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# Cultural Genocide: Between Recognition and Denial\*

*Where they have burned books, they will end in burning human beings.*

Heinrich Heine

## Abstract

This article explores the concept of cultural genocide, returning to its conceptual “roots” and aiming, among other things, to explore its origins as articulated by its foremost advocate, Raphael Lemkin. As the scholar who coined the term “genocide” and played a pivotal role in shaping the 1948 Genocide Convention, Lemkin’s contributions provide essential context for this analysis. During the drafting of the Convention, cultural genocide emerged as a central issue, occupying a prominent place in the debate on the nature of the crime. Despite its prominence in the discussions, it was ultimately excluded from the final text following extensive debate among the Convention’s drafters. Unlike biological and physical genocide, which were retained as the core forms of the crime, cultural genocide was excluded. What were the principal arguments advanced for and against the recognition of cultural genocide? Why does the debate over its inclusion persist decades after its exclusion from the Genocide Convention?

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To what extent – if at all – do these discussions hold legal significance today? These are the central issues that this article seeks to address.

KEYWORDS: cultural genocide, genocide, Genocide Convention

## 1 | Introduction

Since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: “Convention” or “Genocide Convention”)<sup>[1]</sup> in 1948, this crime has been the subject of sustained debate and has been described as “the pinnacle of evil,”<sup>[2]</sup> the crime above all crimes. It stands as a sobering reminder that genocide is not merely a matter of history; it continues to be perpetrated, leaving lasting scars on humanity. It has been acknowledged in the case law of the International Court of Justice and international criminal ad hoc tribunals since the 1990s. Proceedings addressing both individual and state responsibility have confirmed that genocide is a crime that is difficult to prove, albeit not impossible.

Genocide comprises two elements: the first is the material element and refers to five enumerated prohibited acts (*actus reus*):

- (a) killing the members of the group;
- (b) causing serious bodily or mental harm to the 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; and
- (e) forcibly transferring children of the group to another group.<sup>[3]</sup>

No other acts are prohibited by the Convention.

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<sup>1</sup> United Nations, Treaty Series, Vol. 78, 277. The Genocide Convention was adopted as a General Assembly Resolution 260(A)(III): Prevention and Punishment of the Crime of Genocide, on 9 December 1948. It entered into force on 12 January in accordance with Article XIII.

<sup>2</sup> Payam Akhavan, “Cultural Genocide: Legal Label or Mourning Metaphor?,” *McGill Law Journal – Revue de Droit De McGill* 62, no. 1 (2016): 266.

<sup>3</sup> Genocide Convention, Art. 2. The same definition has also been adopted in the statutes of international criminal courts (e.g., ICTY Statute, Art. 4; ICTR Statute, Art. 2; Rome Statute; Art. 6). See also the Draft Code of Crimes Against Peace

These acts are directed exclusively at the physical or biological destruction of specifically designated protected groups, namely national, ethnic, racial, or religious ones. No other groups are protected by the Convention.

The other element of the crime is the psychological element of the so-called genocidal intent or *dolus specialis*, “the most exacting mental element in criminal law.”<sup>[4]</sup> This element defines genocide as the ultimate “crime of crimes,” distinguishing it from other substantively similar crimes.<sup>[5]</sup> The perpetrator must demonstrate an intent that extends beyond the mere execution of *actus reus*. *Dolus specialis* refers to the specific intent to achieve the ultimate goal – the destruction of the protected group,<sup>[6]</sup> “collective itself,”<sup>[7]</sup> rather than merely individual members. This is the defining characteristic of genocide, a point that Raphael Lemkin (the conceptual originator of the term)<sup>[8]</sup> had emphasized even before the Convention was adopted.<sup>[9]</sup> Without *dolus specialis*, no genocide could be established.

Beyond these brief introductory remarks on genocide, this article will not undertake a detailed analysis of the crime. Instead, it will focus on the concept of “cultural genocide,” which Lemkin proposed as a central component of the future Genocide Convention. Cultural genocide was incorporated into the drafts of the Convention, extensively debated, but ultimately excluded from the final text, leaving only physical and/or biological destruction as formally recognized forms of genocide. In other words, cultural genocide is not recognized under current positive international law.

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and Security of Mankind with Commentaries, International Law Commission, 48<sup>th</sup> session, 6 May-26 July 1996 (hereinafter: 1996 Draft Code of Crimes Against Peace and Security of Mankind), Art. 17, paras. 4-5. [https://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf).

<sup>4</sup> Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 250.

<sup>5</sup> *Prosecutor v. Jean Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998 (hereinafter: “Akayesu Trial Judgment”), 1998, para. 498.

<sup>6</sup> 1948 Genocide Convention, Art. 2.

<sup>7</sup> David Nersessian, “A Modern Perspective: The Current Status of Cultural Genocide Under International Law,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey S. Bachman (London and New York: Routledge Studies in Genocide and Crimes against Humanity, 2019), 64.

<sup>8</sup> Lemkin coined the term “genocide” (which was previously nonexistent) by combining the Greek word *genos* (race, tribe) and the Latin suffix *-cide* (killing), understanding it as the “destruction of a nation or of an ethnic group.” Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944), reprinted in *New Introduction by Samantha Power* (The Lawbook Exchange, Ltd. Clark, 2005), 79.

<sup>9</sup> Raphael Lemkin, “Genocide as a crime under international law,” *The American Journal of International Law* 41, no. 1 (1947): 147.

However, despite the rejection of that concept in 1948, it continues to attract sustained attention within political and legal discourse, bringing us back to the question of whether that omission was justified in light of broader developments in cultural heritage protection. For centuries, the destruction of cultural heritage was regarded merely as a crime against property, with efforts to safeguard it primarily centered on preserving material and tangible cultural assets. However, in recent years, the understanding of cultural heritage has evolved. It is no longer confined to the physical remnants of a civilization; it now extends beyond monuments and buildings. In the twenty-first century, it encompasses intangible traditions, knowledge, and practices that shape cultural identity and are transmitted across generations. The connection between genocide and cultural heritage is profoundly intricate and contested,<sup>[10]</sup> rooted in longstanding historical, social, and ideological forces.

Given the foregoing account of what the crime of genocide entails, and the fact that it is defined by the Convention in a manner that is both precise and narrowly circumscribed, the question arises whether the use of the term cultural genocide is conceptually and legally appropriate. Cultural genocide does not amount to either the physical or biological destruction of a group, nor does a “cultural group” fall within the list of protected groups. However, nearly eight decades after its exclusion from the final text of the Convention, the notion of cultural genocide continues to resonate in contemporary discourse. It therefore remains essential to engage with Akhavan’s question: what is it about this term that continues to carry such profound weight?<sup>[11]</sup> At the same time, it is necessary to examine whether current debates may lay the groundwork for its formal legal recognition. Therefore, this analysis revisits the origins of cultural genocide as presented by Raphael Lemkin and examines the arguments that led to its removal from the final text of the Genocide Convention. The central thesis of this article is that cultural genocide does not, *per se*, constitute an independent crime within the framework of the Convention and that the requirement of physical or biological destruction of a protected group remains the prevailing position under international law. Building on this claim, the analysis seeks to move beyond a strictly physical or biological

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<sup>10</sup> Ana Filipa Vrdoljak, “Cultural Heritage in Human Rights and Humanitarian Law” in *International Human Rights and Humanitarian Law*, ed. Orna Ben-Naftali (Oxford: Oxford University Press, 2011), 291.

<sup>11</sup> Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 245.

understanding of group destruction by emphasizing the importance of cultural heritage and cultural identity for the survival of human communities. It is further argued that, since the exclusion of cultural genocide from the Convention, the protection of cultural heritage has been legally elevated to a level not anticipated at the time of its adoption. Finally, by addressing whether cultural genocide was unduly omitted and legally neglected, the article examines relevant jurisprudence of international courts and recent academic and policy-oriented efforts to reconsider this concept.

## 2 | Possible Reasons Why Cultural Genocide Could (Still) Be Relevant: Lemkin's Perspective

Although cultural genocide has been rejected as a legal concept, its connections to the destruction of cultural heritage warrant a reexamination of its origins – namely, the development of the term in Lemkin's works, his advocacy during the drafting process, and the reasons why this concept was not ultimately included in the Genocide Convention, despite the fact that it could have been incorporated.

