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4 Rethinking the Concept of Cultural Genocide under International Law

The German Jewish poet Heinrich Heine wrote, “Where they have burned books, they will end in burning human beings,”¹ thereby famously laying bare the link between the mass slaughter of human beings and attacks on cultural heritage around the world. Raphael Lemkin had envisioned the crime of genocide as consisting of not only the physical or biological intentional destruction of a particular group of people but also the destruction of its cultural heritage. In the initial drafts of the Genocide Convention, one can easily see that Lemkin wanted the definition of genocide to include cultural genocide. In fact, the ad hoc criminal tribunals considered the systematic and intentional destruction of cultural heritage as evidence of the specific intent to destroy a group.

Cultural heritage is as much a reflection of the identity of a group as its physical or biological features, if not more. There are numerous examples where perpetrators have not only physically tried to annihilate a group but have tried to further obliterate any signs of its existence on this planet by intentionally destroying its cultural heritage. This chapter aims, firstly, to understand the term “cultural genocide” by considering it a crime against persons and not solely against property. Secondly, it will examine whether it should be incorporated into the wider definition of genocide by putting forth arguments for and against and examining the reasons why it has not been incorporated yet.

Introduction

Indeed, we cannot keep telling the world in endless sentences don’t murder members of national and religious groups; don’t sterilize them; don’t impose abortions on them; don’t steal children from them; don’t compel their women to bear children for your country, and

¹ United States Holocaust Memorial Museum, “1933 Book Burnings,” accessed March 1, 2022, <https://www.ushmm.org/collections/bibliography/1933-book-burnings>.

Note: This chapter was first presented as a paper at the 7th Annual International Conference on Genocide, organized by the International Network of Genocide Scholars in 2020. All related relevant information can be accessed at <https://commons.erau.edu/genocide-conference/2020/day-2/2/>.

so on; but it would be good to tell the world now, when it emerges from darkness don't practice genocide. Rapheal Lemkin²

These words of Rapheal Lemkin, a lawyer and activist who conceived and defined an unimaginable crime as “genocide,” sound both appalling and optimistic at the same time. This barbarity that Lemkin talks about had previously been called “a crime without a name” by UK Prime Minister Winston Churchill in a speech in 1941 broadcast to the world about a meeting with US President Franklin D. Roosevelt.³ Lemkin is today remembered as the man behind the first United Nations (UN) human rights treaty, known as the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNGC). He undoubtedly played a significant role in getting the UNGC drafted and finally enforced, albeit not in the same form that he had envisioned. Nevertheless, this enforcement of the UNGC was a reflection of the urgency that the world community felt at that time to act upon the realization that it had just witnessed one of the darkest events to have ever occurred in recent world history: the Holocaust. The international community, when passing the UNGC in 1948, had only one thought on its mind, which was “never again.” It had witnessed the horrific Holocaust, and with the inception of the UN in 1945 came the realization that no citizen of the world in the coming times should suffer what the victims of the Holocaust had suffered.

Undoubtedly, one cannot study or understand genocide without realizing that violence is the epicenter of this heinous crime. One of the most surprising elements of genocidal violence is witnessing how individuals commit violence. These individuals not only dehumanize their victims but also pursue exclusionary practices and indulge in physical and sexual violence to break the very spirits of their victims. Many scholars are of the belief that the perpetrators of genocidal violence generally seem to be “ordinary individuals” caught up in extraordinary situations.⁴ Researchers such as Johan Galtung have further emphasized how specific cultures may even enforce violence. According to him, cultural violence includes “those aspects of culture, the symbolic sphere of our existence exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) that can be used to justify or legitimize direct or structural

2 Raphael Lemkin to John. J. Parker, Judge at the International Military Tribunal, Nuremberg (1946), cited in Kurt Mundorff, *A Cultural Interpretation of the Genocide Convention* (New York: Routledge, 2021).

3 United States Holocaust Memorial Museum, “Genocide, 1948: 12 Years that Shook the World Podcast,” accessed March 1, 2022, <https://www.ushmm.org/learn/podcasts-and-audio/12-years-that-shook-the-world/genocide-1948>.

4 Olaf Jensen and Claus-Christian Szejnmann, *Ordinary People as Mass Murderers: Perpetrators in Comparative Perspectives* (Berlin: Springer, 2008).

violence.”⁵ Hence, genocides are examples of how both individuals and cultures can end up being victims as well as perpetrators.

