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Challenges for the Recognition of Cultural Genocide under International Law

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This paper explores the legal status of cultural genocide in international law in the context of decolonisation. Cultural genocide means the destruction of the culture, which can be language, religion, heritage, and traditions, in a systematic way to erase a group from the society or country. But still, it's not recognised in international law as the 1948 Genocide Convention has only stated about the physical genocide. Still, the inclusion of cultural genocide has not happened till now, which shows the legal gap in the protection of people in the context of cultural genocide. The main aim of this paper is to analyse the challenges of recognising cultural genocide in the context of International Law. The current world is facing many cases of cultural genocide, such as in Ukraine and Palestine. So, the recognition of cultural genocide is crucial not only for the indigenous communities but also for all the people of the world for the protection of their own culture and cultural identity. This paper examines the legal framework of cultural genocide in international law in the context of the present world for being recognised. Cultural genocide should also be recognised as the historical colonial oppression of people. This paper finds that expansion of the definition of genocide is important for the recognition of cultural genocide. This paper calls for a new legal instrument for cultural genocide to achieve true decolonisation.

Keywords: *cultural genocide, recognition, international law, culture, legal instrument.*

INTRODUCTION

Genocide has been a recurrent occurrence throughout history, shown by notable case studies from ancient civilisations to contemporary times, therefore demonstrating its persistent character.¹ Raphael Lemkin's original idea of what genocide is puts cultural genocide at the centre. Lemkin believed that a new law category was required because mass murder was not enough to describe genocide.² 'Cultural genocide' is a serious issue for Indigenous tribes because it often means destroying their cultures and making them fit in with other people. People should see it as a way to safeguard and promote human rights.³ 'Culture' and 'Genocide' are intricately interconnected, yet cultural genocide lacks legal recognition. So far, the concept has not been formally acknowledged as a criminal offense under international criminal law since genocide is believed to only include the physical or biological annihilation of particularly targeted populations.⁴

DEFINITION OF CULTURAL GENOCIDE

While there isn't a clear meaning of 'Cultural Genocide' in International Law or academia, it is different from genocide.⁵ Cultural genocide is often overlooked and criticised alongside genocide. Cultural genocide, unlike genocide, does not involve killing a single individual and in such genocide, there is no requirement that the victim needs physical injury, although it destroys objects, papers, publications, monuments, and languages, erasing human cultural contributions.⁶ Cultural genocide is often seen as a type of genocide or an important part of a larger plan to kill everyone. It may happen before, during, or after genocide, and it is sometimes

¹ Ben Kiernan et al., *Volume 1: Genocide in the Ancient, Mediaval and Premodern Worlds* (Cambridge University Press 2023)

² Raphael Lemkin, 'Genocide' (1946) 15(2) *American Scholar* <<http://pscourses.ucsd.edu/poli120n/Lemkin1946.pdf>> accessed 20 August 2024

³ Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous People' (2015) 14(1) *Journal of Human Rights* <<https://doi.org/10.1080/14754835.2014.886951>> accessed 20 August 2024

⁴ Sarah Albaladejo Garcia, 'Cultural Genocide, the Forgotten Nemesis of Cultural Heritage. Case Study of the Genocide of Rohingya in Myanmar' (2020) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550492> accessed 20 August 2024

⁵ Kingston (n 3)

⁶ Kristina Hon, 'Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC' (2013) 43(1) *Seton Hall Law Review* <<https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1461&context=shlr>> accessed 20 August 2024

a different crime that needs to be dealt with right away.⁷ Cultural genocide extends beyond significant historical events and remains a persistent threat to worldwide civilisation. The phenomenon can manifest in diverse manifestations and circumstances, frequently disguised as modernity or cultural dissemination, therefore constituting a widespread and covert influence.⁸ Cultural genocide refers to the deliberate plan to eradicate the cultural characteristics of certain people, encompassing both physical and non-physical elements of their identity.⁹ When a whole group of people from the same culture are tried to be wiped out, including their bodies and genes, this is called cultural genocide.¹⁰