Lemkin's analysis identified multiple dimensions of genocide, extending beyond physical and biological destruction and encompassed a broad spectrum of non-physical forms of destruction. He introduced the eight “techniques of genocide” in the following fields: political, social, cultural, economic, physical, biological, religious, and moral,<sup>[12]</sup> without prioritizing one over another.<sup>[13]</sup> For Lemkin, cultural genocide<sup>[14]</sup> extends beyond

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<sup>12</sup> Lemkin, *Axis Rule in Occupied Europe*, 82-90.

<sup>13</sup> Leora Bilsky, Rachel Klagsbrun, “The Return of Cultural Genocide?,” *European Journal of International Law* 29, no. 2 (2018): 379.

<sup>14</sup> Lemkin did not actively promote the term “cultural genocide” as a subtype of genocide, except in discussions surrounding the second draft of the Convention after 1946, when the concept of genocide was divided into physical and biological genocide on one side, and cultural genocide on the other. Even then, Lemkin used that term by explaining that an attack on a culture was a means of committing genocide rather than a distinct type of genocide. See more in: Douglas Irvin-Erickson, “Raphael Lemkin: Culture and Cultural Genocide,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey S. Bachman (London and New York: Routledge Studies in Genocide and Crimes against Humanity, 2019), 21-22.

forced assimilation achieved through moderate coercion, such as the prohibition of language. At its core, it is a deliberate policy that employs drastic methods aimed at the rapid and complete destruction of the cultural, moral and religious existence of a human group.<sup>[15]</sup> According to Bilsky and Klagsbrun, Lemkin viewed the systematic attack on a particular group and its cultural identity – a crime intended to erase diversity itself – as the central concept of genocide.<sup>[16]</sup> Sandhar argues that, by adopting a comprehensive perspective on genocide, Lemkin acknowledged the interrelationship between cultural and physical factors that shape the foundation of a nation.<sup>[17]</sup> The eradication of cultural diversity may have consequences comparable to the physical destruction of the group.<sup>[18]</sup> As Mako highlighted, Lemkin viewed culture as a fundamental component of both individual and collective well-being within human societies.<sup>[19]</sup> Threats or violations directed against a group's cultural identity inevitably lead to its disintegration, forced assimilation, and even its physical annihilation at the end.<sup>[20]</sup>

Proceeding from the premise that cultural diversity enriches the human experience and warrants protection, Lemkin wrote extensively about the connection between culture and genocide:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. 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

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<sup>15</sup> Draft Convention on the Prevention and Punishment of the Crime of Genocide, Economic and Social Council, 26 June 1947 (hereinafter: 1947 Draft Convention), 27. <https://digitallibrary.un.org/record/611058?v=pdf>

<sup>16</sup> Bilsky, Klagsbrun, "The Return of Cultural Genocide?" 374.

<sup>17</sup> Jaspreet K. Sandhar, "Cultural Genocide in Tibet: The Failure of Art. 8 of the United Nations Declaration on the Rights of Indigenous Peoples in Protecting the Cultural Rights of Tibetans," *Santander Art and Culture Law Review* 2, no. 1 (2015): 179.

<sup>18</sup> 1947 Draft Convention, 27.

<sup>19</sup> Shamiran Mako, "Cultural Genocide and Key International Instruments: Framing the Indigenous Experience," *International Journal on Minority and Group Rights* 19 (2012): 180.

<sup>20</sup> Lemkin, *Axis Rule in Occupied Europe*, 79.

security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.<sup>[21]</sup>

According to Mako, the deliberate attempt to erase a group's cultural and social identity through forced integration or assimilation was not incidental; rather, it constituted a fundamental element and a defining feature of Lemkin's understanding of cultural genocide.<sup>[22]</sup> In his view, attacks on culture typically preceded other forms of destruction, which, as Luck observes, further emphasizes the importance of culture in preserving the existence of a group. In Luck's view, it is inconsistent to diminish the significance of cultural genocide if it functions as the most reliable indicator of impending physical and biological destruction.<sup>[23]</sup> When the disintegration of culture, personal security, liberty, health, and dignity fails, Lemkin wrote, "the machine gun can always be utilized as a last resort."<sup>[24]</sup> As noted by Akhavan<sup>[25]</sup> and Nersessian,<sup>[26]</sup> for Lemkin, genocide was inseparable from the Holocaust.<sup>[27]</sup> According to Mako, Lemkin was keenly aware of the experiences of native populations in settler societies during the process of colonization; this influenced his development of the concept of cultural genocide as a framework for understanding the non-physical destruction of a group.<sup>[28]</sup> During the drafting of the Genocide Convention, Lemkin viewed the inclusion of a clause on cultural genocide as crucial to acknowledging and preventing the non-physical

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<sup>21</sup> Ibidem.

<sup>22</sup> Mako, "Cultural Genocide and Key International Instruments," 182.

<sup>23</sup> Edward C. Luck, *Cultural Genocide and the Protection of Cultural Heritage*, (Los Angeles: J. Paul Getty Trust, Occasional Papers in Cultural Heritage Policy, 2/2018), 20.

<sup>24</sup> Lemkin, Raphael, *Genocide – A Modern Crime*, April 1945. <http://www.preventgenocide.org/lemkin/freeworld1945.htm>

<sup>25</sup> Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 266.

<sup>26</sup> Nersessian, "A Modern Perspective: The Current Status of Cultural Genocide Under International Law," 65.

<sup>27</sup> Lemkin suffered an immense personal tragedy; he lost 49 family members in the Holocaust. In his unpublished autobiography, he conveyed his anguish, describing his relentless campaign for the adoption of the Genocide Convention as an epitaph on his mother's grave. See more in Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 266.

<sup>28</sup> Thus, for example, in the context of colonialism in the United States, Lemkin argued that the colonial enslavement of American Indians amounted to cultural genocide – an effective and systematic mean of erasing a culture and stripping individuals of their social identity. Mako, "Cultural Genocide and Key International Instruments," 181, referring to footnote 26 in that paper.

destruction of a group. He asserted that the survival of a racial, national, or religious group is intrinsically tied to the preservation of its spiritual and moral unity. Its right to exist is not merely a matter of moral consideration but is also justified by the contributions such groups make to the overall progress of humanity.<sup>[29]</sup> Lemkin's approach entails systematic efforts to dismantle the foundations that sustain a group's identity and existence, rather than focusing solely on its physical destruction. His arguments continue to resonate today, particularly in the context of the importance and preservation of a group's cultural identity. Building on this perspective, the article examines whether the destruction of a group's cultural heritage may lead to the erosion of its cultural identity and, ultimately, to its physical disappearance.

Despite Lemkin's steadfast commitment to securing recognition for cultural genocide, the term was ultimately excluded from the final text of the Genocide Convention. Following extensive deliberations, the drafters opted to define genocide strictly in terms of physical and biological acts, omitting cultural destruction from its scope and consequently departing from Lemkin's framework.

### 3 | Why Was the Concept of Cultural Genocide Ultimately Excluded from the Final Draft of the Genocide Convention?

To assess the arguments both for and against the inclusion of cultural genocide in the Convention and to determine whether these perspectives remain relevant and justified today, it is essential to revisit and analyze the debates from the drafting process. Understanding these discussions provides insight into the complexities surrounding cultural genocide and its place (if it exists at all) within international law.

One could argue that the fact that the drafters of the Genocide Convention debated not only the physical and biological destruction of a group (which ultimately became the core definition of genocide) but also the destruction of culture, highlights its significance. Cultural genocide,

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<sup>29</sup> 1947 Draft Convention, 27.

as initially defined in the first draft of the Genocide Convention, referred to “the destruction by brutal means of the specific characteristics of a human group, that is to say, its moral and sociological characteristics.”<sup>[30]</sup> This definition served as the foundation for subsequent discussions on the matter.

The drafting of the Convention proceeded through three distinct stages. It began with the preparation of the first draft by the UN Secretary-General in early 1947.<sup>[31]</sup> Subsequently, an Ad Hoc Committee on Genocide was appointed to refine the text, resulting in a revised second draft. Finally, the Sixth Committee, a broader representative body, systematically reviewed proposals from member states, conducted a comprehensive legal analysis, engaged in extensive debates, and ultimately drafted and presented the final text of the Convention to the General Assembly for adoption.<sup>[32]</sup> The Genocide Convention was adopted in December 1948.

