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The Physical, Biological and Cultural Dimensions of Genocide: An Expansive Interpretation of the Crime?

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Abstract

This paper deconstructs the definition of genocide provided for by Article II of the Genocide Convention with a view to assessing whether an expanding scope of the crime is possible. The current definition of genocide does not seem to correspond with the original conception of the term, which finds its roots in Raphael Lemkin's writings, the "father" of the Genocide Convention. Lemkin envisaged three forms of genocide, namely physical, biological, and cultural, so as to convey a concrete idea of the number of faces that genocide could show over time. The drafters of the Genocide Convention largely discussed the three-dimensional structure of genocide, which, in the end, did not reach a consensus when pondering the inclusion of a cultural component within the so-called crime of crimes. This notwithstanding, there are still some remnants of the cultural dimension within the current definition of genocide, although it reads differently as initially envisioned.

In addition, this paper introduces the reader to some of the examples that in recent years have dealt explicitly or implicitly with the question of 'cultural genocide', whose definition has never been clearly determined. This is certainly problematic inasmuch as there is no unanimity in the scope of the term, as was evidenced throughout the discussions which preceded the adoption of the Genocide Convention. Broadly speaking, the notion of 'cultural genocide' appears to refer to an intent to destroy, entirely, or partially, the cultural traits which characterise the *modus*

vivendi of a certain group, encompassing both tangible and intangible attributes. In this regard, this article also considers different alternatives which might circumvent the strict definition of genocide in order to subsume similar offences against the cultural characteristics of a group within other serious crimes under international law.

Keywords: *genocide; cultural genocide; persecution; war crime; protected groups; genocide convention*

Introduction

Seventy-one years ago, the Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention] came into force for the purpose of protecting groups from their extermination (78 UNTS 277). While human groups have been targeted since time immemorial, the Holocaust made the international community to react by adopting the Genocide Convention on 9th December 1948. As of July 2019, the Convention counts on 152 States Parties who have ratified or acceded to the treaty, hence being one of the most universal human rights instruments ever adopted.

After its adoption, the Genocide Convention did not have an immediate impact on international law (Schabas, 2002, p. 132). It took almost fifty years for genocide to be in the spotlight as a result of the Bosnian war, which witnessed a series of atrocities that were brought to the notice of the International Court of Justice [hereinafter ICJ] in March 1993 by Bosnia-Herzegovina, on the basis that "acts of genocide have been committed, and will continue to be committed against, in particular, the Muslim inhabitants of Bosnia-Herzegovina" (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Provisional Measures, para. 40). The decision of the ICJ to accept jurisdiction marked the beginning of a prolific period of developments in the law of genocide, including *inter alia* the adoption of the Statutes of the International Criminal Tribunal for the Former Yugoslavia (S/RES/827 (Annex)) [hereinafter ICTY], the International Criminal Tribunal for Rwanda (S/RES/955 (Annex)) [hereinafter ICTR], the Rome Statute of the International Criminal Court (2187 UNTS 3) [hereinafter ICC], and the Extraordinary Chambers in the Courts of Cambodia (NS/RKM/1004/006) [hereinafter ECCC]. These instruments conferred their respective courts with jurisdiction to prosecute individuals for the commission of the crime of genocide.

The present paper aims at shedding light on the historical and legal roots of genocide, with particular attention to the three-dimensional structure of the crime in the light of the

Convention, namely physical, biological, and cultural. Special emphasis is placed on the genesis of genocide prior to its codification in 1948, when a narrow definition of the crime was adopted by the General Assembly of the United Nations [hereinafter UN GA]. Therefore, the following pages will illustrate a historical assessment and a succinct description of the chain of events that led to the adoption of the current definition of genocide under Article II, whose strict wording has been often criticized (*Karadžić Appeals*, partial diss. op. De Prada, paras 837-838).

1. The genesis of genocide

1.1 The origins of the term

The term 'genocide' was a neologism, a newly coined word which found its roots in ancient Greek – 'genos', or *γένος*, meaning generally, race, of beings, including clan, house, family and also tribe – (The Online Liddell-Scott-Jones Greek-English Lexicon), and Latin – 'cide', from the verb *caedere*, meaning murder – (Latdict (Latin Dictionary & Grammar Resources)). A definition of genocide appeared for first time in Chapter IX of *Axis Rule in Occupied Europe*, a book written by the Polish legal scholar Raphael (also known as Raphaël, Rafael, or Rafał) Lemkin in 1943, and published one year later (Lemkin, 1944, pp. 79-95). *Axis Rule in Occupied Europe* was Lemkin's major work since it provided for a broad notion of genocide, consisting of 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. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups" (Lemkin, 1944, p. 79). Lemkin would also clarify that genocide "is directed against the national group as an entity, and the actions involved are directed against individuals, […] as members of the national group" (Lemkin, 1944, p. 79).

The elements characterizing genocide, as defined in *Axis Rule in Occupied Europe,* constituted a recurrent concern in Lemkin's thoughts. As is described in his memoirs, Lemkin developed an early interest in group-based persecution, especially after reading the novel *Quo Vadis* by Henryk Sienkiewicz, the Polish author and Nobel Prize winner. (Frieze, 2013, p. 1; Korey, 2002, p. 5; Cooper, 2008, p. 11; Sands, 2016, ref. 75.11). In 1915, the Ottoman Turks' massacre of the Armenians (now deemed as genocide for a significant number of States) also left a strong impression on Lemkin (Frieze, 2013, p. 19). It would not be until spring 1933

when Lemkin drafted a report proposing new international rules to prohibit 'barbarity' and 'vandalism' (Korey, 2002, p. 9 et seq.), two proposals which were to be presented in October 1933 at the Fifth Conference for the Unification of Penal Law held in Madrid. The Conference aimed at discussing the problem of crimes that several States considered dangerous, as well as identifying which crimes could be included in this category and which offences could be deemed as international (Frieze, 2013, p. 22).

Lemkin defined acts of barbarity as "actes exécutés sur la population sans défense. Ce sont les massacres, les pogroms, les cruautés collectives sure les femmes et les enfants, le traitement des hommes d'une façon qui humilie leur dignité"[1] (Lemkin, 1933, pp. 15-16). With regard to the crime of 'vandalism', Lemkin defined it generally as 'la méchante déstruction des œuvres d'art et de culture' ["the evil destruction of works of art and culture"] (Lemkin, 1933, p. 15). The destruction of works of art and culture, in the view of Lemkin, "doit être considérée comme violation des biens internationaux" ["should be considered a violation of international property"], by which the perpetrator of such crime inflicts "un dommage irréparable, non seulement au propriétaire particulier et à L'État où il l'a commis, mais à l'humanité civilisée qui liée par d'innombrables liens tire toute entière les profits des efforts de ses fils, les plus géniaux, dont les œuvres entrent en possession et augmentent la culture de tous"[2] (Lemkin, 1933, p. 15). It is noteworthy that proposals for crimes of barbarity and vandalism were not entirely original to Lemkin, but are attributed to Vespasian V. Pella, a Romanian scholar who proposed the crime of *barbarie* (or barbarous actions) in April 1933 at the Third International Congress on Penal Law, held in Palermo (Schabas, 2008, p. 226). The records of the Congress indicate that the topic 'For what offences is it proper to admit universal competency?' was addressed, referring to "offences which are harmful to the interests common to all States" (de la Cuesta & Blanco Cordero, 2015, pp. 261-264). The list of serious offences included "acts of barbarism or vandalism", although no definition was provided.

