
Genocide in International Law: Revisiting the Definition of Genocide in the Convention on the Prevention and Punishment of the Crime of Genocide (1948)*

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Introduction

The international community accepted the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention” or “Convention”) in 1948.¹ This unprecedented Convention was the international community’s response to the horrors of World War II in general and the Shoah in particular. The discussions in the Ad Hoc Committee established by the UN² and the writings of legal scholars, especially the Polish Jewish lawyer Raphaël Lemkin, served as the basis for the Convention. The Convention’s text had numerous ground-breaking achievements, including defining genocide as an international crime to which both individual criminal responsibility and state responsibility are attached, determining the acts constituting the crime and the special intent required for its commission – an intent to destroy the national, ethnic, religious or racial group in whole or in part – and imposing an international legal obligation upon states to prosecute or extradite suspects of committing the crime.

The Convention also gained the following practical achievements in international law and in particular, in international criminal law: it set the infrastructure for lawsuits brought to the International Court of Justice (ICJ),³ and submitted against states suspected of the commission of genocide; it established a definition of genocide that was later accepted by the ad hoc international criminal tribunals⁴ and the International Criminal Court (ICC), and thus provided the basis for criminal prosecution of state leaders and army commanders for the commission of crimes.⁵

Nevertheless, the Convention was criticized for its narrow definition of genocide, which excluded both destruction of culture of the groups protected by the Genocide Convention and the physical destruction of political groups (cultural genocide and political genocide)

from its purview. The acts constituting the crime of genocide which are enumerated by the convention are physical acts including: killing, causing physical and mental harm, inflicting damage on a group by conditions of life intended to bring about its physical destruction

* This article is based on a lecture given at AUCRSG Inauguration Conference: “The Holocaust and Genocide in the 21st Century: A Grievous Yet Never Ending Story,” held at Ariel University, November 15-17, 2022.

1. Convention on the Prevention and Punishment of the Crime of Genocide Convention, 12 January 1951, 78 U.N.T.S. 277 (1951) (hereinafter: “Genocide Convention”).
2. United Nations Economic and Social Council, Draft Convention on the Prevention and Punishment of the Crime of Genocide, UN Doc. E/AC.25/12. (1948) (hereinafter: “Genocide Draft”).
3. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, Judgment, ICJ Reports 43 (2007) ; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 3 (2015) ; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Provisional measures, 23 January 2020, §§ 79-80, available at <https://www.icj-cij.org/en/case/178/provisional-measures>
4. International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR).
5. The ICC has not yet dealt with genocide cases, but there is a pending arrest warrant against Omar al-Bashir, Sudan's former president, for the commission of three counts of genocide: killing, causing serious bodily or mental harm, and deliberately inflicting on each target group conditions of life calculated to bring about the group's physical

and forcibly transferring children and preventing births within the group.⁶ The groups to which the Convention refers are national, ethnic, racial, and religious.⁷ This article sheds light on the criticism raised against the narrow definition, and focusses on two aspects: the importance of the inclusion of cultural, and not only physical genocide, as an integral element of the crime; and the inclusion of political affiliation among the groups protected by the Convention.

2. Cultural Genocide

Cultural genocide refers to the systematic destruction of a group by targeting its cultural heritage, including its tangible and intangible cultural structures. According to the analysis of genocide by Raphaël Lemkin, cultural genocide is one of eight techniques of implementing genocide. These techniques comprise a wide spectrum of physical and non-physical means of destroying a group, including political, social, cultural, economic, religious, and moral means. Cultural aspects include “the destruction of cultural symbols... [which] menaces the existence of the social group which exists by virtue of its common culture.”⁸ Lemkin views this type of destruction as genocide.