Regardless of Lemkin’s best intentions, genocides have been occurring more frequently since the end of the Second World War than anticipated by politicians and lawmakers around the globe. Beyond formally recognized cases of genocide, such as the Holocaust, Cambodia, Rwanda, and Darfur, to name only a few, there are also many contested cases from recent decades, such as the ongoing conflicts in Myanmar (the Rohingya conflict), Sri Lanka, and Tibet. Allegations of genocide have also been made by both sides in the recent Ukraine-Russia war. All this goes to show that the threat of genocide is omnipresent even today and seems to support the lamentation of Hannah Arendt when she remarked that “no statesman, no political figure of any importance” could take the Genocide Convention and the Declaration of Human Rights seriously because they were sponsored by “marginal figures – by a few international jurists without political experience.”⁶ This statement reflects the mixed responses of the international community and the lukewarm success of the UNGC over the decades due to the political conditions in which the UNGC came into being. Surprisingly, in international law, the conceptualization of genocide since the adoption of the UNGC has been highly contested, irrespective of the fact that the UNGC aimed to bring clarity regarding this concept. Disturbingly, there are multiple categories that genocides can be classified under, such as cultural genocide, ethnocide, democide, politicide, etc., but not all of them are duly recognized under international law. Regardless of the fact that six million Jews were killed during the Holocaust, along with many others from groups such as Roma, homosexuals, etc., there are still issues with both defining and understanding the term “genocide” even today.

Understanding Genocide

The credit for coining the term “genocide” undoubtedly goes to Lemkin, who used the Greek word “*genos*” (race) and “*caedo*,” the Latin word for the act of killing, in an attempt to define it as clearly as possible.⁷ His definition tried to include

5 Johan Galtung, “Cultural Violence,” *Journal of Peace Research* 27, no. 3 (1990): 291–305.

6 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harper Collins Publishers, 1951), 292, cited in Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017), 197.

7 “Raphael Lemkin Defines Genocide,” *Genocide Watch*, accessed March 1, 2022, <http://genocide-watch.net/2013/03/14/raphael-lemkin-defines-genocide-2/>.

almost every aspect of an individual's life that could be partially or wholly targeted by a perpetrator in order to bring destruction to the very ethos of the targeted group. In 1944, Lemkin proposed the following definition of genocide:

[Genocide is] a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.⁸

Lemkin had lost many of his family members to this most atrocious crime, which may have seemed new but was, in fact, deeply entrenched in antiquity. The Holocaust jolted the world community, not only because it was perceived as a crime against humanity but also due to the scale on which it had occurred in modern times. This led to Lemkin taking up the magnanimous exercise of drafting the UNGC, as it was both a personal and a moral duty for him. This single-minded devotion to outlaw genocide also resulted in him feeling paranoid about a potential lack of support for the UNGC's enforcement. He was not incorrect in having such fears, as there was opposition to the UNGC from the UK, France, Belgium, the USA, the USSR, South Africa, and Canada. However, the UNGC was supported by many smaller states and former colonies, who not only saw to it that the UN considered the Convention but also made sure that it was enforced.⁹

Regardless of Lemkin's hard work and the eventual enforcement of UNGC, the concept of genocide is still riddled with issues. Before moving on to understanding cultural genocide conceptually, we need to understand that the issues related to it very much start from the definition of genocide itself. Over the decades since Lemkin's definition, scholars from a plethora of specializations have also defined genocide. Some of these definitions will be cited here to outline how most of them are still insufficient.

To begin with, Pieter N. Drost lays down that "Genocide is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such."¹⁰ On the other hand, Vahakn Dadrian remarks that "Genocide is the successful attempt by a dominant group, vested

⁸ Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.

⁹ Irvin-Erickson, *Raphael Lemkin*, 8.

¹⁰ Pieter N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and People* (Leyden: A.W. Sythoff, 1959).

with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate continued extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide.”¹¹

One of the most respected and accepted definitions of genocide has been provided by Helen Fein, who believes that

Genocide is a series of purposeful actions by a perpetrator(s) to destroy a collectivity through mass or selective murders of group members and suppressing the biological and social reproduction of the collectivity. This can be accomplished through the imposed prescription or restriction of reproduction of group members, increasing infant mortality, and breaking the linkage between reproduction and socialization of children in the family or group of origin. The perpetrator may represent the state of the victim, another state, or another collectivity.¹²

Though the legal definition set out in the UNGC has not been able to satisfy academics from different areas due to its narrowness, some individuals, such as Leo Kuper, support the Convention’s legal definition of genocide:

I shall follow the definition of genocide given in the [UN] Convention. This is not to say that I agree with the definition. On the contrary, I believe a major omission to be in the exclusion of political groups from the list of groups protected. In the contemporary world, political differences are at the very least as significant a basis for massacre and annihilation as racial, national, ethnic or religious differences. Then too, the genocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict.¹³

It can easily be observed that none of these definitions talk about the cultural aspect of genocide; their emphasis is on physical violence. Notably, cultural genocide may take place without any violence or loss of life, but it is as life-altering as any other type of genocide. Hence, it is not surprising that it has not yet been duly recognized under international law.