While the proposal of 'actes de barbarie' or barbarity is attributed to Pella (Lemkin, 1933, p. 16; Schabas, 2008, p. 226; Sands, 2016, ref. 82.7), Lemkin appears to have been influenced by Nicholas Roerich in relation to 'le vandalisme' or the crime of vandalism. In this connection, in his report to the Madrid Conference, Lemkin referred to "une très caractéristique proposition provient du Professeur Rörich [sic] qui concerne la protection des œuvres d'art et de culture pendant la guerre, à l'instar de protection accordée aux hôpitaux de la Croix Rouge"[3] (Lemkin, 1933, p. 15). In contrast to the reference to Pella and his proposals at the Palermo Congress when defining his proposal of barbarity, Lemkin did not cite any publication of

Roerich that could have served as a basis for the formulation of vandalism. It is worth noting that Nicholas Roerich's major work was the launching of a movement that led to the adoption of the Roerich Pact, which was the first multilateral treaty dealing exclusively with the protection of significant buildings and monuments and was signed in 1935 (167 LNTS 289).

1.2 Several techniques of genocide

The definition of genocide is reminiscent of Lemkin's proposal of the crimes of barbarity and vandalism, both requiring a certain form of persecution or destruction (Lemkin, 1944, pp. 91-92). The latter elements remained part of the broad concept of genocide designed by Lemkin, which consisted of a defined non-exhaustive list of techniques of genocide, namely political, social, cultural, economic, biological, physical, religious, and moral. Lemkin barely defined each of these techniques, since rather he detailed the Nazi legislation adopted in relation to each of them (Novic, 2016, p. 18). For the purpose of this paper, only the cultural, biological, and physical techniques of genocide will be considered.

Against this backdrop, Lemkin stated that genocide "is effected through a synchronized attack on different aspects of life of the captive peoples". Thus, in the cultural field, the acts amounting to genocide could consist in "prohibiting or destroying cultural institutions and cultural activities; […] substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking" (Lemkin, 1944, pp. xi-xii). It is likely that Lemkin aimed at describing the *modus operandi* in occupied States with regard to the areas of culture controlled by the Nazis, such as linguistic, artistic, and social activities. In addition, he wrote that the population was "deprived of inspiration from the existing cultural and artistic values […], especially in Poland, [where] national monuments [were] destroyed and libraries, archives, museums, and galleries of art carried away" (Lemkin, 1944, p. 84). With regard to the biological technique of genocide, Lemkin explained that "a policy of depopulation is pursued" in the occupied States in relation to "people of non-related blood" (Lemkin, 1944, p. 86). This policy involved several measures "calculated to decrease the birth-rate of the national groups of non-related blood" by way of separating males from females. These measures included deportation for forced labour elsewhere as well as the undernourishment of the parents with a view to reducing the birth rate and the survival capacity of children (Lemkin, 1944, p. 86). Lastly, the physical technique consisted in "physical debilitation and even annihilation of national groups in occupied countries", that includes *inter alia* "mass killings" (Lemkin, 1944, pp. 88-89).

Taking the above into account, the different techniques of genocide made clear that for Lemkin, genocide could show a number of faces over time (Luck, 2018, p. 17); it was thus not restricted to one single dimension. Although his definition of genocide lacks precision and clarity in legal terms, Lemkin's ideas would gain momentum after the Second World War.

1.3 The search for an agreed definition of genocide

The term genocide started to gain recognition in international circles, especially once it was included in the indictment of the Nuremberg Trials with a view to describing the Nazi extermination campaign against various groups. Count Three, on War Crimes, while referring to murder and ill-treatment of civilian populations of or in occupied territory and on the high seas, stated that the defendants "conducted deliberate and systematic *genocide*, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others" (emphasis added, Nuremberg Judgment, pp. 43-44). Although no reference to genocide is found in the judgment of the International Military Tribunal at Nuremberg, it seems obvious that Lemkin's theories were at least taken into consideration by the US delegation (Report of Robert H. Jackson, 1949, p. 68).

It is worth noting that the publication of *Axis Rule in Occupied Europe* was the first of a series of publications written by Lemkin in the context of the Nazi persecution campaign in occupied territories (Lemkin, 1945, pp. 39-43; Lemkin, 1946, pp. 227-230; Lemkin, 1947, pp. 145-151). The centrepiece of these publications is the recognition of genocide as a serious crime which threatens the existence of groups. In a document entitled *Memorandum on the necessity of including anti-genocide clauses in the Peace Treaties*, Lemkin argued that he "has developed the concept of genocide on a larger scale and covering both physical, biological and cultural destruction of a nation, race or religious group independently of the fact whether the destroyed group are citizens of the country which practices genocide" (Memorandum on the necessity of including anti-genocide clauses in the Peace Treaties, p. 1, para. 1). Thus, Lemkin's conception of genocide embedded three aspects, namely physical, biological, and cultural destruction.

On 11th December 1946, the UN GA adopted Resolution 96(I), which defined genocide as "a denial of the right of existence of entire human groups, [which] shocks the conscience of mankind, [and] results in great losses to humanity in the form of cultural and other

contributions represented by these human groups" (A/RES/96(I)). The opening of the definition mirrors the language of Lemkin's *Memorandum on the necessity of including anti-genocide clauses in the Peace Treaties*, which distinguishes between the "right of existence" and "rights of development" in the context of human rights. With respect to the former, Lemkin writes that "the right to live" implies "not to be deprived or not to be put in such conditions when the loss of life is imminent or possible, (Concentrations Camps, deportations, ghettoisation [sic])" (Memorandum on the necessity of including anti-genocide clauses in the Peace Treaties, p. 1, para. 3). The second part of the definition of genocide provided for by Resolution 96(I) echoes the arguments defended by Lemkin in his article *Genocide – A Modern Crime*, particularly when he wrote that "[o]ur cultural heritage is a product of the *contributions of all peoples*. We can best understand this when we realize how impoverished our culture would be if the so-called inferior peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie, the Czechs a Huss, and a Dvorak; the Greeks a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich" (emphasis added, Lemkin, 1945, p. 43).

While it appears reasonable to sustain that the definition of genocide under Resolution 96(I) bears the signature of Lemkin, the remaining content of the resolution seems to be plainly based on Lemkin's writings. In this respect, Resolution 96(I) states that the UN GA "[a]ffirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable". The first part of the statement coincides with a proposal that Lemkin made in his article *Genocide*, which was published a few months before the UN GA adopted Resolution 96(I). In *Genocide*, Lemkin wrote that "[o]nce we have recognized the international implications of genocidal practices, we must create the legal framework for the recognition of genocide as an international crime" (Lemkin, 1946, p. 229). In this connection, Lemkin proposed that "the United Nations […] enter into an international treaty which would formulate genocide as an international crime, providing for its prevention and punishment in time of peace and war" (Lemkin, 1946, p. 230). It is thus clear that Lemkin's ideas had an influence on the drafters of Resolution 96(I) (Moses, 2010, p. 37).

In addition, Resolution 96(I) requested the Economic and Social Council of the United Nations [hereinafter ECOSOC] "to undertake the necessary studies, with a view to drawing up

a draft convention on the crime of genocide". On 28th March 1947, after discussing the matter of genocide, ECOSOC Resolution 47(IV) instructed the Secretary-General of the United Nations to undertake studies and to prepare a draft convention on the crime of genocide "with the assistance of experts in the field of international and criminal law", and for the document "to [be] submit[ted] to the next session" of the ECOSOC, after consultation with appropriate organs (Doc. E/325). In pursuance of the ECOSOC's resolution, the Secretary-General asked Professor John P. Humphrey, the Director of the Division of Human Rights, to prepare a draft convention in conjunction with the assistance of three experts: Henri Donnedieu de Vabres, Vespasian V. Pella, and Raphael Lemkin. The comments of these experts produced a preliminary draft, which was accordingly amended and supplemented by the Secretary-General (Doc. E/447) [hereinafter 1947 Secretariat Draft], and subsequently circulated to the Assembly Committee on the Progressive Development of International Law and Its Codification on 13th June 1947, and to the UN Member States for observations on the document on 7th July 1947. This study is particularly relevant since it presents, among other things, an interesting insight of the scope of the term genocide, which was based distinctly on Lemkin's ideas (Novic, 2016, p. 47).

