Perspectives on Cultural Genocide:

From Criminal Law to Cultural Diversity

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> *'World culture is only as strong and vital as the spiritual forces which are brought to it by various contributing peoples. If these peoples are annihilated, their cultural heritage is also destroyed. The destruction of a people by genocide results in an immediate, irretrievable loss to world culture.'* Raphael Lemkin[1]

Introduction

Cultural genocide broadly refers to "the extermination of a culture that does not involve physical extermination of its people."[2] In the words of the International Law Commission, acts of cultural genocide cover "any deliberate act committed with the intent to destroy the language, religion, or culture of a group, such as 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 or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other

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[1] Raphael Lemkin, 'Genocide a New International Crime Punishment and Prevention', 17 Revue Internationale de Droit Penal (1946), at 364.

[2] Kurt Jonassohn and Frank Chalk, 'A Typology of Genocide and some Implications for the Human Rights Agenda' in Isidor Wallimann, Michael N. Dobkowski, Richard L. Rubenstein (eds), *Genocide and the Modern Age: Etiology and case studies of Mass Death* (Syracuse University Press, 1987), p. 11.

cultural institutions and objects of the group."[3] Cultural genocide is based on the idea that a group can be destroyed by attacks on its capacity to preserve and transmit its own specific culture which would then disappear. There are plenty of illustrations of such cultural assaults across the globe. For example, in a 2002 speech to the European Parliament, the Dalai Lama stated: "[T]he Chinese authorities view Tibet's distinct culture and religion as the source of threat of separation. Hence as a result of deliberate policies an entire people with its unique culture and identity are facing the threat of extinction."[4] The speech from the Dalai Lama is representative of the claim often made that the ban on Tibetan cultural expression by the Chinese authorities is intended at destroying the Tibetan culture and as such is constitutive of cultural genocide.[5] Tibet is not isolated as situations of oppression and intentional destruction of minority cultures abound throughout history. This includes, for examples, the destruction by Azerbaijan of thousands of medieval Armenian gravestones at a cemetery in Julfa; the attack on the culture of Eastern European Jews living within Russian-controlled areas before the Holocaust; or the Khmer Rouge regime proclaimed policy of return to 'Year Zero' which notably included the destruction of most of Cambodia's Buddhist temples.[6]

The notion of cultural genocide sits uneasily within the definition of the crime of genocide, as "the crime of the crimes" refers to the intent to physically exterminate a people.[7] Despite the criminal law definition of genocide, which supports the recognition of physical extermination only, the issue of cultural genocide keeps making the headlines. Mention of the term cultural genocide is itself seen as controversial, with on the one-hand positivists, who see the term as falling outside the legal framework, and activists asserting that the law on genocide ought to include cultural genocide. Supporters of the concept argue that international law should recognise that the systematic and intentional destruction of the culture of a specific group constitutes genocide. Behind the facade of positivists versus activists, the debate on the need to recognise that intentionally destroying a culture does constitute genocide is often a

[3] Report of the International Law Commission on the Work of Its Forty-Eighth Session,1996, UN Doc. A/51/10
[4] Speech of His Holiness the Dalai Lama to the European Parliament (Oct. 24, 2001)
[5] See: Barry Sautman, 'Cultural Genocide and Tibet', 38 Tex. Int'l L.J (2003) 173
[6] See: Lawrence Davidson, *Cultural Genocide* (Rutgers University Press, 2012).
[7] See: William Schabas, 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?', 35.2 New England Law Review (2001), 287-302

quarrel between criminal lawyers and minority and indigenous peoples' rights activists.[8] Minorities and indigenous peoples often are the victims of forced assimilation policies that are usually rooted in cultural oppression and destruction. The debate between criminal lawyers and minority rights activists has some clear historical roots. Historically, the question of whether cultural annihilation does constitute genocide, or not, has been at the centre of the development of international human rights law. When in December 1948 the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted, its sister, the Universal Declaration of Human Rights (UDHR) was meant to deal with the issue of protection of minorities. As this never materialised in the UDHR, and since the Genocide Convention rejected the notion of cultural genocide, the intentional destruction of a minority culture fell between two stools as not being covered by international criminal law and forgotten as a human rights issue. This debate on whether cultural destruction of group-specific cultural traits should be protected under criminal law or minority rights has, since, remained a central pillar of contention.

The present chapter wishes to examine how from a criminal law concept, cultural genocide has moved to a concept to protect cultural diversity, and notably the cultural rights of minorities and indigenous peoples. To undertake such a journey, the chapter will first examine how, and why, the crime was rejected under international criminal law. Based on this analysis, it will then examine how human rights law, which was meant to address the issue of cultural protection of minorities, has in fact left this area of the law unachieved. Based on such analysis, the second section will assess to what extent the notion of cultural genocide can act as an important tool for conflict prevention when minorities' cultural assets are under attack. The third section will explore how the indigenous peoples' rights movement has renewed the idea that prohibiting cultural genocide constitutes an essential elements of human rights law, by both focusing on instruments against assimilation and cultural annihilation, and promoting the notion of cultural diversity.