HISTORICAL BACKGROUND

In chapter 9, titled ‘Genocide,’ Lemkin clarified that ‘genuine concepts necessitate novel terminology.’¹¹ Lemkin coined the term ‘Genocide’ by combining the Greek word ‘Genos’ (race or tribe) with the Latin word *cide* (killing). Lemkin defined genocide as a concerted plot to destroy the foundations of national groupings with the goal of annihilating them.¹² Genocide has two phases in Lemkin’s view. The oppressed group's national pattern is destroyed first, followed by the oppressor's national pattern. Lemkin says that the second part includes both the oppressed group that stays in the territory and the territory after the abuser takes it over and replaces the oppressed group.¹³ Physical, social, cultural, economic, political, and religious ‘genocide’ were all different kinds of the same thing, each with its own tools and methods.¹⁴

⁷ Damien Short, ‘Australia: a continuing genocide?’ (2010) 12(1-2) *Journal of Genocide Research* <<https://doi.org/10.1080/14623528.2010.508647>> accessed 20 August 2024

⁸ Urther Rwafa, ‘Playing the Politics of Erasure: (Post) Colonial Film Images and Cultural Genocide in Zimbabwe’ (2014) 30(2) *Journal of Literary Studies* <<https://doi.org/10.1080/02564718.2014.919108>> accessed 20 August 2024

⁹ Pablo Gavira Diaz, ‘The Physical, Biological and Cultural Dimensions of Genocide: An Expansive Interpretation of the Crime?’ (2022) 21(1) *Journal on Ethnopolitics and Minority Issues in Europe* <<https://doi.org/10.53779/CNWO2236>> accessed 20 August 2024

¹⁰ Markus D Dubber and Christopher Tomlins, *The Oxford Handbook of Legal History* (Oxford University Press 2018)

¹¹ Raphael Lemkin, ‘Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress’ (1945) 51(1) *The American Historical Review* <<https://academic.oup.com/ahr/article-abstract/51/1/117/101266?redirectedFrom=fulltext>> accessed 20 August 2024

¹² *Ibid*

¹³ Thomas Johansson, ‘Cultural Genocide in International Law: An Assessment’ (2019) Örebro University, School of Law, Psychology and Social Work <<https://oru.diva-portal.org/smash/get/diva2:1353009/FULLTEXT01.pdf>> accessed 20 August 2024

¹⁴ Lemkin (n 11)

Lemkin made sense of it. In 1946, Lemkin worked as an advisor to the 'Chief Prosecutor' during the Nuremberg trials, where Nazi War Criminals were put on trial,¹⁵ which made him very sad because the term 'Genocide' wasn't used in the final decision and Lemkin went to New York to start working on a Genocide Convention. This would make Genocide a war crime, and people and countries could be punished for what they did.¹⁶

DRAFTING PROCESS

Resolution 96(1) of the 'United Nations General Assembly (UNGA)' on December 11, 1946, defines genocide as the denial of the right to existence of entire human groups, resulting in significant cultural and contribution losses and UNGA Confirmed 'genocide as a crime under International Law' and requested relevant studies to develop a draft convention on the crime.¹⁷ 'The Secretary-General' told the 'Secretariat's Human Rights Division' that they needed to make a first draft. Three experts were called in by the Division: Henri Donnedieu de Vabres, Vespasian V Pella, and Raphael Lemkin.¹⁸ 'The Secretariat Draft Convention' aims to prohibit the extinction of human groupings based on race, nationality, language, religion, or politics. The term genocide refers to a criminal act that aims to destroy a group of people or hinder their preservation or development.¹⁹ The draft put these kinds of acts into three groups. There are three types of genocide: physical, biological, and psychological.²⁰ This means that the eight different ideas of killing that Lemkin came up with first had been whittled down to three.²¹ Lemkin kept saying how important the idea was, and the Secretary-General chose to include it, but the 'UNGA' had to agree first.²² A separate provision protected solely cultural material items, including libraries, museums, schools, monuments, and the group's language. The shift from viewing cultural genocide as a tactic to preserve cultural products made it seem less terrible than physical or