### 3.1. The First Draft (September 1947)

The first draft was prepared by three distinguished authorities in international law: Vespasian Pella, Henri Donnedieu de Vabres, and Raphael Lemkin.<sup>[33]</sup> The initial objective of what would become the Genocide Convention, as set out in Article 1 of that draft, was to establish a comprehensive legal framework for the prevention and punishment of all forms of genocide by preventing “the destruction of racial, national, linguistic, religious, or political groups of human beings.”<sup>[34]</sup> The crime of genocide

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<sup>30</sup> Ibidem, 17.

<sup>31</sup> Acting on UN General Assembly Resolution 96(I) on “The Crime of Genocide” from 11 December 1946, the UN Economic and Social Council instructed UN Secretary-General to conduct studies for drafting a Convention on genocide.

<sup>32</sup> More on the drafting process of the Convention in: William A. Schabas, *Genocide in International Law. The Crimes of Crimes* (Cambridge University Press, 2000), 51-101, or in Jeffrey S. Bachman, “An Historical Perspective: The Exclusion of Cultural Genocide from the Genocide Convention,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey S. Bachman (London and New York: Routledge Studies in Genocide and Crimes against Humanity, 2019), 45-51. See also: Sixth Committee: Draft Convention on Genocide: Report of the Economic and Social Council: Report and Draft Resolution / Adopted by Sub-Committee 2 on [the] Progressive Development and Codification of International Law, 11 November 1947. <https://digitallibrary.un.org/record/603461?ln=en&v=pdf>

<sup>33</sup> Bilsky, Klagsbrun, “The Return of Cultural Genocide?,” 388.

<sup>34</sup> 1947 Draft Convention Draft, Art. 1(1).

was defined 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,”<sup>[35]</sup> that is, as “the deliberate destruction of a human group.”<sup>[36]</sup>

The draft introduced a threefold definition of genocide:

- (a) causing the death of members of a group or injuring their health or physical integrity (i.e., physical genocide);
- (b) restricting births (i.e., biological genocide);  
and
- (c) destroying the specific characteristics of the group (i.e., cultural genocide).<sup>[37]</sup>

As Luck observed, in light of Lemkin’s holistic approach, the first draft made no explicit reference to physical, biological, and cultural genocide.<sup>[38]</sup> However, both the description and subsequent discussion clearly indicated that these were the forms being addressed in accordance with Lemkin’s view.<sup>[39]</sup> Even in this initial phase – which served as a starting point for further discussion on cultural genocide – there was no consensus regarding the justification for its inclusion in the Genocide Convention. While Lemkin strongly advocated its adoption, Pella and Donnedieu de Vabres argued that cultural genocide 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.”<sup>[40]</sup>

Despite criticism, the first draft ultimately incorporated a comprehensive provision on cultural genocide. The listed methods of its commission were:

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<sup>35</sup> Ibidem, Art. 1(II).

<sup>36</sup> Ibidem, 16.

<sup>37</sup> Ibidem, Art. 1(II)1-3.

<sup>38</sup> Luck, *Cultural Genocide and the Protection of Cultural Heritage*, 23.

<sup>39</sup> 1947 Draft Convention, 17, 25-28.

<sup>40</sup> Ibidem, 27.

### a) forced transfer of children to another human group.<sup>[41]</sup>

The practice of forcibly transferring children from one group to another is not a recent phenomenon; throughout history it has been employed by states seeking to eradicate certain populations, as well as by colonial powers that aimed to assimilate indigenous peoples under their authority.<sup>[42]</sup> The separation of children from their parents and community during a crucial developmental stage can lead, even within a relatively short period, to the disappearance of a group as a cultural entity.<sup>[43]</sup> It may also contribute to the physical destruction of the group. Perpetrators often aim to dismantle protected communities by removing their children and assimilating them into a different cultural setting.<sup>[44]</sup> This remains the sole provision retained from the proposed elements of the ultimately discarded concept of cultural genocide.<sup>[45]</sup> Some authors perceive it as a “distant echo of rejected cultural genocide,”<sup>[46]</sup> while others regard it as an enigmatic provision, seemingly inserted into the Convention “almost as an afterthought, with little substantive debate or consideration.”<sup>[47]</sup> According to Akhavan, the inclusion of this provision aimed to prevent the forced displacement of children, as carried out under Nazi policies during World War II to transfer the so-called “racially valuable” children.<sup>[48]</sup> This article will not undertake a detailed analysis of this element of genocide; nevertheless, it continues

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<sup>41</sup> Ibidem, Art. 1(II)3a).

<sup>42</sup> Hilly B. Moodrick Even Khen, “The Forcible Transfer of Children from Ukraine as Genocide: Awakening the Dormant Prohibition of the Genocide Convention,” *The International Journal of Children’s Rights* 32 (2024): 82.

<sup>43</sup> 1947 Draft Convention, 27. See also: Iryna Kozak-Balaniuk and Ihor Kozak, “Genocide of Ukrainian Children. The Forcible Transfer of Ukrainian Children by Russia as an Attempt to Erase National Identity,” *Prawo i Więź*, no. 4 (57) (2025): 974.

<sup>44</sup> Moodrick Even Khen, “The Forcible Transfer of Children from Ukraine as Genocide,” 89.

<sup>45</sup> This provision was included in the final text at the proposal of the Greek representative in the Sixth Committee, following the definitive rejection of the concept of cultural genocide. Although the proposal faced resistance from some representatives, it was ultimately accepted.

<sup>46</sup> Bilsky, Klagsbrun, “The Return of Cultural Genocide?,” 374.

<sup>47</sup> Schabas, *Genocide in International Law*, 175.

<sup>48</sup> During the trial of Heinrich Himmler, the defendant stated that among the “mixture of [occupied] peoples, there will always be some racially good types... I think that it is our duty to take their children with us, to remove them from their environment, if necessary, by robbing or stealing them.” For more see: Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 260.

to generate debate to this day, both in the context of armed conflicts and in the protection of indigenous peoples. Since children are the bearers of their community's culture and the key to its future, such transfers affect not only the child's perception of their own cultural "belongings" but also the preservation of the group's cultural cohesion. The link between the forcible transfer of children and the preservation of cultural heritage is explicitly acknowledged in the ICC Policy on Cultural Heritage,<sup>[49]</sup> a document that underscores the fundamental role of cultural heritage as a shared legacy of humanity and a vital element of community survival. It recognizes that children serve as a primary channel through which cultural heritage is transmitted to future generations. Their forcible removal from their community constitutes an underlying act of genocide, one that seriously disrupts access to, practice of, and continuity of a group's cultural heritage. For the children themselves, such transfer results in a profound rupture from their cultural roots, language, and traditions.<sup>[50]</sup>

b) forced and systematic exile of individuals representing the culture of a group.<sup>[51]</sup>

Such individuals include educators, teachers, scholars, writers, artists, and others – those who, through their work, contribute to the cultural, linguistic, and moral cohesion of the group. According to the drafters of the Convention, the removal of such persons results in the group becoming “nothing more than an amorphous and defenseless mass.”<sup>[52]</sup> This has also been recognized in the previously mentioned ICC Policy on Cultural Heritage. The court acknowledges that acts of violence directed against prominent individuals who symbolize the group as a whole or who are vital to its survival, such as those with significant cultural standing or leadership roles, may themselves amount to genocide or serve as evidence of genocidal intent.<sup>[53]</sup>

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<sup>49</sup> Policy on Cultural Heritage, International Criminal Court, The Office of the Prosecutor, June 2021.

<sup>50</sup> Ibidem, para. 87.

<sup>51</sup> 1947 Draft Convention, Art. 1(II)3b).

<sup>52</sup> Ibidem, 28.

