J U R I D I C U M

Cultural Genocide in International Law
An Assessment

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This essay assesses the legal status of cultural genocide in international law. It does so in a three-stage process. The first stage examines cultural genocide's status in treaty law, i.e. the Genocide Convention. It finds there are two approaches to interpreting the *mens rea* and the *actus reus* of genocide. The current understanding by the ILC and the ICJ is that the Genocide Convention only prohibits the physical and biological destruction of the group. They base their argument on the preparatory work of the Genocide Convention, which expressly excluded cultural genocide from the final text. The second approach is a literal interpretation of the ordinary meaning of the terms of the Genocide Convention, which allows for a more extensive approach that does not limit the Genocide Convention to physical and biological destruction. That interpretation would allow for a possibility to recognize cultural genocide under treaty law. The second stage examines cultural genocide's status as a crime in customary international law. The essay finds cultural genocide cannot be regarded as having reached the status of customary international law as state practice needs to be sufficiently widespread and representative, as well as consistent. This essay finds that cultural genocide has special importance in relation to indigenous peoples. Indigenous peoples have a right not to have their culture destroyed according to article 8 of the United Nations Declaration of the Rights of Indigenous Peoples. The article has been interpreted to reflect the acts of cultural genocide. The third stage examines cultural genocide in relation to crimes against humanity, namely persecution. This essay finds that acts that would amount to cultural genocide also fall within crimes against humanity, but It provides arguments for recommendations, *de lege ferenda*.

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1 Introduction

1.1 Background

The Uighurs are an ethnic Turkic Muslim minority in the Xinjiang province, an autonomous region in northwest China.[1] The Chinese government has for a long time tried to repress, through different policies, the Uighurs in Xinjiang. Recent reports suggest that as many as one million Uighurs and other Turkic Muslim minorities have been held in so-called 'counter-extremism centers'. Another two million have been forced into 're-education camps' for political and cultural indoctrination.[2]

Reports paint a grim and disturbing picture of the conditions inside these mass detention centers. Detainees are forced to learn Mandarin Chinese and sing songs that praise the Chinese Communist party. They are also forced to memorize rules applicable primarily to Turkic Muslims. The detainees are told that they will not be allowed to be released if they have not learned at least 1000 Chinese characters or are otherwise deemed to have become loyal Chinese subjects. Furthermore, Uighur detainees are punished for any peaceful practice of their Muslim faith. They are also barred from contacting family and friends.[3] Reports about torture, deaths and suicide attempts within the camps have raised the concern about physical and phycological abuse. The camps are reported to be in very poor conditions, with overcrowding issues. Elderly, teens, sick and pregnant people, even breastfeeding women and people with disabilities, are all being detained.[4]

The Xinjiang province has been described as 'something that resembled a massive internment camp shrouded in secrecy'.[5] Uighurs, who are not being held in the camps, are being heavily watched by their neighbors, police and tech-enabled mass surveillance systems. They must attend weekly, or daily, Chinese flag-raising ceremonies and political indoctrination meetings. They also need to attend Mandarin classes. Uighurs are often subjected to different kind of movement restrictions such as house arrest, barred from leaving their locales and forbidden to leave the country. The Chinese government has restricted religion so stringently that it has *de facto* outlawed Islam.[6] China has made even the most common-placed expressions of ethno-religious significance to Muslims into a penal offense. Such expressions included daily greetings, growing a full beard, wearing headscarves and possessing certain Halal products.[7]

Furthermore, mosques are being shut down and in hundreds of cases torn down. The Chinese government is denying that any abuse is taking place. It is describing the mass detention camps as 'vocational training centers' and that the measures taken are necessary to root out extremist violence and create social stability. However, experts describe it as 'a concerted campaign to

[1] Human Rights Watch, "*Eradicating Ideological Viruses" China's Campaign of Repression Against Xinjiang's Muslims* (HRW 2018) 1.
[2] Due to the secrecy of the camps, and the unwillingness of the Chinese government to let any outside actor observe the situation, the numbers are only estimations and can differ.
Office of the High Commissioner for Human Rights (OHCHR), 'Committee on the Elimination of Racial Discrimination reviews the report of China' (OHCHR News and Events, 13 August 2018) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23452&LangID=E> accessed 7 April 2019.
[3] Human Rights Watch (n 1) 4.
[4] Human Rights Watch (n 1) 2.
[5] OHCHR (n 2).
[6] Human Rights Watch (n 1) 4.
[7] OHCHR (n 2).

hollow out a whole culture, to terrorize a whole people'.[8] The systematic and cruel attempts to diminish and even eradicate the Uighurs' culture have been categorized as 'cultural genocide'.[9]

To categorize the situation in China as cultural genocide is legally problematic. Although the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)[10] was drafted over 70 years ago, the scope of genocide remains fraught with controversies. One of these is the issue of whether cultural genocide can fall under the definition of genocide, according to Article II of the Genocide Convention. According to Philippa Webb, the notion of cultural genocide is controversial; there is a discrepancy between the integrated position of international courts on the one hand and the academic literature on the other.[11]

1.2 Purpose and Legal Question

As provided above, cultural genocide is a current and important legal issue. The reports of China's treatment of the Uighurs are truly horrific and it is crucial to shed light on the situation from a legal point of view. The tremendous mass detention, prohibition of language and religion, destruction of property and inhumane treatment, seemingly, provide a strong *prima facie* argument that China is trying to eradicate the Uighur minority as a distinct group in the Chinese society. However, does the legal definition of genocide allow for cultural destruction as well as the physical destruction of a group?

The purpose of this essay is to provide a comprehensive, critical and analytical assessment of the current understanding of cultural genocide in international law. In order to make such an assessment, several questions need to be asked. The overarching question is what is the current legal status of cultural genocide in international law? In order to correctly answer that question, this essay also asks whether cultural genocide can be included in the Genocide Convention through an extensive literal interpretation of the Genocide Convention and if cultural genocide can be considered a norm of customary international law?

1.3 Delimitations

Genocide is a complex international crime, which can be addressed from several different angles, through different legal questions. This essay focuses on the possibility of the concept of cultural genocide, other issues such as actually proving intent of the crime of cultural genocide and/or the possibility for conviction in a case concerning cultural genocide will not be addressed. Also, the goal of this paper is not to assess whether China's treatment of the Uighurs constitutes cultural genocide. The primary goal is to give a comprehensive assessment of cultural genocide as a crime in international law as a whole.

Furthermore, except in the evaluation of the United Nations Declaration on the Rights of Indigenous Peoples (the UNDRIP),[12] human rights in relation to cultural destruction will not be assessed. This is because this essay focuses on the prohibition of the crime of genocide and not on the rights given to different groups through the different human rights treaties.

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[8] Rachel Harris, 'Bulldozing mosques, the latest tactic in China's war against Uighur Culture' *The Guardian* (London, 7 April 2019) <www.theguardian.com/commentisfree/2019/apr/07/bulldozing-mosques-china-war-uighur-culture-xinjiang> accessed 8 April 2019.

[9] Rachel Harris, 'Cultural Genocide in Xinjiang: How China Targets Uyghur Artists, Academic, and Writers' *The Globe Post* (Washington DC, 17 January 2019) <https://theglobepost.com/2019/01/17/cultural-genocide-xinjiang/> accessed 8 April 2019.

[10] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[11] Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 46.

[12] United Nations General Assembly (UNGA) United Nations Declaration on the Rights of Indigenous Peoples (2007) UN Doc A/RES/61/295.

In chapter 3, Cultural Genocide in Customary International Law, this essay does not try to establish a full, comprehensive and exhaustive analysis of customary international law in relation to cultural genocide. To do so would require more time and more space or be essay subject on its own merit. Nevertheless, this essay provides a sufficient enough analysis for the purpose of determining cultural genocide's status in customary international law.

The paper focuses primarily on the cases before the International Court of Justice (ICJ) and the International Criminal Tribunal of the former Yugoslavia (ICTY). These cases had elements of genocidal actions that were non-physical in nature and thus more relevant to the issue of cultural genocide. Contrastingly, the cases out of the International Criminal Tribunal of Rwanda (ICTR) concerned mostly established mass murders and are thus omitted.

1.4 Method

This essay uses the legal dogmatic method. It does so by discussing and analyzing the different legal sources relevant to the concept of cultural genocide in international law. The most important source is the Genocide Convention from 1948. This paper analyzes how the Genocide Convention's Article II has been interpreted by, primarily, the ICJ and the ICTY. As a result, the case law of these courts is thoroughly discussed and analyzed. These courts have, in their judgments, relied extensively on the preparatory work leading up to the final adaptation of the Genocide Convention. Thus, this paper puts significant weight on the preparatory work in order to establish its importance. The preparatory work has also a secondary purpose in this essay. It provides an explanation and a definition of cultural genocide for the reader. Since this essay has a focus on the interpretation of different treaty rules, the rules of the Vienna Convention on Law of Treaties are conferred.

In order to fulfill the purpose of comprehensiveness and to adequately answer the legal question, this essay makes an evaluation of relevant state practice in relation to cultural genocide, as an attempt to review if cultural genocide can be considered a rule of customary international law. It does so with regard to ILC's report on identification of customary international law. In this aspect, the paper focuses on the issue of forcibly transferring aboriginal children from their families in Australia and Canada, the drafting of the UNDRIP and the case law from Germany concerning Nikola Jorgic. Furthermore, to provide a truly comprehensive analysis, this essay also establishes what legal status cultural genocide has in relation to crimes against humanity.

The essay uses secondary sources as supplementary tools and to highlight arguments and further the discussion about the law. Publications by renowned scholars such as Philippa Webb and William A. Schabas are used. Schabas is considered one of the prominent scholars in the field of genocide. He was heard before the ICJ in the *Croatia v. Serbia*[13] case in 2015 and was referred to by the European Court of Human Rights in the *Jorgic v. Germany*.[14] Raphael Lemkin is also referred to give a historical background to the concept of cultural genocide. Journal articles are also used, as stated, to highlight arguments and further discussion.

This essay provides a critical and analytical assessment throughout the text.

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Judgment) [2015] ICJ Rep 3.
[14] *Jorgíc v. Germany* App no 74613/01 ECHR 2007-III.

2 Cultural Genocide in the Genocide Convention

2.1 Historical Background

In 1944, Raphael Lemkin[15] released his book *Axis Rule in Occupied Europe.* The work had the premise to collect and analyze the outrageous laws and the cruel and ruthless behavior perpetrated by the Axis powers.[16] In chapter 9, entitled Genocide, Lemkin explained that 'new conceptions require new terms'.[17] By combining the Greek word *genos*, meaning race or tribe and the Latin word *cide*, meaning killing, Lemkin created the term *genocide*. Lemkin explained that genocide is intended 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'.[18] He explained further:

> The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of a national group, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups.[19]

This description of the act of genocide is clearly a broad one. It involves not only the taking of lives but also the 'disintegration' of cultural, language and religion. Lemkin pointed out that genocide has two phases. The first phase is the destruction of the national pattern of the oppressed group and the second is the imposition of the national pattern of the oppressor. The second part, Lemkin argues, could be made both on the oppressed group itself which is allowed to stay in the territory, and upon the territory itself, after the oppressed group has been removed and replaced by the oppressor.[20] This suggests that genocide could take place even if the oppressed group was not physically eliminated.