¹⁵ Aviva Cantor, 'Raphael Lemkin and Genocide Convention: Living Legacy of a Lonely Lawyer' (2010) Center for Jewish History <<https://www.cjh.org/pdfs/Summer2010NaamatWoman.pdf>> accessed 20 August 2024

¹⁶ *Ibid*

¹⁷ UN General Assembly, 'The Crime of Genocide' (*UN General Assembly*, 11 December 1946) <<https://www.refworld.org/legal/resolution/unga/1946/en/27712>> accessed 20 August 2024

¹⁸ William A Schabas, *Genocide in International Law* (2nd edn, Cambridge University Press 2002)

¹⁹ United Nations Economic and Social Council, *Draft Convention on the Crime of Genocide* (1947) pg 5

²⁰ *Ibid*

²¹ *Ibid*

²² Schabas (n 18)

biological genocide.²³ The idea to include cultural genocide was thrown out during the writing process because it was thought that the Third Committee would handle cultural rights in the 'Universal Declaration of Human Rights'.²⁴ Many countries were against including cultural genocide in the final draft because they were worried about how it could be interpreted and used in the wrong way.²⁵ In its final form, the 'Genocide Convention' excluded cultural genocide. Instead, it focused on physical and biological elements.²⁶ Politics and the law were argued over during the writing of this ban.²⁷

CULTURAL GENOCIDE AND TREATY INTERPRETATION

The lack of clarity in the '1948 Genocide Convention' on group destruction has resulted in differing interpretations, as some courts support a wider socio-cultural reading, while others favour a more limited physical-biological view.²⁸ 'Convention on the Law of Treaties (VCLT)' is essential.²⁹ Treaties should be construed in good faith, taking their goal and setting into account and the preamble, annexes, agreements, and instruments linked to the treaty are to be considered for interpretation. Consider any later interpretation agreement and practices in the treaty's application that establish the interpretation agreement.³⁰ It has also been stated that if the interpretation of a particular term or provision leaves the meaning unclear or gives rise to a result that is clearly absurd or unreasonable, additional methods of interpretation may be used. This allows for recourse to the authors' intention as part of the preparatory work of the treaty and the circumstances surrounding its conclusion.³¹ These rules are a compilation of customary international law concepts that were already in place. This means that they apply to treaties that

²³ Hon (n 6)

²⁴ Elissavet Stamatopoulou-Robbins, *Cultural Rights in International Law* (Brill 2007)

²⁵ Tye Tavaras, 'The case for cultural genocide: the formulation of a working definition' (Master's Thesis, American University 2011)

²⁶ Leora Bilsky and Rachel Klagsburn, 'The Return of Cultural Genocide' (2018) 29(2) *European Journal of International Law* <<https://academic.oup.com/ejil/article-pdf/29/2/373/25197971/chy025.pdf>> accessed 20 August 2024

²⁷ Mark Lattimer, *Genocide and Human Rights* (1st edn, Routledge 2007)

²⁸ Elisa Novic, 'Physical –biological or socio-cultural 'destruction' in genocide? Unravelling the legal underpinnings of conflicting interpretations' (2015) 17(1) *Journal of Genocide Research* <<https://doi.org/10.1080/14623528.2015.991208>> accessed 20 August 2024

²⁹ Vienna Convention on the Law of Treaties 1969

³⁰ Vienna Convention on the Law of Treaties 1969, art 31

³¹ Vienna Convention on the Law of Treaties 1969, art 32

were in place before the 'VCLT', such as the '1948 Genocide Convention'.³² 'The Genocide Convention' interpretation should follow these two processes, particularly on the critically debated Article II interpretation. The legal definition of 'Genocide' has been criticised for being too limited since its codification. Issues arise about the definition's two major elements: mens rea (intention to destroy a specific group) and actus reus (list of five possible genocides).³³ Mostly, the crimes on this list of genocides are acts that hurt a group physically or biologically. 'Article II(e)', which says 'the forcible transfer of children, is the only part that kind of fits Lemkin's description of 'Cultural Genocide'.'³⁴

