Adjudicating attacks targeting culture: revisiting the approach under state responsibility and individual criminal responsibility

Abtahi, H.

CHAPTER 3: GENOCIDE

I. Introduction: an intrinsically anthropological crime

According to the ICJ, the principles contained in the Genocide Convention form part of customary international law and constitute an obligation erga omnes.[783] As it appears in the Genocide Convention, genocide occurs when any of its actus rei are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[784] Traditionally, and especially in the practice of ICR-based jurisdictions, determining the mens rea has been the main challenge to prove the constitutive elements of this crime, since the material element is perceived as being relatively clearly enumerated in the Genocide Convention.

However, in reality, this perception does not reflect the complexities inherent to the crime of genocide.[785] There are instances where the material element of this crime poses as many problems as its mental element – in isolation and/or in combination with the latter. This Chapter's problematic consists of assessing the extent to which – if at all – "cultural genocide" may be considered an existing category of genocide, under either the mental or material elements. To date, this issue has remained blurred, and both the wording of the Genocide Convention and the practice of ICR-based jurisdictions have prevented the neat settlement of this issue.

Two main factors explain this uncertainty: the definition of the word "culture" and the discrimination made between tangible-centred and anthropo-centred crimes in the hierarchy of crimes. On the first factor, as seen in the general introduction, since any exact delimitation of the scope of the word culture will always result in controversies, attacks targeting culture are best viewed under both tangible-centred and anthropo-centred approaches. When applied to the Genocide Convention, the challenge is whether, in some situations, exactions of the collective's culture amount to genocide. That is, whether that collective constitutes a "group" under the convention and whether the cultural damage inflicted on that group may result in its destruction "in whole or in part", should the perpetrator have so intended.

---

[783] For customary international law, *see Reservation on the Convention on the Prevention and Punishment of the Crime of Genocide,* (ICJ) Advisory Opinion (18 May 1951) ICJ Rep 1951 p 15, p 23. ICTY and ICTR judgments have relied on this case and the "Report of the Secretary-General" (n 108) to affirm that this customary international norm contains a jus cogens rule prohibiting States from committing genocide (for an exception, *see Sikirica et al* Trial Judgment (n 720) para 55). However, neither this case nor the report mention this. In fact, the report simply speaks of genocide as forming part of customary international law. *See* "Report of the Secretary-General" (n 108) para 45. *See* also generally Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?" (2007) 18(4) *European Journal of International Law* 631. For obligations erga omnes, *see Barcelona Traction, Light and Power Company (Belgium v Spain)*, (ICJ) Judgment (5 February 1970) ICJ Rep 1970, p 4, paras 33-34.

[784] Genocide Convention (n 105) art 2.

[785] For an examination of the implications and complexities surrounding the crime of genocide more generally, *see* Akhavan (n 48).

The second factor explaining the uncertainty surrounding cultural genocide flows from the distinction between anthropo-centred and tangible-centred crimes. When referring to the crime of genocide, physical genocide first comes into mind, sometimes followed by biological genocide, but rarely by cultural genocide. This is because the first two categories of genocide are perceived as directly concerning the integrity of the individuals belonging to the targeted group. For example, torturing or sexually assaulting individuals belonging to the targeted group illustrates victims' suffering – either mental, physical or both. However, cultural genocide – should it exist – would constitute a different type of suffering: one that, a priori, does not penetrate the group's individual members as deeply as physical and biological genocide. The use of the words "a priori" is intentional, since the IACtHR has found that tribal/indigenous groups may actually experience illness as a result of cultural heritage attacks (Part I, Chapter 2).