Secondly, Lemkin was critical of the word 'denationalization', which was commonly used to describe genocidal actions up to that point in time. Lemkin believed that denationalization failed in describing the act of genocide in an accurate manner. It did not suggest the destruction of the biological structure of a group, nor did it suggest the imposition of the national pattern of the oppressor. Denationalization was at the time also used to describe only the deprivation of citizenship. Lemkin also objected to the terms like 'Germanization' and 'Italianization'. Lemkin argued that these terms only implied the cultural, economic and social aspect of genocide, thus they failed to 'convey the common elements of one generic notion'. They are too narrow as they leave 'out the biological aspect, such as causing the physical decline and even destruction of the population involved'. [21] It is evident that Lemkin envisioned the term genocide to include numerous actions. At the same time, he held the physical and biological aspect of genocide as the worst kind since he referred to it as '*even* the destruction of' and '*even* the lives of the individuals'.

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[15] Lemkin, of Jewish decent, was born in the eastern parts of Poland. He worked as a lawyer, prosecutor and university teacher before he fled the country in 1939. He made his way to the United States, through Sweden, and soon became a professor at Yale University. Lemkin started the World Movement to Outlaw Genocide and worked tirelessly to promote legal norms directed against the crime.
William A Schabas, *Genocide in International Law* (Cambridge University Press 2002) 24.

[16] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 4.

[17] ibid 79.

[18] ibid.

[19] ibid.

[20] ibid.

[21] ibid 80.

In describing the Germans' techniques of genocide, he divided them into several different fields. Namely political, cultural, economic, social, physical, biological, religious and moral genocide. Under the heading *cultural*, Lemkin enumerated different actions he considered part of cultural genocide. The first action is the prohibition of the use of a group's own language in schools and in printing. The German forced teachings in accordance with principles of National Socialism and created vocational schools. In Poland, Polish youths were forbidden to take part in liberal arts studies as it could 'develop independent national Polish thinking'. Instead, the youth of unwanted groups were sent to trade schools to become skilled laborer for German industries. As another way to prevent expression a national spirit through artistic media, German authorities had rigid control over all kinds of cultural activities. In a Nazi document, used in the Nuremberg Trial, the German authorities' policy against the Polish people was further explained. It stated that 'in order to prevent any cultural or economic life, Polish corporations, associations and clubs cease to exist … Polish restaurants and cafes as centers of the Polish national life are to be closed down'. It also stated that 'Polish theaters, cinemas, and other places of cultural life are to be closed down. There will be no Polish newspaper, nor printing of Polish books'.[22] National monuments, libraries, archives, museums and galleries were closed, moved or destroyed. According to Lemkin, these actions have made 'national creative activities in the cultural and artistic field been rendered impossible by regimentation' and 'the population has also been deprived of inspiration from the existing cultural and artistic values'.[23] Under the religious category, Lemkin mentioned actions such as legally permitting children over fourteen years to renounce their religious affiliation and destroying church property and persecution of the clergy.[24]

Lemkin finished his chapter on genocide with a part called 'recommendations for the future', where he called for an amendment of the international law, to encapsulate the crime of genocide. He criticized international law at the time for not taking into account 'various ingenious measures for weakening or destroying political, social, and cultural elements in national groups'.[25] Lemkin insisted that 'the entire problem of genocide needs to be dealt with as a whole; it is too important to be left for piecemeal discussion and solution in the future'.[26] Thus, Lemkin proposed, *de lege ferenda*, an international multilateral treaty that should provide for the introduction of provisions protecting minority groups from oppression into each countries' constitution and criminal code. Each criminal code should have provisions penalizing genocidal practices and not only should the person who execute genocidal acts be held accountable, but also the one who orders such acts.[27] Furthermore, Lemkin believed that 'because of the special implications of genocide in international relations, the principle of universal repression should be adopted for the crime of genocide'.[28]

2.2 The Drafting Process

On 11 December 1946, the United Nations General Assembly (UNGA) stated in Resolution 96(1) that 'genocide is a denial of the right of existence of entire human groups, … such denial of the right to 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'. UNGA thus

[22] Case No 8, *United States v Greifelt* et al., Opinion and Judgment and Sentence, Green Series Vol 5 at 88 (Mil Trib No 11948-03-10) 93.
[23] Lemkin (n 16) 84.
[24] ibid 89.
[25] ibid 92.
[26] ibid.
[27] ibid 93.
[28] ibid 94.

affirmed that genocide is a crime under international law and requested the undertaking of the 'necessary studies, with a view to drawing up a draft convention on the crime of genocide'.[29]

The Secretary-General gave the mission of preparing an initial draft to the Secretariat's Human Rights Division. The Division consulted three experts, Henri Donnedieu de Vabres, Vespasian V. Pella and, of course, Raphael Lemkin.[30]

The so-called Secretariat Draft Convention defined the purpose of the convention to be the prevention of destruction of racial, national, linguistic, religious or political groups of human beings. The word genocide was to mean a 'criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or preventing its preservation or development'.[31] The draft divided up such acts in three categories. Physical genocide, biological genocide and cultural genocide. In other words, the eight different concepts of genocide first conceived by Lemkin had been narrowed down to three. Cultural genocide was described as 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.[32]

Already at this stage, the concept of cultural genocide was questioned. Both Pella and Donnedieu de Vabres argued that cultural genocide represented an undue extension of the notion of genocide and that such protection should fall under minority protection and not be covered by the term of genocide. However, Lemkin insisted on the importance of the concept. The Secretary-General decided to include it, subject to decision by the UNGA.[33] Later, a second drafting committee was established. An *Ad Hoc* committee composed of China, France, Lebanon, Poland, the Soviet Union, the US and Venezuela.[34] Their draft also included cultural genocide (article III), but now in a much less detailed and with a less broad description:

> 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 beliefs of its members such as:
>
> 1. Prohibiting the use of language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

[29] UNGA Res 96(1) 'The Crime of Genocide' (11 December 1946) UN Doc A/RES/96(I).
[30] Schabas (n 15) 52.
[31] United Nations Economic and Social Council (ECOSOC) 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447, 5.
[32] ibid 6.
[33] Schabas (n 15) 53.
[34] ibid 61.

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[35]

Even when reduced to just the actions of prohibiting language or the destruction of cultural institutions, the question of whether to include it at all remained. During the process, this question was one of the main issues and several states had proposed the exclusion of cultural genocide, and thus to limit the scope to physical and biological genocide.[36] Consequently, the UNGA met, at their 83rd meeting on 25 October 1948, exclusively to decide whether to include the concept of cultural genocide.

Pakistan was the first delegation to start the discussion. It held, firmly, that cultural genocide could not be separated from physical and biological genocide, as the crimes had the same motives and objects. Genocide in all forms had the object of destroying a national, racial or religious group as such, either by exterminating its members or by destroying its special characteristics. Pakistan argued that cultural genocide actually represented the end, whereas physical genocide was only the means. The chief motive of genocide 'was a blind rage to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence'.[37] Thus, Pakistan held that cultural and physical genocide were indivisible and that it would go against all reason to make one a crime and not the other.

However, Pakistan's arguments met harsh criticism from several states. The main point was that physical and cultural genocide was not at all the same thing. This idea was clearly pointed out by the Danish delegation that stated that 'it would show a lack of logic and a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries'.[38] Iran held similar views as it expressed that there was a 'great inherent difference between physical … and so-called cultural genocide'.[39] Physical genocide meaning the extermination of human groups, while cultural genocide only referred to the attempts to destroy the language, religion or culture of a group. Iran, therefore, held that these two concepts should not be 'artificially' placed on the same level.[40] Also, the US expressed that 'the destruction of a culture had no connection with the better known concept of genocide as the physical destruction of members of a human group'.[41]

China agreed that physical genocide seemed less brutal than cultural genocide but argued at the same time that cultural genocide could be more harmful. China contented that it 'worked below the surface and attacked a whole population, attempting to deprive it of its ancestral culture and to destroy its very language'.[42] Ecuador similarly held that destruction of culture was normally affected with less violence than the extermination of a group, but the result was the same. It considered that the Genocide Convention would be incomplete if it was limited to physical genocide.[43]

[35] ECOSOC Ad Hoc Committee on Genocide 'Report of the Committee and Draft Convention Drawn up by the Committee' (5 April – 10 Maj 1948) UN doc E/794 17.
[36] Schabas (n 15) 62.
[37] UNGA Sixth Committee 'Continuation of the consideration of the draft convention' (25 October 1948) UN Doc A/C.6/SR.83, 193.
[38] ibid 199.
[39] ibid 200.
[40] ibid
[41] ibid 203.
[42] ibid 198.
[43] ibid 203.

The other main argument for not including cultural genocide in the convention was that cultural genocide fell rather within the sphere of the protection of human rights or of the rights of minorities. Canada was in favor of an earlier French suggestion that language, religion and culture should be protected within the framework of the international declaration on human rights.[44] The US argued that if the purpose of including cultural genocide was to protect the culture of the group, then it was 'primarily freedom of thought and expression for the members of the group that needed protection. Such protection came within the sphere of human rights'.[45] Sweden agreed with this notion and suggested that the cultural protection of minorities should be re-examined with the view of forming another separate draft convention which would 'prescribe different forms of international control and suppression from those laid down in the convention on genocide'.[46]

The purpose of a Genocide Convention was to establish genocide as an international crime and to make sure that people would get punished for such atrocities in the future. The purpose was not to give rights to people. Thus, the arguments in favor of cultural genocide to be treated as a human rights issue are missing the mark. This is rather effectively pointed out by the delegation of Belarus. It stated that '[a]rticle III, however, was not concerned with restrictions of the cultural life of a group, but with actions aiming at the destruction of the language, religion or culture of a group'.[47] Also, the Soviet Union pointed this out. It stated that the declaration was made for the protection of individuals' right to life, liberty and security. That could be interpreted as guaranteeing protection against any act of physical genocide, yet no one had disputed the relevance and need for a convention on physical genocide.[48]

The third opposing argument to the inclusion of cultural genocide was that the concept, as drafted, was conceived as too vague. This notion was shared by both states that wanted to include it and states that wanted to exclude it. For example, Venezuela, a state in favor of retaining cultural genocide, stated that article III was 'an ill-assorted mixture of heterogeneous elements and abstract conceptions lacking in precision … terms used were vague and too general'. It suggested that the text could be improved.[49] Ecuador held that the drafting of article III was not felicitous and noted that it would be undesirable to vote out the inclusion of cultural genocide before the article could be amended.[50] Similarly, Czechoslovakia urged the need for 'mature reflection' before deciding about the exclusion of cultural genocide in the convention.[51]

Furthermore, Egypt proposed that the meeting to be adjourned due to the importance of the subject and the fact that a number of delegations were not represented at the meeting. This motion was voted down by 24 votes to 18, with 2 abstentions.[52]

Thus, the UNGA voted, by 25 votes to 16, to exclude article III relating to cultural genocide in the convention. 4 delegations abstained from voting and 13 were absent during the vote.[53]

Even if cultural genocide, as it was described under draft article III; was voted out of the legal framework of the Genocide Convention, it is not evident that cultural genocide *per se* was dismissed as a concept. This notion could be further supported due to the fact that the *actus*

[44] ibid 200.
[45] ibid 203.
[46] ibid 197.
[47] ibid 202.
[48] ibid 205.
[49] ibid 197.
[50] ibid 204.
[51] ibid 205.
[52] ibid 206.
[53] ibid 206.

reus 'forcible transfer of children to another human group', which was an action prohibited under cultural genocide in the Secretariat's draft, was voted into the draft after an amendment by the Greek delegation. During the draft process, the forced transfer of children was constituted as cultural genocide by several delegations. The delegation of Yugoslavia stated that 'the forced transfer of individuals with a view to their assimilation into another group constituted cultural genocide'. [54] The Soviet Union believed that there were no legal grounds for including the amendment since it was not a question about the physical destruction that was under consideration.[55] Greece themselves stated that forced transfer of children had not only cultural aspects but also physical and biological aspects of genocide. Thus, not ruling out a cultural aspect of genocide.[56] This, in conjunction with the aforementioned vagueness of the concept of cultural genocide, makes it possible to asses that it was more draft article III *per se* that was voted down, and not the entire notion of cultural genocide.