Cultural genocide is like the concept of genocide in the sense that it targets a group and not individuals per se. Groups are a fundamental element of genocide because of their crucial significance to the sustainability and continuity of a nation, race, ethnos, and religion. When a group is destroyed, its heritage and even its intergenerational connections may be destroyed. Even though the members of the group are not physically exterminated, they lose the role the group played in their lives, a crucial and irredeemable loss of both external recognition and self-acknowledgment.⁹

The United Nations Draft Declaration of the Ad Hoc Committee on Genocide established by the Economic and Social Council in 1948 included cultural genocide in the definition of the crime, stating that 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 national or racial origin or religious belief.”¹⁰ The committee also provided examples of such acts: the prohibition on the use of the language of the groups and the destruction or prevention of the use of libraries, attending museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. The draft nevertheless excluded from its definition the forced assimilation of a national group, and determined that a policy of forced assimilation does not constitute genocide.¹¹

One reason for excluding forced assimilation from the purview of “genocide” in the Genocide Convention can also explain the final decision to ultimately exclude cultural genocide from the convention. This explanation rests on some of the political constraints in the background of the drafting of the Genocide Convention. In 1948, when the convention was drafted, colonial states such as the United States, France, and the United Kingdom,¹² and other states with indigenous peoples under their sovereignty, such as Canada and Australia, two of which (the United States and France) were members of the Ad Hoc Committee on the Genocide Convention,¹³ warned that the inclusion of cultural genocide might impede legitimate efforts by states to foster a national community and “civilize” the peoples under their control.¹⁴

Therefore, except for the prohibition on transferring children from the targeted group to another – an act that can be interpreted as intending to sever the cultural connection between those children and their national,

destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan. Some examples of genocide case law in the ad hoc tribunals are: Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, Sept. 2, 1998; Judgment, *Jelisić* (IT-95-10-T), Trial Chamber, Dec. 14, 1999 (“*Jelisić* Trial Judgment”); Judgment *Krstić* (IT-98-33-T), Trial Chamber, Aug. 2, 2001 (“*Krstić* Trial Judgment”); Judgment, *Brdanin* (IT-99-36-T), Trial Chamber, Sept. 1, 2004.

6. Genocide Convention, Art. 2.
7. *Ibid.*
8. Raphaël Lemkin, “The Concept of Genocide in Anthropology,” NYPL, Box 2, Folder 2.
9. Larry May, *GENOCIDE: A NORMATIVE ACCOUNT* 10-87 (Cambridge University Press, 2010).
10. Genocide Draft Convention.
11. *Ibid.*
12. The United States and France were members of the Ad Hoc Committee on the Genocide Convention. See Jeffrey S. Bachman, “An Historical Perspective,” in *LAW, POLITICS, AND GLOBAL MANIFESTATIONS* 48 (London: Routledge, 2019).
13. Jeffrey S. Bachman, “An Historical Perspective,” in *LAW, POLITICS, AND GLOBAL MANIFESTATIONS* 48 (London: Routledge, 2019).
14. Julie Cassidy, “Unhelpful and Inappropriate? The Question of Genocide and the Stolen Generations,” 13(1) *AUSTRALIAN INDIGENOUS LAW REVIEW* 114-139, 130 (2009); Johannes Morsnik, “Cultural Genocide, the Human Rights Declaration on Minority Rights,” 21 (4) *HUMAN RIGHTS QUARTERLY* 1009-1060, 1025 (1999).

ethnic, or religious origin – cultural genocide was finally removed from the Genocide Convention. The Convention defines the crime of genocide as including five acts of which four pertain exclusively to the physical destruction of the members of the group (and thus, the group itself): killing, causing serious bodily or mental harm, deliberately inflicting specific conditions of life on the group calculated to bring about its destruction, and imposing measures to prevent births within the group. Thus, currently, there is no legal support in a treaty and state practice for the idea that “the destruction of culture short of physical destruction of such protected groups [constitutes] an act of genocide.”¹⁵

Nevertheless, this is not to say that the concept of cultural genocide has no relevance in the legal arena and beyond. While studies have identified cultural genocide as part of the process of genocide, they also address it as a process of its own, called ethnocide. In this sense, cultural genocide has an independent existence as a crime in itself: genocide without murder.