Another issue related to the conceptualization of genocide is the confusion surrounding a conflict being identified as one. During the Nuremberg Trials, regardless of the fact that Lemkin had introduced the term “genocide” by then, all the alleged perpetrators were tried for crimes against humanity. Lemkin saw this as a huge setback to his work. Hence, there does seem to be confusion as to what constitutes the crime of genocide in comparison to other mass atrocities such as

¹¹ Vahakn N. Dadrian, “A Typology of Genocide,” *International Review of Sociology* 5, no. 2 (1975): 201–212.

¹² Helen Fein, *Genocide: A Sociological Perspective* (London: Sage, 1993), 26.

¹³ Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (London: Penguin, 1981), 9.

ethnic cleansing or crimes against humanity. To ease this confusion, scholars such as Yehuda Bauer have defined a number of elements that should be fulfilled in order for a mass atrocity to fall under the crime of genocide. According to Bauer:

[Genocide is] the planned destruction, since the mid-nineteenth century, of a racial, national, or ethnic group as such, by the following means:

- (a) Selective mass murder of elites or parts of the population;
- (b) Elimination of national (racial, ethnic) culture and religious life with the intent of denationalization;
- (c) Enslavement, with the same intent;
- (d) Destruction of national (racial, ethnic) economic life, with the same intent;
- (e) Biological decimation through the kidnapping of children, or the prevention of normal family life, with the same intent. . . .

Holocaust is the planned physical annihilation, for ideological or pseudo-religious reasons, of all the members of a national, ethnic, or racial group.¹⁴

Based on the above definition, it can be concluded that the elimination of cultural life is a vital element for a mass atrocity to be recognized as a genocide. To correctly understand genocide, one needs to consider the idea that culture is a central and prominent dimension of it, regardless of the domination of the UNGC's physical and biological interpretation. Over the decades, it has also been observed that the various parameters used to define the term "genocide" have been tested widely in international law, but disappointingly, the cultural elements of genocide have been highly streamlined in the legal arena. Academics from various areas, such as history, anthropology, sociology, psychology, etc., along with law, have tried to study cultural genocide, but as far as legal scholars are concerned, they have primarily concentrated on the domain of international criminal law. The legal definition of genocide ultimately becomes important because the elimination of the cultural aspect of genocide is there for everyone to see. Article II of the UNGC defines genocide as follows:

In the present Convention, 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;

¹⁴ Yehuda Bauer, "The Place of the Holocaust in Contemporary History," *Studies in Contemporary Jewry* 1 (1984): 213.

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁵

The term “genocide” has also been defined under Article 6 of the Rome Statute, which states that

“Genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁶

There are numerous conditions and factors which are instigators of genocidal violence. Over time, it has been observed that genocide is just one example of the varied kinds of violence taking place between groups. Factors such as ethnicity, religion, political ideologies, cultural differences, and social and economic inequalities are prime instigators of genocidal violence. In cases of genocide, either direct or indirect violence is used to eliminate or harm a particular group of people. Group conflict is also responsible for the origin of collective violence. Factors such as the subordination of groups in a society or territory issues may result in genocidal violence. Many cases of genocidal violence have also been instigated by flawed leadership, as in the case of Adolf Hitler.

Cultural Genocide

Looking at the UNGC’s and the Rome Statute’s definitions of genocide, it is easy to see that the cultural context is nearly absent from both. The only remnant of Lemkin’s original definition of genocide, which included the cultural dimension, is the forcible transfer of children from one group to another. One of the most prominent examples of this can be seen in countries such as Canada that are now coming to terms with their past policies of assimilation for indigenous people and

¹⁵ United Nations, “Convention on the Prevention and Punishment of the Crime of Genocide,” accessed November 15, 2021, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

¹⁶ International Criminal Court, “Rome Statute of the International Criminal Court,” accessed January 20, 2022, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

their brutal consequences, such as the forcible separation of thousands of indigenous children from their families, only to be kept in boarding schools in inhumane conditions, causing them to lose their national identity and culture.¹⁷ In 2015, the Canadian Truth and Reconciliation Commission also concluded the same when it remarked that the Aboriginal policy “can best be described as cultural genocide.”¹⁸ Lemkin envisioned the crime of genocide as consisting not only of the physical or biological intentional destruction of a particular group of people but also of the destruction of its cultural heritage. He recognized cultural genocide as just one of the techniques of committing genocide, but not much attention was paid to this concept until the 1970s, when there was a revival of the term. This can be corroborated by looking at the initial drafts of the Genocide Convention, where one can see that Lemkin wanted the definition of genocide to include cultural genocide. Under the “Cultural” heading in his book *Axis Rule in Occupied Europe*, Lemkin enumerated different actions he considered part of cultural genocide, such as the prohibition of the use of a group’s own language in schools and printed materials. Additionally, national monuments, libraries, archives, museums, and galleries may be closed, moved, or destroyed. According to Lemkin, these actions rendered “national creative activities in the cultural and artistic field . . . impossible by regimentation,” and “the population has also been deprived of inspiration from the existing cultural and artistic values.” Lemkin further argued that