Furthermore, the vote was 25 to 16, which cannot easily be construed as a conclusive vote. That, together with the evident separate opinions of the delegations on a fundamental level makes the vote even more inconclusive. The fact that 13 delegations did not have a chance to vote is, at least at a hypothetical level, a valid argument against the conclusiveness of the decision.

Lastly, the political motivation, rather than the actual legal standpoints, behind the vote is apparent. Christopher Powell argues in his article, 'What do Genocides Kill? A Relational Conception of Genocide', that the exclusion of cultural genocide 'was shaped by the by the desire of its framers not criminalize their own behavior'. Powell aimed this statement mostly against the United States, due to their history with their indigenous peoples and African Americans. [57] Similarly, William A. Schabas argues that Australia, the US, Canada, Sweden, France, India, Peru and the U.K. all were unhappy with the inclusion of cultural genocide due to their ongoing or past treatment of immigrants, minorities and indigenous peoples.[58] In the case of Canada, their delegation was instructed to do all it takes to get rid of the notion of cultural genocide. A telegram from the Secretary of State to the delegation stated: 'You should support or initiate any move for the deletion of Article three on "cultural" Genocide. If this move [is] not successful, you should vote against Article three and if necessary, against the Convention'.[59] In other words, Canada was prepared to vote against the Genocide Convention as a whole, if cultural genocide was retained, which is quite remarkable. This highlights the true contentiousness of cultural genocide.

2.3 Cultural Genocide and Treaty Interpretation

In 1948, the Genocide Convention was finally adopted by the UNGA. Article II has the following wording:

> 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:

[54] UNGA Sixth Committee 'Continuation of the consideration of the draft convention on genocide' (23 October 1948) UN doc A/C.6/SR.82, 191.
[55] ibid 190.
[56] ibid 186.
[57] Christopher Powell, 'What do genocides kill? A relational conception of genocide' (2007) 9 Journal of Genocide Research 527, 532.
[58] Schabas (n 15) 184.
[59] Payam Akhavan, 'Cultural Genocide: Legal Label or Mourning Metaphor' (2016) 64 McGill Law Journal 243, 260.

(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.[60]

Lemkin's idea of a broad concept of genocide went from 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups' to only include five acts on an exhaustive list, with the intent to destroy the protected groups. With no explicit mention of cultural genocide in the final Genocide Convention, one can presume that cultural genocide is a dismissed legal concept. Since the establishment of the ICTR, ICTY and the genocide cases held before the ICJ, the concept of genocide has been elaborated and defined. However, there still exist numerous discrepancies with the currently understood interpretation of the Genocide Convention. The main issue is how the *mens rea*, meaning the *dolus specialis* or special intent, shall be interpreted. The wording of 'with the intent to destroy', does that necessarily indicate the physical or biological destruction of a group? The second ambiguity is the how the *actus reus*, meaning the prohibited actions listed (a) through (e) in article II, should be interpreted and if they can include actions that do not set out to harm the physical or biological existence of the group.

The principles of treaty interpretation in international law are set out in the Vienna Convention on the Law of Treaties (VCLT).[61] Article 31 and article 32 constitute a two-stage process. Article 31, paragraph 1, provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Moreover, article 31 provides that the preamble, annexes, any agreement relating to the treaty, any instrument related to the treaty shall be considered for the purpose of interpretation. Also, any subsequent agreement regarding the interpretation and any subsequent practices in the application of the treaty which establishes the agreement regarding the treaty's interpretation shall be considered.[62]

Secondly, article 32 provides that when the interpretation according to article 31 '[l]eaves the meaning ambiguous or obscure' or '[l]eads to a result which is manifestly absurd or unreasonable', recourse may be had to supplementary means of interpretation, such as 'preparatory work of the treaty and the circumstances of its conclusion'.[63] These rules of interpretation are considered a codification of customary international law. They are therefore applicable to treaties that entered into force prior to the VCLT, such as the Genocide Convention.[64]

The appropriate question to ask is: what is the ordinary meaning of 'with the intent to destroy a group as such' and could that include the cultural destruction of a group?

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[60] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 2.
[61] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[62] ibid art 31.
[63] ibid art 32.
[64] Elisa Novic, 'Physical-biological or socio-cultural "destruction" in genocide? Unravelling the legal underpinnings of conflicting interpretations' (2015) 17 Journal of Genocide Research 63, 69.

2.3.1 *Mens Rea*

The first authority to define the word 'destroy' was the International Law Commission (ILC) in 1996. In its commentary on the Draft Code of Crimes against the Peace and Security of Mankind, the ILC expressed its view on the interpretation of destruction in the context of genocide. Interestingly, the ILC took its standpoint by directly referring to the preparatory work:

> As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense.[65]

The ILC based much on its reasoning, not on the ordinary meaning of the word destroy, but on the discussions and work of the draft committee. Significant weight was given to the fact that the final convention 'did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide'. According to the ILC, the subparagraphs *a* to *c* constitute physical genocide and *d* and *e* constitute biological genocide. [66]

In *Prosecutor v. Radislav Krstic*[67] before the ICTY in 2004, the Trial Chamber upheld the ILC's reasoning. In a discussion where it contemplated in what manner the destruction of a group could be implemented, it first 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'.[68] However, the Trial Chamber concluded that cultural genocide was considered too 'vague and too removed' from the physical and biological destruction that motivated the Genocide Convention and it reiterated the ILC's interpretation from 1996.[69] By doing so, the ICTY based its interpretation, indirectly, only on the preparatory work. Later, the Appeal Chamber stated that '[t]he Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.'[70]

This notion was further affirmed in *Bosnia and Herzegovina v. Serbia and Montenegro*[71] before the ICJ in 2007. Bosnia and Herzegovina argued that the Serb forces had deliberately destroyed historical, cultural and religious property of the protected group in 'an attempt to wipe out the traces of their very existence'.[72] It was proved that many mosques, churches and other religious sites, such as cemeteries and monasteries had been destroyed.[73] It was also found that archives and libraries were subjected to attacks. The Institute for Oriental Studies in Sarajevo was bombed, resulting in the loss of 200,000 documents including a collection of more than 5,000

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[65] International Law Commission (ILC), 'Report of the Commission to the General Assembly on the Work of its 48th session' (6 May – 26 July 1996) UN Doc A/CN.4/SER.A/1996/Add.l (Part 2) 46.
[66] ibid para 12.
[67] *Prosecutor v Krstic* (Judgment) IT-98-33-T (2 August 2001).
[68] ibid para 574.
[69] ibid para 574.
[70] *Prosecutor v Krstic* (Judgment) IT-98-33-A (19 April 2004) para 25.
[71] *The Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment) [2007] ICJ Rep 43.
[72] ibid para 335.
[73] Ibid para 338.

Islamic manuscripts. Furthermore, Bosnia's National Library was bombed, and an estimated 1.5 million volumes were destroyed.[74] The ICJ noted that the destruction was 'an essential part of the policy of ethnic purification and an effort to erase traces of Bosnian Muslims existence'. However, the Court found 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'.[75] The Court acknowledged that such destruction could be significant inasmuch as it is done with the intent of eliminating all traces of the cultural or religious presence of a group, but it does not fall in under the scope of genocide. The ICJ based its conclusion on, once again, the preparatory work of the Genocide Convention.[76]

In the more recent case from the ICJ, *Croatia v Serbia*[77], Croatia questioned this notion of interpretation. Croatia argued that the required intent is not limited to the intent to physically destroy the group. It also includes the intent to make sure that the group in question stops functioning as a unit.[78] This could include actions conceived as cultural genocide. The ICJ did not give much reasoning. It simply stated that the idea of cultural genocide was dropped, and it was 'accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group'.[79] According to Philippa Webb, there is seemingly a clear consensus among the judgments of the ICTY, ICTR and ICJ that the destruction intended for the crime of genocide must be physical-biological in nature.[80]

However, that notion can be contested in several ways. One contention is how the different Courts and Tribunals have resorted to the preparatory work. Lars Berster argues in his article 'The Alleged Non-Existence of Cultural Genocide', that the Court's historical interpretation of destruction as being limited to physical and biological annihilation of the protected groups can be challenged in two respects. As has been shown above, the ICJ has construed the meaning of destruction in Article II of the Genocide Convention only with recourse to the preparatory work. This is, according to Berster, 'obviously inconsistent with the entrenched rules of treaty interpretation' as reflected in VCLT articles 31-32.[81] He argues, and rightfully so, that the preparatory work is only permitted as a supplementary tool according to Article 32. It is rather clear from the case law above that these courts have been using the preparatory work as a primary source of interpretation of the Genocide Convention. Moreover, the ICJ has in its previous case law explicitly adhered to the rules of interpretation. Berster believes that, against the backdrop of legal certainty, it is 'unfortunate that the ICJ chose to depart from its beaten track, all the more in regard to an issue of such unabated global concern'.[82]

Furthermore, as pointed out previously, the exclusion of cultural genocide in the drafting process does not conclusively reject the concept of cultural genocide. Berster argues that it would be 'premature' to draw the conclusion that the drafting committee really had the intention to confine the scope of the genocide convention to only encompass different situations of physical and biological genocide. Part of his argument is that the notion of 'forced transfer of

[74] Ibid para 342.
[75] Ibid para 344.
[76] Ibid para 344.
[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Judgment) [2015] ICJ Rep 3.
[78] ibid para 134.
[79] ibid para 136.
[80] Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 44.
[81] Lars Berster, 'The Alleged Non-Existence of Cultural Genocide: A Response to the Croatia v. Serbia Judgment' (2015) 13 Journal of International Criminal Justice 677, 679
[82] ibid 680.

children' and 'causing mental harm' was included in the prohibited actions, and thus deliberately widen the protective scope of genocide. Therefore, Berster maintains that the 'historical deliberations provide flimsy grounds and should not be drawn on to warrant the exclusion of social destruction from the definition of genocide'.[83]

Another argument against the notion that the intent to destroy must be physical or biological in nature is the dissenting opinion of Judge Shahabuddeen in the Appeal Chamber of the *Krstic* case. The counsel for Krstic claimed that the intent to destroy a group always must be to cause the physical or biological destruction of said group. By transferring children, women and elderly of the group out to the Srebrenica area, the counsel argued that Krstic had no intent to destroy the group physically.[84] The Appeal Chamber accepted the fundamental contention of the counsel, and reiterated, according to its interpretation, that the intent had to be to destroy physically or biologically the Srebrenica part of the Bosnian Muslim group.[85] The appeal of this point was dismissed. However, Judge Shahabuddeen did not agree with the proposition that the intent to destroy necessarily meant the physical or biological destruction of a group.