<sup>53</sup> ICC Policy on Cultural Heritage, para. 80.

c) prohibition of the use of the national language even in private intercourse.<sup>[54]</sup>

Such a prohibition aims to suppress the language of a particular group, with consequences that have, or may have, a significant impact on the group's cultural survival. Reducing a group's language to the status of a dialect can contribute to its marginalization, rendering it socially and politically insignificant.<sup>[55]</sup> Half a century later, language would be recognized in international law as a "vehicle of intangible cultural heritage,"<sup>[56]</sup> a primary means of transmitting it from one generation to another. Its prohibition or neglect represents more than the loss of a communication tool. Language is a vehicle of culture, tradition, cultural identity, and collective knowledge and memory across generations. Its loss leads to the erosion of cultural identity and, ultimately, of a group's cohesion. Proponents of the concept of cultural genocide may argue that the deliberate destruction of a group's language dismantles its cultural foundations, which in turn may threaten its survival as a distinct community.

d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications.<sup>[57]</sup>

Such destruction places cultural heritage under the exclusive "guardianship" of oral tradition, and despite the protection that oral traditions and expressions enjoy today, particularly under the Convention for the Safeguarding of the Intangible Cultural Heritage,<sup>[58]</sup> the question remains to what extent, if at all, such tradition, as the sole transmitter of culture, can ensure its preservation.

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<sup>54</sup> 1947 Draft Convention, Art. 1(II)3c).

<sup>55</sup> *Ibidem*, 28.

<sup>56</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, Art. 2(2)a). Convention is adopted on 18 October 2003 and entered into force on 4 May 2006. More information at: <https://treaties.un.org/pages/showDetails.aspx?objid=080000028006656f>

<sup>57</sup> 1947 Draft Convention, Art. 1(II)3d).

<sup>58</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, Arts. 2(2) and 31.

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.<sup>[59]</sup>

These elements may also be viewed against the backdrop of the destruction of cultural heritage in the present age. In its contemporary meaning, cultural genocide can be understood as the destruction of the structures and practices that enable a group to preserve its identity,<sup>[60]</sup> or as a group of resources inherited from the past that people, independently of ownership, identify as a reflection and expression of their evolving values, beliefs, knowledge, and traditions, encompassing all aspects of the environment shaped by the interaction between people and places over time.<sup>[61]</sup> It encompasses all aspects of the environment shaped by the interaction between people and places over time, serving as a medium through which individuals and communities define, affirm, and transmit their identity.<sup>[62]</sup> Contemporary debates on cultural genocide must therefore extend beyond the destruction of cultural property, as regulated by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter: “1954 Hague Convention”).<sup>[63]</sup> Rather than focusing solely on material, tangible heritage, contemporary discourse embraces broader conceptions of cultural heritage, grounded in intangible elements manifested in diverse forms that depend on human beings as bearers and transmitters of a group’s distinctive attributes:

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<sup>59</sup> 1947 Draft Convention, Art. 1(II)3e).

<sup>60</sup> 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*, 2015, 1. [https://irsi.ubc.ca/sites/default/files/inline-files/Executive\\_Summary\\_English\\_Web.pdf](https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf). See also Nersessian, “Rethinking Cultural Genocide.”

<sup>61</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Council of Europe Treaty Series, no. 199, 27 October 2005, Article 2.

<sup>62</sup> Recommendation of the Committee of Ministers to Member States on the European Cultural Heritage Strategy for the 21<sup>st</sup> century, CM/Rec(2017), 22 February 2017.

<sup>63</sup> The Hague Convention is adopted on 14 May 1954 and entered into force on 7 August 1956. More information at: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280145bac>

- (a) oral traditions and expressions, including language;
- (b) performing arts;
- (c) social practices, rituals, and festive events;
- (d) knowledge and practices concerning nature and the universe; and
- (e) traditional craftsmanship.<sup>[64]</sup>

Moreover, cultural heritage must be understood as transcending legal definitions, with its significance situated within a broader social, sociological, and historical framework.

Against this backdrop, attacks on cultural heritage in contemporary armed conflicts, which persists as a recurring feature and have acquired a particularly alarming dimension in Ukraine and Gaza, reopen debates on cultural genocide.<sup>[65]</sup> As highlighted in international debates, cultural heritage transcends material form, embodying national consciousness and a foundation of survival. Thus, for instance, in the debate before the Congress of the Council of Europe in October 2024,<sup>[66]</sup> as well as in the preceding declaration on the destruction of Ukraine's cultural heritage,<sup>[67]</sup> it was emphasized that the targeting of Ukraine's cultural heritage bears a genocidal dimension, given its orientation toward erasing Ukrainian identity.<sup>[68]</sup> Emphasis was placed on the fact that cultural heritage is not merely material but represents a foundation of national consciousness and survival.<sup>[69]</sup> The declaration further underscored that the targeted destruction and looting of cultural property reflect a systematic policy "aimed at erasing Ukraine's historical and cultural identity, consistent with genocidal intent."<sup>[70]</sup>

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<sup>64</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2.

<sup>65</sup> See e.g., UNESCO, *Damaged Cultural Sites in Ukraine Verified by UNESCO*, 22 September 2025. <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco> or UNESCO, *Impact on Cultural Heritage*, 9 October 2025. <https://www.unesco.org/en/gaza/assessment>

<sup>66</sup> Council of Europe Office in Ukraine, *Destruction of Cultural Heritage in Ukraine*. <https://www.coe.int/en/web/kyiv/-/destruction-of-cultural-heritage-in-ukraine>

<sup>67</sup> Congress of Local and Regional Authorities of the Council of Europe, *The Destruction of Cultural Heritage in Ukraine, Declaration 9 (2024)*, 15 October 2024.

<sup>68</sup> Council of Europe Office in Ukraine, *Destruction of Cultural Heritage in Ukraine*.

<sup>69</sup> *Ibidem*.

<sup>70</sup> *The Destruction of Cultural Heritage in Ukraine, Declaration*, para. 5.

The foregoing indicates that recent armed conflicts contribute to a renewed consideration of the concept of cultural genocide, despite the absence of its formal recognition in international law. The fact that attacks on cultural sites are no longer perceived solely as assaults on the material value of a group but as attempts to annihilate its historical and cultural identity has reopened debates on cultural genocide and its possible recognition as a category within international legal and political discourse.

In light of the destruction of numerous cultural and religious monuments, international courts have addressed related cases since the 1990s.<sup>[71]</sup> These cases, as analyzed in this study, emphasize both the importance of preserving cultural heritage and its expanding recognition in safeguarding the cultural identity of peoples whose heritage is deliberately targeted. It is maintained herein that courts have established, among others, a link between the destruction of cultural heritage and the crime of genocide, which will be discussed further below.

### 3.2. The Second Draft (May 1948)

In May 1947, the first draft was presented to the UN Economic and Social Council, which then established the Ad Hoc Committee on Genocide<sup>[72]</sup> to further develop the Convention.<sup>[73]</sup> Unlike the first draft, the second, introduced in May 1948 by the Ad Hoc Committee, contained separate articles addressing acts intended to bring about the physical or biological

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<sup>71</sup> The first legal proceeding focused entirely on attacks against and the destruction of cultural heritage during an armed conflict was the ICC's case against Ahmad Al Faqi Al Mahdi. In September 2016, he was convicted of the war crime of deliberately targeting historic and religious monuments in Timbuktu, Mali, in 2012. Found guilty, he was initially sentenced to nine years' imprisonment, later reduced to seven. The situation in the Republic of Mali, in *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, 27 September 2016.

<https://www.internationalcrimesdatabase.org/Case/3321/Al-Mahdi-Case/>

<sup>72</sup> The Ad Hoc Committee, consisting of seven members – China, France, Lebanon, Poland, Soviet Union, United States, and Venezuela. See more in: Bachman, "An Historical Perspective," 46.

<sup>73</sup> See the result of their deliberations in the Report of the Committee and Draft Convention drawn up by the Committee / Ad Hoc Committee on Genocide (Dr. Karim Azkoul – Rapporteur), 24 May 1948 (hereinafter: 1948 Report of the Ad Hoc Committee on Genocide). <https://digitallibrary.un.org/record/604195?ln=en&v=pdf>

destruction of a group (Article 2)<sup>[74]</sup> and cultural genocide (Article 3). According to Bachman, this separation allowed governments to make reservations to specific provisions of the Convention, enabling them to express their disagreement with the concept of cultural genocide while still allowing its adoption.<sup>[75]</sup> Recognizing the lack of sufficient support for the inclusion of cultural genocide in the Convention, Lemkin contemplated the possibility of a future protocol to address these concerns. However, he did not pursue this idea further. His primary objective throughout was to persuade others to acknowledge that the destruction of culture was an integral part of genocide, rather than to treat it as a separate crime.<sup>[76]</sup> According to Bilsky and Klagsbrun, that “tactical separation” marked a departure from Lemkin’s holistic approach, shifting toward a narrower humanitarian law perspective.<sup>[77]</sup> It allowed states to argue that issues related to the protection of culture should be addressed through human rights instruments rather than the Genocide Convention, a point that would be emphasized in the final phase of discussions before the Sixth Committee, which will be presented in more detail below.

