to cultural heritage, primarily under the framework of war crimes**.**

b) The Weakness of the Protection of Cultural Property under Article 8(2)(b)(ix) of the Rome Statute

Among the many provisions of the Statute, Article 8 stands out for its attention to the protection of cultural property during armed conflict[125]. The article outlines several war crimes that address the destruction of cultural objects, such as the extensive destruction and appropriation of property not justified by military necessity and the intentional directing of attacks against civilian objects including those dedicated to religion, education, art, and science. This recognition places cultural monuments and sites under a similar protection than hospitals and places.

The ICC's Rome Statute marks a significant advancement by codifying the protection of cultural heritage, but there remain notable limitations in the application of these norms. One of the key limitations is the "military necessity" exception, which permits attacks on cultural property if it becomes a military objective. This exception, while grounded in customary international law, poses a substantial risk to the consistent protection of cultural sites, as it can

[122] Hon, Kristina (2013) "Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC," *Seton Hall Law Review*: Vol. 43 : Iss. 1 , Article 7. [You find the source here]

[123] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[124] [124] Chechi and M.-A. Renold (eds.) (2017), *Cultural Heritage Law and Ethics: Mapping Recent Developments*, Zürich [or alternatively: Schulthess Verlag]. [You find the source here]

[125] Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 *Penn St. Int'l L. Rev.* 857 (2005). [You find the source here]

be misused to justify destruction under the guise of military strategy. Despite the ICC's progress in integrating cultural protection into the realm of war crimes, the "military necessity" doctrine undermines the full safeguarding of cultural heritage, as it allows for the potential erosion of protections in times of conflict.

Moreover, the Rome Statute does not include cultural destruction within the definition of genocide, which remains limited to acts causing physical or biological destruction of a group. While Article 8 offers some level of protection, it is restricted to specific wartime contexts, and the destruction of cultural heritage as an independent crime remains unaddressed. This limitation clearly recalls the approach of the Genocide Convention of 1948, which similarly excluded cultural genocide from its definition. Despite opportunities during the drafting of the Statute to expand the definition of genocide to include the destruction of cultural identity and heritage, the delegates at the Rome Conference opted for a more conservative stance, adhering to the traditional framework. As a result, while the ICC's provisions acknowledge the importance of cultural property, they fail to elevate its destruction to the level of genocide unless accompanied by acts of physical extermination.

While the Rome Statute offers meaningful progress in the protection of cultural heritage, particularly through the classification of such destruction as a war crime, it falls short of recognizing cultural genocide as an independent offense.

Nevertheless, years later, Article 8 was used in a case as a prosecution tool in a way it had never been before.

c) Ahmad al-Faqi al-Mahdi case: a unprecedent legal proceeding regarding cultural heritage

Ahmad Al Faqi Al Mahdi was a member of the armed Islamist group Ansar Dine who aimed to impose sharia law across Mali. In early 2012, Ansar Dine joined a rebellion led by the National Movement for the Liberation of Azawad in Northern Mali. After the rebels forced the Malian military to retreat south, infighting among the rebels led to the MNLA being driven out of Mali's main urban centers. By April 2012, Ansar Dine, in collaboration with Al Qaeda in the Islamic Maghreb took control of Timbuktu. During their occupation, which lasted until January 2013, they established an Islamic tribunal, a morality brigade called the Hibah, and a police force to enforce sharia law.[126]

Starting from April until September 2012, Al Mahdi was appointed head of the Hisbah, tasked with regulating the morality of Timbuktu's residents and suppressing any "visible vice" perceived by the occupiers. Given his expertise in religious matters, he was also reportedly involved in other occupier-established structures, including the Islamic tribunal. Between approximately June 30 and July 11, 2012, members of the Hisbah, possibly with AQIM members, destroyed several historic and religious buildings in Timbuktu, which they deemed idolatrous and a "visible vice". Al Mahdi is said to have been consulted about and involved in planning and executing these attacks.