According to Judge Shahabuddeen, there must be a distinction between the nature of the listed acts (article II a-e) and the intent with which they are executed. The listed acts must indeed take a physical or biological form but the intent to destroy must not always lead to physical or biological destruction. Judge Shahabuddeen bases this reasoning by an *a contrario* interpretation of the listed acts. Article II(c) speaks of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' and article II(d) proscribes 'measures intended to prevent birth within the group'. These two acts are the only ones that expressly provide an intent of physical or biological destruction. Seemingly, with an *a contrario* interpretation, the other provisions in the Genocide Convention do not require an intent to cause a physical or biological destruction of the group in whole or in part.[86]

Judge Shahabuddeen makes the conclusion that the emphasis put on the need for physical and biological destruction in article II(c) and (d) implies that a group can be destroyed in non-physical or non-biological ways. He stated that

> [a] group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.[87]

An example of this reasoning would be that if a perpetrator has the intent to destroy a group in a socio-cultural way, and the perpetrator tries to achieve this by eliminating the special characteristics of the group by killing certain important and influential figures of the group and by forcibly transferring children of the group to another group. According to Judge Shahabuddeen, this would constitute genocide since the *mens rea* is established and that it is accomplished with two of the listed prohibited acts. Contrarily, according to the current interpretation of the ICJ, it would not, since the intent was not to destroy the group in a physical or biological way.

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[83] ibid 681.
[84] *Prosecutor v Krstic* (Judgment, dissenting opinion of Judge Shahabuddeen) IT-98-33-A (19 April 2004) para 45.
[85] Ibid para 46.
[86] ibid para 49.
[87] ibid para 50.

However, Judge Shahabuddeen is clear that he does not take a stand for cultural genocide. He expressly states that 'the foregoing is not an argument for the recognition of cultural genocide'. He believes that cultural genocide shares that same intent of destruction in a non-physical or non-biological way, but in order to achieve cultural genocide none of the prohibited acts listed in article II need to be used.[88] Even if that is debatable, his reasoning cements the argument that the currently accepted *mens rea* interpretation is too restrictive.

Furthermore, Judge Shahabuddeen argues that the ILC's standpoint, that the definition of destruction must be regarded in a material sense, is in itself only an argument to exclude cultural genocide from the definition. However, he expresses this with a saving clause; '[i]f that [his argument] 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 acts, there is no reason why the destruction must always be physical or biological.'[89]

Moreover, Judge Shahabuddeen questioned, similarly as Berster, the use of the preparatory work. He firmly believed that his interpretation of a more extensive *mens rea* is not inconsistent with the preparatory work. Shahabuddeen argued that even if it was, the final text of the Genocide Convention is too clear to be set aside by the preparatory work and concluded that '[o]n settled principles of construction, there is no need to consult this material, however interesting it may be.'[90] That statement is truly contentious with the current understanding of the ICJ and the ICTY.

Judge Shahabuddeen believes that non-physical destruction that falls outside of the prohibited acts can be used as evidence to prove the intent to destroy a group in whole or in part.[91] Such destruction can be caused by actions that has been categorized as cultural genocide. This was also acknowledged by the Trial Chamber in the same case. It stated that that:

> where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[92]

This way of recognizing acts that have previously been defined as cultural genocide has been used by several courts and can be regarded as standard practice. The ICJ has acknowledged this principle in both *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007 and *Croatia v. Serbia* in 2015. In the latter case, the ICJ held that the destruction of historical, religious and cultural heritage cannot fall under article II(c), but such destruction may be taken into account in order to establish an intent to destroy the group physically.[93]

By recognizing that cultural destruction, such as the destruction of Mosques, buildings and other cultural heritage, can be used to prove the intent to destroy a group physically puts this aspect of cultural genocide as a subsidiary role in the current legal framework of the Genocide Convention.[94]

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[88] ibid para 53.
[89] ibid para 51.
[90] Ibid para 52.
[91] ibid para 54.
[92] *Prosecutor v Krstic* (n 67) para 580.
[93] ICJ *Croatia v Serbia* (n 77) para 390.
[94] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14 Journal of Human Rights 63, 75

Judge Shahabuddeen's interpretation was later used in a judgment by ICTY in the case *Prosecutor v. Momcilo Krajisnik*.[95] The ICTY stated that destruction as a component of *mens rea* of genocide is not limited to physical and biological destruction. It reasoned that while the members of a group are, obviously, physical and biological beings, but the 'bonds among its members' are not. This refers to what Judge Shahabuddeen describes as 'intangible characteristics', which the ICTY describes as member's culture and belief. It stated, accordingly, that the 'Genocide Convention's "intent to destroy" the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically.'[96]

In *Prosecutor v. Vidoje Blagojevic*,[97] concerning mostly the accused's responsibility for participating in acts of forced transfer of civilians, the Trial Chamber elaborated on the interpretation of the word destroy. It first stated that the exclusion of cultural genocide in the preparatory work, could not in itself prevent physical or biological genocide to be extended beyond the actual killings of the members of the group. The Trial Chamber acknowledged that several sources, including the ICTY's own case-law, attempted a broader interpretation of the destruction of a group.[98] It based much on its reasoning on Judge Shahabuddeens conclusions, but also on the work of the German national courts (which is detailed below). The Trial Chamber thus concluded that forcible transfer of a population can be encompassed in the definition of genocide. It held that the specific intent to destroy a group must be the destruction of the group as a 'separate and distinct entity'.[99] According to the Trial Chamber '[a] group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land'.[100] It, therefore, held that by forcibly transferring a population in such a way that the group can no longer reconstitute itself 'could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.'[101]

It seems that the Trial Chamber in this case equals material destruction with the destruction of the special characteristics of the group that makes it function as a social unit. However, the Trial Chamber stated, just as judge Shahabuddeen, '[t]he Trial Chamber emphasizes that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.'[102]

Prima facie, this could be seen as a contradiction. If the Trial Chamber has the purpose of broadening the understanding or the interpretation of the meaning of physical and biological destruction, to include what best can be understood as social or cultural destruction, it seems unreasonable to exclude a recognition of cultural genocide. Physical and biological destruction cannot, in the ordinary meaning of the words, be interpreted as to also include their opposites, in this context, social or cultural destruction. The only explanation would be if the Trial Chamber relies on the same reasoning as Judge Shahabuddeen. He stated that cultural genocide has the same *mens rea*, the same intent to non-physically destroy a group, but the actions taken to achieve cultural destruction do not fall within the listed prohibited acts of the Genocide Convention, the *actus reus*.

[95] *Prosecutor v Krajisnik* (Judgment) IT-00-39-T (27 September 2006).
[96] ibid para 854, in footnote 1701.
[97] *Prosecutor v Blagojevic* (Judgment) IT-02-60-T (17 January 2005)
[98] ibid para 658.
[99] ibid para 665.
[100] ibid para 666.
[101] ibid.
[102] ibid.

2.3.2 *Actus Reus*

The discussion on whether the *mens rea* of genocide can or should be interpreted as to include intent to destroy a group's cultural characteristics is only one aspect of the crime of genocide. The other aspect is the so-called *actus reus*, meaning the listed prohibited acts in article II(a) to (e). Thus, for cultural genocide to able to be included in the Genocide Convention acts that would constitute cultural destruction must be encapsulated within the *actus reus*. The two listed prohibited acts that are the most relevant in relation to the notion of cultural genocide are article II(b) 'causing serious bodily or mental harm to members of the group' and article II(e) 'forcibly transferring children of the group to another group'.

Causing serious mental harm to members of the group means, in the ordinary meaning of the word, that no physical attack or physical effects need to be caused. This interpretation is supported by the wording since mental harm and bodily harm is placed on equal footing. Thus, causing serious mental harm does not necessarily imply physical or biological destruction of the group.[103] This notion was reaffirmed in the *Blagojevic* case. 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'.[104] In the *Krstic* case, the Trial Chamber held that causing serious bodily or mental harm constitute an act or omission causing serious bodily or mental suffering. It stated that the suffering does not need to cause 'permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'[105] The Trial Chamber gave the examples of inhumane treatment, torture, rape, sexual abuse and deportation as acts which may constitute serious mental or bodily harm. It also held that the 'gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances'.[106] This construction allows for actions, such as China's mass detention centers and 're-education camps' directed against the Uighurs, to be included in the scope of *actus reus*. Especially, if the detention also entails inhumane treatment and torture. Also, the destruction of cultural or religious significant buildings and institutions can reasonably be considered as creating mental suffering for the affected group**.**

However, the threshold constructed by the Trial Chamber is challenged by the ICJ. In the *Croatia v. Serbia* case, the ICJ held that the interpretation of 'serious' in the ordinary meaning of the word 'must be such as to contribute to the physical or biological destruction of the group, in whole or in part.'[107] It bases its interpretation partially on the ICTY Trial Chamber's statement in the *Krajisnik* case, where it stated that the harm must be such 'as to contribute, or tend to contribute, to the destruction of the group or part thereof'.[108] However, that does not mean the physical or biological destruction of the group. Firstly, in the very same case, the Trial Chamber held, as stated above, that destruction of a group cannot sensibly be limited to the physical and biological destruction. Secondly, the Trial Chamber equated such destruction with long-term disadvantage to a person's ability to lead a normal and constructive life.[109] Not being able to lead a normal and constructive life due to psychological suffering, could not sensibly be regarded as the actual physical or biological destruction of a group. However, an argument could be made that such damage may destroy the socio-cultural existence of the group, as

[103] Gerhard Werle and Florian Jesberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 304.
[104] *Prosecutor v Blagojevic* (n 97) para 650.
[105] *Prosecutor v Krstic* (n 67) para 513.
[106] ibid.
[107] ICJ *Croatia v Serbia* (n 77) para 157.
[108] *Prosecutor v Krajisnik* (n 95) para 862.
[109] ibid.

mental suffering and trauma could damage the social cohesion between the members of the group. Which could be seen as destroying the group as it once was.

The most debated aspect of *actus reus* in relation to cultural genocide is the last subparagraph of Article II of the Genocide Convention. It provides that 'forcibly transferring children of the group to another group' is a prohibited act that constitutes genocide if it is carried out with the intent to destroy the group in whole or in part.

As mentioned above, the inclusion of this provision was widely debated during the drafting process. The first obvious reason for that discussion is that forced transfer of children was a provision contained under 'cultural genocide' in the Secretariat's draft Convention. It was then described as: 'The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit a relatively short time'.[110] During the UNGA's deliberations, the Venezuelan delegate stated that by introducing this subparagraph to article II of the convention the Committee indirectly accepted the notion of non-physical destruction. According to him, by transferring children to another group, the group could be destroyed without having inflicted any physical harm. The effect would be that the children received a different education, new customs, religions, and probably language; thus, only the cultural characteristics of the children would change.[111] This would seem as an interpretation in line with the ordinary meaning of the terms, according to VCLT. However, the courts have taken a different approach.