Part I of the 1947 Secretariat Draft includes the complete version of the preliminary draft of the convention, including the preamble and the provisions (1947 Secretariat Draft, pp. 5-13). The first paragraph of Article I of the 1947 Secretariat Draft, on 'Protected Groups', clarifies that the purpose of the convention "is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings." The second part of the same provision, on 'Acts qualified as Genocide', defines 'genocide' as "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 of preventing its preservation or development" (1947 Secretariat Draft, p. 5). The referred acts are divided into three sections, namely:

> 1. Causing the death of members of a group or injuring their health or physical integrity by:
>
> (a) group massacres or individual executions; or
>
> (b) subjection to conditions of life while, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individual; or
>
> (c) mutilations and biological experiments imposed for other than curative purposes; or (d) deprivation of all means of livelihood, by confiscation of property, looting,

curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

2. Restricting births by:

(a) sterilization and/or compulsory abortion; or

(b) segregation of the sexes; or

(c) obstacles to marriage.

3. Destroying the specific characteristics of the group by:

(a) forced 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 (1947 Secretariat Draft, pp. 5-6).

Part II of the 1947 Secretariat Draft contains comments on the draft convention by the three appointed experts (1947 Secretariat Draft, p. 14 et seq.). In Section I, it is explained that the aforementioned three forms of genocide correspond to a formula envisaged by Lemkin, who distinguished between 'physical' genocide (destruction of individuals), 'biological' genocide (prevention of births), and 'cultural' genocide (brutal destruction of the specific characteristics of a group) (1947 Secretariat Draft, pp. 17, 25). These three ways contemplated by the 1947 Secretariat Draft were elaborated for the purpose of achieving a general understanding of the term (1947 Secretariat Draft, p. 18). The proposals of physical and biological genocide reached a consensus, but cultural genocide met with criticism from Professor Donnedieu de Vabres and Professor Pella on the grounds that it "represented an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities (which was based on other conceptions) under cover of the term genocide" (1947 Secretariat Draft, p. 27). This notwithstanding, Lemkin asserted that "a racial, national, or religious group cannot continue to exist unless it preserves its spirit and moral unity. Such a group's right of existence was justified not only from the moral point of view, but also from the point of view of the value of the contribution made by such a group to civilization generally.

If the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations" (1947 Secretariat Draft, p. 27). He further noted that cultural genocide "was a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings."

The convergence of the three dimensions seemed to be key to understand Lemkin's conception of genocide. Apart from his contribution in the 1947 Secretariat Draft, Lemkin referred elsewhere to the same matter, arguing that the proposed draft "protects not only physical existence, but also spiritual life and thus it marks a great progress in protecting culture and civilisation" (Memorandum on the Convention for the Prevention and Punishment of the Crime of Genocide, p. 2). Cultural genocide is contemplated as "the brutal destruction of the basic elements of spiritual life of national, racial and religious groups. It can be accomplished by removing spiritual leaders and also by mass destruction of churches and works of art and culture, and of any objects in which the spiritual life of a human group is being expressed" (Memorandum on the Convention for the Prevention and Punishment of the Crime of Genocide, p. 2). This argument is better explained by Lemkin in another memorandum, which was tantamount to distinguishing the physical, biological and cultural types of genocide. He argued, in the context of Resolution 96 (I), that "[t]here are three basic phases of life in a human group: physical existence, biological continuity (through procreation) and spiritual or cultural expression" (Genocide as a Crime under International Law, p. 2). This distinction is Lemkin's launching point for explaining his conception of cultural genocide inasmuch as "attacks on these three basic phases of the life of a human group can be qualified as physical, biological or cultural genocide." In his view, cultural genocide "can be accomplished predominantly in the religious and cultural fields by destroying institutions and objects through which the spiritual life of a human group finds its expression, such as houses of worship, objects of religious cult, schools, treasures of art and culture. By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate. This is especially significant for the existence of religious groups. Religion can be destroyed within a group even if the members continue to subsist physically" (Genocide as a Crime under International Law, p. 2).

1.4 The adoption of the Genocide Convention

A second draft was elaborated for the purpose of formalising the crime of genocide, but this time Lemkin was not personally involved in the drafting. This is due to the mandate requested by the ECOSOC Resolution 117(VI) of 3rd March 1948 (Doc. E/734), which established an *ad*

hoc Committee with a view to preparing the draft Convention, and only composed of delegates from China, France, Lebanon, Poland, the USA, the USSR and Venezuela. Unlike ECOSOC Resolution 47(IV), Resolution 117(VI) did not request the opinion of experts. The meetings of the *ad hoc* Committee, held at Lake Success, were followed by the adoption of a report (Doc. E/794) [hereinafter the 1948 *ad hoc* Committee Draft Convention], whose Articles II and III provided for the legal definition of genocide and attached observations thereto. It is noteworthy that both provisions pertain to Lemkin's three types of genocide: while Article II includes the so-called "physical" and "biological" genocide, Article III refers to "cultural" genocide. The definitions of these three dimensions, however, do not reproduce Lemkin's ideas verbatim.

Article II of the 1948 *ad hoc* Committee Draft Convention states that genocide entails "deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members". Four punishable acts are deemed to fall under Article II, namely: "1. killing members of the group; 2. impairing the physical integrity of members of the group; 3. inflicting on members of the group measures or conditions of life aimed at causing their deaths; 4. imposing measures intended to prevent births within the group" (1948 *ad hoc* Committee Draft Convention, p. 13). The first three genocidal acts are reminiscent of the definition provided for by the three appointed experts of "physical" genocide under the 1947 Secretariat Draft (1947 Secretariat Draft, pp. 25-26), while the fourth sub-paragraph reminds of the proposal of "biological" genocide of the same document, which restricted its scope to "measures aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive" (1947 Secretariat Draft, p. 26). Therefore, it seems plain that the two forms of genocide which Lemkin characterised as 'physical' and 'biological' genocide gained consensus of opinion among the delegates of the *ad hoc* Committee, who accepted Article II as a whole in second reading by 5 votes to 2 (1948 *ad hoc* Committee Draft Convention, p. 15).

Article III of the 1948 *ad hoc* Committee Draft Convention, on "cultural" genocide, provided for a second additional meaning to the definition of genocide:

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as:
>
> > 1. prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

> 2. destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group (1948 *ad hoc* Committee Draft Convention, p. 17).

This definition gathers some of the elements included in the description of "cultural" genocide within the 1947 Secretariat Draft (1947 Secretariat Draft, pp. 26-28), and added the punishable act of "preventing the use of" specific immovable institutions.