Cultural genocide has also remained of crucial importance in the legal arena. Various branches of international law address many facets of the concept. In international criminal law, international courts have applied the concept of cultural genocide to maintain that under certain circumstances, cultural genocide can amount to genocide or serve as evidence for the specific intent (*mens rea*) to destroy the group.¹⁶ The ICC prescribed that this can be the case when “such a practice... brings about the commission of the objective elements of genocide... with the *dolus specialis* [special intent] to destroy in whole or in part the targeted group.”¹⁷ The ICTY discussed the mass killing of between 7,000 and 8,000 Bosnian Muslims in Srebrenica and suggested that when a physical or biological destruction takes place, it is often accompanied by attacks on religious property and symbols of the religious group. This can indeed serve as evidence of intent to destroy the group.¹⁸ The ICTY, therefore, saw the destruction of mosques and houses of Bosnian Muslims as evidence for the specific intent to commit genocide.¹⁹ This argument was also endorsed by the ICJ in the *Bosnia v. Serbia* case, in which the court applied the decision of the Krstić Trial Chamber when it assessed the special intent of the perpetrators of the Srebrenica genocide.²⁰

In addition, beyond the crime of genocide, international criminal law includes the constitutive acts of cultural genocide within “persecution” – an offence included in crimes against humanity in the ICC Statute.²¹ International human rights law treaties also protect culture, and the UN Declaration on the Rights of Indigenous Peoples²²

(UNDRIP) makes more specific references to Indigenous Peoples’ right not to be subjected to forced assimilation or destruction of their culture.²³ This is perhaps because the cultural genocide of indigenous groups is more egregious than other forms of ethnocide.

The connection between physical and cultural genocide has practical implications that could also serve to warn of genocide in advance and perhaps prevent the genocide. If evidence of cultural genocide is collected before the physical destruction begins, relevant monitoring bodies such as the UN Human Rights Council, the UN human rights treaty bodies, and especially the UN Office on Genocide Prevention and Responsibility to Protect could intervene to warn of the possibility of genocide.

Moreover, the importance of cultural genocide exceeds the legal realm and has broader implications for the social and political context. The fact that the non-physical destruction of a group is a fundamental factor in determining its overall destruction means that the legal understanding of genocide, entrenched by the Genocide Convention, is too limited. Outside the narrow lens of international law in general, and international criminal law in particular, a broader concept of genocide should be endorsed. A sharp distinction between what destroys a culture and what kills a people is often not possible. On the contrary, it is more likely that the two concepts of physical and cultural destruction are inextricable; the

15. James Anaya, cited by Cassidy, *supra* note 14, n.15, at 129.

16. Genocide Convention, Article 2 determines that a crime of genocide requires “[the] intent to destroy in whole or in part a national, ethnical, racial or religious group, as such.”

17. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, March 4, 2009, ¶ 145.

18. Judgment *Krstić* (IT-98-33-T), Trial Chamber, Aug. 2, 2001 (*Krstić* Trial Judgment), § 580; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, April 19, 2004 (*Krstić* Appeal Judgment), § 53.

19. *Krstić* Trial Judgment, § 580.

20. *Bosnia v. Serbia*, § 344.

21. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/Conf.183/9 (entered into force July 1, 2002) (“ICC Statute”), Art.7 (1)(h), 1009-1060, 1025.

22. UN Office of the High Commissioner for Human Rights (OHCHR), The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, HR/PUB/13/2.

23. UNDRIP, Art. 8(1), 8(2).

interpretation of the former has repercussions on the interpretation of the latter.²⁴

Thus, although the codification and criminalization of cultural genocide do not seem foreseen developments in the near future, the fact that cultural genocide has not disappeared from the legal and the socio-political discussion points to its potential resurgence in international law and beyond. This is especially, but not exclusively, relevant to the right of Indigenous Peoples to culture and language. It seems that the infringement of this right is not only a violation of international human rights law but also amounts to cultural genocide under certain circumstances; it should also be recognized as such by the international community.²⁵

Crucially, arguments against expanding the definition of genocide to include ethnocide (or cultural genocide) should be considered. Conceptually, it could be argued that expanding the definition will dilute the force of the core meaning of genocide. Practically, a narrow definition is more administrable and serves as a better basis for enforcing criminal liability. This may thus justify not changing the definition of genocide in the Genocide Convention. It does not, however, rule out the possibility of expanding the definition in other and broader contexts.