[t]he world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contribution to the world. . . . Among the basic features which have marked progress in civilization are the respect for and appreciation of the national characteristics and qualities contributed to world culture by different nations – characteristics and qualities which . . . are not to be measured in terms of national power or wealth.¹⁹

Hence, he identified eight dimensions of genocide: political, social, economic, cultural, biological, physical, religious, and moral.²⁰ These were later narrowed down to three categories under the so-called Secretariat Draft: physical, biological, and cultural genocide. Even in times of conflict, safeguarding cultural heritage is a priority,

17 TRT World, “Explained: Canada’s ‘Cultural Genocide’ of Indigenous People,” accessed November 15, 2021, <https://www.trtworld.com/magazine/explained-canada-s-cultural-genocide-of-indigenous-people-47835>.

18 “Honouring the Truth, Reconciling for the Future,” accessed June 1, 2022, https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf.

19 Lemkin, *Axis Rule in Occupied Europe*, 79–95.

20 Ibid., 79–90.

although the prohibition of cultural genocide is not explicitly mentioned under international law. Its destruction is viewed as a violation not only of the principles of international criminal law but also of human rights.²¹ This is because individuals view culture as a part of their identity, and as it is strongly linked to one's individualism, any loss of cultural heritage is intrinsically connected to the loss of one's being.

The newly formed UN soon realized that it was high time that the crime of genocide, along with its cultural dimensions, was duly recognized, which it did in Resolution 96(I), adopted on 11 December 1946:

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 United Nations.²²

During the process of drafting the UNGC, the Secretariat's original draft did include a provision on cultural genocide based on Lemkin's work:

[Cultural genocide] Destroying the specific characteristics of the group by:

- (a) forcible transfer of children to another human group; or
- (b) forced and systematic exile of individuals representing the culture of a group; or
- (c) prohibition of the use of the national language even in private intercourse; or
- (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.²³

Even the second draft, which was known as the Ad Hoc Committee Draft since it was prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC) that met between 5 April and 10 May 1948, referred to cultural genocide:

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:

²¹ Ann Marie Thake, "The Intentional Destruction of Cultural Heritage as a Genocidal Act and a Crime Against Humanity," *European Society for International Law Conference Paper Series* 10, no. 5 (2017): 1–25.

²² General Assembly Resolution 96(I), "The Crime of Genocide," A/BUR/50, December 11, 1946.

²³ Prevent Genocide International, "Convention on the Prevention and Punishment of the Crime of Genocide: The Secretariat and Ad Hoc Committee Draft," accessed February 20, 2022, <http://www.preventgenocide.org/law/convention/drafts/>.

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.²⁴

It was during this time, while the Ad Hoc Committee debates were going on, that the question of removing or keeping the term “cultural genocide” raised a lot of concerns.²⁵ These were eventually reflected in the final version of the UNGC, which limited the scope of the definition of genocide – laid down under Article II – considerably. Not only do these debates portray the evolution of the concept of genocide, but the International Court of Justice (ICJ) also referred to them very clearly when it was asked to give an advisory opinion:

The origins of the convention show that it was the intention of the United Nations to condemn and punish genocide as a “crime under international law” involving the denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to the moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.²⁶

These remarks by the ICJ reiterate that states are under an obligation not to commit genocide and to prevent and punish perpetrators. Even though the conceptualization or the coining of a definition of cultural genocide is still a problematic area due to the fact that it entails two complex concepts (that is, culture, which may be broadly understood as the way of life of a particular people, and genocide, which has not been adequately defined under international law), there are ample examples of cultural genocide in world history. In these incidents, the perpetrators tried not only to annihilate a group physically but also to obliterate any signs of their existence by intentionally destroying their cultural heritage. The destruction of cultural and religious heritage in Bosnia and Herzegovina, the forced removal of Aboriginal children in Australia and Canada, and the endangerment of the belief system and oral history of Yezidis in Iraq and Syria are just some of the examples of alleged cultural genocides that resulted in cultural heritage being

²⁴ Second Draft of the Genocide Convention Prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC), meeting between April 5, 1948 and May 10, 1948, UN Doc. E/AC.25/SR.1–28.

²⁵ Report of the Committee and Draft Convention and Draft Convention Drawn Up by the Committee, E/794, 24 May 1948, 17–20.

²⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion, 1951), ICJ Reports 16, 23, quoted in *Legality of the Threat or use of Nuclear Weapons* (Advisory Opinion, 1996), ICJ Reports 226, para. 31.

intentionally targeted, damaged, trafficked, and destroyed, cultural practices being restricted, or both. In 2008, when the Chinese military cracked down on unrest in Lhasa in Tibet, the exiled Tibetan spiritual leader, the Dalai Lama, remarked that “[t]here is an ancient cultural heritage that is facing serious danger . . . whether intentionally or unintentionally, some kind of cultural genocide is taking place. And if losing independence is acceptable, on the contrary losing one’s culture, accepting the destruction of our spirituality, of Tibetan Buddhism, is unthinkable.”²⁷

In its report titled “Cultural Genocide in Tibet: A Report,” the Tibet Policy Institute – part of the Department of Information and International Relations, Central Tibetan Administration – describes the Chinese government’s actions in Tibet as “Tibetocide.” It not only describes the forceful removal of 2.5 million Tibetans from their homeland but also talks about the imposition of language policies, the destruction of Tibetan Buddhism, the banning of religious festivals and restrictions on cultural activities, and crackdowns on Tibetan intellectuals as measures being used to commit this “Tibetocide,” which has all the makings of cultural genocide.²⁸ Further, less than a decade after the above remarks by the Dalai Lama, the Chinese faced further allegations of committing cultural genocide against the Uyghurs in the Xinjiang province. It is alleged that deliberate efforts to destroy the Uyghurs’ culture, heritage, and identity are part of an ongoing process of intentionally rupturing their cultural, religious, and linguistic practices.²⁹

These and many more incidents of mass detentions, the prohibition of language and religion, the destruction of property, and inhumane treatment seemingly provide a strong *prima facie* argument that countries around the world have tried and are still trying to eradicate distinct groups culturally. When survivors of genocide talk of their experiences of cultural oppression, these often include the loss of agency, dignity, and the very being of individuals, which tend to be an inalienable part of committing genocide. This can clearly be felt in the following excerpts from the testimonies of two survivors of the genocide in Sudan who were interviewed by Louise E. Wise. The first testimony lays bare the psychological scars that victims of cultural genocide carry with them for the rest of

27 “Cultural Genocide in Tibet: Dalai Lama,” *The Economic Times*, March 17, 2008, accessed June 25, 2022, <https://economictimes.indiatimes.com/news/politics-and-nation/cultural-genocide-in-tibet-dalai-lama/articleshow/2872608.cms?from=mdr>.

28 The Tibet Policy Institute, “Cultural Genocide in Tibet: A Report,” accessed June 25, 2022, <https://tibetpolicy.net/wp-content/uploads/2017/10/Tibetocide.pdf>.

29 La Trobe University, “Time To Act on China’s Cultural Genocide,” accessed June 25, 2022, <https://www.latrobe.edu.au/news/articles/2018/opinion/time-to-act-on-chinas-cultural-genocide>.

their lives following the soul-crushing oppression they suffered at the hands of their perpetrators:

Physical destruction is certainly something that is being pursued with different intensities at different times. But I think, what is being destroyed at heart, . . . when you destroy someone physically, you are not just destroying the person, you are inflicting a deeper kind of, I would call it, pain, defeat, destruction, that is psychological and extends to the rest of society. It is destruction of the social fabric as well – a way of living, culture. It is destruction of, if you like, the collective spirit of the group. If you are culturally oppressed, and you grew up as a child in this environment, what outlook will you have on yourself? You would have a slave mentality. Looking at yourself, you are ashamed of who you are, and that, I think, is even more sinister.³⁰

The second testimony reflects how cultural genocide breaks the spirit of an individual to the extent that the very essence of life is lost. The following words indicate how cultural genocide needs to be legally recognized, irrespective of the fact that it may not lead to one's physical death – for individuals to lose their zeal to live is death itself: "I just feel like I'm just living. I'm just here, just feel like mechanical. I just feel like the rest of my life is just duties and I'm just like a machine, mechanical. I don't feel it, the type or way of life here. I don't feel the way that your life is, and everywhere, I'm not attached to it psychologically, to anywhere. [. . .] The way I feel is that life has become tasteless."³¹

Lemkin undoubtedly saw what many nations failed to see or take accountability for. Though genocides primarily target the physical and biological aspects of the victims, the cultural aspect of an individual's life, which makes up their identity, is also under attack. Regardless of how Lemkin envisioned the concept of genocide, the definition evolved as far as cultural issues are concerned before it was put down in quite a restrictive form in the UNGC. Since then, in the contemporary context, the UN Declaration on the Rights of Indigenous Peoples (2007) has addressed the issue and mentioned the term "cultural genocide."

Cultural Heritage

Since ancient times, it has been observed that cultural heritage has faced the threat of being desecrated or obliterated due to conflicts. Even modern history is replete with examples of the demolition of irreplaceable cultural heritage, such

³⁰ Louise E. Wise, "Social Death and the Loss of a 'World': An Anatomy of Genocidal Harm in Sudan," *International Journal of Human Rights* 21 (2017): 838–865.