As pointed out, the ILC characterizes the transfer of children as biological destruction. It states that '[t]he forcible transfer of children would have particularly serious consequences for the future viability of a group as such.'[112] This was reiterated by the ICJ in the *Croatia v Serbia* case. Croatia partially based its notion that destruction must not always be physical or biological on the fact that forcible transfer of children was included in article II. The ICJ stated, however, that transferring children to another group 'entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence ensure its long-term survival'.[113]

As a contrast to this view, the Trial Chamber in the *Krajisnik* case stated that transferring children out of the group does not constitute physical or biological destruction, thus concurring with Croatia's claim.[114] Berster agrees with this position in his article as he holds that '[it] does not infringe on the group's physical intactness and hence cannot be conceptualized as being geared towards the group's physical destruction.'[115]

The decisive aspect is the *mens rea*. It could be argued that a transfer of children to another group can be seen as a measure intended to prevent a group to renew itself in a biological way. If the *mens rea* is interpreted to only include physical and biological destruction, then such a transfer needs to be intended to be permanent as it is the only way to prevent the regeneration of the group. However, such measures are already prohibited in article II(d), which prohibits measures taken to prevent births within the group. If the *mens rea* would follow the interpretation of Judge Shahabuddeen or the Trial Chamber in the *Krajisnik* case, then a transfer of children could reach its intended destruction much faster. This is pointed out in Payam

[110] ECOSOC (n 31) 27.
[111] UNGA Sixth Committee (n 37) 195.
[112] ILC (n 65) 46.
[113] ICJ *Croatia v Serbia* (n 77) para 136.
[114] *Prosecutor v Krajisnik* (n 95) 854.
[115] Berster (n 81) 691.

Akhavan's article 'Cultural Genocide: Legal Label or Mourning Metaphor?'. Akhavan states that 'in the case of cultural destruction […] children are separated from a group temporarily or for a prolonged period with the intention to 'destroy' the group's cultural identity rather than its reproductive capacity'.[116]

It can, therefore, be argued that since a 'permanent' transfer cannot be interpreted out of the ordinary meaning of the terms or the context, and that Article II(d) already covers measures preventing birth, a transfer of children to another group must entail a cultural or social dimension of genocide. This notion would also get support from the preparatory work, as several States regarded the transfer of children as a manifestation of cultural genocide.[117]

2.4 Chapter Conclusion

It is rather clear that two schools of thought can be deducted from the above-mentioned case law. First, it is the ILC and the ICJ, who have chosen an interpretation relied upon the preparatory work of the Genocide Convention. Such interpretation limits the scope of genocide to physical and biological destruction of the protected groups, as the preparatory work expressly excluded the concept of cultural genocide. Second, we have Judge Shahabuddeen together with some of the ICTY's case-law, which have embraced a literal interpretation of the intent to destroy a group. The latter provides for a more extensive approach which allows for non-physical and non-biological destruction of the protected groups.

As the *actus reus* is constructed, an interpretation that allows for non-physical and non-biological acts to constitute genocide is entirely possible. As pointed out in the last sub-heading, causing serious mental harm can constitute a wide range of acts committed towards the group, as such acts need to be determined in the circumstances of the situation on a case by case basis. It is no stretch of the imagination to draw the conclusion that what has been reported of China's treatment of the Uighurs in Xinjiang, can cause serious mental harm. Arbitrary detention, imprisonment and torture clearly fall within that scope. Also, to live under systematic and long-term repression, such as the prohibition of the Uighurs language, the destruction of their religious properties, the restriction of movement, the prohibition of cultural and religious expression and constant mass surveillance, could definitely be seen as causing serious mental harm as it affects their ability to lead a normal and constructive life.

When considering Judge Shahabuddeen's approach and the reasoning in the *Krasjinik* and *Blagojevic* cases, which provides an extensive interpretation of the *mens rea*, together with the notion that at least two of the *actus reus* allows for non-physical and non-biological destruction, the concept of cultural genocide is entirely possible. This would also be supported by the principles of treaty interpretation in international law as defined in the VCLT. This is more in line with the ordinary meaning of the words of the treaty. The ILC's and ICJ's interpretation relies solely on the preparatory work to the Genocide Convention, and that is only a supplementary means of interpretation. Also, as Judge Shahabuddeen pointed out, there is no need to rely on the preparatory work, as the Genocide Convention is too clear for that. By that, he argues that the wording is not ambiguous or obscure and does not lead to a result that is manifestly absurd or unreasonable, which is only when the preparatory work should be used.

However, both Judge Shahabuddeen and the Trial Chamber in the *Blagojevic* case expressly stated that they did not recognize cultural genocide. This is crucial. When the two authorities, which allow for cultural destruction, at the same time renounce the concept of cultural genocide,

[116] Akhavan (n 59) 263
[117] UNGA Sixth Committee (n 54).

it is very hard to argue that cultural genocide *per se* has a legal status under the treaty of the Genocide Convention.

In this sense, the only recognized legal status cultural genocide has under the Genocide Convention is a subsidiary role when determining the perpetrators intent to physically or biologically destroy a group as used in several cases by the ICTY and the ICJ.

3 Cultural Genocide in Customary International Law

The ICTY Appeal Chamber stated in the *Krstic* case in 2004 that customary international law only prohibits the physical and biological destruction of a human group in the context of genocide. It did this, however, exclusively on the basis of the ILC's examination of the preparatory work to the Genocide Convention.[118] This notion allows to be questioned and further examined.

In a newly released report from the ILC, called 'Identification of customary international law',[119] it states that the determination of the existence and content of a rule of customary international law is done by ascertaining whether there is a general practice that is accepted as law (*opinio juris*).[120] When ascertaining general practice accepted as *opinio juris*, regard must be taken to the 'overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found'.[121] Furthermore, the ILC provides that general practice refers primarily to the practice of States that contributes to the formation or expression of customary international law. This State practice can include (not an exhaustive list): executive conduct, decisions of national courts, conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference, conduct in connection with treaties and legislative and administrative acts. The word 'general' is to mean sufficiently widespread, representative and consistent. *Opinio juris* means that the practice in question 'must be undertaken with a sense of legal right or obligation'.[122]

The ICTY reliance on the ILC's examination of the preparatory work to determine the customary international law is solely based on the exclusion of cultural genocide during the drafting process. This would constitute 'conduct in connection with treaties'. As already discussed, the exclusion of cultural genocide was contentious, and it could only be concluded that 26 states did not agree on the concept of cultural genocide as it was defined in the *Ad Hoc* Committee's draft. It is questionable if this could be regarded as widespread, representative and consistent and if there is a sense of legal obligation not to prohibit and punish cultural or social destruction of a group. Moreover, the ILC conclusion that genocide only prohibits material destruction of a group was made in 1996. This was two years before the first conviction of genocide by an Ad hoc Tribunal.[123] And, already in 1997, reports and cases were beginning to come out of national courts, which argued otherwise.

3.1 State Practice

3.1.1 Cultural Genocide in Relation to Forced Transfer of Children

In Australia, the Australian Human Rights and Equal Opportunities Commission (the Commission) acknowledged a more extensive interpretation of genocide. The Commission was

[118] See footnote 39, *Prosecutor v Krstic* (Judgment) IT-98-33-A (19 April 2004) para 25.
[119] ILC 'Report of the International Law Commission of its 70th Session (30 April – 1 June and 2 July – 10 August 2018) A/73/10 (ILC Report).
[120] ibid 119.
[121] ibid.
[122] ibid 120.
[123] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998).

requested by the Attorney-General to inquire into, *inter alia*, the past laws, practices and policies which resulted in the separation of Aboriginal children from their families.[124] In their subsequent report from 1997, the Commission found that 'genocide does not necessarily mean the immediate physical destruction of a group or a nation'.[125] It based much of its reasoning on Lemkin's original idea of genocide. An idea that incorporated both the disintegration of social institutions and the culture of a group. The Commission did not, contrary to the ILC, ICJ and ICTY, put an emphasis on the exclusion of the concept of cultural genocide during the drafting process. Rather, it is convinced that non-physical destruction is entailed in the provision of forced transfer of children to another group. It reiterated the Venezuelan delegate's approach that those children are not physically destroyed but they will receive new customs, traditions and language, constituting the destruction of the group.[126]

During most of the 19th century until the 1960s there were discriminatory laws and practices that allowed for the large-scale and systematic forced removal of Aboriginal children from their families. The key objective was to remove them from the influence of their parents and communities so that they could be assimilated and acculturated into Anglo-Australian values and aspirations.[127] The Commission concluded that:

> The Inquiry's process of consultation and research has revealed that the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture. In other words, the objective was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of' Indigenous peoples … Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention is concerned to preserve.[128]

The last sentence showcases that the Commission interprets the *mens rea* as to include cultural destruction. It also points to the purpose of the prohibition of genocide and argues that the Genocide Convention is concerned to preserve the cultural unity of a group. Most certainly, the Commission is referring to the preamble of the Genocide Convention, which in turn refers to the UN resolution 96(1). That resolution states genocide 'results in great losses to humanity in the form of cultural and other contributions represented by these human groups'[129] This interpretation is fully in line with the interpretation rules of article 31 of the VCLT.

This reasoning received partial concurring opinions in *Nulyarimma v Thompson*[130] before the Federal Court of Australia. The appellant, Mrs. Wadjurlarbinna Nulyarimma, had been forcibly removed from her family as a child. The Court acknowledged that children had been removed for an upbringing in a 'European way of life' and that such (non-biological) forced removal of children did fall within the scope of the Genocide Convention.[131] It also acknowledged that Indigenous people have died due to diseases and loss of the traditional lands. It stated that 'those peoples who have been deprived of their land, but who nevertheless have managed to survive,

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[124] Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Commonwealth of Australia, 1997) 1.
[125] ibid 235.
[126] ibid 236.
[127] ibid 238.
[128] ibid 237.
[129] United Nations General Assembly Resolution 96(1) 'The Crime of Genocide' (1946).
[130] *Nulyarimma v Thompson* 1999 FCA 1192 165 ALR 621
[131] ibid para 5.

have lost their traditional way of life and much of their social structure, language and culture.'[132] In this sense, the Court did not question the notion that cultural or social destruction could be a part of genocide. However, the Court stated that such crimes could not be genocide if there was no intent to destroy the group in whole or in part, and such intent could not be established in that case.[133] If the *mens rea* would have been established, then this case would have been a case of proven cultural genocide.

In a similar case, concerning the 1918 ordinance allowing for *inter alia* the forced removal of children, the High Court of Australia held a similar position:

> The first thing that may be said is there is nothing in the 1918 Ordinance, even if the acts authorised by it otherwise fell within the definition of genocide, which authorises acts committed with intent to destroy in whole or in part any Aboriginal group. On the contrary, as has already been observed, the powers conferred by the 1918 Ordinance were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally. The acts authorised do not, therefore, fall within the definition of genocide contained in the Genocide Convention.[134]

Elisa Novic stated that the Australian Courts' decisions have made the Commission's finding to remain 'in the realm of non-binding soft law' by not qualifying cultural destruction as genocide.[135] Nonetheless, the Commission provides an alternative interpretation that allows for the cultural destruction within the current framework of the Genocide Convention. The Australian Courts' judgment fell clearly in state practice as they are decisions of national courts. However, it is questionable it the Commission's conclusion can be considered state practice. The Commission's report was requested and sanctioned by the Australian State, so it could be argued that it acted with the authority of the state. Nonetheless, even other entities than States and international organization can contribute to the identification of customary international law. The ILC states that the conduct of other actors than States and international organizations such as NGOs, private individuals or corporations, are not creative or expressive of customary international law. However, the ILC recognizes that such conduct may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations'.[136] As such, the Commission's report is still relevant.