1: Cultural Genocide and International Criminal Law

[8] See: William Schabas, 'Developments Relating to Minorities in the Law on Genocide', in Kristin Henrard & Robert Dunbar (eds.), *Synergies in Minority Protection, European and International Law Perspectives* (Cambridge University Press, 2008).

Going back to the origin of the concept of genocide, Lemkin's work shows that he had envisaged that genocide covered different types of 'techniques', including physical, biological and cultural.[9] Lemkin included cultural genocide because it would protect groups that could not continue to exist without the "spirit and moral unity" provided by their culture.[10] In his work he has generally concentrated significantly on highlighting how national groups (or national minorities) greatly contribute to humanity's cultural wealth and how such cultures ought to be protected.[11] From his perspective, there was no doubt that the intentional destruction of culture, or the cultural artefacts of a national group, constituted a 'technique' of genocide.

1.1. The Drafting of the Convention

Based on Lemkin's proposal, the initial Secretary-General's proposed draft included an article prohibiting cultural genocide, including proscriptions of national languages and the systematic destruction of monuments or other historical, artistic, or religious objects.[12] However, already at this early stage, two of the three experts nominated to comment on the draft, Donnedieu de Vabres and Pella, held 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.[13] The third expert, Lemkin, was supportive of the inclusion. This early disagreement amongst the experts is indicative of the debate which was going to mark the issue of cultural genocide over the next steps of the drafting process. This debate also echoed some of the governments' positions as out of the seven States that replied to the initial Secretary-General's appeal for comments, both France and the United States opposed the inclusion of cultural genocide.[14]

At the next stage of the drafting process, one of the tasks of the Ad Hoc Committee established to develop an initial draft convention was to examine whether the scope of the convention should be limited to physical and biological genocide. The Ad Hoc

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[9] Lemkin's reviews of the different techniques included: political, social, cultural, economic, biological, physical, religious, and moral. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress* (Carnegie Endowement for World Peace, 1944), pp. 82 -90

[10] *Ibid.*, p. 85.

[11] *Ibid.* on pp. 90-95, but see also 'Totally Unofficial' (unpublished autobiography), in United States of America, Hearing before the Committee on Foreign Relations, United States Senate, 5 March 1985 (Washington: US government Printing Office, 1985).

[12] Draft Convention on the Crimes of Genocide, U.N. ESCOR, 5th Sess., at 6-7, U.N. Doc. E/447 (1947).

[13] See: UN Doc. E/447, p. 27

[14] For details, see: William Schabas, *Genocide in International Law* (Cambridge University Press, 2nd ed., 2009), p. 65

Committee's draft proposed the inclusion of an article prohibiting 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.[15]

This draft article gave rise to a "fairly full discussion" between supporters and opponents on the inclusion of cultural genocide.[16] On one side of the spectrum were the members who highlighted that "the Convention would fail fully to achieve its objectives if it left out 'cultural genocide'", with one of the members stating:

> The cultural bond was one of the most important factors among those which united a national group and that was so true that it was possible to wipe out a human group, as such, by destroying its cultural heritage, while allowing the individual members of the group to survive. The physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime.[17]

On the other side of the spectrum, several members raised the issue that it would be difficult to fix the "limits of 'cultural' genocide, which impinged upon the violations of human rights and the rights of minorities."[18] On a more pragmatic point, they also highlighted that the "inclusion of cultural genocide in the Convention might prevent many countries from becoming parties to the Convention and jeopardize its success."[19] Whilst the United States were vigorously opposed to such inclusion,[20] and France uneasy about it, the other States did favour the inclusion of such an article.[21]

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[15] Draft Convention on the Crimes of Genocide, U.N. ESCOR, 5th Sess., at 6-7, U.N. Doc. E/447 (1947). See: Summary Record of Meetings, U.N. ESCOR, 7th Sess., Supp. No. 6, at 6, U.N. Doc. E/3/SR.175-225 (1948).
[16] Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794), p. 17
[17] Summary Record of the Fifth Meeting of the Ad Hoc Committee on Genocide, U.N. ESCOR, 6th Sess., 5th mtg., at 2-3, U.N. Doc. E/AC.25/SR.5 (1948).
[18] Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794), p. 17
[19] *Ibid.*
[20] See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (E/794), p. 17
[21] The text was adopted by 5 votes against 2, see: UN Doc. E/AC.25/SR. 14, p. 14, it worth highlighting that China was a firm supporter of the inclusion of cultural genocide, see: UN Doc. E/AC.25/9

When the Sixth Committee finally met to adopt the draft text, the issue of cultural genocide resurfaced as being a contentious idea. Ultimately, the Committee voted to limit punishable acts of genocide to physical and biological genocide highlighting that the issue of cultural destruction should be addressed elsewhere as a human rights issue. The debate took place between two main camps, the States totally opposed to cultural genocide,[22] and the States favouring the prohibition of cultural genocide but opposing the draft as being too broad. For example, the Philippines cautioned that cultural genocide "could be interpreted as depriving nations of the right to integrate the different elements of which they were composed into an homogenous whole, as for instance in the case of language."[23] Sweden highlighted that, for example, its conversion policies of the Lapps (Sami) to Christianity could lead to an accusation of cultural genocide.[24] And Brazil warned that "some minorities might have used it as an excuse for opposing perfectly normal assimilation in new countries."[25] These comments are very illustrative of the concerns expressed by several States, both colonial and post-colonial States, about their policies of assimiliations towards minority and indigenous peoples groups within their territory. It might be worth bearing in mind that the 1948 Genocide Convention was drafted at a time when colonisers were worried that their colonial acts might qualify as cultural genocide. Consequently, by a majority of twenty-four States to sixteen (with four abstentions), the Committee excluded cultural genocide from the text of the Convention. In a last attempt to revive the idea, the Soviet Union proposed an amendment to re-incorporate the notion of cultural genocide at the General Assembly level, which was ultimately defeated by a large margin.[26]