On 24th September 1948, the UN GA, at its 142nd Plenary Meeting, decided to allocate the item 'Genocide: draft Convention and report of the Economic and Social Council' to the Sixth (Legal) Committee for consideration and report (Doc. A/PV/142). Thus, the Sixth Committee of the UN GA examined thoroughly the 1948 *ad hoc* Committee Draft Convention and agreed, among other things, that the provision on "cultural" genocide would not be included within the Convention by 25 votes to 16, with 4 abstentions (Doc. A/C.6/SR.83). On 3rd December 1948, the Sixth Committee delivered its final report to the Plenary Meeting of the UN GA (Docs. A/760 and A/760/Corr.2), along with proposed amendments by the USSR and Venezuela (on 5th and 6th December 1948 respectively). While the USSR representative sought to reinstate Article III of the 1948 *ad hoc* Committee Drafted Convention (Doc. A/766, para. 2) in the convention, the Venezuelan delegate proposed to include a paragraph (f) in Article II of the draft convention proposed by the Sixth Committee, namely the "[s]ystematic destruction of religious edifices, schools or libraries of the group" (Doc. A/770). The proposal by the USSR delegate was rejected by 31 votes to 14, with 10 abstentions, whereas the Venezuelan representative eventually withdrew his amendment "in the hope that, at some future occasion, the State parties to the convention would be prepared to be guided by experience and would support such an amendment, were it to be submitted again" (Doc. A/PV.179). On 9th December 1948, the text of the Convention on Genocide was approved by the UN GA, and subsequently adopted. Article II of the Convention contains the current definition of genocide, which reads as follows:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

2. The crime of genocide in the light of the Convention

Article II of the Genocide Convention provides for a general definition of genocide along with an exhaustive list of five genocidal acts. It becomes quickly apparent that the thrust of this provision is the term 'group', which is repeated seven times. The opening sentence of Article II specifies that genocide must be committed "with intent to destroy" a closed list of protected groups, namely national, ethnical, racial, and religious. The requisite intent (*mens rea*) is a necessary condition for an act to qualify as genocide and it is what makes this crime distinct from any other serious offences under international law (*Akayesu Case*, para. 498; *Kambanda Case*, para. 16; *Jelisić Case*, para. 66). In this regard, the specific intent to destroy a protected group – also known as special intent or *dolus specialis* – is part of the mental element of the crime (*Akayesu Case*, para. 517) and complements the general intent requirement – *dolus generalis* –, which relates to the material elements of the individual genocidal act (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 187). While the latter pertains to the opening of Article II ("genocide means any of the following acts") as well as to the listed prohibited acts (sub-paragraphs (a) to (e)), the *dolus specialis* consists of the "intent to destroy, in whole or in part, [the protected] group, as such". Therefore, genocide has two layers of *mens rea* (Cassese, Acquaviva, Fan, & Whiting, 2011, p. 201; Ambos, 2009, p. 834; Akhavan, 2012, p. 43).

Article II does not require the genocidal act to be directed at a group in its entirety, but it is sufficient that the act aims at the partial extermination of the group. This is explained by the insertion of the words "in whole or in part" within the *chapeau* of Article II, a reference that clarifies that genocide may take place even if some members of the targeted group remain alive. The question thus resides in whether genocide extends to cases where a single individual was attacked as a member of a group. The discussions during the *travaux préparatoires* of the Convention supported the interpretation of individual genocide (Doc A/C.6/224 (Mr. Chaumont)), and the wording of sub-paragraphs (a) and (b) of Article II also allow such an expansive interpretation the crime. The allusion to "members of the group" in both sub-paragraphs suggests that an individual may be a victim of genocide provided that the person is targeted because of his/her membership in a group. Sub-paragraph (e) does not refer explicitly but implicitly to members of the group – "children of the group". The *ad hoc* Committee responded affirmatively to the issue of individual execution as an act of genocide, but it

preferred not to state that view in its 1948 *ad hoc* Committee Draft Convention in order that the ECOSOC, and later the UN GA, "should be free to give any interpretation they deemed desirable" (Doc. A/C.6/SR.81 (Mr. Pérez Perozo)). However, it should be noted that, in practice, an isolated attack that results in the death of one member of a protected group would hardly fall under sub-paragraph (a) of Article II. The interpretation of an individual genocide appears to be sustained as long as the attack against the victim is part of a series of similar acts aiming at the destruction of the group to which that individual belonged (Robinson, 1949, p. 17). The same holds true for sub-paragraphs (b) and (e) if they are aimed at the same end (Robinson, 1949, p. 17; Schabas, 2009, p. 179; Jessberger, 2009, p. 94). Since the destruction of a group "as a whole" is not required by Article II for the Genocide Convention to be applicable, the number of casualties have been determined by the doctrine with reference to a 'substantiality requisite', considering that the Convention's object is to deal with acts against large numbers or on a mass scale, not individuals even if they happen to enjoy common features (Robinson, 1949, pp. 17-18; Kuper, 1981, p. 32). The scope of the substantiality test is necessarily determined on a case-by-case basis (Robinson, 1949, p. 18; *Blagojević & Jokić Case*, para. 667; *Brđanin Case*, para. 684; *Karadžić Case*, para. 541; *Bagilishema Case*, para. 65; *Semanza Case*, para. 317; *Muvunyi Case*, para. 484).

The four categories of groups under the Genocide Convention, namely national, ethnical, racial and religious, differ from the more general definition of genocide provided for by Resolution 96(I) of the UN GA ("a denial of the right of existence of entire human groups"). The scope of the protected groups is not defined anywhere in the text and nor do the preparatory works of the Convention offer guidance on this matter. This absence has not prevented international tribunals from determining on a case-by-case basis the particular characteristics of each of the protected groups in the framework of the Convention (*Krstić Case*, para. 556; *Jelisić Case*, para. 70; *Brđanin Case*, para. 682; *Karadžić Case*, para. 541; *Popović et al. Case*, para. 809; *Tolimir Case*, para. 735; *Semanza Case*, para. 317; *Muvunyi Case*, para. 484). In this regard, it has been established that a definition of a protected group "must be assessed in the light of a particular political, social and cultural context" (*Rutaganda Case*, para. 56; *Krstić Case*, para. 557), and it also has to be formulated in "positive" terms inasmuch as each human group is distinct and possesses "particular identities" (*Stakić Appeals*, para. 20 et seq.). A group thus "is defined by particular positive characteristics –national, ethnical, racial or religious– and not the lack of them" (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 193; *Stakić Appeals*, para. 21; *Popović et al. Case*, para. 809; *Karadžić Case*, para. 541). A

negative definition of a group, e.g. non-Serbs in a particular region, thus does not coincide with the aforementioned criteria (*Stakić Appeals*, paras 19-20, 28). Moreover, Article II states that the protected group must be attacked "as such", meaning that the group is the ultimate target of the perpetrator. The Genocide Convention's object is therefore to safeguard the very existence of certain human groups (*Reservations to the Convention on Genocide*, Advisory Opinion, p. 23), in the sense that the victim of genocide is the group itself and not only the individual (*Akayesu Case*, para. 521).

The fact that the jurisprudence has determined that a group is defined "as such", i.e. targeting the group through its members, is not only in compliance with the Genocide Convention, but also with Lemkin's conception of the crime (Lemkin, 1944, p. 79). This understanding of genocide, in the view of the jurisprudence, "requires a positive identification of the group", which presents "well-established, some said immutable, characteristics" (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 194). Similarly, the Trial Chamber in *Akayesu* clarified that the preparatory works of the Convention appears to allude to "'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment" (*Akayesu Case*, para. 511). It has been said that this vision supports the exclusion of both political groups and cultural genocide from the final version of the Genocide Convention (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 194; *Stakić Appeals*, paras 23-24), but the reasoning behind this logic is unconvincing. The position held by the Appeals Chamber in *Stakić*, subsequently endorsed by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* and the Trial Chamber in *Popović et al.* (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, paras 194-195; *Popović et al. Case*, para. 809), provided for an incomplete analysis when referring to political groups and cultural genocide, since the latter was never intended to be included within the *chapeau* of Article II of the Genocide Convention. While political groups were mentioned within Resolution 96(I), Article I of the 1947 Secretariat Draft and Article II of the 1948 *ad hoc* Committee Draft Convention, its insertion as part of the protected groups under Article II was discussed by the drafters of the Convention and later excluded from the final version of the text (Doc. A/C.6/SR.128). Having said that, it is still to be tested how the durable and stable characteristics of a protected group under the Convention are to be understood in the light of contemporary considerations. Given that diverse and heterogenous human groups cohabit in open and dynamic societies, and that some terms – e.g. 'race' – do no longer have the relevancy nor the

same implications in today's society, it will be interesting to see how genocide claims will arise in the context of globalization.