Consequently, several buildings in Timbuktu, including 14 of the 16 mausoleums that make up the World Heritage site, were destroyed and an estimated 4,203 manuscripts stored at the Ahmed-Baba Institute of Higher Islamic Studies and Research were burned or stolen by armed

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[126] Vrdoljak, A. F. (2018, March 5). _Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and sentence & reparations order (int'l crim. ct.): International Legal Materials_. Cambridge Core. [You find the source here]

groups. This systematic destruction illustrates how radical Islam was brutally imposing its social and cultural standards on a country at war, in defiance of its history and heritage. This case actually reflects the primary and recurring intent observed across various cases throughout the investigation.

In connection with these events, Al Mahdi has been charged with the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments which were not military objectives, as set out in Article 8(2)(e)(iv) of the ICC Statute. The prosecution asserts that he is criminally responsible under the points a); b); c) and d) from the third paragraph of Article 25 of the ICC Statute. These implicates the individual criminal responsibility and explains why the case brought Al Mahdi in person before the court. [127]

When the case against Ahmad al-Faqi al-Mahdi was opened for his role in the destruction of mausoleums in Timbuktu, the ICC Chief Prosecutor Fatou Bensouda emphasized the significance of pursuing international criminal accountability for heritage destruction.[128] She described the case as historic, given the "destructive rage" of our times, where humanity's shared heritage is subjected to systematic and deliberate damage. The protection and realization of universal values sit at the very heart of the purposive foundations of international criminal law. Since the inception of the notion of international criminal accountability, the courts and tribunals that have been tasked with its delivery have recognized that acts that threaten and destroy the heritage of peoples cannot be left unpunished

In September 2016, the International Criminal Court (ICC) rendered its first verdict that deals entirely with cultural destruction- Prosecutor v. Al-Mahdi. The decision was lauded for its precedential value for recognizing the link between an attack on a group's cultural heritage and its destruction. He was sentenced to nine years' imprisonment.

Even if the Court acknowledged that Mr. Al Mahdi's actions were crimes against property rather than against individuals and therefore of lesser gravity, it still deemed the crime significant. This was because the destruction targeted World Heritage sites of great importance to both Mali and the international community, held symbolic and psychological value for the local population, and was driven by discriminatory religious intent aimed at preventing religious practices. In mitigation, the Court noted that Mr. Al Mahdi had initially advised against the destruction to preserve relations with the local community, admitted his guilt, and expressed "genuine" remorse and empathy for the victims.[129]

However, despite these considerations, the Court did not classify the act as genocide, which concerns the destruction of groups, but instead charged Mr. Al Mahdi with the more narrowly defined war crime of destroying cultural property.

Finally, the case testifies both progress and at the same time disappointment. While it has shown that such a crime may be assessed as sufficiently grave to justify an action by the ICC, it does not provide an easy path for other prosecutions. The conviction of Al-Mahdi was based on his guilty plea, which obviously resulted in quick trial and the lack of appeal procedures, but it is

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[127] Leora Bilsky, Rachel Klagsbrun, The Return of Cultural Genocide?, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 373–396, [You find the source here]

[128] Hon, Kristina (2013) "Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC," *Seton Hall Law Review*: Vol. 43 : Iss. 1 , Article 7. [You find the source here]

[129] Vrdoljak, A. F. (2018, March 5). _Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and sentence & reparations order (int'l crim. ct.): International Legal Materials_. Cambridge Core. [You find the source here]

unlikely that future trials will go so smoothly. The final judgment has undoubtedly served to enhance public awareness concerning the seriousness and gravity of international cultural heritage crimes. It has also allayed somewhat the sense of injustice and frustration brought about by the unrestrained process of destroying world-famous cultural heritage sites in Syria and Iraq.

Yet at the same time the recent initiatives by the UNSC and Council of Europe confirm that without closer cooperation between States with respect to the prosecution, extradition, and punishment of those committing crimes against cultural heritage, the fight against the impunity of perpetrators of cultural crimes is doomed to failure.