The only inclusion of what could be classified as cultural genocide comes under Article II(e) which addresses "forcibly transferring children of the group to another group." This covers situations where offenders intentionally forcibly transfer children from one group to another with the intention to destroy the group in a cultural sense. Overall, the drafting history of the Convention clearly shows that the political will was to address cultural rights of the minorities under the banner of human rights law but not

[22] France, Belgium, Sweden, Iran, United Kingdom, India, United States, Peru, Netherlands, for analysis, see Schabas, *supra note* 12, p. 211.
[23] UN Doc. A/C.6/SR.65 (Paredes, Philippines)
[24] UN Doc. A/C.6/SR.83 (Petren, Sweden)
[25] UN Doc. A/C.6/SR.83 (Amado, Brazil)
[26] Fourteen in favour, thirty one against, ten abstentions, see: UN Doc. A/PV.179. See also: see also H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden, Martinus Nijhoff, 2008), 2070-2071.

as a criminal issue, or at least not as a crime within the Genocide Convention. In terms of standard setting, the statutes of the two *ad hoc* tribunals for the Former Yugoslavia[27] and Rwanda[28] as well as the Statute of the International Criminal Court[29] literally reproduce the definition of genocide contained in the Genocide Convention, hence rejecting cultural genocide.

1.2. Contemporary Claims

The rejection of cultural genocide from the Convention's text has not stopped claims of cultural genocide reaching criminal courts. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has received several claims relating to attacks against cultural properties of ethnic groups which have often been a target during the conflicts that followed the collapse of the ex-Yugoslavia. This has notably included the destruction of libraries, religious sites, and attacks on cultural leaders of the different ethnic and religious groups. The case against Radislav Krstić attracted a debate regarding the cultural aspect of the genocide which took place in Sebrenica. While the tribunal highlighted that cultural genocide had been rejected from the Genocide Convention, it stated:

> (…) that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[30]

This indicates that while the intentional cultural destruction might not in itself be a constitutive element of the crime of genocide, it could serve as an evidence of the intentional aim of killing members a national, ethnical, racial or religious group. In this contetx, the cultural destruction provided an important element to determine the existence of the specific intent (*dolus specialis*) required for genocide. As noted by Judge Shahabudden in its dissenting opinion in the Appeal Court: "...provided that there is a listed act (being physical or biological), the intent to destroy the group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group

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[27] Statute of the International Criminal Tribunal for the Former Yugoslvaia, UN Doc. S/RES/827 (1993), annex, Art. 4
[28] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1993), annex, Art. 2
[29] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 6
[30] Trial Chamber, *Prosecutor v. Radislav Krstic* , Case No. IT-98-33-T, 2001, para. 580

in whole or in part."[31] This was endorsed in the case against Blagojević in which the tribunal adopted a similar line of reasoning, highighting that while it was not arguing for the recognition of cultural genocide, it nonetheless recognised that the specific intent could be proven by culturally targetes attacks (in that case forced relocation). In doing so the tribunal highighted that:

> While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land.[32]

What is emerging from the jurisprudnce of the ICTY is the notion that targeted cultral attacks against a specific group could contribute as evidence to prove the specific intent to destroy in whole, or in part, a national, religious or ethnic group.

This approach had found some echoes within the jurisprudence of the International Court of Justice (ICJ) which has also received claims regarding cultural destruction in the former Yugoslavia. In the case of *Bosnia v. Serbia* the ICJ highlighted that while there was some conclusive evidence of deliberate destruction of the historical, cultural and religious heritage of the Bosnian Muslims (notably in Srebrenica), "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."[33] However, the court also endorsed the idea that such cultural attacks might be considered as evidence of intent to physically destroy the group. Likewise, in its 2015 decision regarding the claim from Croatia that Serbian forces had intentionally destroyed and looted assets forming part of the cultural heritage and monuments of the Croats, the court highlighted that cultural genocide was not part of the crime defined in the Genocide Convention. However, the Court also ruled that while cultural attacks could not by themselves be part of the *actus reus* of genocide, it stated that "it may take account of attacks on cultural and religious property in order to establish an intent to destroy the group physically."[34] Overall, looking at some of the recent cases regarding

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[31] *Prosecutor* v. *Krstic* (Case no. IT-98-33-A), Partial Dissenting Judgment of Judge Shahabuddeen, 19 April 2004, para. 54

[32] *Prosecutor* v. *Blagojević*, Case No. IT-02-60-T, Trial Judgment, para. 666.

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* Judgment, I.C.J. Reports 2007*,* p. 43, at para. 344.