To conclude this section, an implication of cultural genocide for the present should be addressed: the physical and cultural genocide of the Uyghur minority in northwest China, which has been taking place since 2017. The Uyghurs are an ethno-religious Turkic minority group, who are predominantly Muslim. Most of them (approximately twelve million people) reside in Xinjiang Uyghur Autonomous Region of northwest China, and they comprise about half of the total population of the region.²⁶ The meaning of their name is “unity” or “alliance,” distinguishing their ethnic identity.²⁷

China has acted to repress the Uyghur minority almost since the beginning of its establishment as the People’s Republic of China in 1949. The Chinese regime’s response to the struggle for self-determination of the Uyghurs – a struggle that began in the 1940s – has intensified over the years. Beginning with attempts to forcibly assimilate the Uyghur community, the regime then placed sanctions on the Uyghurs’ religious and cultural expression. In May 2014, in response to an act of terrorism committed by Uyghur extremists in Urumqi, the Capital of Xinjiang,²⁸ the Chinese government launched “The Strike Hard Campaign against Violent Terrorism” (Strike Hard Campaign), that expanded into an aggressive assault on the Uyghurs’ culture and heritage.²⁹

Since 2014, evidence has been collected to prove allegations that the gross violations of human rights that China has committed against the Uyghur population in northwest China amount to crimes against humanity³⁰ and genocide.³¹ Among them are acts that can be referred to as cultural genocide. These include the incarceration of people belonging to the Uyghur community in hundreds of camps, where according to human rights non-governmental organizations (NGOs), people are held in appalling conditions, forced to work, and face sanctions on their freedoms of religion, culture and faith, including prohibitions on using the Uyghur language and practicing Islam, the Uyghur religion.³²

24. To further elaborate on cultural genocide and its connection to physical genocide, see Hilly Moodrick-Even Khen, “The Uyghurs: A Case for Making the Prohibition on Cultural Genocide a Soft Law Norm in International Law,” 30 INT’L J. ON MINORITY AND GROUP RIGHTS 76-109 (2023).
25. Note, for example, Canada’s Truth and Reconciliation Commission report on the abduction of 150,000 First Nations’ children committed by the government between 1867 and 1996 and their forced assimilation in residential schools as a form of cultural genocide. See “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015), available at: https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf
26. “To Make Us Slowly Disappear,” The Chinese Government Assault on the Uyghurs, United States Holocaust Memorial Museum Report, Nov. 2021, at 5 (USHMM report).
27. Sumaya S. Bamakhrama, “Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; Re- Education Camps,” 55 U.S.F.L. REV. 399, 404 (2020-2021).
28. The extremists set off explosives that killed 31 people and injured more than 90.
29. Brennan Davis, “Being Uyghur... With ‘Chinese Characteristics’: Analyzing China’s Legal Crusade Against Uyghur Identity,” 44 AM. INDIAN L. REV. 81, 98 (2019-2020).
30. Such as killings, torture, mass incarceration, rape, arbitrary deprivation of life, forced disappearances, and forced labor.
31. Committed through transferring Uyghur children from their group (putting them in state-run institutions when their parents are detained or in exile) and applying measures of forced sterilization or birth control.
32. China describes these camps as “re-education” centers set up in response to “terrorist activities” committed by Uyghur organizations and objects to the allegations it faces, as described above.

The Chinese regime is also accused of additional acts of cultural genocide outside the camps. These include: 1) laws and policies instituted to limit and criminalize the practice of both Islam and Uyghur culture and language,³³ and making any violation of the prohibitions on the exercise of religious freedom a basis for arrest or detention;³⁴ 2) aggressive promotion of marriage between Han Chinese and Uyghurs, in particular between Han men and Uyghur women;³⁵ and 3) destruction of Uyghur religious and cultural property.

While the restrictions on the Uyghur community with regard to their right to express their religion and culture in daily life and outside detention centers are clear violations of human rights law instruments that determine the right to freedom of religion and the right to perform cultural practices,³⁶ they are not in and of themselves a form of cultural genocide intended to systematically destroy the Uyghurs by means of eliminating their culture and religion. However, considering the establishment of internment camps (in which at least one million people have been incarcerated so far)³⁷ that provide evidence for the special intent to replace the Uyghurs' culture with that of the dominant Han group, these camps constitute a form of cultural genocide. As noted above, China has strongly objected to the accusations. It has also limited the international community's access to Xinjiang and its ability to intervene.³⁸ Yet, when supported by the endorsement of the theoretical concept of cultural genocide, the evidence collected by NGOs and reports of the UN monitoring bodies that proved China's violations of international law could eventually bring about a strong international condemnation and significant actions against China.³⁹