Cultural genocide was defined as a distinct form of genocide as:

any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on the ground of national or racial origin or religious belief such as:

- a) 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;
- b) destroying, or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.<sup>[78]</sup>

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<sup>74</sup> The 1948 Report of the Ad Hoc Committee on Genocide, Article 2, unlike the final text and the definition of protected groups, protects political groups instead of ethnic groups on the grounds of national or racial origin, religious belief, or political opinion of its members. Such physical or biological genocide involves four forms of *actus reus*: (a) killing members of the group; (b) impairing the physical integrity of member of the group; (c) inflicting on members of the group measure or conditions of life aimed at causing their deaths; (d) imposing measures intended to prevent births within the group.

<sup>75</sup> Bachman, “An Historical Perspective,” 48.

<sup>76</sup> Luck, *Cultural Genocide and the Protection of Cultural Heritage*, 23.

<sup>77</sup> Bilsky, Klagsbrun, “The Return of Cultural Genocide?,” 388-389.

<sup>78</sup> 1948 Report of the Ad Hoc Committee on Genocide, Art. 3.

From the perspective advanced in this article, the debate over the inclusion or exclusion of cultural genocide from the draft in May 1948 crystallized the core arguments of both sides and revealed the reasons why cultural genocide was ultimately rejected at the next stage of its consideration. Those advocating its removal emphasized the distinction between physical genocide – the crime that had prompted the discussion on adopting the Convention, on the one hand, and cultural genocide – a concept shrouded in ambiguity and difficult to define, on the other. They feared that its inclusion might hinder the Convention’s broader acceptance, thereby diminishing its impact. Conversely, proponents of cultural genocide argued that a human group can be suppressed in two equally destructive ways: first by eliminating its members, and second, by erasing its distinctive traits without directly targeting their lives. To them, the absence of cultural genocide within the Convention would prevent it from realizing its purpose. In the end, the Ad Hoc Committee voted six to one in favor of retaining the prohibition of cultural genocide.<sup>[79]</sup>

The definitions of cultural genocide set out in the two drafts laid the foundation for debates following 1948. They remain relevant in the twenty-first century, not merely as historical drafts of the crime in a strictly legal sense but because their elements can be discerned in subsequent discriminatory practices. This demonstrates that the components set out in the original definitions continue to function as indicators of cultural genocide in public discourse, though today they are framed within a broader context encompassing human rights, international law, and societal development, with the digital environment in particular opening further avenues for discrimination and enabling its faster and more efficient execution.

### 3.3. Third Draft Discussions (September – October 1948)

On August 26, 1948, the UN Economic and Social Council submitted the Ad Hoc Committee’s draft to the General Assembly, which subsequently forwarded it to the Sixth Committee for further review.<sup>[80]</sup> The discussions on cultural genocide before the Sixth Committee, in September and October 1948, were among the most complex aspects of the discourse,<sup>[81]</sup> likely

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<sup>79</sup> Ibidem, 17-18.

<sup>80</sup> Bachman, “An Historical Perspective,” 46.

<sup>81</sup> Mako, “Cultural Genocide and Key International Instruments,” 183.

because cultural genocide was perceived as “a rather nebulous concept.”<sup>[82]</sup> The debates leading up to the adoption of the final text<sup>[83]</sup> highlighted the delicate balance between achieving international consensus, establishing a robust and enforceable legal framework, and navigating the intersection of political considerations and legal interpretations.

The proponents of including cultural genocide in the Convention underscored that cultural and physical genocide are not separate phenomena but rather two aspects of the same phenomenon, each rooted in the same origin, driven by the same motive, and serving the same purpose – the annihilation of a human group.<sup>[84]</sup> A group may cease to exist either through the physical extermination of its members or through the eradication of its defining and enduring traits.<sup>[85]</sup> The erosion of these characteristics leads to the disintegration of its unity, even in the absence of a direct assault on the lives of its members.<sup>[86]</sup> Although physical genocide and cultural genocide are not of the same gravity, and cultural genocide may indeed be seen as “less brutal” or “less hideous,” it may still pose a threat to a particular group and lead to its destruction.<sup>[87]</sup> For some, it is more harmful than physical or biological genocide since “it worked below the surface,”<sup>[88]</sup> attempting to deprive the whole population of its ancestral culture, tradition, language, or practices. Such actions are a feature of persecutions that seek to annihilate a group.<sup>[89]</sup> While cultural genocide serves as the means or a prelude, physical genocide is its end. To condemn physical genocide while disregarding cultural genocide would be a denial of reason.<sup>[90]</sup>

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<sup>82</sup> Antonio Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2008), 130.

<sup>83</sup> All information in the following text regarding the discussion in the Sixth Committee in September and October 1948, especially the arguments put forward by both proponents and opponents of cultural genocide, can be found in: Official Records of the 3<sup>rd</sup> Session of the General Assembly. Part 1: Legal Questions: 6th Committee: Summary Records of Meetings, 21 September – 10 December 1948 (hereinafter: “1948 Sixth Committee Report”). <https://digitallibrary.un.org/record/698144?v=pdf>

<sup>84</sup> *Ibidem*, 33, 203.

<sup>85</sup> *Ibidem*, 205.

<sup>86</sup> *Ibidem*, 196.

<sup>87</sup> *Ibidem*, 194-198.

<sup>88</sup> *Ibidem*, 198.

<sup>89</sup> *Ibidem*, 202.

<sup>90</sup> *Ibidem*, 193.

The opponents of including Article 3 in the Convention argued that cultural genocide exists on a distinct plane from physical or biological genocide, one that far exceeded the intended scope of the Convention.<sup>[91]</sup> They maintained that, unlike physical genocide, cultural genocide lacked a precise legal definition, rendering it “too indefinite” or “too vague” to be effectively incorporated into the Convention.<sup>[92]</sup> This position revived arguments emphasized in earlier drafting sessions: that the Genocide Convention was primarily motivated by physical genocide, the large-scale extermination of human groups, which had profoundly shocked the conscience of humanity. Therefore, equating physical and cultural genocide was deemed inappropriate.<sup>[93]</sup> Addressing mass executions in gas chambers alongside the closure of libraries within the same binding document was seen as both illogical and disproportionate.<sup>[94]</sup> Cultural genocide, therefore, falls outside the scope of the Genocide Convention and should instead be addressed within existing human rights frameworks or as an issue concerning national minorities.<sup>[95]</sup>

The discussion also revealed positions suggesting that the recognition of cultural genocide requires a more nuanced consideration of its potential implications. Before proceeding, it would be essential, the participants argued, to clearly define which cultural groups would be granted protection. Would it extend to all cultures, including “even the most barbarous”?<sup>[96]</sup> Furthermore, they considered it crucial to determine whether state-sponsored assimilation policies (historically justified as civilizing missions) should also fall within the definition of cultural genocide.<sup>[97]</sup> They contended that the broad scope and inherent vagueness of provisions on cultural genocide would inevitably create opportunities for unwarranted interference in the internal affairs of states.<sup>[98]</sup>

After an intense debate marked by sharply opposed positions the Committee ultimately ruled – by a vote of 25 in favor, 16 against, with 4 abstentions and 13 delegations absent – against including provisions on cultural genocide in the Convention. In the end, only material destruction, whether

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<sup>91</sup> *Ibidem*, 14, 31.

<sup>92</sup> *Ibidem*, 198, 202.

<sup>93</sup> *Ibidem*, 200.

<sup>94</sup> *Ibidem*, 199.

<sup>95</sup> *Ibidem*, 15, 16, 186, 197.

<sup>96</sup> *Ibidem*, 201.

<sup>97</sup> *Ibidem*, 201.

<sup>98</sup> *Ibidem*, 186.

physical or biological, was retained.<sup>[99]</sup> The sole element associated with cultural genocide to survive from the original draft, as noted above, was the forced transfer of children from one group to another.