Mens Rea

'Article II, Paragraphs 1-5' lists five things that must be done with 'intent'. This is one of them. First, the 'International Law Commission (ILC)' said that the word 'destroy' only meant 'physical or biological destruction,' leaving out the idea of 'cultural destruction'.³⁵ The committee established the definition of the words in their draft. Lord Goddard states that a court cannot find a person guilty of an offense against their mind unless they have a guilty mind, even if the act was accidental, unintentional, or performed without malice.³⁶ In the early phases of the 'ICTY', the 'Trial Chamber in the Mladi and Karadi' case suggested expanding the term of genocide.³⁷ The Prosecutor classified certain actions as genocide, including as the interment of people in detention institutions and harsh treatment, while others were classified as 'Crimes against humanity'. In assessing 'Crimes against humanity', 'the Chamber' assessed whether the pattern of conduct of (...) 'ethnic cleansing,' taken as a whole, reveals genocidal intent.³⁸ The Court said that evidence provided to the 'Trial Chamber' suggests that systematic rape of women may be meant to instill a new ethnic identity in children. Sometimes, shame and dread

³² Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016)

³³ Convention on the Prevention and Punishment of the Crime of Genocide 1948, art 2

³⁴ *Ibid*

³⁵ International Law Commission, Report of the International Law Commission on the Work of its Forty Eight Session (1996)

³⁶ *Brend v Wood* [1946] 62 TLR 462

³⁷ Swaak-Goldman O Prosecutor v Rajic, 'Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence' (1997) 91(3) American Journal of International Law

<<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/prosecutor-v-rajic-review-of-the-indictment-pursuant-to-rule-61-of-the-rules-of-procedure-and-evidence/ECCDF49B374686EBE1D3D022C64BFAD7>> accessed 20 August 2024

³⁸ *Ibid*

disintegrate the group. The demolition of mosques, Catholic Churches, and libraries aims to erase centuries-old cultural contributions from many ethnicities.³⁹ Previously, genocidal intent has been proven by the loss of culture and physical attacks on a community. For these reasons, the court requested the prosecutor to consider the genocide count for ethnic cleansing, which he eventually acknowledged. ‘The 2004 ICTY case of Prosecutor v Radislav Krstić’ explored the concept of undermining a group's culture and identity to cause its extinction.⁴⁰ In Srebrenica, the ICTY recognised mosque demolition as proof of intent to eliminate the ‘Bosnian Muslim Community’. ‘Judge Shahabuddeen’ argues for a difference between the nature of Genocide Convention actions and their purpose. Shahabuddeen argues that a group can be annihilated non-physically or biologically if its unique social unit traits are eliminated.

INTERNATIONAL LEGAL FRAMEWORK ON CULTURAL GENOCIDE

International Criminal Law (ICL): ‘International Criminal Law (ICL)’ has mostly dealt with the ‘Physical and Biological elements of Genocide’. It has not dealt with cultural genocide. There are a lot of unclear words in the Convention, which makes it hard to figure out what a particular group needs to have to be protected as an ethnic, racial, religious, or national group. There are no clear-cut definitions of what makes a group safe. Instead, each group must be described on its own, based on its unique situation in a society.⁴¹ Aside from that, it is hard to show and gather proof of the criminal's mens rea because confessions are not common. People have used cultural genocide as proof that someone wanted to wipe out a protected group as such in situations of ‘Physical or biological genocide’.⁴²

International Human Rights Law (IHRL): The first step in understanding cultural genocide is to look at how ‘International Human Rights Law (IHRL)’ protects people. As we already said, when they were talking about whether to include cultural genocide or not, they wanted it to stay in the international framework of the protection of human rights and minorities.⁴³

³⁹ *Ibid*

⁴⁰ *Prosecutor v Radislav Krstic* [2001] IT-98-33-T

⁴¹ *Prosecutor v Jean Paul Akayesu* [1998] Case No 96-4-T

⁴² *Prosecutor v Radislav Krstic* [2001] IT-98-33-T

⁴³ Jinan I M Rawab, ‘Cultural Genocide within International Law: A Legal Analysis of Power Dynamic’ (2023) Department of Global Political Studies <<https://www.diva-portal.org/smash/get/diva2:1817898/FULLTEXT02>> accessed 20 August 2024