[34] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, para. 388-90

claims of cultural genocide within the international jurisprudence, it appears that although judges are clear that cultural genocide is not part of the convention text, cultural attacks against a specific group could serve as evidence to prove the intent to physicaly destroy of group.[35] Hence, it could be concluded that from the perspective of international criminal law, while cultural gencide is not a prohibited crime under the Genocide Convention, cultural attacks against particular national, ethnical, racial or religious group could form evidence of a specific intent to to committ genocide.

2. Minority Rights and Conflict Prevention

As indicated earlier, the lack of integration of cultural destruction within the Genocide Convention was meant to be compensated by the introduction of a strong protection of the cultural rights of the minorities within the UDHR. The dominant agreement being that the protection of the cultural rights of the minorities should be an issue of human rights law rather than criminal law. However as examined below, this promise was never totally fulfilled.

2.1. The Forgotten Minority Rights Framework

Historically the rights of minorities have played an important role, if not a central one, to the development of international law. The Treaty of Westphalia, which is often seen as one of the first international instruments, was in many ways concerned with the protection of religious minorities.[36] The principal international treaties that emerged during the League of Nations period were dedicated to the rights of minorities.[37] With the emergence of the United Nations, the mandate given by the Economic and Social Council to the Commission on Human Rights included the rights of minorities as part of its terms of references.[38] At the first meeting of the Commission, a general support for the recognition of the importance of minority rights as part of a future universal human rights declaration seemed to be prevailing.[39] But not unlike the debates that took place

[35] See also: *Kjuradj Kusljic* case, Judgment, Federal Supreme Court, 21 February 2001 [BGH 3 StR 244/00 - Bechluss v. 21. February 01]
[36] See: Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991)
[37] See: P. de Azcárate y Flórez, *The League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace, 1945).
[38] UN Doc. A/CONF.32/6
[39] See: William Schabas, 'Les droits des minorités: Une déclaration inachevée', in *Déclaration universelle des droits de l'homme 1948-98, Avenir d'un idéal commun* (La Documentation française, 1999), p. 226

during the drafting of the Genocide Convention, the process was going to be more problematic.

The Commission had established a redaction committee for the task ahead; however, the committee had received only a few proposals that specifically integrated minority rights. Amongst such proposals was the proposal put forward by Lauterpacht which included the following article:

> In States inhabited by a substantial number of persons of a race, language and religion other than those of the majority population, persons belonging to such ethnic, linguistic or religious minorities shall have the rights to establish and maintain, (...) their schools and cultural and religious institutions and to use their own language before the courts and other authorities and organs of the state.[40]

In the words of Lauterpacht: "the claim of the individual to the preservation and development of his ethnic identity by at least some education in his native language and by being allowed to use it before the administrative and judicial authorities of the State and to maintain cultural institutions of his ethnic group cannot be disregarded without doing violence to a principle of justice and stultifying human personality."[41] The draft article proposed by Lauterpacht played a pivotal role as it was included in the draft text of the declaration proposed by the committee.[42]

However when the text reached the States' representatives some serious disagreement started to appear. The Commission was still uneasy with the inclusion of minority rights, and several States made comments against. For example, Egypt stated that the Declaration should be about individual rights, not rights of minorities, suggesting that a specialized convention would be a better forum for minority rights protection.[43] Roosevelt was also adamantly opposed to the inclusion of minority rights stating: "provisions relating to minority rights had no place in a declaration of human rights."[44] Ultimately, the final version of the Declaration adopted by the Commission in June 1948 did not contain any mention of minority rights.[45]

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[40] Hurst Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945), p. 151 (article 12).
[41] Id., p. 153
[42] UN Doc. E/CN.4/AC1.3/3, p. 16
[43] UN Doc. E/CN.4/82/Add.3, p. 2
[44] Summary of Record of the Seventy-Third Meeting, UN Doc. E/CN.4/SR.73 at 5.
[45] The inclusion of minority rights was rejected by a vote of 10 versus 6, with the Soviet Union making a specific statement indicating its opposition to such rejection. See: UN Doc. E/CN.4/SR74, p. 5

Despite this rejection by the Commission, the issue was revived at the General Assembly level due to pressure from the Soviet Union, Czechoslovakia and Denmark who supported the inclusion of minority rights within the Declaration.[46] The main opposition came from North and South American countries as well as Turkey, Greece, the United Kingdom, New Zealand and Australia. Following intense debates, a resolution aiming at sending the issue of minority rights for further study by the Sub-Commission was adopted. Ultimately, despite the intense lobbying exercised notably by the Soviet delegation to ensure that minority rights were included in the Declaration, the General Assembly adopted a resolution rejecting minority rights from the text of the Declaration and sending back the issue of minorities for further study.

On the 10th of December 1948, the UDHR was adopted without any mention of minority rights. This came a day after the adoption of the Genocide Convention that did not include the notion of cultural genocide. As noted earlier, the prevailing view within the committee in charge of the drafting of the Genocide Convention was that ultimately the protection of cultural rights was more an issue of human rights and more specifically of minority rights. The inclusion of minority rights, and their right to culture, was nonetheless rejected within the text of the Declaration. Hence, on the twilight of the 10th of December 1948, a day after the adoption of the Genocide Convention, international law had failed to provide a clear legal framework of protection for the cultural rights of the minorities. While clearly the issue had been central to the debates of the two drafting committees (Third and Sixth), ultimately the political opinion of the day won the argument in a tacit agreement not to include such protection either as a human rights issue, or as a crime under international law.