The foregoing analysis demonstrates that Lemkin's vision of genocide was ultimately set aside, with the concept redefined in more restrictive terms. This outcome was shaped not only by the legal complexities inherent in the crime but also, to a significant extent, by political considerations and the prevailing outlook of the time. As Bilsky and Klagsbrun have emphasized, Lemkin had consistently identified the state-centric bias of international law and its strong attachment to the protection of state sovereignty. During the drafting process, however, this protection operated as a limiting factor in understanding and addressing genocide,<sup>[100]</sup> a concern that proved accurate with the rejection of cultural genocide. Geopolitical and national interests of member states played a role in shaping the fate of the cultural genocide clause. For Bachman, the Genocide Convention was a "political project," the result of political maneuvering. It was shaped in response to the atrocities of the early twentieth century while safeguarding the interests of those involved in its negotiation.<sup>[101]</sup> As Schabas concluded, the issue aligned with the concerns of several countries, especially those mindful of the challenges within their own policies regarding minority groups, including indigenous peoples and immigrants.<sup>[102]</sup> Even today, he argues, broader interpretations of genocide are tied to concerns about the survival of minority cultures.<sup>[103]</sup>

As Moodrick-Even Khen argues, colonial states were resistant to recognizing cultural genocide, fearing that their assimilation policies toward indigenous populations in the territories they governed would be classified as acts of genocide.<sup>[104]</sup> "A state would never prosecute a crime instigated or backed by itself," Lemkin wrote.<sup>[105]</sup> As Powell concluded, the wording of the Convention was shaped with the drafters' intent to avoid

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<sup>99</sup> Ibidem, 206.

<sup>100</sup> Bilsky, Klagsbrun, "The Return of Cultural Genocide?," 378.

<sup>101</sup> Bachman, "An Historical Perspective," 53.

<sup>102</sup> Schabas, *Genocide in International Law*, 184.

<sup>103</sup> William A. Schabas, *Genocide*, Encyclopedia Entries, Max Planck Encyclopedias of International Law [MPIL], March 2023. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e804>.

<sup>104</sup> Moodrick Even Khen, "The Forcible Transfer of Children from Ukraine as Genocide," 86.

<sup>105</sup> Raphael Lemkin, "Genocide," *The American Scholar* 15, no. 2 (1946): 228.

criminalizing their own actions. Although the Convention holds significance on its own, it remains influenced by political forces beyond Lemkin's reach.<sup>[106]</sup> While Lemkin's understanding of genocide was detailed and multifaceted, Luck argued that it lacked an equally comprehensive vision for the measures and institutions necessary to prevent it. As a legal scholar rather than an expert in politics or international enforcement, Lemkin placed trust in legal solutions while giving limited attention to mechanisms that ensure compliance.<sup>[107]</sup> He overlooked the fact that, even in shaping this issue in the immediate aftermath of World War II, political interests and fears – particularly those of major colonial powers, some of which were permanent members of the UN Security Council – had an influence.

In light of the foregoing, it may be concluded that the exclusion of the concept of cultural genocide from the Convention delineated its position within international law. In strictly legal terms, cultural genocide does not constitute a crime *per se*, thereby confirming the principal argument advanced in this article. Subsequent debates, many of which remain active to this day, have approached cultural genocide more broadly, through the prism of the destruction of cultural heritage (both tangible and intangible) and the suppression of a people's cultural identity. Its connection to genocide, however, has been acknowledged only indirectly, a point that will be further examined in the following sections of this article.

## 4 | Cultural Genocide in the Twenty-First Century: Its Current Status and Potential Perspectives

The crime of genocide has remained substantively unchanged since 1948. It is defined as the physical or biological destruction of a protected group.

In 1996, the International Law Commission (ILC) reinforced this position in the Draft Code of Crimes Against the Peace and Security of Mankind, stating:

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<sup>106</sup> Christopher Powell, "What do genocides kill? A relational conception of genocide," *Journal of Genocide Research* 9, no. 4 (2007): 532.

<sup>107</sup> Luck, *Cultural Genocide and the Protection of Cultural Heritage*, 22.

As clearly shown by the preparatory work for the Convention, 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.<sup>[108]</sup>

The ILC further emphasizes that:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group; and
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part are regarded as forms of physical destruction, while
- (d) imposing measures intended to prevent births within the group and
- (e) the forced transfer of children from one group to another constitute forms of biological destruction of the group.<sup>[109]</sup>

The requirement of either physical or biological destruction of a group is now firmly established in international customary law and reflected in numerous judgments by international criminal *ad hoc* tribunals<sup>[110]</sup> and the ICJ.<sup>[111]</sup> The concept of cultural genocide has never been incorporated into the statutes of international criminal *ad hoc* tribunals or the International

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<sup>108</sup> 1996 Draft Code of Crimes Against Peace and Security of Mankind, 45-46, para. 12.

<sup>109</sup> *Ibidem*, 46, para. 12.

<sup>110</sup> See e.g., *Prosecutor v. Goran Jelisić*, Judgment, Case No. IT-95-10-T, 4 December 1999, para. 60; *Akayesu Trial Judgment*, para. 495; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgment and Sentence in the Trial Chamber, Case No. ICTR-96-3-T, 6 December 1999, para. 46; *Prosecutor v. Laurent Semanza*, Judgment and Sentence, Case No. ICTR 97-20-T, 15 May 2003, para. 315; *Prosecutor v. Radovan Karadžić*, Judgment, Case No. IT-95-5/18-T, 24 March 2016, paras. 539-540; *Prosecutor v. Zdravko Tolimir*, Judgment, Case No. IT-05-88/2-T, 12 December 2012 (hereinafter: *Tolimir Trial Judgment*), para. 746, etc.

<sup>111</sup> See e.g., International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (hereinafter: “2007 ICJ Genocide Case”), paras. 161, 344.

Criminal Court.<sup>[112]</sup> While courts recognize “recent developments”<sup>[113]</sup> and acknowledge that a group can be destroyed through the deliberate eradication of its culture and identity, ultimately leading to its disappearance as a distinct entity<sup>[114]</sup> – this perspective remains limited. An attack solely on the sociological or cultural characteristics that define a group’s uniqueness – even where specifically intended to destroy those elements – does not fall under the legal definition of genocide.<sup>[115]</sup> 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 confirmed in numerous proceedings before international courts, such attacks may legitimately be regarded only as evidence of an intent to physically destroy the group.<sup>[116]</sup>

The same conclusion was endorsed by the ICC Policy on Cultural Heritage: genocide presupposes the physical or biological destruction of a group, and acts directed against cultural heritage alone are not legally recognized as constituting genocide. Yet, when they are perpetrated in parallel with physical or biological attacks on members of a protected group, they may serve as indicators of genocidal intent.<sup>[117]</sup> The Policy underscores that cultural heritage is not merely an accessory to group identity but a constitutive element of its survival. By recognizing that attacks on cultural heritage, when combined with physical or biological assaults, may serve as

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<sup>112</sup> As O’Keeffe noted, the Rome Statute’s drafting never included a proposal to expand genocide’s definition to encompass “cultural genocide.” Roger O’Keeffe, “Cultural Heritage and International Criminal Law” in *Sustainable Development, International Criminal Justice, and Treaty Implementation*, eds. Sébastien Jodoin and Marie Claire Cordonier Segger (Cambridge: Cambridge University Press, 2013), 140.

<sup>113</sup> *Prosecutor v. Radoslav Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001 (hereinafter: “Krstić Trial Judgment”), para. 580 in connection with paras. 577-579.

<sup>114</sup> *Ibidem*, para. 574.

<sup>115</sup> *Ibidem*, para. 580.

<sup>116</sup> *Ibidem*. The Trial Chamber in this case therefore considered the deliberate destruction of mosques and houses belonging to members of the group as evidence of intent to destroy that particular group. For confirmation of the same conclusion see also e.g.: *Karadžić Trial Judgement*, para. 553; *Tolimir Trial Judgment*, paras. 741, 746; *Prosecutor v. Zdravko Tolimir*, Judgment, Case No. IT-05-88/2-A, 8 April 2015, para. 230, where the Appeals Chamber identified an error in para. 766 of the Trial Judgment. Specifically, the Trial Chamber had incorrectly concluded that the destruction of mosques constituted an additional act of genocide under Article 4(2)(c) of the Statute. See also 2007 ICJ Genocide Case, para. 344.