³¹ Anonymous Victim, Wise, "Social Death," 838–865, cited in Rasa Davidavičiūtė, "Cultural Heritage, Genocide, and Normative Agency," *Journal of Applied Philosophy* 38, no. 4 (2020): 599–614.

as the Buddhas of Bamiyan by the Taliban or Palmyra's Temple of Bel during the Syrian Civil War. This heritage not only reflects the history of mankind and its evolution but is also an inseparable part of individuals' life, identity, and belief system. Over the centuries, humans have thrived on the culture they created, which they cannot imagine living without. Hence, when there is talk of concepts such as cultural genocide, we need to realize that preserving culture is equivalent to preserving human life, and cultural genocide, just like genocide, tends to unfold over time, as formulated in Lemkin's thesis. It is thus imperative to understand what cultural heritage means in order to get a clear idea of what cultural genocide is. According to UNESCO,

Cultural heritage is, in its broadest sense, both a product and a process, which provides societies with a wealth of resources that are inherited from the past, created in the present and bestowed for the benefit of future generations. Most importantly, it includes not only tangible, but also natural and intangible heritage. [. . .] Cultural Heritage: Refers to: a) monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features which are of outstanding value from the point of view of history, art or science; b) groups of buildings: groups of separate or connected buildings, which because of their architecture, their homogeneity or their place in the landscape, are of outstanding value from the point of view of history, art or science; c) sites: works of man or the combined works of nature and man, and areas including archaeological sites, which are of outstanding value from the historical, aesthetic, ethnological or anthropological point of view.³²

Cultural genocide is currently an important legal issue, and why it should or should not be incorporated into the broader definition of genocide has been repeatedly debated. This raises the additional question of whether the destruction of cultural heritage, termed as cultural genocide, should be considered a crime in its own right. Undoubtedly, when the aim is to annihilate a group's very existence, the task would not be complete without the destruction of their way of life. Caroline Fournet puts it perfectly when she says,

If the cultural heritage of the group targeted for destruction is eradicated, this group will disappear from collective memory, its whole existence will be eliminated, all traces of this group's life on Earth will be annihilated – and the genocide, the destruction, will be complete. Cultural genocide is more often than not part of the genocidal plan to destroy the group, to deny it any human life, to dehumanize it. By failing to include it among the proscribed acts, the conventional text totally fails in specifying the uniqueness of the crime of genocide.³³

³² UNESCO Culture for Development Indicators, "Heritage," 132, 134, accessed June 30, 2022, https://en.unesco.org/creativity/sites/creativity/files/cdis/heritage_dimension.pdf.

³³ Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (London: Routledge, 2007), 43.

Cultural heritage, in its various manifestations, has been identified under international law. For instance, the Universal Declaration of Human Rights of 1948 recognizes various individual rights, including the right to religion, the right to realize one's social and cultural rights, and the right to participate freely in the cultural life of one's community.³⁴ In 1949, in Article 27 of the Geneva Convention, it was laid down that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs."³⁵ The International Covenant on Civil and Political Rights of 1966 provides for freedom of religion, as well as the protection of the rights of ethnic minorities.³⁶ The rights of indigenous and tribal people were also recognized under the Convention Concerning Indigenous and Tribal People in 2007.³⁷ Hence, it is evident not only that cultural heritage and cultural rights are intrinsically linked to each other but that the destruction of cultural heritage must also be considered a violation of cultural rights.³⁸

While the destruction of cultural property is recognized as a specific war crime by various international legal institutions, no international convention classifies the intentional destruction of cultural heritage as a genocidal act or as a specific crime against humanity. It was the International Military Tribunal (IMT) at Nuremberg that first pronounced the intentional destruction of cultural heritage as a crime against persons. A similar conviction was observed at the trial of Adolf Eichmann when the Israeli Supreme Court did not hold him responsible for the intentional destruction of cultural heritage, only for crimes against humanity.³⁹ Additionally, the International Criminal Tribunal for the Former Yugoslavia (ICTY) played a significant role in identifying the destruction of cultural genocide as a crime against property but also as a crime against persons if it was carried out with discrimina-

³⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217A (III), Articles 18, 19, 22, and 27.

³⁵ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 27.

³⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, Article 18 and 27.

³⁷ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: Resolution/Adopted by the General Assembly, 2 October 2007, A/RES/61/295, Article 2 (b).

³⁸ UN General Assembly, Cultural Rights, Report of the Special Rapporteur in the Field of Cultural Rights, 9 August 2016, A/71/17, para. 6.