Despite the fact that minority rights did re-emerge in the ICCPR[47], the fact that the UDHR omitted to refer to minority rights cannot be underestimated. As summarised by Humphrey in the late 1960's: "[i]n the higher bodies of the United Nations, at least, there has never been any serious intention of doing anything about minorities."[48] Despite more recent evolutions, and notably the adoption of the UN General Assembly of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious

[46] Mr. Pavlov, the Soviet delegate, was adamant that the declaration ought to insure the right for minorities to use their mother tongue, enjoy their own culture and develop their own music. See: UN Doc. A/C.3/307, pp. 719-720

[47] See article 27 of the ICCPR

[48] John Humphrey, 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities', 62 American Journal of International Law (1968), 872.

or Linguistic Minorities in 1992, and the developments regarding minority rights at the regional levels, the promises to protect the cultural rights of the minorities still feels very unachieved. It is certain that minority rights have since then developed as a comprehensive field of international law, however the lack of integration and recognition of the essential need to address and punish cultural attacks against national, ethnical, racial or religious group certainly represent a serious weakness of the international legal edifice.

2.2. Minority Rights as Genocide Prevention

The rise of ethnic conflicts in the period of the 1990's has led to a renewed focus on minority rights. With the move from inter-States wars to predominately ethnic conflicts, the protection of the minorities became seen as an essential element of conflict prevention. Under this agenda of conflict prevention, the issue of protecting the cultural assets of the minorities has resurfaced. In situation of ethnic tensions, violations of the rights of minorities are often a clear sign of an escalation towards a conflict situation.[49] A new approach focusing on minority rights as a tool to prevent conflicts and eventually genocide has been voiced in several statements adopted by international organisations during the start of the new century. For example, the outcome document of the 2005 World Summit stated:

> We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious, and linguistic minorities contributes to political and social stability and peace and enriches the cultural diversity and heritage of society.[50]

There have been numerous institutional developments within the UN following such approach, a Special Adviser to the Secretary-General on the Prevention of Genocide was appointed, a Peace Building Commission has been formed, the Secretary-General has expanded his 'good offices' for conflict mediation, and in 2005, the former Commission on Human Rights established an Independent Expert on Minority Issues. These are only illustrations of the increased focus on the need to focus on minority rights as a tool to prevent conflicts by international institutions. This led to the realisation that the protection of minority rights, and their cultural rights, does also form

[49] Clive Baldwin, Chris Chapman & Zoe Gray, *Minority Rights: The Key to Conflict Prevention* (MRG, 2007)
[50] General Asembly, World Summit Outcome, UN Doc. A/RES/60/1 (2005), para. 130.

an important element of the international framework to prevent genocide.[51] In early 2005, the Committee on the Elimination of Racial Discrimination adopted a "Declaration on Prevention of Genocide."[52] The Committee notably highlighted "the cultural and historic roots of genocide and the importance of recognizing the multicultural dimension of most societies." The Committee also adopted a "follow-up procedure" which includes a list of indicators of patterns of systematic and massive racial discrimination which include the systematic official denial of the existence of particular distinct groups.[53]

The focus on minority rights and their cultural rights also find echoes in the development of a multitude of early warning mechanisms for conflict prevention that have flourished during that period. These early warning mechanisms very often include reference to cultural destruction and oppression as indicators of conflicts.[54] For example, the European Commission Check List for Root Causes of Conflict includes indicators regarding respect for religious and cultural rights of the minorities. All these early warning mechanisms indicate the need to take seriously in consideration systematic and targeted attacks against the cultural assets of the minorities as indicators of potential escalation towards conflict, but also genocide. Overall, the period between the end of the 1990's and the early years of the new millennium saw a renewed focus on the need to protect the cultural rights of minorities as an essential element to prevent conflict and genocide. It took all the horrors of the attacks against minorities in the former Yugoslavia and Rwanda for the international community to try to patch the gap left by the lack of a proper legal framework to address cultural attacks against minorities.

However, despite minority rights being perceived as a key indicator to the prevention of conflicts and mass killings, the underdevelopment of the legal framework on minority rights makes such a connection between minority rights and prevention very weak. Ironically, while most of the conflict prevention tools are indicating that respect for minority rights and notably their cultural rights are essential to prevent conflicts (and mass killings), the minority rights legal framework remains both underdeveloped and largely misapprehended at both international and national levels.

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[51] See: William Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, 2006)
[52] UN Doc. CERD/C/66/1, 17 October 2005
[53] UN Doc. CERD/C/67/1 (14 October 2005).
[54] See: F. Barton and K. von Hippel with S. Sequeira and M. Irvine, *Early Warning? A Review of Conflict Prediction Models and Systems* (Washington: CSIS, 2008).