<sup>117</sup> ICC Policy on Cultural Heritage, paras. 79-80.

indicators of genocidal intent,<sup>[118]</sup> the Policy situates culture at the center of genocide analysis. Moreover, the acknowledgement that acts such as the forced transfer of children<sup>[119]</sup> or the systematic erosion of cultural practices<sup>[120]</sup> can contribute to the destruction of a group highlights the inseparability of cultural continuity from physical existence. In this way, the ICC Policy on Cultural Heritage affirms that safeguarding cultural heritage is indispensable to the protection of groups under international law and that violations directed against culture must be taken seriously both as evidence of genocidal intent and as aggravating circumstances in the adjudication of genocide.<sup>[121]</sup> On the basis of the foregoing, it may be concluded that the ICC Policy does not redefine genocide, insofar as it maintains the requirement of biological or physical destruction of a protected group. Nevertheless, it contributes to the contemporary understanding of cultural genocide. By linking the destruction of cultural heritage to the establishment of genocidal intent and to aggravating circumstances, contemporary law may create a bridge between the formal legal definition of genocide and the reality in which the annihilation of a culture is inseparably tied to the destruction of human groups.

In a similar vein, the United Nations Strategy and Plan of Action on Hate Speech<sup>[122]</sup> underscores that hate speech erodes social cohesion, undermines shared values, and has historically served as a precursor to atrocity crimes, including genocide.<sup>[123]</sup> Hate rhetoric serves as a tool of stigmatization and dehumanization, justifying the destruction of language, customs, religion, and cultural heritage of “others” “on the basis of who they are.”<sup>[124]</sup> By emphasizing belonging rather than exclusion, the strategy fosters a positive identification of protected communities, a feature recognized by international courts<sup>[125]</sup> as central to the determination of genocide. Although

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<sup>118</sup> *Ibidem*, para. 30.

<sup>119</sup> *Ibidem*, para. 87.

<sup>120</sup> *Ibidem*, para. 83.

<sup>121</sup> *Ibidem*, para. 78.

<sup>122</sup> UN Strategy and Plan of Action on Hate Speech, United Nations, 18 June 2019. The Strategy was developed within the framework of the UN Working Group on Hate Speech and is coordinated by the Secretary-General’s Special Adviser on the Prevention of Genocide.

<sup>123</sup> United Nations Strategy and Plan of Action on Hate Speech Detailed Guidance on Implementation for United Nations Field Presences, September 2020, 7.

<sup>124</sup> *Ibidem*, 2.

<sup>125</sup> Namely, by stressing the necessity of positively identifying the group and the importance of ensuring that the targeted group is not defined negatively as

the strategy does not employ the term “cultural genocide,” it recognizes that hate speech can suppress fundamental rights, including the survival of groups protected under the Genocide Convention. By framing hate speech as a threat to democratic values and by underscoring the safeguarding of cultural diversity, the strategy promotes human rights, non-discrimination, and intercultural dialogue,<sup>[126]</sup> thereby contributing to the preservation of diverse identities. Taken together, these instruments underscore that assaults on culture and identity, whether through physical destruction or verbal incitement, must be treated as integral components of genocide prevention. At the same time, they contribute to a broader understanding of the protection of cultural heritage within the context of cultural genocide.

This process began immediately after the adoption of the Genocide Convention and the 1954 Hague Convention and has evolved over the years through the adoption of numerous instruments on the protection of human rights and cultural heritage, continuing to the present day. It may be argued that the rethinking of cultural genocide was propelled by the dynamics of decolonization and the growing political activism of indigenous peoples throughout the 1970s and 1980s, which created political space for its return to international discourse.<sup>[127]</sup> This refers to the establishment of the UN Working Group on Indigenous Populations in 1982.<sup>[128]</sup> A decade later, it introduced the Draft Declaration on the Rights of Indigenous Peoples (hereinafter: “1993 Draft”).<sup>[129]</sup> It may be argued that cultural genocide might be

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a “non-Serb national, ethnic, or religious group” (as referenced in the Applicant’s final submissions in *Bosnia and Herzegovina v. Serbia and Montenegro*), the Court concluded: “It is a matter of who those people are, not who they are not.” 2007 ICJ Genocide Case, paras. 193, 196, 368. The same criterion was also accepted in proceedings before the ICTY, see e.g.: *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-A, March 22, 2006, paras. 16–27; Jelisić Trial Judgment, paras. 71–72; Karadžić Trial Judgment, para. 541.

<sup>126</sup> United Nations Strategy and Plan of Action on Hate Speech Detailed Guidance on Implementation, 42.

<sup>127</sup> See e.g., Luck, *Cultural Genocide and the Protection of Cultural Heritage*, 26.

<sup>128</sup> It was established as one of the six working groups overseen by the Sub-Commission on the Promotion and Protection of Human Rights. See more at: <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>

<sup>129</sup> Discrimination Against Indigenous Peoples. Report of the Working Group on Indigenous Populations on its eleventh session; Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fifth session, Agenda item 14, E/CN.4/Sub.2/1993/29, 23 August 1993. <https://www.refworld.org/reference/themreport/unsubcom/1993/en/91751>

perceived differently today and might have acquired greater legal significance<sup>[130]</sup> if the rejected provision of Article 7 from the 1993 Draft had been accepted. That provision recognized the collective and individual rights of indigenous peoples, ensuring they would not be subjected to ethnocide or cultural genocide. It outlined measures of prevention and redress in relation to practices such as the erosion of cultural identity, dispossession of lands, forced population transfers, imposed assimilation, and targeted propaganda.<sup>[131]</sup> According to Akhavan, had that provision been adopted, it might have reintroduced an even broader concept of cultural genocide than that proposed in first draft of the Genocide Convention.<sup>[132]</sup> After 1993, as Nersessian concludes, discussions of cultural genocide remained on the margins of debates, occupying a secondary position in contemporary interpretations of genocide and group destruction.<sup>[133]</sup>

The concept was ultimately omitted from the final text of the 2007 UN Declaration on the Rights of Indigenous Peoples,<sup>[134]</sup> which nevertheless recognized their right, among others, “not to be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”<sup>[135]</sup> It is noteworthy that, although the term “cultural genocide” was removed from the final text, the list of prohibited acts contained in the discarded Article 7 was largely retained in the final version of Article 8. Rather than guaranteeing protection against ethnocide and cultural genocide, Article 8 provides that indigenous peoples have the right “not to be subjected to forced assimilation or the destruction of their culture.”<sup>[136]</sup> On this basis, Sandhar argues that, while the term “cultural genocide” was omitted from the final text, all the substantive

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<sup>130</sup> Although UN General Assembly declarations do not have the binding force of international law, they can still significantly influence the development of customary law.

<sup>131</sup> Draft Declaration on the Rights of Indigenous Peoples, Article 7.

<sup>132</sup> Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 254.

<sup>133</sup> David Nersessian, “Rethinking Cultural Genocide Under International Law, Human Rights Dialogue (1994-2005): Cultural Rights,” *Carnegie Council for Ethics in International Affairs*, 22 April 2005. <https://www.carnegiecouncil.org/media/series/dialogue/human-rights-dialogue-1994-2005-series-2-no-12-spring-2005-cultural-rights-section-1-rethinking-cultural-genocide-under-international-law>

<sup>134</sup> UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 13 September 2007.

<sup>135</sup> *Ibidem*, Art. 7(2).

<sup>136</sup> Compare rejected Article 7 from the Draft and Article 8 of the Declaration on the Rights of Indigenous Peoples (final text).

elements of the concept remain, thereby providing a credible foundation for reassessing cultural genocide, even despite the declaration's non-binding nature.<sup>[137]</sup>

Notwithstanding the Genocide Convention's refusal to recognize cultural genocide, even a brief analysis of the aforementioned instruments shows that the concept may today be understood as a multidimensional process in which identity is destroyed through various forms of violence, not only by physically annihilating cultural heritage, but also through hate speech, stigmatization, and the suppression of language, culture, or traditions directed toward systematic eradication. This becomes particularly evident when cultural heritage is seen not merely in material terms, but also as intangible and embodied in individuals who sustain and transmit it. Its destruction thus effaces the elements by which one group is distinguished from another.