While acknowledging that expanding the scope of the crime could be detrimental to the purpose of genocide; that is to say, to deal only with those acts which represent the most egregious behaviours towards human groups, it is not unreasonable to sustain that a strict interpretation of the groups subject to protection under Article II does not seem to accord with the will of the drafters of the Convention. A careful and combined reading of the discussions held during the *travaux préparatoires* reveals that the drafters intended to secure the protection of groups, an intention that crystallised into the fact that the word 'group' is by far the most repeated term within Article II. In this respect, the Trial Chamber in *Akayesu* perhaps provided for the most logical interpretation when it comes to groups accorded protection by the Convention under the terms of Article II, pointing at "the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of *any* stable and permanent group" (emphasis added, *Akayesu Case*, para. 516).

The second part of Article II includes five different modalities by which a protected group under the Convention can be targeted: "(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." This definition gathers some of the acts proposed by Article II of the 1948 *ad hoc* Committee Draft Convention, although it incorporates sub-paragraph (e) (Docs A/C.6/242 and A/C.6/SR.82), a proviso first envisaged as an act falling under the scope of cultural genocide by the 1947 Secretariat Draft (1947 Secretariat Draft, p. 27). An implicit distinction between physical genocide, biological genocide and cultural genocide is thus remaining in Article II of the Genocide Convention (Schabas, 2009, pp. 202-203; Donders, 2016, pp. 132-133; Bilsky & Klagsbrun, 2018, p. 390).

2.1 The destruction of a group under the Genocide Convention: The approaches taken by the International Law Commission and the jurisprudence of international tribunals

In 1996, the International Law Commission [hereinafter ILC] submitted to the UN GA a report on the draft Code of Crimes against the Peace and Security of Mankind (1996 ILC Draft Code), a task originally requested in 1947 (A/RES/177(II), para. (b)). The 1996 ILC Draft Code is the final version of a series of three reports on offences/crimes against the peace and security of

mankind (1954 ILC Draft Code; 1991 ILC Draft Code) and included genocide among the serious crimes addressed within the report. Article 17 of the 1996 ILC Draft Code repeats word-for-word the definition of genocide contained in Article II of the Genocide Convention, adding a commentary thereto. Paragraph 12 of Article 17 confined the scope of Article II to 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. […] Subparagraphs (a) to (c) of the article list acts of 'physical genocide', while subparagraphs (d) and (e) list acts of 'biological genocide'" (1996 ILC Draft Code, pp. 45-46, para. 12). This statement replicates paragraph 4 of Article 19 of the second report on the Draft Code of Crimes against the Peace and Security of Mankind (1991 ILC Draft Code, p. 102, para. 4), which contributed with a brief commentary on genocide. The ILC did not provide for, in either of the two reports, further explanation on why forcibly transferring of children of the group to another group was deemed as an act of biological genocide. This interpretation deviates not only from the preparatory works of the Genocide Convention, but also from Lemkin's writings.

The materialist approach taken by the ILC with regard to the physical and biological destruction of a group was echoed in the ICTY, the ICTR, the ECCC and the ICJ. The Statutes of the ICTY, the ICTR and the ICC reproduce verbatim the definition of genocide contemplated by the Genocide Convention in Article 4(2), Article 2(2) and Article 6, respectively, while the English version of the Statute of the ECCC introduces almost imperceptible but relevant changes to the definition of genocide. Article 4 of the ECCC Statute reads as follows:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.
>
> The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> • killing members of the group;
>
> • causing serious bodily or mental harm to members of the group;
>
> • deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> • imposing measures intended to prevent births within the group;

• forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

• attempts to commit acts of genocide;

• conspiracy to commit acts of genocide;

• participation in acts of genocide.

The words "any acts" and "such as" within the provision differ from the original definition provided for by the Genocide Convention, whose Article II restricts genocide to "any of the following acts" and "as such". A likely explanation for this divergence is a possible translation error from the Cambodian text to the English version of the Statute.

Apropos the ILC's commentary on the material destruction of a group, the Trial Chamber in *Krstić* added that "cultural genocide was considered too vague and too removed from the physical or biological destruction that motivated the Convention" (*Krstić Case*, para. 576; *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 344; *Croatia v. Serbia*, Judgment, para. 136; *Case 002/02 Judgment*, para. 800). In the view of the same Chamber, "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group" (*Krstić Case*, para. 580). This statement was confirmed and reiterated by the Appeals Chamber (*Krstić Appeals*, para. 25), and the Trial Chamber in *Brđanin* (*Brđanin Case*, para. 694), *Blagojević & Jokić* (*Blagojević & Jokić Case*, para. 657), *Popović et al.* (*Popović et al. Case*, para. 822), and *Karadžić* (*Karadžić Case*, para. 553). Moreover, the ICTR refers predominantly to the "material destruction of a group" as interpreted by the ILC (*Kamuhanda Case*, para. 627; *Semanza Case*, para. 315; *Kajelijeli Case*, para. 808), although the nature of the *mens rea* did not have practical implication, since the destruction of the Tutsi group (ethnic) was indeed principally physical (*Akayesu Case*, para. 702). Lastly, a Trial Chamber of the ECCC (*Case 002/02 Judgment*, para. 800) concurred with the view of the ICJ in *Croatia v. Serbia*, which found that the scope of the Genocide Convention is limited to "the physical or biological destruction of the group" (*Croatia v. Serbia*, Judgment, para. 136). In addition, in *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ, while acknowledging the materialist approach taken by the Trial Chamber in *Krstić*, held that "the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention" (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 344).

In spite of the above, the Trial Chamber in *Krstić* recognised 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" (*Krstić Case*, para. 580). This finding was reiterated in *Popović et al.* (*Popović et al. Case*, para. 822), and in *Karadžić* (*Karadžić Case*, para. 553), as well as in *Bosnia and Herzegovina v. Serbia and Montenegro* by the ICJ (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, para. 344).

The argument that the concrete modalities of commission prescribed by Article II of the Genocide Convention all aim at the physical extermination of a group has found some support (Donders, 2016, p. 132), but it is not clear-cut that the text accommodates only such an understanding. The preparatory works of the Convention do not shed light on the issue, and a literal interpretation of Article II seems to permit a broad interpretation that is not only confined to the physical destruction of a group, but also as encompassing other situations where the viability of a certain collectivity is at risk. The case of forced assimilation policies towards a group is striking in this light, and it has been cited as a manifestation of cultural genocide (Bilsky & Klagsbrun, 2018, p. 379). Having said that, the current reading of Article II does not cover the forced assimilation of communities, but only the transfer of children from one group to another group.

2.2 The materialist approach vis-à-vis the cultural destruction of a group

The ILC's materialist interpretation of the destruction of a group in the context of genocide has been extensively contested. The 1996 ILC Draft Code refers to the material destruction of a group either by physical or biological means excluding the "destruction of the national, linguistic, religious, cultural or other identity of a particular group". In addition to it, the ILC referred to the definition of cultural genocide provided for by Article III of the 1948 *ad hoc* Committee Draft Convention, which covered "any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group" (1948 *ad hoc* Committee Draft Convention, p. 17; 1996 ILC Draft Code, pp. 45-46, para. 12). The content of this provision contains both tangible and intangible heritage, which are protected by numerous instruments under international law.