As noted in a report produced by Minority Rights Group International on this issue: "[O]ver 80 years after minority rights began to be developed as a tool of conflict prevention, it is striking how poorly international experts still understand minority issues. Often, they fail to perceive the ethnic and religious issues within conflicts that may be nominally about other issues."[55] From that perspective, the promise of 1948 that not including cultural genocide as a crime under the Genocide Convention would be remedied by a strong inclusion of cultural rights for minorities under the human rights framework still feels unachieved.

3. Indigenous Peoples and Cultural Integrity

The very strong lobbying and advocacy indigenous peoples' movement over the last three decades has revived the issue of cultural genocide. Across the globe, indigenous peoples are often the victims of aggressive assimilationist policies.[56] Indigenous peoples possess ethnic, economic, religious, or linguistic characteristics that are different from the dominant groups in the societies where they exist. As noted by Hitchcock, indigenous peoples are "particularly vulnerable to genocidal acts because of their small group sizes, cultural distinctiveness, occupation of remote areas, and relative technological and organizational simplicity."[57] More dominant groups very often perceive indigenous peoples as being 'primitive', 'backward' and 'uncivilized' societies. Indigenous peoples have been victims of genocidal acts during the colonial encounter, especially in settlers' colonial countries where a "logic of elimination" was dominant.[58] This has included physical attacks, but also cultural policies of intentional destruction of indigenous cultures.

As highlighted by Lemkin, it is important not to confuse natural processes of cultural transformations, what he referred to a "process of cultural diffusion", under which cultural changes take place as "the continuous and slow adaptation of the culture to new situations" with aggressive and intentional form of cultural destruction.[59] For

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[55] C. Baldwin, C. Chapman and Z. Gray, *Minority Rights: The Key to Conflict Prevention* (Minority Rights Group International, 2007), 32

[56] See: Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002).

[57] Robert K. Hitchcock and Tara M. Twedt, 'Physical and Cultural Genocide of Indigenous Peoples', in S. Totten, W. Parsons (eds), *Century of Genocide: Critical Essays and Eyewitness Accounts* (Routledge, 3rd ed.) p p. 530.

[58] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native', 8 (4) Journal of Genocide Research (2006): 387–409

[59] See: Damien Short, "Cultural genocide and indigenous peoples: a sociological approach", 14 (6) The International Journal of Human Rights, 2010

many indigenous peoples, it is the later form of aggressive and intentional cultural destruction that has been dominated their history. Hence, many indigenous victims, and their supportive organisations, have been pushing for the recognition of the cultural genocide that is taking place against their cultures. As examined below, this has taken the form of legal actions in courts, but also in the form of pushing for a change in the international legal framework.

3.1. Cultural Genocide, the Courts, and Indigenous Peoples

The destruction of indigenous peoples' cultures can take many forms, including forced relocation, removal of children from their communities, invasion of their lands, aggressive assimilationists policies, or restriction to access to their traditional means of livelihoods. For example, it was reported that during the 1980's, twenty five per cent of the Brazilian Xingu Indians who were forcedly relocated died from diseases and homesickness, as their natural environment was part of their conditions of life.[60] A question, which often arises in the context of indigenous peoples' rights, is whether the removal of indigenous communities from their land could be regarded as a means of destruction to ensure the disappearance of the group. One of the recent cases involving such a claim has been coming through the use of the US Aliens Torts Claim Act (ATCA).[61] While ATCA is not related to international criminal law, and even less so to the prohibition of genocide, because of its reference to the "law of nations" the act has become an important platform for remedies for violations of international law notably by private companies.[62] In a case against Freeport (one of the world's largest copper company), Beanal, a leader of the Amungme indigenous community of Indonesia, alleged that Freeport's mining operations resulted in "cultural genocide" by destroying the Amungme's habitat and religious symbols. The indigenous leader argued that Freeport purposely engaged in activities that destroyed the Amungme's cultural and social framework, notably that their forced relocation to areas in the lowlands away from their cultural heritage of highland living. This constituted cultural genocide since it resulted "in the purposeful, deliberate, contrived and planned demise of a culture of indigenous people whose rights were never considered, whose heritage and culture were

[60] Independent Commission on International Humanitarian Issues, Indigenous Peoples, A Global Quest for Justice 85 (1987).
[61] Alien Tort Claims Act, 18 U.S.C. sect.1350
[62] See: Peter Henner, *Human Rights and the Alien Tort Statute: Law, History, and Analysis* (American Bar Association, 2009); C. Ochoa, 'Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act', *Indiana Journal of Global Legal Studies* 12 (2005).

disregarded and the result of which is ultimately to lead to the cultural demise of unique pristine heritage which is socially, culturally and anthropologically irreplaceable."[63] Relying on the language of Article II of the Genocide Convention, the Court concluded that cultural genocide was not recognised by the international community as a violation of international law. In the words of the Court: "Genocide means the destruction of a 'group' not a 'culture'."[64] This was later confirmed by the Appeal Court which ruled that Beanal had not demonstrated that cultural genocide has achieved universal acceptance as a discrete violation of international law. In reaching such a conclusion, the Court highlighted that the applicant's claim was based on "pronouncements and proclamations of an amorphous right to 'enjoy culture,' or a right to 'freely pursue' culture, or a right to cultural development', but that there was no clear view on the existence of cultural genocide."[65]