UDHR

A number of international human rights documents protect 'Cultural Rights'. For example, the 'Universal Declaration of Human Rights (UDHR)' and the 'International Covenant on Economic, Social, and Cultural Rights (ICESCR)' both talk about culture.⁴⁴ In general, though, these tools protect cultural rights in a wide range of ways. While the 'UDHR' says that everyone has the right to take part in cultural life, the 'ICESCR' says that each person has the right to take part in cultural events. A section on minority rights that was meant to be like the section on cultural murder in terms of human rights was taken out of the final version of the 'UDHR'.⁴⁵ A lot of countries, including 'Canada, Latin American countries, Australia, the USA, and Egypt', were against adding it to the 'UDHR'. These were the same countries that wanted the 'UDHR' to cover cultural murder.⁴⁶ Individuals are free to take part in the cultural life of their own community.⁴⁷ Every group of people has the right to choose for themselves, and because they have that right, they can freely choose their political situation and work on their economic, social, and cultural growth.⁴⁸ It also acknowledges the entitlement of every individual to participate in cultural activities.⁴⁹

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): This is the 'Declaration on the Rights of Indigenous Peoples (UNDRIP)', which was made by the 'UN General Assembly' and approved in 2007.⁵⁰ It was first written in 1994, which is almost 20 years ago and it recognises the right of indigenous peoples not to be subjected to ethnocide and cultural genocide as a group and an individual.⁵¹ The final Declaration says that states should have good ways to stop actions that take away the rights of indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture.⁵² 'Indigenous peoples' should be able to live in peace, safety, and freedom as different groups.⁵³ They should not be

⁴⁴ *Ibid*

⁴⁵ Universal Declaration of Human Rights 1948

⁴⁶ Novic (n 32)

⁴⁷ Universal Declaration of Human Rights 1948, art 27(1)

⁴⁸ International Covenant on Economic, Social and Cultural Rights 1976, art 1(1)

⁴⁹ International Covenant on Economic, Social and Cultural Rights 1976, art 15

⁵⁰ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (2007)

⁵¹ Draft Declaration on the Rights of Indigenous Peoples 1994, art 7

⁵² United Nations Declaration on the Rights of Indigenous People 2007, art 8(2)

⁵³ United Nations Declaration on the Rights of Indigenous People 2007, art 7(2)

killed or wiped out. Even though the UNDRIP Declaration is important, it is not legally binding because it is not a General Assembly decision and it does not specifically mention cultural murder.⁵⁴ Finally, it has been found that these tools aren't fully legal because they only protect individual rights and rely on states agreeing to accept them.⁵⁵

CONTINUOUS STRUGGLE OF CULTURAL GENOCIDE

The 'Rohingya' have been in trouble with the Myanmar government for many years because of policies that are meant to erase their ethnic identity.⁵⁶ Destroying their cultural sites and putting an end to their language are signs that someone is trying to erase their identity and customs.⁵⁷ The 'Uyghur' group in China faces harsh cultural repression, which includes the loss of language and customs. This shows how important it is for the international community to quickly recognise cultural genocide as a crime.⁵⁸ In Australia, from 1912 to 1962, 'Aboriginal children' were taken away from their families against their will as part of a plan to integrate Indigenous people into white society and this is also seen as 'A form of Cultural Genocide'.⁵⁹ The acts of the Russian Federation in Ukraine are an example of cultural genocide because they take and destroy 'Ukrainian cultural assets', persecute pro-Ukrainian activists, and force Russian school systems on occupied areas.⁶⁰ Significant cultural sites have been destroyed as a result of the continuous conflict, which is seen as an effort to diminish 'Palestinian' identity in the current conflict between Israel and Palestine.⁶¹

⁵⁴ David Nersessian, 'The Current Status of Cultural Genocide under International Law' in Jeffrey S Bachman (ed), *Law Politics and Global Manifestations* (Routledge 2019)