3. Political Genocide

Another form of genocide included in Lemkin's description of the "eight techniques of genocide" is political genocide. In contrast to cultural genocide, political genocide is a physical form of genocide, and thus should have more naturally fit within the criteria of the crime of genocide as defined in the Genocide Convention. However, the convention limited the protected groups to national, ethnic, racial, or religious groups. The rationale for this limitation was identified by the ICTR as focusing on "stable groups," that is, groups whose belonging is determined by birth.⁴⁰ Political groups have thus not gained the protection of the convention since they are not defined as "stable" groups.

Nevertheless, the exclusion of political genocide from the purview of the definition of genocide in international law has not gained support across the board. For example,

the Extraordinary Chambers in the Court of Cambodia – established as a hybrid court⁴¹ in June 2006 to try perpetrators of mass atrocities committed in Cambodia between April 1975 and January 1979 by members of the Communist Pol Pot regime – included the crime of genocide in its jurisdiction.

33. "Like We Were Enemies in War, China's Mass Internment, Torture and Persecution of Muslims in Xinjiang," AMNESTY INTERNATIONAL REPORT 25 (2021), (Amnesty Report); USHMM Report, at 18.

34. USHMM Report, at 19.

35. USHMM Report, at 10-11. Given that a person who refuses such marriages risks being detained, the "aggressive promotion" may be rightfully described as forcing the marriage.

36. These rights are enumerated in the customary law; UN GA, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, 217 A (III); UN GA, Elimination of all forms of intolerance and of discrimination based on religion or belief, Dec. 16, 1976, A/RES/31/138, and in treaties to which China is a party such as the UN GA, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, U.N.T.S. vol. 660, p. 195.

37. The Chinese government does not supply any official data on these centers so exact numbers are not available. These estimates are based on NGO reports. See Amnesty report, at 23; Bamakhrama, *supra* note 27, at 404.

38. See for example, the former UN High Commissioner for Human Rights report on September 15, 2021, on her failure to gain access to Xinjiang. Sophie Richardson, "UN Rights Chief to Report on China's Abuses in Xinjiang," HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2021/09/15/un-rights-chief-report-chinas-abuses-xinjiang>

39. For the implications of the international community's recognition of the cultural genocide of the Uyghurs on the development of cultural genocide as a soft law norm of international law, see Moodrick-Even Khen, *supra* note 24, at 106-109.

40. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, Sept. 2, 1998, ¶ 511.

41. Hybrid courts are ad hoc courts with mixed characteristics of domestic and international courts, established to try perpetrators of core crimes including war crimes, crimes against humanity and genocide. The "hybrid characteristics are found in their applicable law, and in the rules of their composition, procedure and jurisdiction." For more on hybrid courts, see Hybrid Courts, in Ariel University Center for the Research and Study of Genocide: <https://www.ariel.ac.il/wp/rsg/hybrid-courts/>

There is reason to believe that the interpretation of the Genocide Convention may be revisited to include political genocide under the broader definition of genocide.

4. Conclusion

This article addressed the question of whether the time has come to revisit the definition of genocide in the Genocide Convention and include two forms of genocide that were intended for inclusion by the draftsmen of the convention but were eventually excised from the convention's final provisions. The article answered these questions in the affirmative. It provided theoretical and practical arguments for including cultural and political genocide in the definition of genocide and presented their implications for current events, such as the genocide of the Uyghurs in China, and for past events (that are nevertheless still dealt with by national and international courts) such as the mass atrocities committed in Cambodia between 1975 and 1979.

The argument for broadening the definition of genocide stems from the view that the legal concept of genocide in

general and in international criminal law in particular is just one aspect of the broad phenomenon of genocide. While the broadening of the definition of genocide may have direct legal implications (such as providing evidence for anticipated acts of genocide and their prevention), it will also have implications for the interpretation of genocide in other contexts. Such interpretation is required for a more nuanced and accurate understanding of the concept of genocide that may serve as well for fulfilling the most important mission of combatting genocides and aiming at their eradication. ■

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