This case from the US court reflects some of the decisions taken by other courts when it comes to claims of cultural genocide. In Australia, it was alleged in two cases that the government had committed genocide through its formulation of the Native Title Amendment Act 1998, however the judges were of the view that either genocide had no status in Australian law or there was no foundation to the charge of genocide.[66] Going even further, a Canadian Court decided in 1998 that the use of the term cultural genocide by indigenous peoples to describe environmentally and socially degrading developments of lands claimed by indigenous peoples amounted to defamatory speech against the development company.[67]

However, it would be wrong to assume that the jurisprudence emerging from these national courts means that claims of genocide by indigenous peoples will always be rejected if connected with cultural destruction. The Genocide Convention in its article II includes that act of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". Hence such criminal acts if carried out with the specific intent to destroy physically the group would constitute genocide. Ultimately the test will be based on the notion of 'specific intent'. This was

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[63] Tom Beanal, on behalf of himself and all against Freeport-McMoran, Inc., and Freeport-McMoran Copper & Gold, Inc., Third Amended Complaint, at para. 45
[64] *Beanal* v. *Freeport-McMoran* , 969 F.Supp. 362 (E.D.La. 1997).
[65] US Court of Appeals, 5th Circuit, *Beanal* v. *Freeport-McMoRan*, 29 November 1999
[66] Federal Court of Australia, *Nulyarimma* v. *Thompson* and *Buzzacott* v. *Minister for the Environment* [1999] FCA 1192; 165 ALR 621 -
[67] *Daishowa* v. *Friends of the Lubicon* 78 A.W. C.S. 3d 861, Ontario Court (General Division), April, 14, 1998.

notably affirmed by the Commission for Historical Clarification of Guatemala which concluded that genocide had been committed against the Mayan population during the civil war.[68] In its finding, the Commission highlighted that the destruction of property and the burning of the harvest as well as the practice of so-called scorched earth operations amounted to genocide, stating:

> (…) the reiteration of destructive acts, directed systematically against groups of the Mayan population, within which can be mentioned the elimination of leaders and criminal acts against minors who could not possibly have been military targets, demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed 'with intent to destroy, in whole or in part' these groups.[69]

It is also worth noting that Article 6 of the I.C.C. statute recognizes the fact that the destruction of the conditions of life of a group, in order to physically destroy it, is an act of genocide. The Text of the Elements of Crimes states that: "[T]he term 'conditions of life' may include, but are not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsions from homes."[70] In terms of indigenous peoples' rights, this part of the text of the elements of crimes is crucial as in most of the cases that lead to the physical destruction of indigenous communities those notions of access to food or systematic expulsion are the facts that give rise to the destruction of physical life.

3.2. Law Making: From Cultural Genocide to Cultural Integrity

Indigenous peoples' rights have greatly evolved over the last decades. The issue of cultural genocide, and the recognition that indigenous peoples have been, and are, the victims, of aggressive assimiliationist and cultural agressions have been at the heart of that development.[71] The issue of cultural genocide was one of the important issues which resurfaced during the 22 years process that finally led to the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 (UNDRIP). An earlier Draft of

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[68] 83 percent of fully identified victims were Mayan, *see*: Report of the Commission for Historical Clarification, *Guatemala: Memory of Silence* (1999), *at*: www.shr.aaas.org/guatemala/ceh/report/english/toc.html

[69] *Id*, para. 111; on this issue, *see* also: *Plan de Sánchez Massacre, Guatemala,* Case 11.763, Report No.31/99 (March 11, 1999) – IACHR.

[70] See: Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, September 2002 ICC-ASP/1/3, p.114, fn 4; see also: Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, PCNI.C.C./2000/INF/3/Add.2, 6 July 2000, at 7.

[71] See: Shamiran Mako, 'Cultural Genocide and Key International Instruments: Framing the Indigenous Experience', 19 International Journal on Minority and Group Rights (2012) 175–194

the Declaration which was submitted in 1994 to the former Commission on Human Rights for its adoption included a direct reference to cultural genocide and ethnocide.[72] The Draft stated: "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide."[73] During the drafting process, several indigenous representatives had highlighted that their removal from their traditional territories often amounted to cultural genocide, as the practice of dispossession, forced relocation or population transfer amounted to the destruction of their community.[74] However the reference to cultural genocide led to serious debates when it reached the States reprentatives. Some of the member States including the United States, Norway, New Zealand and Canada called for the use of an alternative language noting that cultural genocide and ethnocide were defined under international law.[75] Ultimately, the draft article on cultural genocide and ethnocide was removed, but States agreed on the need to provide a strong language on anti-assimilation and protection of cultural diversity.