C. Prospects of development for the prevention and repression of cultural genocide

a) The possibility of expansion of the genocide's definition outlined in the Genocide Convention

As previously stated, international law has yet to provide an effective complementary framework for recognizing and addressing crimes against cultural heritage, along with an adequate enforcement mechanism.

The ICC's judgment in the Al-Mahdi case and the internationally funded restoration of Timbuktu's monuments have provoked global awareness and solidarity in fighting these crimes. However, stronger mechanisms of international cooperation are still needed, not only in criminal justice but also in information sharing, mutual technical and financial support, and educational initiatives. While these areas are now being seriously considered, they remain underdeveloped.

The logical potential solution to consider, following the review of Chapters I and II, would be a revisit and possibly revise the definition of genocide in the Genocide Convention. Given the passage of time and the rise of awareness, it may now seem feasible to expand and refine the definition to better address contemporary issues.

The inclusion of cultural aspects within the definition of genocide is evident but has yet to be fully recognized in international law. While the negotiations around the Convention took place during a period when the international legal order was still being established, the subsequent evolution of international law must now be reconsidered within this analytical framework.[130]

Therefore, although excluded from the final text of the Genocide Convention and lacking an "official" or unanimous definition, cultural genocide could enter the genocidal scope of application "through the back door", applying that it could be attached to the crime without being a constitutive element or "through the front door", this time by being considered a manifestation of genocidal intent. In all, cultural genocide could be integrated into the definition of the crime of genocide thanks to a broad interpretation of the latter.[131]

To address this issue, two types of instruments could be adopted to complement the 1948 Convention. On one hand, the additional protocol would allow the term to exist alongside the

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[130] NOVIC, E. *The concept of cultural genocide: An international law perspective*. New York ; Oxford : Oxford University Press, 2016, Cultural heritage law and policy [You find the source here]

[131] Johnson Petri, R. (2019*)*. _ *The Death of a Culture – A Critical Analysis of the Concept of Cultural Genocide in International Law*. FACULTY OF LAW Lund University [You find the source here]

Convention and extend its scope by specifically addressing cultural genocide without altering the Convention's original text. One the other hand, the amending protocol, who aim to add, delete, or modify specific provisions of the Genocide Convention, would be similar to other additional protocols to the ECHR that make substantive changes to the treaty's terms.

Challenges for reforming and amending a convention is crucial to consider. Indeed, international law, being based on the will of states, can only be amended with the consensus of all affected states. Achieving such consensus can be challenging due to the need for agreement among a large number of states. However, this formal rigidity may be mitigated by adopting an evolutionary interpretation of the norms in question. Such an interpretation considers changes in the legal context from the time the treaty was adopted to its application. Since the rules outlined in Articles 31 to 33 of the Vienna Convention on the Law of Treaties do not explicitly address temporal variables in interpretative processes, it remains unclear whether treaty terms should be understood according to the law at the time of adoption or if they can be interpreted in light of new circumstances.[132]

These proposed instruments would provide a means to address cultural genocide within the framework of international law, reflecting contemporary understandings and needs while preserving the foundational principles of the Genocide Convention.

Ultimately, William A. Schabas argues that "among international lawmakers, [cultural genocide] is a dead issue". He suggests that the idea of establishing a new treaty to address cultural genocide is highly idealistic, especially since the rhetoric of cultural genocide was ultimately rejected in the final version of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). [133]

Given the difficulty to revise a treaty, it seems necessary to explore a potential alternative and fresh perspective. it is relevant first to might examine the legal advancements concerning the status of victims and the prospect of reparation that could follow. This serves as a starting point for re-evaluating cultural genocide.

b) Beyond war crime and crimes against humanity: towards recognition of cultural genocide

The intentional destruction of cultural and historic objects during armed conflicts has long been recognized as a war crime. It is essential to keep in mind that for an act of cultural destruction to qualify as a war crime, it must occur within the broader context of an armed conflict. This context is crucial because it transforms what might otherwise be ordinary crimes against persons or property into international offenses. Once this context is established, various offenses against cultural property or the cultural identity of group members can be prosecuted, including those committed directly or by subordinates for whom a commander is legally responsible.[134]