Similarly to the Australian report, Canada released in 2015 a report called *Honouring the Truth, Reconciling for the Future*.[137] This report was done by the Truth and Reconciliation Commission of Canada (TRC), established by the Federal Government.[138] The TRC stated that Canada has, for over a century, engaged in policies with the aim of eliminating Aboriginal peoples as legal, social, cultural, religious and racial entities. According to the TRC, Canada's establishment and operation of so-called residential schools, where aboriginal children were

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[132] ibid.
[133] ibid para 12.
[134] Kruger v Commonwealth 1997 HCA 190 146 ALR 126 37.
[135] Elisa Novic, 'Physical-biological or socio-cultural "destruction" in genocide? Unravelling the legal underpinnings of conflicting interpretations' (2015) 17 Journal of Genocide Research 63, 72
[136] ILC (n 119) 132.
[137] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Library and Archives Canada Cataloguing in Publication, 2015) (TRC Report).
[138] Truth and Reconciliation Commission of Canada, 'Our Mandate' (*TRC*) <www.trc.ca/about-us/our-mandate.html> accessed 8 May 2019 para 2.

forcibly transferred to, 'can best be described as "cultural genocide"'. [139] The TRC classified cultural genocide as:

> the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred, and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.[140]

It is crucial to note that the TRC did not invoke any legal sources in its reasoning, and it did not try to establish a legal conclusion.[141] However, the TRC report did state that transferring children from one group to another group of another race for the purpose of destroying the race and culture from which the children came, can be deemed an act of genocide under Article II(e) of the Genocide Convention.[142] This could be considered as state practice in favor of the concept of cultural genocide, especially when it comes to the *actus reus* of forced transfer of children.

3.1.2 Cultural Genocide in the UNDRIP

Another important source for determining customary international law, also relating to indigenous peoples, is the United Nations Declaration of the Rights of Indigenous People (UNDRIP).[143] During the drafting of the UNDRIP, cultural genocide was again a topic of discussion in international law. In 1993, a Working Group on Indigenous Population (the Working Group), established by the Economic and Social Council, drafted a declaration on the rights of indigenous people.[144] Article 7 of that draft declaration read as follows:

> '[i]ndigenous peoples have the collective and individual right not to be subjected to ethnocide and *cultural genocide*, including prevention of and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; (e) Any form of propaganda directed against them. [145]

In the subsequent discussions, reservations regarding the terms 'ethnocide' and cultural genocide were expressed. Several states argued that these terms did not encapsulate any clear concepts that could be usefully applied in practice. The United States expressed that article 7 was too broad and Norway proposed replacing the words of 'ethnocide and cultural genocide'

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[139] TRC Report (n 137) 1.
[140] ibid.
[141] Payam Akhavan, 'Cultural Genocide: Legal Label or Mourning Metaphor' (2016) 64 McGill Law Journal 243, 246.
[142] TRC Report (n 137) 202.
[143] UNGA United Nations Declaration on the Rights of Indigenous Peoples (2007) UN Doc A/RES/61/295.
[144] United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples' (*United Nations*) <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 9 May 2019.
[145] United Nations Commission on Human Rights (UNCHR) Report of the Working Group on Indigenous Populations on its 11th Session (23 August 1993) UN Doc E/CN.4/Sub.2/1993/29 52 (emphasis added).

with the words 'genocide, forced assimilation or destruction of the culture'.[146] Several states supported the suggestion for amendment, but at the same time, several states were prepared to accept article 7 as it was currently drafted, including Argentina, Denmark, Ecuador, Finland, Sweden and Switzerland. In that sense, they had no issues with the term cultural genocide.[147] Several indigenous organizations stated that article 7 was a restatement of the provisions in the Genocide Convention and that article 7 was important due to the history and impact of colonization.[148] By stating that draft article 7 reflected the provisions in the Genocide Convention, the indigenous organizations argued that cultural genocide was already included in the meaning of the Genocide Convention.

References were also made to the 1981 UNESCO Declaration of San José (the UNESCO Declaration).[149] It was a declaration made to express concern over the problem of the loss of cultural identity among 'Indian populations' of Latin America. It stated that ethnocide means 'the denial to an ethnic group of its right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually'.[150] Paragraph 1 declared that 'ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948'.[151] In other words, the UNESCO Declaration recognized, already in 1981, that cultural genocide was the same as genocide in the Genocide Convention. Indigenous representatives argued that the use of ethnocide and cultural genocide in 1981 made the terms to be founded in international law. However, that notion was dismissed. It was argued that ethnocide and cultural genocide was not accepted in international law and that the UNESCO Declaration was developed by 'experts in ethnodevelopment and ethnocide' and not by states. Thus, the terms were not accepted in international law.[152] This notion can, at least partially, be questioned. The UNESCO Declaration was signed by several representatives from Ministries of Culture and Education, representing Colombia, Nicaragua and Costa Rica.[153] The ILC provides that the conduct of any State organ is state practice and that an organ 'includes any person or entity that has that status in accordance with the internal law of the State'.[154]

Ultimately, the term cultural genocide was dropped. Cultural genocide was replaced with 'forced assimilation or destruction of their culture' and moved to article 8.[155] Akhavan argues that the change of draft article 7 was a missed opportunity to transform cultural genocide as a concept into a binding norm of customary international law. UN declarations, which are not by themselves legally binding, can be crystallized into customary law if it reflects state practice and *opinio juris*.[156] The UNDRIP was adopted with support from 144 states voting in favor and only 4 votes against. The countries who voted against did later reverse their position and now support the declaration.[157] The huge recognition is significant since the conduct of states in

[146] UNCHR Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 (6 January 2003) UN Doc E/CN.4/2003/92 para 55.
[147] ibid para 57.
[148] UNCHR Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 (4 January 1996) UN Doc E/CN.4/1996/84 para 64.
[149] UNESCO Unesco and the Struggle against ethnocide: Declaration of San José (11 December 1981
[150] ibid 1.
[151] ibid.
[152] UNCHR (n 145) para 52
[153] UNESCO (n 149) 3
[154] ILC (n 119) page 132
[155] UNHRC Report of the Working Group Established in Accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its 10th Session (1 April 2005) E/CN.4/2005/89/Add.2 12.
[156] Akhavan (n 141) 254.
[157] United Nations Website (n 144) accessed 10 May 2019.

regard to conduct in connection with resolutions adopted by international organizations is considered state practice.[158]

The final version of article 8(1) states 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.'That, read together with 8(2)(a) '[a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities', could be argued to reflect the same intent to destroy as cultural genocide does. This argument was supported by the International Law Association[159] (ILA) at the 2010 Hauge Conference of the Rights of Indigenous Peoples. The ILA stated that even if cultural genocide was omitted from the final text of the UNDRIP, its replacement 'forced assimilation and destruction of their culture' includes the definition of ethnocide by the UNESCO Declaration and it covers the scope that the Secretariat of the Genocide Convention gave to cultural genocide.[160] In this sense, it could be argued that article 8 of the UNDRIP reflects cultural genocide and therefore cultural genocide is indirectly recognized by the international community of states, at least in relation to Indigenous Peoples.

However, the UNDRIP provides rights, it is not a declaration that prohibits acts in a criminal sense. Although, one could reasonably argue that destroying the culture of indigenous peoples with the intent of depriving them of their distinct integrity is a recognized international wrong, due to the overwhelming support the UNDRIP has from the international community.

3.1.3 The case of Nikola Jorgic

The most important case, with regard to the interpretation of genocide, coming out of national courts is the prosecution against Nikola Jorgic in Germany, starting in 1997. Nikola Jorgic was a leader for a Serb paramilitary group that acted, by themselves and together with the Serb military, to commit various crimes against the Muslim population in Bosnia and Herzegovina.[161] Jorgic was a German citizen from 1969 and returned to the former Republic of Yugoslavia when the war broke out. He was arrested in 1995 when he returned to Germany to visit his wife and child.[162] He was subsequently charged with the crime of genocide on 11 accounts. These accounts included taking prisoners, mistreatment and the murder of 29 Muslims.[163]

The Dusseldorf Higher Court held that Jorgic was guilty of genocide as according to paragraphs 220(a)(1)(1) and 220(a)(1)(3) of the German Criminal Code[164], corresponding to killing members of the group and subjection on the group conditions which were such as to bring about the partial or total physical destruction of the group.[165] The Dusseldorf Higher Court held that all of these actions had been carried out by the accused with the intention to destroy, in whole

[158] ILC (n 119) 120.
[159] The ILA has consultative status, as an international non-governmental organisation, with a number of UN specialized agencies. International Law Association, 'About Us' (*ILA*) <www.ila-hq.org/index.php/about-us> accessed 17 May 2019.
[160] International Law Association, 'Interim Report of Rights of Indigenous Peoples' (The Hague 2010) 17.
[161] International Crimes Database, 'The Prosecutor v Nikola Jorgic' (*ICD*) <www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/> accessed 3 May 2019.
[162] Higher State Court of Dusseldorf, *Jorgic* (Judgment) IV-26/96 2StE 8/96, 9.
[163] ibid 5.
[164] In 2002 the German legislator passed the 'Code of Crimes Against International Law' or CCAIL (Völkerstrafgesetzbuch, VStGB). 220a of the German Criminal Code was transferred without any significant change of the wording and content.
[165] *Jorgic* (n 162) 94.

or in part, the Muslims characterized by religion and ethnicity, in north-east Bosnia, or at least the Doboj region.[166]

More importantly, the Dusseldorf Higher Court held that the intent to destroy set forth in the German Criminal Code did not require physical or biological destruction. It reasoned that destroying the group as such means 'destroying the group as a social unit in its specificity, uniqueness and feeling of belonging'.[167] According to the Court, this intention to destroy was attested through a systematic pattern of conduct including detention, mistreatment, acts of violence, looting and destruction of houses and mosques. These actions lead to the deprivation of Muslims' fundamentals of existence.[168]

The case was appealed, and the Federal Supreme Court elaborated on the provincial court's reasoning. It stated that even if it is the individual that is attacked or hurt, it is not the object of the crime of genocide. The object is the individual's characteristics as a member of a group whose social existence the perpetrator intends to destroy. The Federal Supreme Court thus held that the legally protected interest is the 'protection of the social existence of a persecuted national, racial, religious group or one determined by its tradition'.[169] This is clearly an interpretation of the *mens rea* that is broader than the physical or biological interpretation.