Instead, adopting a similar approach to the one followed in 1948, the Declaration adopts a more 'cultural rights' approach to the issue of cultural genocide by affirming that indigenous peoples have "the right not to be subjected to forced assimilation or destruction of their culture."[76] Article 7(2) asserts that "indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group." This particular reference to the removal of children was seen as particularly important for many indigenous peoples who have in the past suffered such policies of forced removal. For exemple, the report

[72] The term ethnocide means that "an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether individually or collectively", Declaration of San Jose (December 11, 1981) UNESCO Doc.FS 82/WF.32 (1982),
[73] See UN Doc. E/CN.4/Sub.2/1994/56, UN Draft Declaration on the Rights of Indigenous Peoples, Article 7.
[74] See: UN Doc. E/CN.4/2002/98, p. 18
[75] United Nations High Commissioner for Human Rights, Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 , UN Doc. E/CN.4/2003/92, 2003.
[76] UN Declaration on the Rights of Indigenous Peoples, Article 8, paragraph 1. For more analysis, see: Bartolomé Clavero Salvador, 'Study on international criminal law and the judicial defence of indigenous peoples' rights', UN Doc. E/C.19/2011/4

of the Australian Human Rights and Equal Opportunities characterised the forced removal of indigenous children, the 'stolen generation' as genocide.[77]

The other important approach of the declation relates to its anti-assimilationists tone. Article 8 of the Declaration states: "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." Getting into more details, the text adds that States shall provide effective mechanisms for prevention of, and redress for:

a) Any action which has the aim or eff ect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

b) Any action which has the aim or eff ect of dispossessing them of their lands, territories or resources;

c) Any form of forced population transfer which has the aim or eff ect of violating or undermining any of their rights;

d) Any form of forced assimilation or integration;

e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.[78]

As noted by Vrdoljak, in providing a clear statement against assimiliation and cultural destruction, this article straddle "the divide between the international crime of genocide and positive human rights related to culture and cultural heritage."[79]

In many ways, the adoption of UNDRIP in 2007 is reflective of a consistent approach when it comes to standard setting at the international level which has over the last 60 years supported the protection of minorities' cultural assets under the banner of cultural rights rather than as an issue of international criminal law. What is specific about UNDRIP, and more generally about indigenous peoples' rights, is the focus on the notion of cultural rights and the notion of the right to cultural integrity. Cultural rights are one of the underlying pillars of the Declaration which uphold indigenous peoples' rights, to develop their own culture and customs generally, to use and control ceremonial objects, to not be subjected to destruction of culture or discrimination based upon culture, and to redress mechanisms for deprivation of cultural values.[80] Likewise, Article 2 of the Indigenous and Tribal People's Convention C169 stipulates that

[77] Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997)
[78] UNDRIP, article 8 (2)
[79] Ana Vrdoljak, 'Reparations for Cultural Loss', in Lenzerini Federico (ed), *Reparations for Indigenous Peoples: International & Comparative Perspectives* (Oxford University Press, 2008), p. 209.
[80] Articles 11(1), 12(1), 13(1), 15(1), and 34.

"governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for *their integrity*". Based on such notion of cultural integrity, the Inter-American Court of Human Rights and the African Commisison on Human and Peoples's Rights have both taken decisons affirming the right of indigenous peoples to have their cultural integrity protected, this notion of cultural integrity is a composite agregate of their rights to culture, religion, health, development and natural resources.[81] Hence instead of taking the criminal law angle, the legal framework regarding indigenous peoples' rights enshrines a right to the protection of indigenous peoples' continued cultural survival and existence. It gives prominence to the notion that cultural integrity is an essential element of physical survival, and that as such States have an obligation to prevent any attacks on indigenous peoples' cultures.

Conclusion

Cultural genocide is a loaded term, which usually attracts serious contentions between positivists and activists. As demonstrated by the account of the adoption of both the Genocide Convention and the UDHR, the notion of cultural genocide has been a controversial element of the law making process as well. States have resisted the inclusion of a criminal offence which could include many of the aggressive assimilationist polices they have adopted, or been complicit to, against minority and indigenous peoples cultures. Hence, in terms of international criminal law, the view developed by Lemkin, the 'architect' of the term genocide, that intentional destruction of a culture amounts to genocide has been put to rest. However as shown by some of the international jurisprudence on genocide, while cultural annihilation in itself is not an act of genocide, the intentional destruction of the cultural assets of a minority community could be an evidence of the specific intent to destroy a group. Despite the arduous start of the minority rights legal framework, which was for a long time forgotten from the international legal developments, decades of ethnic conflicts have finally made the international community realise how significant cultural attacks against minorities are, and how conflict and genocide prevention ought to carefully integrate and consider such attacks. More recently, indigenous peopels have managed to revive the notion of

[81] See: Jérémie Gilbert, 'Indigenous Peoples' Heritage and Human Rights', in Stefan Disko and Helen Tugendhat (eds.), *Indigenous Peoples and the World Heritage Convention* (IWGIA and Forest Peoples Programme, 2014)

cultural genocide in showing how assimiliationists policies and forcefull removal from their lands and territories could lead to the destruction of their culture. All this indicates a move from criminal law to a more human rights based approcah to the notion of cultural diversity. The idea is that instead of a criminal offence, the focus is put on the prevention of cultural destruction by protection the most vulnerable cultures, e.g. minorities and indigenous peoples. The minority and indigenous peoples rights frameworks are both based on the fundamental notion that the protection of cultural identity, recognising the destructive aspect of cultural attacks against a particular group or community. From that perspective it could be argued that despite the debates between positivists and activists, criminal lawyers and sociologists, the notion of cultural genocide defined by Lemkin is still been used positively to ensure the development of human rights law towards the protection of the cultural rights for minorities and indigenous peoples. From a criminal law concept it has become a concept for the protection of cultural diversity.