These two factors shaped twentieth century discussions surrounding cultural genocide, which was notoriously conceptualised by Raphaël Lemkin in "Axis Rule in Occupied Europe".[786] The creator of the word "genocide" identified eight "fields" in which this crime could occur: cultural, biological, economic, moral, physical, political, religious and social.[787] With regard to culture, he explained that genocide could be perpetrated:

> by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, […] because it promotes national thinking.[788]

Although the above passage does not use the expression "cultural genocide", the means it refers to constitute an early conceptualisation of some of its actus rei, which Lemkin viewed as both tangible-centred (destruction of cultural institutions) and heritage-centred (change of modes of education). Considering the "immediate" destruction of the group through mass killings as one aspect of genocide, Lemkin saw the latter as:

> 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 political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[789]

This passage should be read in the context of the Second World War, including the conflation of the concepts of nationality and minority. While the scope of the group is narrower than that later defined in the Genocide Convention, Lemkin saw genocide as

---

[786] During the 1933 Fifth International Conference for Unification of Penal Law, Lemkin proposed that certain acts aimed at the destruction of racial, religious or other groups be declared international crimes. Lemkin included the "barbarity" as "the extermination of social collectivities" and vandalism "consisting in destruction of cultural and artistic works of these groups". *See* Raphael Lemkin, "Genocide as a Crime in International Law" (1947) 41(1) *American Journal of International Law*146, which also refers to Raphael Lemkin, "Le Terrorisme" (1933) *Actes de la Vème Conférence pour l'unification du droit penal à Madrid* 14-20 X 1933 (1933), and its supplement entitled "Les Actes constituent un danger général (interétatique) considérés comme délits des droit des gens" (1933).
[787] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law 1944), pp xi-xii and 79-90.
[788] Lemkin, *Axis Rule in Occupied Europe* (n 787) pp xi-xii.
[789] Lemkin, *Axis Rule in Occupied Europe* (n 787) p 79.

encompassing criminal acts in fields as diverse as culture, economics, politics, etc. Evidently, as seen in the general introduction, many of these, eg language and religion, are culture's constitutive elements. As regards culture, Lemkin explained that:

> [t]he world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.[790]

Lemkin thus adopted a heritage-centred approach of culture as a diptych/triptych, wherein the destruction of a nation results in world impoverishment. Pivotal to this Chapter is the idea that a nation – read "a group" – is a set of original contributions based on culture. Almost as if nation and culture were synonymous. This understanding, as later relayed by Lebanon and, most passionately by Pakistan during the Genocide Convention drafting (II) is key to this Chapter's approach to genocide. As will be seen, the definition of a group requires integrating a set of objective and subjective factors which, with the passing of time, often are perceived as stereotyping (eg racial groups). What is clear, is that groups are understood through cultural lenses which depend on two factors: geographic (where an idea is expressed) and temporal (when an idea is expressed). Eventually, therefore, groups are a set of cultural units since they are defined through cultural perceptions. Following the footsteps of Lemkin and countries such as Lebanon and Pakistan, this study will thus argue that genocide itself is cultural insofar as its intent and consequences are concerned. Hence cultural genocide is a tautology. However, as regards its means, genocide may be physical and biological and, as will be discussed, perhaps cultural. This dichotomy between intent, consequence and means constitutes this Chapter's foundation. As will be argued, if this had been and were systematically incorporated into international law actors' discourse, many of the issues surrounding the so-called cultural genocide would not (have) arise(n). As will be seen, ICR-based jurisdictions have considered that the Genocide Convention does not include cultural genocide, with Schabas suggesting, rightly, that no customary norm – which would fill the conventional gap – has emerged.[791] In contrast, and as noted by Novic, non-binding instruments, such as the 1982 UNESCO Declaration of San Jose consider cultural genocide as a crime under international law.[792]

The ultimate anthropological crime, genocide – as defined in the Genocide Convention article II – has continuously given rise to interpretative challenges, as the ordinary meaning of many of the expressions contained therein is equivocal. This has made it necessary to move from the Vienna Convention on the Law of the Treaties article 31(1),[793] to article 32.[794]

---

[790] Lemkin, *Axis Rule in Occupied Europe* (n 787) p 91.

[791] Schabas, *Genocide in International Law* (n 15), p 189.

[792] *See* UNESCO, "Latin-American Conference, Declaration of San Jose" (11 December 1981) UNESCO Doc FS 82/WF32 (1982), equating "ethnocide" (an ethnic group's denial, often as mas human rights violations, of cultural and language development, enjoyment and transmission, individually and collectively) with cultural genocide. *See* also Novic (n 15) p 35.