The first part of Article III of the 1948 *ad hoc* Committee Draft Convention alludes to a prohibition to use the language of the group in daily intercourse or in schools, or to print and circulate publications written in that language. In this regard, intangible heritage, such as language, religious practices, or access to cultural and religious sites, is reflected in a wide variety of legal instruments, including the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, as well as the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the 2005 UNESCO Convention on the Preservation and Promotion of the Diversity of Cultural Expressions, and the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

The second part of Article III contains a reference to immovable tangible objects, which are generally protected as 'cultural heritage' under the World Heritage Convention (1037 UNTS 151). The Convention includes three categories of edifices, namely monuments, groups of buildings, and sites (World Heritage Convention, Art. 1), which must possess the quality of being 'outstanding universal value' to be considered as cultural heritage in the eyes of the Convention, a fact determined with reference to paragraph 49 of the Operational Guidelines for the Implementation of the World Heritage Convention: "Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity" (UNESCO Doc. WHC.19/01). In this respect, States Parties to the Convention are entitled to "identify and delineate" the immovable objects situated on their territory (World Heritage Convention, Art. 3), and to ensure the "identification, protection, conservation, presentation and transmission to future generations" of the aforesaid heritage (World Heritage Convention, Art. 4). Also at the international level, but in the context of wartime, immovable objects are efficiently protected by relevant provisions of the Hague Regulations of 1907 (UKTS No. 9 (1910), Cd 5030), the Hague Convention of 1954 (249 UNTS 240) and its 1999 Second Protocol (2253 UNTS 212), and the 1977 Additional Protocols I (1125 UNTS 3) and II (1125 UNTS 609) to the Geneva Conventions of 1949 (75 UNTS 287).

The protection of immovable objects under international humanitarian law has been also greatly developed in the field of international criminal law, especially since the establishment of the ICTY in 1993. Article 3(d) of the Statute of the ICTY conferred the Tribunal with jurisdiction over violations of the laws or customs of war, including the "(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science". This

provision enabled the ICTY to prosecute individuals for offences against cultural heritage (O'Keefe, 2010, pp. 6-7). In this context, the Tribunal faced a few cases in which it was pondered whether the destruction of cultural and religious buildings of a certain group constituted a violation of the crime of genocide and whether the materialist approach taken by the ILC was authoritative. For instance, the Trial Chamber in *Krajišnik* questioned the Convention's "intent to destroy a group [since it] cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said" (*Krajišnik Case*, para. 854, fn 1701). In *Blagojević & Jokić*, the Chamber held that "the physical or biological destruction of a group is not necessarily the death of the group members", and that a group embraces not only individuals, but also "its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land" (*Blagojević & Jokić Case*, para. 666; Jorgic Case, para. (III)(4)(a)(aa)). A similar argument was raised by ICJ Judge Cançado Trindade, who asserted in his Dissenting Opinion to the *Croatia v. Serbia* judgment that "individuals living in groups cannot prescind from their cultural values, and, in any circumstances, in any circumstances (even in isolation), from their spiritual beliefs. Life itself, and the beliefs that help people face the mysteries surrounding it, go together" (*Croatia v. Serbia*, Judgment, Cançado Trindade diss. op., para. 418). The same Justice, in his Separate Opinion to the Order of provisional measures in the *Cambodia v Thailand* case, speaks of a 'human factor' to explain *inter alia* that the protection of the spiritual needs of human beings consists of the safeguarding of cultural and spiritual world heritage, as is the case of the Temple of Preah Vihear (*Cambodia v. Thailand*, Provisional Measures, Cançado Trindade diss. op., para. 101). Judge Cançado Trindade's opinion seeks to link territoriality, preservation of human life, and the cultural and spiritual heritage dimension in the interest of preventing spiritual damage (Gerstenblith, 2016, p. 384). In his view, "the needs of protection of people comprise all their needs, starting with the protection of the fundamental right to life in its wide dimension […], and also including their spiritual needs" (*Cambodia v. Thailand*, Provisional Measures, Cançado Trindade diss. op., para. 102).

Furthermore, in his famed Partial Dissenting Opinion to *Krstić*, Judge Shahabuddeen questioned the ILC's position that the intended destruction "must always be physical or biological", arguing that a distinction has to be made "between the nature of the listed 'acts' and the 'intent' with which they are done" (*Krstić Appeals*, partial diss. op. Shahabuddeen, para. 48). In Judge Shahabuddeen's opinion, "[f]rom their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to

destroy the group in whole or in part need not always lead to a destruction of the same character." Whereas Judge Shahabuddeen recognized that some provisions refer explicitly to the physical or biological destruction of a group, he argued that "in other cases, the [ICTY] Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part". This is the case for Article 4(2)(a) – it penalizes "killing members of the group" –, that is the provision by which Judge Shahabuddeen asserted that, in order to prove genocide, it is necessary to show that the intent with which a group is killed was to cause the physical or biological destruction of the same group (*Krstić Appeals*, partial diss. op. Shahabuddeen, para. 49). In this respect, he held that "[i]t is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the [Genocide] Convention on which the [ICTY] Statute is based, provided that that intent attached to a listed act, this being of a physical or biological nature". Moreover, Judge Shahabuddeen shared the view of the counsel on asserting that "the attack is directed to the existence of the group", and that the crime of genocide is not a crime against individuals, but against "human groups" (*Krstić Appeals*, partial diss. op. Shahabuddeen, para. 50). A group, in his view, "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 a physical or biological nature is 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". Also, Judge Shahabuddeen noted that 'cultural genocide' was not included within the term 'genocide', as used in the Genocide Convention (*Krstić Appeals*, partial diss. op. Shahabuddeen, para. 51). However, while recognising that "the intent certainly has to be to destroy", he argued that "except for the listed act, there is no reason why the destruction must always be physical or biological".

Apart from judicial pronouncements, many voices at the UN level have argued whether a more extensive approach of so-called physical genocide and biological genocide could be recognised as cultural genocide under Article II of the Genocide Convention. Examples of these attempts to revive the issue are found especially in the field of protection of minorities. So much so that in the 1970s, as a result of a decision by the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, the ECOSOC requested the elaboration of a study on genocide and the appointment of a Special Rapporteur of the Sub-Commission. The task was assigned to Mr. Nicodème Ruhashyankiko, who submitted the respective report in 1978. The Ruhashyankiko report put emphasis on the question of cultural

genocide and the developments that motivated its removal from the Genocide Convention (1978 Ruhashyankiko Report, paras 441-461). The study considered this issue with a view to adopting an additional instrument to the Convention or in the Convention, a task of which the Special Rapporteur said he was "unable to draw a definite conclusion" (1978 Ruhashyankiko Report, para. 461).

After reconsidering the issue, and subsequently obtaining authorization of the Commission on Human Rights, the Sub-Commission asked the ECOSOC to designate a new Special Rapporteur with the aim of revising and updating the study elaborated by Mr. Ruhashyankiko. In this regard, Mr. Benjamin Whitaker was appointed as Special Rapporteur, and prepared a report which was not as lengthy as the one submitted by his predecessor. The Whitaker report dedicated only one page to the matter of "cultural genocide, ethnocide and ecocide" (1985 Whitaker Report, paras 32-33), and noted that "[f]urther consideration should be given to this question, including if there is no consensus, the possibility of formulating an optional protocol" (1985 Whitaker Report, para. 33). This conclusion was based *inter alia* on "the increasing attention given by the United Nations bodies to the rights of indigenous peoples". By this statement, Special Rapporteur Whitaker likely referred to the Working Group on Indigenous Populations, which was established in 1982 pursuant to ECOSOC Resolution 1982/34 for a twofold purpose: to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples; and to give attention to the evolution of international standards concerning indigenous rights (E/RES/1982/34). In spite of this mandate, which clearly reflects an intention to only gather statistical data, the large number of participants at the Working Group and their vital concern about indigenous issues motivated the creation of an international mechanism for the protection of indigenous human rights (Mako, 2012, p. 185).