Accordingly, numerous authors have argued for the need to reaffirm the concept of cultural genocide. As awareness of indigenous rights has grown, and genocide studies have undergone a process of decolonization, recognition of cultural destruction as a method of genocide has gained increasing support. In Bachman's view, legal frameworks must adapt to this reality.<sup>[138]</sup> This requires amending the Genocide Convention to include the intentional destruction of cultural heritage, both tangible and intangible, within the definition of the crime.<sup>[139]</sup> As Gerstenblith argues, Lemkin's perspective should be revisited as recognizing cultural and heritage destruction as either a distinct form of genocide or an integral part of physical genocide.<sup>[140]</sup> Cultural genocide should be treated with the same significance as physical genocide rather than being regarded as a secondary issue.<sup>[141]</sup> By defining genocide solely in terms of its physical and biological aspects, a group may remain intact in form while its collective identity is profoundly and irreversibly damaged. In other words, the current interpretation of genocide "preserves the body of the group but allows its very soul to be

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<sup>137</sup> Sandhar, "Cultural Genocide in Tibet," 181.

<sup>138</sup> Bachman, "An Historical Perspective," 57.

<sup>139</sup> Thake, "The Intentional Destruction of Cultural Heritage," 21.

<sup>140</sup> Patty Gerstenblith, *A Crime Against Property or a Crime Against People?*, *The John Marshall Review of Intellectual Property Law* 15, (2016): 392.

<sup>141</sup> Sandhar, "Cultural Genocide in Tibet," 194.

destroyed.”<sup>[142]</sup> For Nersessian, it is necessary to re-examine cultural genocide and address it through a dedicated treaty.<sup>[143]</sup>

However, in light of the foregoing, it is important to highlight that recent developments have not altered the concept of the crime of genocide, nor is there any indication that a revision of the Convention’s definition is presently under consideration. The destruction of tangible cultural heritage – such as the demolition of a monument of a particular significance to a group – will undoubtedly cause shock, consternation, or grief; yet it will not result in the physical extermination of the group as such. While such destruction may hold symbolic and emotional significance for the group, it is unlikely to be fatal to the survival of its cultural identity, which may persist through other forms of heritage preservation.

On the other hand, it must be borne in mind that intangible heritage presupposes individuals as carriers of a particular cultural identity; it does not exist without humans. It is transmitted from generation to generation<sup>[144]</sup> and is constantly recreated by communities and groups in response to their environment, their interaction with nature, and their history, thereby providing them with a sense of continuity and identity. Even so, the destruction of such identity does not fall within the scope of the Genocide Convention.

This does not mean that such conduct will remain unpunished. Even though many such acts may not be prosecutable as genocide, it is important to keep in mind, especially when discussing cultural genocide, that conduct that does not meet the legal threshold for genocide may still constitute another serious crime.<sup>[145]</sup> In other words, even where such destruction, in accordance with the existing case law, serves only to establish genocidal *mens rea* rather than the *actus reus*,<sup>[146]</sup> it may still amount to a violation of other legal norms, such as crimes against humanity or war crimes.

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<sup>142</sup> Nersessian, “Rethinking Cultural Genocide.”

<sup>143</sup> *Ibidem*.

<sup>144</sup> As concluded by Truth and Reconciliation Commission of Canada in elaborating the existence of cultural genocide against Canadian indigenous peoples: “...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.” Truth and Reconciliation Commission of Canada, 1.

<sup>145</sup> Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 249. See also: Ana Filipa Vrdoljak, “The Criminalisation of the Intentional Destruction of Cultural Heritage,” in *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives*, eds. Emanuela Orlando and Tiffany Bergin (London: Routledge, 2016), 16. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2676470](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676470)

<sup>146</sup> Vrdoljak, “Cultural Heritage in Human Rights and Humanitarian Law,” 298.

For some authors, however, this is not sufficient. They argue that, while legal accountability for certain crimes may be established, the discussion should not end there; the law must also address forms of harm that remain unrecognized. Cultural genocide threatens not only individual cultural rights but also a group's collective identity.<sup>[147]</sup> For Guercio and Massidda, identity is not an individual possession but rather a structural element of the social order. Culture, in this sense, functions as a constructed system encompassing the collective beliefs, behaviors, knowledge, or values that shape how people live, what they possess, how they act, and how they think.<sup>[148]</sup> When those who embody and preserve this heritage are lost, the cultural identity they carry risks being not merely diminished, but entirely and irreversibly erased.

## 5 | Conclusion

In light of the foregoing, the following question arises: if cultural genocide lacks formal legal status, why does it remain a subject of sustained debate? The answer is not straightforward. It transcends the strict confines of legal debates and the limitations imposed by the Genocide Convention.

In extra-legal discourse, cultural genocide is often justified through social and historical arguments about the destruction of culture, frequently disregarding legal terminology altogether. The reality is that numerous human rights violations continue to occur through the destruction of cultural heritage. Courts also address the destruction of cultural monuments, holding perpetrators accountable for core crimes. Although attacks on cultural property are not classified as a distinct act of genocide and courts do not use the term "cultural genocide," the destruction of a group's cultural manifestation must still be considered in cases where genocide is being determined, insofar as it may serve as evidence of the perpetrator's

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<sup>147</sup> Nersessian, "A Modern Perspective: The Current Status of Cultural Genocide Under International Law," 76.

<sup>148</sup> Laura Guercio, Paolina Massidda, "Cultural Heritage: A Critical Element of the Right to Education and the Right to Identity of Children in Armed Conflict," in *Heritage in War and Peace. Law and Visual Jurisprudence*, eds. Gianluigi Mastandrea Bonaviri and Mirosław Michał Sadowski (Cham: Springer, 2024), 496. [https://doi.org/10.1007/978-3-031-47347-0\\_31](https://doi.org/10.1007/978-3-031-47347-0_31)

intent. Legally, the absence of the term “cultural genocide” does not exempt perpetrators from accountability for the destruction of cultural heritage.

Why, then, is it so important to insist on the term “cultural genocide”? Does this term, at least seemingly, carry particular force because it is associated with genocide, the gravest crime of all? Conceived by a scholar who sought to address personal trauma through his work on the Convention’s adoption, genocide is linked to the gravest human rights violations, large-scale massacres, concentration camps, and the systematic extermination of entire groups. It holds a “stigma” of being more controversial and more difficult to prove in court than any other crime, presenting distinct legal challenges. The requirement of *dolus specialis* makes it particularly demanding for those seeking to establish its existence in legal proceedings. Yet genocide also exceeds the boundaries of legal discourse. Its emotional weight is profound: it is not only an undeniable source of immense suffering and grief but also a lasting reality that does not readily heal and leaves an indelible mark on those affected. Genocide is a crime that is never forgotten. Nersessian’s observation that the prevailing understanding of genocide protects the body but not the soul highlights the metaphor of “soul destruction,” thereby imparting particular gravity to the notion of cultural genocide. When cultural heritage is conceived as a symbol of identity and belonging, its eradication amounts to the destruction of a community’s cultural identity and disrupts the continuity of collective memory. Beyond this, cultural heritage forms the legacy of humankind as a whole, and its destruction elicits not only strong condemnation but also universal empathy. It is perhaps this intricate interplay between legal complexity and the profound emotional weight of this gravest crime that has kept the idea of cultural genocide “alive,” even nearly eight decades after its formal rejection.

Emotions, however, extend beyond legal debate and do not determine legal conclusions. As horrifying and tragic as genocide undoubtedly is, it remains, above all, a legal term. Regardless of how critically its definition is analyzed and its constituent elements dissected, one fact remains: genocide is a crime whose legal foundation was established long ago, and, at present, there are no clear indications that this definition is likely to change. It is an orchestrated crime of physical or biological destruction targeting a protected group – national, religious, ethnic, or racial. Other forms of destruction fall outside its legal scope, and no other groups remain under its protection. The debate surrounding cultural genocide nearly eight decades ago may serve as an argument for its re-examination today.

However, it is equally true that the concept was ultimately discarded in earlier debates, and subsequent legal documents have not restored it.

On the other hand, based on the foregoing, it may be concluded that current debates – reflected in the documents analyzed in this article as well as in scholarly appeals for the reaffirmation of cultural genocide – may create grounds for its reconsideration. Rooted in the development of human rights and in the contemporary understanding of cultural heritage, with attention devoted to the protection of intangible heritage, these debates may furnish conditions for a renewed recognition of cultural genocide in the years to come.

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