⁵⁵ United Nations Declaration on the Rights of Indigenous People 2007, art 7(2)

⁵⁶ Safdar Ali et al., 'Genocide of Rohingya Muslims and Role of Contemporary World Actors' (2021) 2(1) *Perennial Journal of History* <<https://doi.org/10.52700/pjh.v2i1.35>> accessed 20 August 2024

⁵⁷ Afroza Anwar, 'Interethnic Conflict and Genocide in Myanmar' (2019) 24(1) *Homicide Studies* <<https://doi.org/10.1177/1088767919827354>> accessed 20 August 2024

⁵⁸ Hilly Moodrick-Even Khen, 'A Case for Making the Prohibition on Cultural Genocide a Soft Law Norm in International Law' (2022) 30 *International Journal on Minority and Group Rights* <<https://doi.org/10.1163/15718115-bja10090>> accessed 20 August 2024

⁵⁹ Nuriyeni Kartika Bintarsari, 'The Cultural Genocide in Australia: A Case Study of the Removal of Aborigine Children from 1912-1962' (SHS Web of Conferences, Poland, 2018)

⁶⁰ Vladyslava Bakalchuk, 'Cultural Genocide As International Crime Committed By The Russian Federation in Ukraine' (2022) 1 *Strategic Panorama* <<https://doi.org/10.53679/2616-9460.specialissue.2022.07>> accessed 20 August 2024

⁶¹ Y M Donders, 'Old cultures never die? Cultural genocide in international law' in I Boerefijn et al. (eds), *Human rights and conflicts: essays in honour of Bas de Gaay Fortman* (Cambridge-Antwerp-Portland: Intersentia 2012)

LEGAL CHALLENGES OF CULTURAL GENOCIDE

Cultural Genocide as a form of Genocide: Erroneously, ICJ said that destroying culture does not fall within the categories of acts of genocide set out in Article II of the Convention.⁶² Interestingly, the 'ICJ' set a high standard for causing physical destruction by saying that the destruction of historical, cultural, and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group.⁶³ Though 'ICTY' never officially recognised cultural genocide, in a strange way, it said exactly what it was: The physical destruction of a group is the most obvious method, but one may also imagine destroying a group by purposefully eradicating its culture and identity, resulting in the eventual extinction of the group as a separate entity from the rest of the community.⁶⁴ No one recognised 'Cultural Genocide as a Crime' directly, but since genocide goes beyond murder, the 'UNGC' can be used without harm and when you destroy sacred sites and take their language and customs, you indirectly kill their psyche, although it destroys cultures too.⁶⁵

Complexities in Evidence: Cultural genocide produces psychological and societal wounds that are difficult to assess objectively, unlike other forms of genocide.⁶⁶ It is hard to document and examine the level of cultural erasure in situations like the 'Uyghur' cultural genocide since primary materials are blocked by the Chinese government's censorship.⁶⁷ In the same way, ongoing war and repression in Ukraine make it harder to gather proof because the Russian Federation is systematically destroying cultural identity.⁶⁸

Challenges in Attributing Responsibilities: The shortage of clear evidence of direct state involvement in genocidal acts is one of the problems with the Genocide Convention that makes

⁶² 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)' (*International Court of Justice*, 1993) <<https://www.icj-cij.org/case/91>> accessed 20 August 2024

⁶³ *Ibid*

⁶⁴ *Prosecutor v Radislav Krstic* [2001] IT-98-33-T

⁶⁵ Garcia (n 4)

⁶⁶ Navdeep Kaur Dhaliwal, *The Concept of Cultural Genocide: Challenges and Opportunities in International Law* (Eliva Press 2023)

⁶⁷ Nikhil Kothari, 'Analysis of the Uyghur Cultural Genocide' (2024) 13(1) *Journal of Student Research* <<https://doi.org/10.47611/jsrhs.v13i1.6425>> accessed 20 August 2024

⁶⁸ Bakalchuk (n 60)

it hard for states to be held accountable.⁶⁹ Political dynamics sometimes favour pursuing individual criminals over nations, making cultural heritage crimes during wars harder to assign responsibility for.⁷⁰ Identifying criminal guilt in state-led cultural genocide is challenging, as responsibility may extend beyond the perpetrators to those who created and executed policies.⁷¹