Moreover, by Resolution 1985/22, the Sub-Commission for the Prevention of Discrimination and Protection of Minorities authorized the creation of a draft Declaration on the Rights of Indigenous Peoples, which would not be adopted until 1994 (E/CN.4/SUB.2/RES/1994/45). Article 7 of the draft Declaration stated that "[i]ndigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide". No reference to what ethnocide/cultural genocide meant for the purposes of the draft Declaration was included. The absence of a precise definition and its scope turned out to be decisive for the removal of the former terms from the final text of the Declaration on the Rights of Indigenous Peoples (Mako, 2012, pp. 186-188), which was adopted by UN GA

Resolution 61/295 in 2007 (A/RES/61/295).

At the domestic level, a discussion on the cultural dimension of genocide was also present throughout the truth and reconciliation processes in Canada and Australia, with regard to the forced transfers of Aboriginal children from their families and communities to foster families and residential schools throughout the 19th and 20th centuries. In the case of Canada, the National Inquiry into Missing and Murdered Indigenous Women and Girls handed in its final report in 2019, which displays at length how Canadian governments have historically treated indigenous people with contempt and have used racist and discriminatory policies to advance their own national policies. The final report, while discussing the drafting history of the Genocide Convention in relation to the exclusion of cultural genocide, also noted that the term was rejected by Canada, knowing that it was "perpetrating this type of genocide contemporaneously with the drafting of the Convention" (Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls: A Legal Analysis of Genocide, 2019, p. 7). This information is confirmed by the reaction of the Canadian representative at the Sixth Committee of the UN GA: "[n]o drafting change of Article III [on cultural genocide] would make its substance acceptable to [this] delegation" (Doc. A/C.6/SR.83). Notwithstanding the exclusion of the notion from the Convention, the National Inquiry acknowledged that Article II of the text prohibits the forcible transfer of children to another group, an act originally envisaged by Lemkin as a form of cultural genocide. In this vein, the report stated that "the debate around 'cultural genocide' versus 'real' genocide is misleading, at least in the Canadian context" (Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls: A Legal Analysis of Genocide, 2019, p. 7). Contrariwise, a previous report submitted by the Truth and Reconciliation Commission of Canada in 2015 distinguished cultural genocide from physical and biological genocide, with the former covering "the destruction of those structures and practices that allow the group to continue as a group" (Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future, 2015, p. 1).

In the context of Australia, the High Court's decision in the case of *Kruger & Ors v The Commonwealth of Australia* alluded to cultural genocide which, according to Judge Dawson, was "expressly deleted from [the Genocide Convention] in the course of its being drafted" (*Kruger v. Commonwealth*, p. 38). The plaintiffs who filed the complaint were members of the 'Stolen Generation of the Northern Territory', namely indigenous children who were subjected to forced removal from their parents and placement into non-indigenous institutions and homes,

a practice that took place in Australia from approximately 1910 until 1970 (O'Sullivan, 2005). They argued that the 'Aboriginals Ordinance 1918' (the legislation that authorised the removals from their Aboriginal families) was unconstitutional and thus invalid. The plaintiffs asserted the Ordinance's invalidity on a number of grounds, including *inter alia* that the former "was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act: […] providing for or having a purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group", and also to sub-paragraphs (b), (c), and (e) of Article II of the Genocide Convention (*Kruger v. Commonwealth*, p. 12 (iv. C. vi)). Although the cultural destruction claim was made by the plaintiffs in the light of the Australian Constitution, Judge Dawson used, on his own initiative, the term cultural genocide to clarify that the Genocide Convention does not contemplate such a term. Judge Dawson's observation was noted in *Nulyarimma v Thompson*, a case brought to the Federal Court of Australia, in which Judge Merkel found that "a claim of conduct committed with intent to destroy in whole, or in part, the culture of a national, ethnical, racial or religious group would not, without more, fall within Article II of the Genocide Convention. Rather, such matters were left to be dealt with under other Instruments or Conventions dealing with human rights" (*Nulyarimma v. Thompson*, para. 200).

Moreover, a debate on cultural genocide is currently ongoing in the context of the alleged China's oppression of the Uighurs (Lyons, 2019; Zand, 2019). A report entitled 'Cultural erasure: Tracing the destruction of Uyghur and Islamic spaces in Xinjiang' was published in September 2020 by the Australian Strategic Policy Institute, which identified, among other actions, the Chinese Government's "genocidal policies in Xinjiang [as well as a] deliberate destruction of indigenous cultural practices and tangible sites" (Cultural Erasure Report, p. 36). This information is sustained by an intent "to rewrite the cultural heritage of the Xinjiang Uyghur Autonomous Region" through a "systematic and intentional campaign" aiming at eroding and redefining the culture of the Uyghurs and other Turkic-speaking communities" (Cultural Erasure Report, p. 3). According to the study, "16,000 mosques in Xinjiang (65% of the total) have been destroyed or damaged as a result of government policies, mostly since 2017. An estimated 8,500 have been demolished outright, and, for the most part, the land on which those razed mosques once sat remains vacant. A further 30% of important Islamic sacred sites (shrines, cemeteries and pilgrimage routes, including many protected under Chinese law) have been demolished across Xinjiang, mostly since 2017, and an additional 28%

have been damaged or altered in some way." In addition to it, the report documented a series of policies orchestrated by the Chinese government with a view "to re-engineer[ing] Uyghur social and cultural life by transforming or eliminating Uyghurs' language, music, homes and even diets" (Cultural Erasure Report, p. 3).

The alleged campaign of repression and 're-education' across Xinjiang is catalogued as genocide by the study, which appears to extend the scope of the crime to the destruction of tangible and intangible cultural heritage. This conclusion is not a new one (Albadalejo García, 2019), and it is far from being the last contribution to the enduring debate on cultural genocide (Nafziger, 2020, p. 132). In August 2016, Karima Bennoune, the Special Rapporteur in the field of cultural rights, submitted a report in which she examined the intentional destruction of cultural heritage from a human rights perspective. Special Rapporteur Bennoune held that "[t]he concept of cultural genocide should be given serious consideration, 'perhaps not to explicitly incorporate it as a form of genocide, but … to modify the existing barriers to effective deterrence to the destruction of cultural heritage'" (2016 Bennoune Report, para. 29). The term 'cultural cleansing' was also included within the report, which referred to this notion in the context of "a new wave of deliberate destruction [that] is being recorded and displayed for all the world to see, the impact magnified by widespread distribution of the images. Such acts are often openly proclaimed and justified by their perpetrators. This represents one form of cultural warfare against populations and humanity as a whole" (2016 Bennoune Report, para. 45). Special Rapporteur Bennoune's report also noted that some attacks against this heritage are aiming *inter alia* at "erasing memory of current and past events, civilizations and peoples" (2016 Bennoune Report, para. 33), with a view to "create new historical narratives affording no alternative vision" (2016 Bennoune Report, para. 36).

Furthermore, Special Rapporteur Bennoune's words regarding a "new wave of deliberate destruction" deserve special attention (Lostal, Hausler, & Bongard, 2017, p. 411). It has been sustained that the destruction of tangible heritage during an armed conflict sometimes extends beyond collateral damage, considering this practice as a manifestation of a policy of genocide or ethnic cleansing, and a way to dominate a particular group by eliminating any physical record of their history (Milligan, 2008, p. 98). The motivation of the perpetrator is as diverse as his/her methods and targets: nationalist, religious, political, ideological, and territorial terrorism are all widespread (Bevan 2016, p. 90; Schorlemer, 2018, p. 35). Whilst one act is enough to be qualified as genocide, practices consisting of wiping out the cultural traits of one group do not necessarily involve one attack. It might consist, for instance, in a

policy that gradually exterminates any remnants or traces of the cultural history of that group (*Krajišnik Case*, para. 838). This was the intention behind the destruction of the Buddhas of Bamiyan in March 2001 by the Taliban, who justified the attacks on the basis of an edict issued by their supreme leader Mullah Mohammed Omar (Francioni & Lenzerini, 2003, p. 626; Abtahi, 2004, p. 10; Decken, 2017, p. 49). The dynamiting of the Buddhas was expressly alluded to in the study 'Cultural erasure: Tracing the destruction of Uyghur and Islamic spaces in Xinjiang' as an example of a "dramatic and visible" episode (Cultural Erasure Report, p. 36).