³⁹ The Attorney General v. Adolf, son of Karl Adolf, Eichmann, Criminal Case No. 40/61, District Court of Jerusalem, accessed April 21, 2022, http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgment_11-12-1961.pdf.

tory intent. Judge Theodor Meron made an astute remark on the contribution of ICTY when he said that

[t]he doctrinal contribution that our Tribunal made to the law protecting cultural property from wanton destruction, by characterizing this destruction as a crime against humanity and not only as a war crime, can therefore be applied by other courts to criminalize the destruction of cultural property in time of peace. This is particularly relevant in today's world where terrorist and other attacks by non-governmental armed groups are unfortunately common, and where the line between armed conflicts and discriminatory attacks against civilian population is often difficult to draw. By viewing the destruction of cultural property as a crime directed against individuals, our Tribunal has pointed to a potential new way of enhancing the reach and the thrust of the 1954 Convention.⁴⁰

Over the decades, the arguments for the non-inclusion of cultural genocide under international law have been the same as when the UNGC was being drafted. It has been suggested, for example, that the concept of cultural genocide is too vague and indefinite. The underlying principle and importance given to the comparative lack of severity of the physical harm has been detrimental to the term's inclusion. It has also been recommended that the concept of cultural genocide is better dealt with under "the sphere of protection of minorities" or human rights law or that it should be codified under different international conventions. Christopher Powell argues that the exclusion of cultural genocide "was shaped by the desire of its framers not to criminalize their own behavior."⁴¹ A more strongly worded and broader definition of genocide in the UNGC would undoubtedly have made these nations accountable for the numerous human rights infringements alleged to have occurred both on their own soil and in other nations. Atrocities committed during the colonial era that led to the death and displacement of millions of indigenous people around the world are prime examples of avoiding culpability.

Similarly, William A. Schabas argues that Australia, the US, Canada, Sweden, France, India, Peru, and the UK were all unhappy with the inclusion of cultural genocide due to their ongoing or past treatment of immigrants, minorities, and indigenous peoples.⁴² Edward Luck supports this argument when he remarks that

⁴⁰ Theodor Meron, "The Protection of the Cultural Property in the Event of an Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia," Speech Presented at the UNESCO Symposium on the 50th Anniversary of the 1945 Convention for the Protection of Cultural Property in the Event of an Armed Conflict (Paris, 14 May 2004), 17, accessed April 21, 2022, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1021&context=cultprop>.

⁴¹ Christopher Powell, "What Do Genocides Kill? A Relational Conception of Genocide," *Journal of Genocide Research* 9, no. 4 (2007): 532.

⁴² William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2009).

decolonization played a significant part in the framers' not wanting to become accessible to charges of genocide themselves. Colonial powers such as the UK, France, Belgium, and the Netherlands opposed the inclusion of cultural genocide in the UNGC.⁴³ Schabas addressed the reason behind this intentional exclusion of cultural genocide while discussing the shortcomings of the UNGC by remarking,

The Convention has been much criticised for its limited scope. This was really more a case of frustration with the inadequate reach of international law in dealing with mass atrocities. As history has shown, this difficulty would be addressed not by expanding the definition of genocide or by amending the Convention, but rather by an evolution in the closely related concept of crimes against humanity. Accordingly, the crime of genocide has been left alone, where it occupies a special place as "the crime of crimes."⁴⁴

Although cultural genocide is not duly recognized under international law, ad hoc criminal tribunals have been vigilant enough to consider the intentional and systematic destruction of cultural heritage as evidence of the perpetrator's specific intent to destroy the targeted group. Even though this is a promising premise, it raises pertinent questions regarding the legal status of cultural genocide in international law and whether the legal definition of genocide allows cultural destruction to be identified with the physical destruction of a group. The legal definition of genocide, as laid down under Article II of the UNGC, has primarily been interpreted by the ICJ and the ICTY over the years. Nevertheless, some prominent cases that have shed light on the destruction of cultural heritage have been able to interpret the legal definition more broadly. In *Prosecutor v. Radislav Krstic* (2004),⁴⁵ the ICTY, while contemplating various manners of a group's destruction, stated that aside from physical destruction, "one 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."⁴⁶ Justice Shahabuddeen, in his dissenting opinion, remarked

The focus there was on whether the term "genocide," as used in the Convention, included cultural genocide, the generally accepted answer being in the negative. If that does not account for the view expressed by the Commission, then, with respect, that view is not correct. The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological. . . . It is established that the

⁴³ Edward Luck, *Cultural Genocide and the Protection of Cultural Heritage*, J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy (Los Angeles: Getty Publications, 2018), 23.

⁴⁴ William Schabas, "Convention on the Prevention and Punishment of the Crime of Genocide," *Audiovisual Library of International Law*, accessed June 30, 2022, <https://legal.un.org/avl/ha/cppcg/cppcg.html>.

⁴⁵ Appeals Chamber Judgment, Case No IT-98-33-A (19 April 2004).