LACKINGS IN THE LEGAL INSTRUMENT

Article 38 of the 'ICJ's' statute lists some of the places where International Law comes from along with treaties, international custom (which means 'evidence of a general practice accepted as law') and 'General Principles' are the most significant sources.⁷² Observing a consistent state practice (*usus*) as a legal obligation (*opinio juris*) would already be part of International Law, all nations except persistent opponents are bound, except for the need for treaties.⁷³ 'The International Criminal Court (ICTY)' agreed that rules that protect holy structures and cultural property during the war are part of international customary law⁷⁴, so this can be considered as 'Customary International Law' in the context of prosecution. 'Genocide' may occur during peacetime, not just during armed war. It may be part of international customary law to protect cultural property during armed battles.⁷⁵ Addressing structural disadvantages faced by minorities is challenging when cultural rights are viewed as individual rights and this overlooks the impact of group destruction across the generations, a crucial part of 'Cultural Genocide'.⁷⁶ Compared to crimes against humanity, genocidal crimes are more limited in what they can

⁶⁹ Kevin Aquilina and Klejda Mulaj, 'Limitations in attributing state responsibility under the Genocide Convention' (2018) 17(1) *Journal of Human Rights*

<<https://ore.exeter.ac.uk/repository/bitstream/handle/10871/23573/JHR%20pre-proof%20%2829%20June%202016%29.pdf?sequence=1>> accessed 20 August 2024

⁷⁰ Andrzej Jakubowski, 'State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts' (2015) 2(1) *Santander Art and Culture Law Review*

<https://www.researchgate.net/publication/316036651_State_Responsibility_and_the_International_Protection_of_Cultural_Heritage_in_Armed_Conflicts#fullTextFileContent> accessed 20 August 2024

⁷¹ Dhaliwal (n 66)

⁷² Statute of the International Court of Justice 1945, art 38

⁷³ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3,44

⁷⁴ *Prosecutor v Brdanin* [2004] Case No IT-99-36-T

⁷⁵ Rui Johnson Pedri, 'The Death of a Culture: A Critical Analysis of the Concept of Cultural Genocide in International Law' (Lund University 2019)

<<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8999721&fileId=9003465>> accessed 20 August 2024

⁷⁶ *Ibid*

occur.⁷⁷ The idea could be seen as a way to make cultural genocide illegal. Also, it is not a part of 'Customary International Humanitarian Law (IHL)'.⁷⁸ Cultural genocide is more than just an abuse of cultural rights and also the damage to culture that could happen when people's and groups' rights are grossly violated, which could put the group's life at risk.⁷⁹ The current human rights law doesn't cover cultural genocide, and the narrow legal meanings of genocide don't go far enough to hide the planned and organised destruction of a group's 'Cultural Identity'.⁸⁰

CONCLUSION AND RECOMMENDATION

The overlooked adversary of 'Cultural Property' is cultural genocide, which results in the eradication of the institutions and practices that enable a group to persist as a collective unity.⁸¹ A new treaty dealing with cultural genocide is needed to solve the issues related to it.⁸² Therefore, cultural genocide must be recognised as a 'Crime in International Law'.⁸³ 'Cultural Genocide' could be seen as a 'soft law' practice, which would help international legal instruments be used to deal with these kinds of breaches.⁸⁴

⁷⁷ Guénaél Mettraux, *26 Genocide and Crimes against Humanity* (International Crimes and the Ad Hoc Tribunals, Oxford Academic 2006)

⁷⁸ International Committee of the Red Cross, 'Customary International Humanitarian Law' (ICRC, 2010) <<https://www.icrc.org/en/document/customary-international-humanitarian-law-0>> accessed 20 August 2024

⁷⁹ Rawab (n 43)

⁸⁰ Kingston (n 3)

⁸¹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (University of Manitoba 2015)

⁸² Nersessian (n 54)

⁸³ Johansson (n 13)

⁸⁴ Khen (n 58)