The Federal Supreme Court continued by stating that the *actus reus* of genocide does not 'necessarily presume that the perpetrator strives for the bodily extermination, the physical destruction of the group'.[170] It interprets the meaning of a group 'as such' to mean the social existence of a group, and therefore it is sufficient that it is a question of destroying the group as a 'social unit in its peculiarity and individuality and in its feeling of belonging together'.[171] The Federal Supreme Court thus sees the *actus reus* of killing the members of the group or inflicting grievous bodily harm *clearly* demonstrates the intent to destroy social identity and existence of the group, but other *actus reus* such as the forcible transfer of children and preventing birth within the group are also sufficient to achieve such intent.[172]

Particularly important is the Federal Supreme Court's interpretation of 'putting the group into conditions of life calculated to bring about the group's physical destruction in whole or in part', contained in 220(a)(1)(3) of the Criminal Code. It acknowledged that physical cruelty, imprisonment or expulsion can never on their own merit the perpetration of 220(a)(1)(3). However, it stated that Jorgic had, nevertheless, fulfilled the requirement of this *actus reus* by the destruction of houses and villages in the Doboj region, the expulsion, imprisonment and the infliction of bodily injuries towards Muslims. It held that:

> The totality of these actions is of the kind to destroy the physical existence of the group in whole or in part, because what is most essential for life has been taken from them through inhumane living conditions - for instance in the prison camps - and their foundations for life have been taken away from them by destruction of their houses, through withholding their worldly goods and through systematic expulsion.[173]

[166] ibid.
[167] ibid 95.
[168] ibid.
[169] Federal Supreme Court of Germany, *Nikola Jorgic* (Judgment) 3 StR 215/98 (30 April 1999) 25.
[170] ibid.
[171] ibid.
[172] ibid 26.
[173] ibid 29.

The Federal Supreme Court never mentioned the notion of cultural genocide, but this interpretation suggests that elements that have been considered cultural genocide can be included in the *actus reus* of genocide. Especially, the actions of destroying houses and villages and the expulsion of people of the group, also defined as 'ethnic cleansing'. That said, it seems that the Federal Supreme Court believes that the physical existence of a group is based upon functional foundations of life and when they are destroyed so is the physical group as such. By connecting the possibility of social-cultural destruction with the physical destruction of a group, the Federal Supreme Court truly widened the scope of the *actus reus* that can constitute cultural genocide. With such reasoning, it could be possible to argue that China's treatment of the Uighurs is, in its totality, inflictions of conditions of life calculated to bring about the Uighurs physical destruction.

Later, the Federal Constitutional Court agreed with the previous courts and held that 'the intent to destroy required by 220(a) of the German Criminal Code, considering the natural meaning of the words, has a broader meaning than physical-biological annihilation'.[174] Furthermore, the Constitutional Court stated that the terms of section 220(a) need to be determined in accordance with the 'elements of crime of genocide as they exist in international law, as they are established by Article II of the Genocide Convention'. That said, it held that '[i]t is clear that the nonconstitutional courts' interpretation of § 220a of the German Criminal Code lies within the margins of the possible interpretation of the international law elements of the crime of genocide and conforms to the relevant jurisprudence and practice of the United Nations.'[175]

What the Constitutional Court is referring to as the 'jurisprudence and practice of the United Nations' must be the 1992 General Assembly Resolution concerning the situation in Bosnia and Herzegovina. In this resolution, the UNGA declared that the mass expulsion, concentration camps and detention centers carried out by the Serbs towards Bosnian Muslims were ethnic cleansing 'which is a form of genocide'.[176] Thus, the UNGA refers to actions that do not seek to destroy a group physically or biologically as genocidal.

Jorgic filed an application to the European Courts of Human Rights (the ECtHR), where he complained, *inter alia*, that his conviction for genocide was in breach of article 7(1) of the Convention. The ECtHR issued its judgment in 2007.[177] Article 7(1) reflects the principle of *nullum crimen sine lege*, which means no punishment without law. Jorgic argued that the German Courts' extensive interpretation of genocide has no legal basis in national or public international law.[178] In particular, Jorgic maintained that the courts' interpretation of 'intent to destroy' to include the destruction of the social unity of the group was contrary to the international accepted doctrine that destruction was limited to a physical and biological sense.[179] He maintained that the intent was to drive all Muslims out of the region by force, not to destroy the group's very existence.[180] He claimed that it had not been foreseeable for him at the time of the commission of his acts that such actions would or could be qualified as genocide under German or public international law.[181]

In the German Government's view, the German courts had interpreted the notion of genocide according to the ordinary wording of the Article 220a, which corresponds to Article II of the

[174] German Federal Constitutional Court, *Nikola Jorgic*,(Judgment) 2 BvR 2190/99 (12 December 2000) para 22.
[175] ibid para 27.
[176] UNGA Res The Situation in Bosnia and Herzegovina (18 December 1992) UN Doc A/RES/47/121.
[177] *Jorgic v Germany* App no 74613/01 (ECtHR, 10 October 2007).
[178] ibid para 3.
[179] ibid para 93.
[180] ibid para 92.
[181] ibid para 94.

Genocide Convention. The wording did not restrict the offence of genocide to physical-biological destruction of a group. It reasoned that the wording of destroying a 'group as such', suggests also that the social existence of the group was protected. It also argued that measures of preventing births within the group and forcible transfer of children of the group to another group, do not entail the physical destruction of living members of the group either.[182] The government also questioned the ICTY's statement in the *Krstic* case that customary international law only prohibited physical and biological destruction. It called it 'not convincing'.[183]

The ECtHR started its reasoning by noting that 'however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation' and that there will always be a need for 'elucidation of doubtful points and for adaptation to changing circumstances'. It stated that such progressive development through judicial law-making is well entrenched in the legal tradition.[184] This reasoning is in a sense contrary to that of the ILC and the international tribunals and courts, which have persistently relied on the preparatory work for their judicial interpretations of the crime of genocide. By doing so they have never relied on any elucidation of doubtful points or adaptation to changing circumstances. The ECtHR noted that the German courts had done an extensive interpretation of the 'intent to destroy a group as such', systematically in the context of Article 220(a)(1) as a whole, having regard to measures preventing births and forcible transfer of children, which did not necessitate a physical destruction of living members of the group.[185] It stated subsequently that

> [it] finds that the domestic courts' interpretation of "intent to destroy a group" as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars …, is therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code and does not appear unreasonable.[186]

The ECtHR found it necessary to apply its reasoning to the international law of the prohibition of genocide as well. It stated that '[a]s the wording of Article 220a of the Criminal Code corresponds to that of Article II of the Genocide Convention in so far as the definition of genocide is concerned, the above reasoning with respect to the scope of the prohibition of genocide equally applies.'[187] The ECtHR put considerable weight on the fact that the UNGA had categorized ethnic cleansing as a form of genocide, together with scholarly opinions that supported non-physical destruction. It concluded that 'the applicant's acts, which he committed in the course of the ethnic cleansing in the Doboj region with intent to destroy the group of Muslims as a social unit, could reasonably be regarded as falling within the ambit of the offence of genocide.'[188] Consequently, the ECtHR held unanimously that the German courts' interpretation was reasonably within the essence of the offense of genocide and that the applicant could reasonably have foreseen such consequences. Accordingly, there was no breach of article 7 of the European Convention on Human Rights.[189]

[182] ibid para 96.
[183] ibid para 99.
[184] ibid para 101.
[185] ibid para 105.
[186] ibid para 105.
[187] ibid para 106.
[188] ibid para 108.
[189] ibid para 114.

3.2 *General* State Practice

As stated above, the state practice needs to be general, i.e. sufficiently widespread and representative, as well as consistent. The ILC points out that 'no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context', but it states that 'the practice should be of such a character as to make it possible to discern a virtually uniform usage'.[190] Furthermore, no exact threshold can be set since the circumstances vary greatly between different matters of law. The ILC gives the example that in diplomatic relations, where all States regularly engage, 'a practice may have to be widely exhibited, while with respect to some other matters, the amount of practice may well be less'.[191] Moreover, the ILC states that universal participation is not required, and the participating States should include those that had an opportunity or possibility of applying the alleged rule.[192]

Since the crime of genocide is, fortunately, not often committed, few states have had the opportunity to prosecute and commit individuals for the offense. Even less so, are there genocidal attempts that involve acts other than physical or biological destruction, that can be construed as an attempt to destroy the cultural or sociological aspects of the group. This makes it hard to draw any conclusions on the generality of the practice. What makes it even more complex is that it is an issue of interpretation of the prohibition of genocide. That implies that national courts must first interpret their genocide provisions, before any practice can be established, at least regarding the judicial implementation of the crime of genocide.

At the same time, this gives more significance to the practice of Germany and Australia. Australia, which courts acknowledged that cultural destruction falls within the scope of the Genocide Convention and the German courts which have clearly stated the intent to destroy a group has a broader meaning than physical-biological annihilation. The German courts even made an extensive interpretation of the *actus reus* of genocide.

That, together with the ECtHR acceptance of such an interpretation, the UN resolution determining that ethnic cleansing is a part of genocide, the UNESCO Declaration, the UNDRIP declaring cultural destruction a violation of Indigenous Peoples rights and the ILA stating that the UNDRIP reflects cultural genocide provide strong grounds for an argument that the crime of genocide also entails the cultural or sociological aspect to destruction.

Since the ILC provides that the general practice also must be consistent, meaning that 'where the relevant acts are divergent to the extent that no pattern of behavior can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist.'[193] In that respect, it can be convincingly concluded, based on the above-detailed state practice and the different approach and contradictions in ICTY's own case-law, that the ICTY's conclusion that customary international law *only* prohibits physical and biological destruction, is not a legally correct statement.

However, it must also be noted, and importantly so, that none of the above-mentioned sources (except the UNESCO Declaration) explicitly confirm or accept the notion of cultural genocide as an established legal concept. What it does is to allow for an extensive interpretation of the crime of genocide that can, in a conceptual manner, entail the concept of cultural genocide. Since cultural genocide only remains as a plausible possibility under the current understanding of the crime of genocide in international law, the prevention of cultural genocide itself, cannot

[190] ILC Report (n 119) 136.
[191] ibid 136.
[192] ibid.
[193] ibid 137.

be regarded as general state practice. In order to determine cultural genocide as a binding customary norm, there is a need for further implementation of the concept in national courts or recognition of the concept from international governmental organizations.

Furthermore, the ILC states that '[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.'[194] The ICTY's above-mentioned case-law has clearly shown inconsistencies in how the crime of genocide shall be interpreted, but at the same time, no decisions have recognized the existences of cultural genocide. So, even using subsidiary means to determine rules of customary international law, cultural genocide cannot be established.

3.3 *Opinio Juris*

The ILC explains the requirement of *opinio juris* as that the relevant practice must be undertaken with a sense of legal obligation or right. In other words, the practice must be accomplished by a conviction that it is permitted, required or prohibited by customary international law.[195] In the present case, that means that for *opinio juris* to be established states must feel a sense of obligation to prohibit and prevent cultural genocide.

The prohibition of genocide is widely accepted as *jus cogens*.[196] According to the VCLT article 53, *jus cogens*, or a peremptory norm, is a rule of general international law that is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[197] This provides that the prevention of genocide is a rule of international law, and not only do states have a legal obligation to follow that rule, they also cannot ever derogate from it. This gives the rule of prohibiting and preventing genocide a very strong legal status in customary international law.

With that said, it is possible to conclude that if cultural genocide would be considered part of the crime of genocide by general state practice, the sense of legal obligation would follow directly due to the fact that genocide is in itself is a *jus cogens* norm. However, as already established the prohibition of cultural genocide cannot be regarded as general state practice.