⁴⁶ Ibid.

mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.⁴⁷

In *Prosecutor v. Blagojevic and Jokic* (2005),⁴⁸ the ICTY held that “the forced displacement of women, children, and elderly people was itself a traumatic experience, which, in the circumstances of this case, reaches the requisite level of causing serious mental harm.” Even in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* (2007),⁴⁹ although the ICJ remarked that destruction was “an essential part of the policy of ethnic purification and an effort to erase traces of Bosnian Muslims’ existence,” it concluded that the “destruction of cultural, historical and religious heritage cannot be ‘considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group.’”⁵⁰ In 2015, the ICJ was charged with interpreting the existing notion of interpretation of genocide in the case of *Croatia v. Serbia*.⁵¹ Though Croatia argued not to limit the intent to only the group’s physical destruction but to extend it to include actions falling under cultural genocide, the ICJ disagreed. Without giving much reasoning, the court simply stated that it “decided to limit the scope of the Convention to the physical or biological destruction of the group,”⁵² as the idea of cultural genocide had long since been eliminated based on the drafting process leading up to the UNGC. Recently, in *Prosecutor v. Ahmad Al Faqi Al Mahdi*⁵³ in 2016, the International Criminal Court (ICC) found Al Mahdi guilty of being a co-perpetrator of the war crime of intentionally directing attacks against historic and religious monuments in Timbuktu, Mali, in June and July 2012. This showcased the ICC’s willingness to consider offenses against cultural heritage as not merely being committed against property and its attention to the human element of the act by accessing Al Mahdi’s liability for reparations. All these cases show that even though cultural genocide may be considered a crime against property, cultural heritage is indisputably part of an individual’s identity and needs to be recognized from a human perspective.

47 International Criminal Tribunal for Yugoslavia, “Partial Dissenting Opinion of Judge Shahabuddeen,” accessed July 10, 2022, <https://www.icty.org/x/cases/krstic/acjug/en/krs-doshaa040419e.htm>.

48 Trial Judgment, IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), January 17, 2005.

49 (2007) ICJ Rep.

50 Ibid.

51 ICGJ 470 (ICJ 2015).

52 Ibid.

53 ICC-01/12-01/15-84-Red.

Cultural genocide entails various forms of violence, such as interpersonal and collective violence, resulting in physical, sexual and/or psychological abuse. It hits at the very core of an individual or group who are not only afraid for their physical well-being but are also under the tremendous stress of potentially losing their identity. It is high time that we understood that the violence that permeates a cultural genocide leaves the targeted population a mere shell of what they previously were. During such a conflict, many forms of violence may occur simultaneously. Hence, it is essential to recognize cultural genocide legally as it is a crime not only against property but also against individuals.

Conclusion

The international community that enforced the UNGC following the horrors of the Second World War, especially the Holocaust, took a commendable step in recognizing the act of genocide, but it missed the opportunity to criminalize what is now widely recognized as cultural genocide. Over the decades, as the world has witnessed conflicts turning into genocides or conflicts with all the makings of a genocide, the international community has felt the need to rethink its position on cultural genocide not being legally recognized. Though both the ICJ and ad hoc tribunals have dealt with the question of whether cultural genocide can fall under the interpretation of the concept of genocide, nothing exemplary has come out of their deliberations. With the inception of the ICC, there were renewed debates about whether cultural genocide should be incorporated into the Rome Statute as a separate crime. Once again, the international community declined to do so, but it did agree to introduce the novel mechanism of providing legal representation of certified victims before the court in a capacity comparable to a third party in a case.

This attempt at understanding the concept of cultural genocide aims to support further discussions on cultural heritage, which, especially in times of conflict, does not seem to gather much support or sympathy from the international community. Though many attacks on cultural heritage make it to the news, a comprehensive legal and political framework to counter the offensive is still lacking. There have been discussions on recognizing cultural genocide for decades, but it is far from being recognized under international law as such. Many groups being targeted or persecuted today do not fall under the UNGC's conventional or strict definition of genocide.

Despite the best intentions laid down in the UNGC, the promises of the international community to “never again” let the world suffer from another Holocaust,

which is viewed as “the benchmark of evil” by many scholars and citizens around the world, and the tireless work of international legal institutions such as the ICJ, the ICTY, and the ICC, it has been difficult to prove allegations of genocide in court over the decades. Since cultural genocide, which should form part of the intent to destroy (whether wholly or partly) the targeted group, is not recognized, justice cannot be served.

The central aim of understanding genocidal violence is to stop violence. Over the decades, it has been observed that the UN has been ineffective in both halting and preventing genocidal violence. This failure of the international community to combat genocidal violence has resulted in repercussions that will affect generations to come. Hence, one cannot expect much progress in healing, forgiveness, and reconciling genocide-torn societies without breaking the recurring cycles of genocidal violence itself.

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