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[132] Zagorac Jasmina . (2022, April 30). _Le Génocide Culturel : UN crime Oublié du Droit International ? – soutenance de thèse – 25 mai 2021 (17h00 – 20h00) – en ligne_. Thesis, University of Lausanne [You find the source here]

[133]Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 *Penn St. Int'l L. Rev.* 857 (2005). [You find the source here]

[134] Rossi, P. (2018, April 3). *The al mahdi trial before the International Criminal Court: Attacks on cultural heritage between war crimes and crimes against humanity*. Diritti umani e diritto internazionale no. 1/2018. [You find the source here]

That said, the picture yet is still far from complete when it comes to protecting the cultural existence of human groups themselves under international criminal law. The fact remains that genocide, war crimes and crimes against humanity simply are not the same offenses, and offenders can be convicted of all three crimes in relation to the same underlying conduct, depending on context and the perpetrator's wider intentions.[135] The distinction between war crimes and crimes against humanity emphasizes the need for a more comprehensive legal approach. To record, "war crimes" address criminal acts within the context of armed conflicts and protect specific civilian objects and individuals, while "crimes against humanity" deal with widespread or systematic attacks on civilians.[136] Despite progress in prosecuting cultural destruction under these categories, significant gaps remain in addressing the full scope of harm caused by attacks on cultural heritage.

The already mentioned Al-Mahdi case rightly illustrates how the International Criminal Court has recognized the significant impact of cultural destruction on human identity. Nevertheless, the legal framework for prosecuting these acts as "crimes against humanity" remains constrained. The argument for using "crime against humanity" to address the cultural destruction was supported by the recognition of how deeply intertwined cultural heritage is with human identity and dignity. The ICC acknowledged that the destruction of mausoleums and mosques in Timbuktu was not merely an attack on buildings but on the cultural and spiritual life of the community. The recognition of the "human link" to these protected sites aligns with the ICTY's broader acknowledgment that the destruction of cultural property can have profound human consequences.[137]

However, these existing international legal frameworks do not fully capture the intent behind cultural destruction, specifically the genocidal aim of erasing an entire culture or people. Therefore, while human rights considerations are considered, the concept of cultural genocide is not always adequately addressed by current laws.

A compelling normative argument exists for formally recognizing cultural genocide as a distinct crime. Such recognition would acknowledge the unique and profound impact of deliberate cultural destruction, addressing situations where the intent is to eradicate a group's cultural existence. Although crimes against humanity provide a viable alternative in some cases, they do not entirely capture the existential threat posed by cultural genocide. [138]The legal framework must evolve to better address the intentional destruction of cultural heritage and the erasure of cultural identities, ensuring that these acts are recognized and prosecuted with the gravity they deserve.

. Conclusion

[135] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

[136] Haydee J Dijkstal, Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused, Journal of International Criminal Justice, Volume 17, Issue 2, May 2019, Pages 391–412, [You find the source here]

[137] Vrdoljak, A. F. (2018, March 5). _Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and sentence & reparations order (int'l crim. ct.): International Legal Materials_. Cambridge Core. [You find the source here]

[138] Bachman, (2019) *The Current Status of Cultural Genocide Under International Law*, Chapter 3, CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS ed. Routledge [You find the source here]

This last chapter aimed to explore the critical issue of fully implementing cultural heritage law as a protected matter under International Criminal Law. To pursue this, the main tribunals and court as the ICTY and the subsequent formation of the ICC mark are crucial to examine.

Indeed, both institutions have exposed critical gaps in the protection of cultural identity. The ICTY's acknowledgment of cultural destruction as a form of persecution was an important step, yet did not classify these acts as genocide, emphasizing the limitations in addressing cultural genocide within existing legal frameworks.

In light with these omissions, the ICC's decision to retain the exact same definition of genocide from the Genocide Convention during the drafting of the Rome Statute represented another missed opportunity to enhance legal protections for cultural heritage.