3.4 Chapter Conclusion

It is clear that cultural genocide has been a really contentious issue even outside of the interpretation of the Genocide Convention. The fact that cultural genocide was a topic of discussion during the drafting of the UNDRIP suggests that the concept has importance in international law. In relation to Indigenous Peoples, cultural genocide is the term that best describes the colonizing states' ruthless and systematic assault on the indigenous peoples' culture and identity in an attempt to eradicate them as a distinct entity. A method of accomplishing that was, as described in the Australia and Canada cases, to forcibly transfer children of the group to another group. What happened in Australia and Canada also showcases that it is not the physical or biological existence of the group that is destroyed. It is the group's

[194] ibid 121.
[195] ibid 138.
[196] Florian Jesberger, 'The Defintion of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 88; see also Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of Ius Cogens and Its Implications for the Enforcement of the Law of Genocide' (2005) 5 International Criminal Law Review 401, 404.
[197] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 53.

collective cultural values and ideas together with the members' sense of belonging which are destroyed when children are forcibly removed. As the forced transfer of children is a listed prohibited act of genocide, it provides strong arguments that cultural genocide is already a part of the Genocide Convention.

Even if 'cultural genocide' as a term was not used in the final text of the UNDRIP, the concept was not completely dropped as it was in the preparatory work of the Genocide Convention. The ILA's argument that article 8 reflects cultural genocide is strong. That together with the landslide acceptance of the UNDRIP by the international community clearly shows that there are state practice and even a sense of legal obligation not to destroy the culture of the group. However, that is not an expressed recognition of the crime of cultural genocide. As Akhavan argued, there was a good chance to give legal recognition to cultural genocide if the term was to stay in the UNDRIP.

The fact that state practice must be general in nature makes it impossible to establish that cultural genocide is a legal norm under customary international law. That is because even the most compelling practices such as the UNDRIP, the UN resolution, the German national courts and the ECtHR do not expressly recognize cultural genocide as a crime in international law. There is a need for further implementation of cases involving non-physical and non-biological destruction of the protected groups.

4 If not Genocide, what is it?

Cultural genocide cannot, at least directly, be considered an established or accepted legal concept, either under treaty law or customary international law. Therefore, the logical subsequent question would be if it can be regarded as a crime against humanity?

Akhavan argues precisely so, that cultural genocide, even if it does not qualify as genocide, does not necessarily fall into a normative black hole. He states that 'widespread or systematic attacks against civilian populations, which do not constitute genocide … may still qualify as a crime against humanity'.[198]

Crimes against humanity were codified in the Rome Statute of the International Criminal Court[199] (the Statute), which entered into force in 2002. The Statute's article 7 describes the crimes against humanity as such: 'for the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:'. The acts that follow are, *inter alia*, murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape and persecution. The act that is most relevant to the concept of cultural genocide is persecution. Persecution is explained as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[200] Article 7(1)(h) provides that persecution is a crime against humanity when performed 'against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.'[201]

[198] Payam Akhavan, 'Cultural Genocide: Legal Label or Mourning Metaphor' (2016) 64 McGill Law Journal 243, 248
[199] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 23 March 2002) 2187 UNTS 3
[200] ibid art 7(2).
[201] ibid article 7(1).

It is a rather solid argument to make that cultural genocide, as previously defined, clearly falls within the act of persecution and thus could be defined as a crime against humanity. China's repression of the Uighurs is clearly a knowingly widespread and systematic attack against a civilian population that deprives an ethnic and religious group of its fundamental rights by reason of the group's identity. However, that is because crimes against humanity offer a much broader range of offenses and there is no requirement for a specific group to be targeted, as it is in the crime of genocide.[202] The most important difference between genocide and crimes against humanity is that crimes against humanity lack the *mens rea* aspect, which is the aspect that makes acts under genocide to be genocide. This means that even physical and biological genocide, where the *mens rea* cannot be established, almost by default qualify as crime against humanity. That is because most genocidal acts have been widespread and systematic in their nature. This was pointed out by Schabas: 'there have been no convictions for genocide where a conviction for crimes against humanity could not also have been sustained'.[203] He continued to define crimes against humanity as an 'umbrella rule' as it is a 'relatively broad concept that captures most forms of atrocity committed against innocent civilians'.[204]

As pointed out by Judge Shahabuddeen[205], cultural genocide shares the same *mens rea* as physical and biological genocide, i.e. the same intent to destroy a group as such. In that respect, cultural genocide is as distinct as physical genocide from crimes against humanity and can therefore not, at least in a technical sense, only be considered as a crime against humanity. If it would, then the whole concept of genocide would be superfluous.

Thus, Akhavan's argument that cultural genocide does not fall into a normative black hole is not completely accurate. It may not fall, but if it is not genocide under treaty law or a customary norm and not just a crime against humanity, it seems that cultural genocide is floating freely in the space that is international law.

Here, it is important to recall Pakistan's argumentation for the inclusion of cultural genocide in the Genocide Convention. It argued that genocide was a 'blind rage to destroy the ideas, values and the very soul of a national, racial or religious group, rather than its physical existence'. In other words, the perpetrator of genocide seeks to destroy what the group's identity represents in society, not the actual physical existence. Pakistan argued, and rightfully so, that cultural and physical genocide are indivisible and that it would go against all reason to make one a crime and not the other.

Pakistan's argument is reflected in Lemkin's original construction of genocide. Lemkin argued that genocide has two phases, the first phase being 'the destruction of national patterns of the oppressed group'. The national patterns of a group are clearly the cultural ideas, values and social institutions that make the group a distinct entity. The second phase is the imposition of the national pattern of the oppressor. The destruction of national patterns can happen both through the physical destruction of the group, but the aim is also achieved through imposing actions not directed to the physical or biological destruction of the group. Lemkin argued that the entire problem of genocide needs to be dealt with as a whole. That idea is lost when cultural genocide is not a part of the crime of genocide.

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[202] Alexander Murray, 'Does International Criminal Law Still Require a "Crime of Crimes"? A Comparative Review of Genocide and Crimes against Humanity' (2011) 3 Goettingen Journal of International Law 589, 591.
[203] William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 185.
[204] ibid.
[205] *Prosecutor v Krstic* (Judgment, dissenting opinion of Judge Shahabuddeen) IT-98-33-A (19 April 2004) para 53.

In the name of legal certainty, it is important that cultural genocide get the legal recognition it deserves in international law. It is also important from the standpoint of impunity. By declaring cultural genocide as a distinct crime under international law, it would make it harder for a state to take measures intended to destroy the social and cultural characteristics of a group, even if it is done in the name of counter-terrorism or counter-extremism.

Lindsey Kingston argues in her article 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' that cultural genocide is a 'unique wrong' that warrants independent recognition by the international community, arguing that it should not fall solely under crimes against humanity and as a subsidiary role in cases of physical genocide. She argues that the prevailing restrictive interpretation of the legal definition of genocide does not address the 'intentional and systematic eradication of a group's cultural existence'. Existing human rights jurisprudence lacks sufficient flexibility to address cultural genocide. [206]

Similarly, David Nersessian argues that cultural genocide needs to reach a criminal status in international law. He argues that there is a need to revisit the issue of cultural genocide that the drafters of the Genocide Convention put aside. He suggests a new treaty dealing specially with cultural genocide. A new treaty would solve several issues.[207] Firstly, all interpretation issues would disappear as a new definition of cultural genocide would not need to rely on the all too narrowly constructed article II of the Genocide Convention. Secondly, it would independently cement cultural genocide in international law and take it out of the no-mans land between genocide and crimes against humanity where it lies today. Thirdly, it would prevent impunity**.** Fourthly, and most importantly it would truly protect the cultural contributions which the different national, ethnical, religious and racial groups provide to humankind, as the Genocide Convention was originally set out to protect.

Cultural genocide is a crime that destroys humanity, and the current understanding of genocide does not address it, or as Nersessian said it:

> '[b]y limiting genocide to its physical and biological manifestations, a group can be kept physically or biologically intact even as its collective identity suffers in a fundamental and irremediable manner. Put another way, the present understanding of genocide preservers the body of the group but allows its very soul to be destroyed.'[208]

5 Conclusion

The contentious nature of cultural genocide has been widely evident from the first negations of the drafting process of the Genocide Convention. Lemkin's idea of a broad conception of genocide was abandoned rather quickly, and the focus on the biological and physical aspect of genocide took the upper hand. The vote in favor at the UNGA in 1948 to exclude cultural genocide from the Genocide Convention has been the biggest hurdle for cultural genocide to reach any recognition as a crime in international law. However, the vote was far from a landslide and the states who voted to retain cultural genocide made some striking arguments of its importance. China argued that cultural genocide 'worked below the surface and attacked a whole population, attempting to deprive it of its ancestral culture and to destroy its very

[206] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14 Journal of Human Rights 63, 76.
[207] David Nersassian, 'Rethinking Cultural Genocide Under International Law' (*Carnegie Council for Ethics in International Affairs*, 2005) <www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139> accessed 19 May 2019.
[208] ibid.

language'. Ironically, it seems that China is doing just that in order to establish the destruction of its Uighur population.

The states' different opinions on cultural genocide in 1948 have echoed through time and divided the current understanding of genocide into two contradicting schools of thought. On the one hand, the ILC and the ICJ's reliance on the preparatory work to make the conclusion that the *mens rea* can only be interpreted as the intent to physically and biologically destroy the group. And on the other hand, some of the ICTY's case-law has embraced a literal extensive interpretation, concluding that the intent to destroy a group as such cannot reasonably be limited to the physical and biological destruction of a group**.** The latter interpretation is also in line with the ordinary meaning of the terms in their context and in light of the object and purpose of the Genocide Convention, according to the rules of treaty interpretation found in article 31 of the VCLT.

However, a wider understanding of the *mens rea* of genocide is not in itself an argument for the existence of the crime of cultural genocide. That has been clearly expressed by both Judge Shahabuddeen and the Trial Chamber in the *Blagojevic* case. Thus, it is impossible to ascribe any legal status to cultural genocide in international treaty law, except as a subsidiary means of proving intent to physically destroy the group.

Turning to customary international law. In order to establish a rule as a norm under customary international law, several aspects need to be fulfilled. It is rather clear that the notion of cultural genocide has played a large part in the forming of the UNDRIP, and it could without reasonable doubt be argued that article 8 of the UNDRIP reflects aspects of cultural genocide. However, article 8 is more of a recognition that indigenous peoples have the right not to be subjected to destruction of their culture than it is a recognition of the prohibition of cultural genocide as a crime in international law. Cases out of Australia and Germany share the same extensive interpretation of the *mens rea*, but none of them recognizes cultural genocide as a crime in international law. The Germans courts only allow for an interpretation that can possibly include acts of cultural genocide and thus become a part of the crime of genocide. Since the state practice needs to be sufficiently widespread and representative, as well as consistent, it is not possible to make a conclusion that cultural genocide is a crime under customary international law.

Acts that would amount to cultural genocide fall within the ambit of crimes against humanity. However, crimes against humanity do not encapsulate the concept of cultural genocide in a satisfying manner. Cultural genocide shares the same *mens rea* as physical genocide – the intention to destroy a group – that intent is not required in crimes against humanity. Seemingly, cultural genocide has no appropriate classification in international law.

If cultural genocide has no legal status under treaty law or customary international law, and the essence of the crime is not captured under crimes against humanity, then there is a need for independent recognition of cultural genocide, as argued by Nersessian and Kingston. The same argument was made more than 70 years ago, by Raphael Lemkin.

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