2.3 A way forward on questions related to potential acts of cultural genocide?

In its commentary to the crime of genocide within the 1996 ILC Draft Code, the ILC noted that "some of the acts" alluded to in paragraph 12, including those deemed as cultural genocide, "could constitute a crime against the peace and security of mankind in certain circumstances, for example, a crime against humanity under Article 18, subparagraph (e) or (f) or a war crime under Article 20, subparagraph (e) (iv)" (1996 ILC Draft Code, para. 12, fn 122). This statement refers *inter alia* to the crime against humanity of "Persecution on political, racial, religious or ethnic grounds" and to the war crime of "Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science". The latter is a crime contemplated by the Rome Statute under Articles 8(2)(b)(ix) and 8(2)(e)(iv), which prohibit directing attacks against protected objects both in international and non-international armed conflicts. However, offences on cultural heritage outside the context of wartime do not fall under the Rome Statute as a war crime (*Al Mahdi Case*, paras 17-18).

Alternatively, the ILC proposed that acts that potentially qualified as cultural genocide could be also subsumed within the crime against humanity of persecution, as there seems to be an overlap between the definitions of genocide and crimes against humanity (Schabas, 2016, p. 142). For the purposes of the Rome Statute, crimes against humanity under Article 7(1)(h) means "Persecution 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". In addition, the Statute defines 'persecution' in Article 7(2)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

The crime of persecution is heterogeneous in nature and it requires a discriminatory intent on the part of the perpetrator for the offence to be contemplated as such (*Tadić Case*, para. 697). The Statute of the ICTY did not define persecution in Article 5(h); it merely referred to the crime as committed "on political, racial and religious grounds" in the context of serious crimes occurring simultaneously during the Balkan conflict. This favoured a sort of judicial creativity from the Tribunal, as is evident in *Blaskić*, who was convicted of war crimes and crimes against humanity in relation to offences against protected objects. In this vein, the Appeals Chamber found that "the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute" (*Blaškić Appeals*, para. 149). The discriminatory intent of the perpetrator was thus a key requisite for the Tribunal to establish the link between attacks against cultural objects and persecution, as was stated by the Trial Chamber in *Kordić & Cerkez*: "[t]his act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects" (*Kordić & Čerkez Case*, para. 207).

The similarities between Article 7 of the Rome Statute and Article 5 of the Statute of the ICTY appear to leave room for the ICC to further develop the jurisprudence of the ICTY in relation to damage or destruction of protected cultural objects as a crime of persecution (Gottlieb, 2005, p. 883; O'Keefe, 2010, p. 44; Frulli, 2011, p. 217; Petrovic, 2012, p. 55; Ehlert, 2014, pp. 163-164; Green Martínez, 2015, p. 1079; Novic, 2016, p. 163; Hofmann, 2017, p. 112). Additionally, the definition of persecution under Article 7(2)(g) provides for an expanded scope, which would allow the Court to have jurisdiction over crimes that entail a serious deprivation of fundamental rights contrary to international law. The Rome Statute does not include the 'war-nexus' requisite provided for by the Charter of the International Military Tribunal (82 UNTS 279) and the ICTY Statute, but it requires a connection requirement "with any acts referred to in [Article 7(1)] or any crime within the jurisdiction of the Court". In this context, Article 7(1)(h) requires a connection between a persecutory act, that is taking place on a widespread or systematic basis against any civilian population, and any of the specified acts listed elsewhere in paragraph 1, which are the kind of acts that typically come along in the course of a persecution campaign (Robinson, 1999, p. 55; Badar, 2004, p. 127; Bassiouni, 2011, p. 405; Ambos, 2014, p. 106). The connection requirement proves thus problematic outside an armed conflict, although it does not make persecution entirely inapplicable in peacetime.

Conclusions

In the eyes of the historical drafting of the provision, Article II of the Genocide Convention contemplates three forms of genocide, namely physical, biological, and cultural, the latter restricted to the forcible transfer of children from one group to another group. Customary law is, however, limited to the physical and the biological destruction of the groups accorded protection under the terms of Article II, which detaches genocide from the three-dimensional structure envisaged by Lemkin in his writings and in the first draft of the Convention. It is in this context that a broader interpretation of the crime which would cover the destruction of tangible and intangible cultural traits of a group is not permitted by the scope of Article II. None of the five genocidal acts (sub-paragraphs (a) to (e) of Article II) could be interpreted in such an expansive way. Attempts to include this type of offence have been rejected both by the ILC and the jurisprudence of international tribunals.

Whereas it is questionable that the provision covers all possible ways and means of intentionally destroying a human group as such (Drost, 1959, p. 124; Gaeta, 2011, p. 110), the content of Article II reached consensus during the *travaux préparatoires* of the Genocide Convention and thus has to be accepted. In addition to targeting one of the four groups protected by the Convention through the five different modalities of genocide, the establishment of the specific intent is a necessary element of the crime. In this way, and aside from the uncertain genocidal act of forcibly transferring children from one group to another, the cultural destruction of a group as it stands today is only significant as evidence of the intent to destroy a group (Schabas, 2009, p. 218).

Article XVI provides for revision of the Genocide Convention upon request “at any time” by States Parties, although in practical terms one should ponder whether such a request may be realistic. The 1996 ILC Draft Code already opened the possibility of interpreting potential acts of cultural genocide as a war crime or a crime against humanity of persecution, as is demonstrated by the jurisprudence of the ICTY. The question thus resides in whether the ICC may take up and further develop the path that the former Tribunal took in the context of the Balkans war. The only case in which the ICC has convicted an individual for attacking protected institutions under Article 8(2)(e)(iv) of the Rome Statute was an “easy” one. The defendant in *Al Mahdi* pleaded guilty to the sole charge of the case, consisting of attacking cultural and religious objects during a non-international armed conflict in the territory of Mali.

With regards to the heritage targeted, it does not seem plain that offences against the

intangible heritage of a certain group could be prosecuted by an international tribunal anytime soon, since its nature is not palpable nor sometimes perceptible, up to the extent that on certain occasions it might not be even understood. For its part, an offence against tangible heritage relevant for the group is visible and produces an immediate result, while, for instance, prohibiting a certain group to speak its own language may (or not) have a long-term effect. How can the impact of these restricting actions on the *modus vivendi* of the group be measured, as opposed to a partial or total destruction of the cultural or religious sites relevant for the group? Certainly, both practices are deplorable and extensively condemned in a wide variety of instruments, but it appears that only the destruction of tangible heritage may be considered as factual evidence to undermine a group's viability.

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Notes

[1] "Acts carried out against the defenceless population. These are the massacres, the pogroms, the collective cruelty to women and children, the treatment of men in a way that humiliates their dignity" (Translation by the author).
[2] "Irreparable damage, not only to the individual owner and the State where the act was perpetrated, but also to civilised mankind, which, bound by innumerable ties, derives the entire benefit from the efforts of its most genial sons, whose works come into possession and increase the culture of all" (Translation by the author).
[3] "A very characteristic proposal by Professor Rörich [sic] which relates to the protection of works of art and culture in the event of war, following the example of protection granted to the hospitals of the Red Cross" (Translation by the author).

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