Furthermore, the ICC could not be discussed without considering the Al-Mahdi case, which marked an unprecedented prosecution for cultural destruction. While this case raised awareness about the issue, it mostly illustrates the ongoing challenges in accurately capturing the intent behind such acts within the legal system.

Expanding the definition of genocide outlined in the Genocide Convention might seem like an apparent and natural option. However, an exclusive section of the chapter reveals the complexity of amending such a Convention, especially given the involvement of numerous countries with differing perspectives and the complex nature of the international legal system.

As a final point, to effectively fight the impunity associated with cultural crimes, it is crucial for international law to revisit its definitions and mechanisms, potentially recognizing cultural genocide as a distinct crime. Doing so would not only acknowledge the profound impact of cultural attacks on identity but also strengthen the legal protections necessary to preserve humanity's shared heritage.

Conclusion

In the first chapter, Lemkin's work, *Axis Rule in Occupied Europe*, was studied as both a response to and an outcome of earlier legal cases that emerged after World War II. In this context, Lemkin introduced new concept based on the idea of a new crime, designed to encompass historical massacres that had not been adequately addressed within the existing framework of international law. Genocide, unlike the simultaneously developed "crime against humanity", covered a broader context and focused on specific intent. His research placed significant emphasis on the cultural aspect of genocide, highlighting how cultural destruction and attacks were integral to the crime. This dimension of extermination was crucial to Lemkin, who became the first and primary reference in international law concerning the protection of cultural heritage.

The Genocide Convention was created to promote debate and the development of international law. However, the second section focused on understanding how Lemkin, despite his high expectations and clear vision for implementing the crime of genocide, soon had to adapt his views. Consequently, and as an extension of this section, Lemkin was confronted with scholars offering differing interpretations and nations prioritizing their own interests amid the tense Cold War atmosphere. As a result, the cultural dimension of this new crime was quickly sidelined and ultimately excluded from the convention.

Thanks to the chronological review provided in the previous chapters, the analysis of the dismissal of the cultural dimension of genocide highlights how the protection of cultural heritage has consistently been overshadowed by physical and biological crimes. This situation raises significant questions about the importance of cultural protection and exposes deeper judgments at play. The sidelining of the cultural aspect was largely due to the self-interest and caution of nations. Chapter III ultimately aims to address the consequences of this oversight, as evidenced by the ICC's Al-Mahdi case. The disappointing judgment in this case underscores the ongoing destruction of cultural heritage and reflects a persistent intent to undermine the identity of a nation.

Finally, while genocide is seemingly well-defined, it remains one of the most misunderstood concepts. This misconception, prevalent in media and politics, has led to confusion about the true meaning of genocide, which can occur through other destructive processes beyond systematic killings. The notion of cultural genocide, even more debated and uncertain, has long been claimed by communities worldwide as an overlooked form of victimization. Seven decades after its exclusion from the Genocide Convention, calls for recognition, official apologies, and reparations persist, prompting renewed attention from scholars, the public, and to some extent, governments.

Although cultural genocide remains formally outside the legal framework, it continues to be a subject of debate across jurisprudence, scholarship, and institutions. This lack of clarity has allowed critics to keep it out of international criminal law.

Just as an individual is defined not only by physical traits but by their character and identity, so too is a group not simply the sum of its members. A group can cease to exist through the elimination of its members, as physical genocide, or through the destruction of its cultural identity referring to cultural genocide. In this way, even if the biological existence of individuals

persists, the collective identity of the group may perish, leaving only disconnected individuals or a new entity formed under different terms.

The progress achieved regarding the capacity to prosecute the intentional destruction of cultural heritage represents a positive development, even if it does not fully address the broader issue of cultural genocide. The current legal framework primarily protects individual cultural rights rather than the collective cultural existence of groups. This distinction highlights a critical gap in the law: the failure to recognize and safeguard the unique cultural identity of groups as an intrinsic right. As we move forward, it is essential for the international community to reconsider and potentially develop a dedicated instrument to address and prevent the cultural destruction of human groups in its entirety.

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