[793] Art 31(1) ("general rule of interpretation") reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

See Vienna Convention on the Law of the Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[794] Art 32 ("supplementary means of interpretation") reads:

Accordingly, the following section will turn to the travaux préparatoires of the Genocide Convention in order to provide an objective account of the discussions that shaped cultural genocide (II). Unlike most other scholarly commentaries or even the 1996 ILC Report, this study will proceed with a session by session account of the 1946-1948 negotiations of the Convention, so as to maximise the exposure of facts to the reader, minimise the author's margin of subjectivity and settle once for all the travaux préparatoires' ambiguities. This is important as it appears that, except for a few such as Novic and Schabas, most commentators have looked only at the travaux préparatoires' prominent documents or that they have espoused other commentators' points, by reference. However, as the author and Dr Philippa Webb had to proceed with a line-by-line reading of all available travaux préparatoires in order to generate their first ever compilation,[795] the author came to the realisation that the picture is far less clear than that proposed by commentators and international jurisdictions. Thereafter, a review of the latter's practice will help explain their mantra-like rejection of cultural genocide resulting from the conflation of the type of destruction contained in the chapeau of the definition of genocide and the means to effect that, ie the actus reus (III).

II. Drafting the Convention

A. Introduction

On 11 December 1946, the UNGA adopted, unanimously and without debate, Resolution 96(I), declaring genocide, "the denial of the right to existence of entire human groups", as homicide denies the right of existence of individuals.[796] Although UNGA Resolution 96(I) did not clarify the crime's scope, it adopted a heritage-centred approach by providing that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups".[797]

Thereafter, the UNSG drew-up a draft convention ("Secretariat Draft"), in consultation with Raphaël Lemkin, Henri Donnedieu de Vabres and Vespasian Pella, including all potential aspects of genocide, subject to their subsequent retention, modification or rejection by the following bodies. First, it would be transmitted to the ECOSOC ad hoc Committee ("Ad Hoc Committee"),[798] which would transmit its revised draft ("Ad Hoc

---

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable.

See VCLT (n 793).

[795] Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6).

[796] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.

[797] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (n 6) p 34.

[798] UNGA, "Draft Convention on Genocide" (11 November 1947) UN Res 180(II) *in* Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (n 6) pp 467-468. The Ad Hoc Committee comprised China and Lebanon (the future Asia-Pacific Group ("APG")), Poland and the Soviet Union

Committee Draft") to the UNGA through the Sixth Committee.[799] In fact, following preliminary discussions on the Ad Hoc Committee Draft, it was decided that a drafting committee ("Drafting Committee") would consider the Ad Hoc Committee Draft as modified and adopted by the Sixth Committee.[800] The resolutions recommended by the Drafting Committee, including a final draft convention ("Drafting Committee Draft"), which reflected articles II and III of the Ad Hoc committee Draft, formed the basis for a second round of discussions in the Sixth Committee.[801]

As reflected in the travaux préparatoires, this very complex drafting process combined with the negotiators' confusion with respect to the mens rea, actus reus and motive of the crime does not facilitate the understanding of definition of genocide. In turn, the confusions of the 1940s' legislators with respect to cultural genocide have been transferred into the ILC's work, which has in turn been imported by adjudicatory bodies and not always refuted by legal scholars. The following section will demonstrate this and propose a different reading of the travaux préparatoires by providing an in-depth focus on the discussions during the drafting of the chapeau (A) and the actus rei (B) of genocide. On this basis, it will be proposed that even though the tangible-centred actus rei were excluded from the Genocide Convention, the crime of genocide embraces many cultural features that turn cultural genocide into a tautology.

(the future Eastern European Group ("EE")), Venezuela (the future Latin American and Caribbean Group ("GRULAC")) and France and the United States (the future Western European and others Group ("WEOG")). *See* ECOSOC, "Resolution of 3 March 1948" (3 March 1948) UN Res 117(VI), UN doc E/734 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 619 and ECOSOC, "Ad Hoc Committee on Genocide Ad Hoc Committee's Terms of Reference" (1 April 1948) UN Doc E/AC25/2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 643-645.

[799] ECOSOC, "Draft Convention on the Crime of Genocide ('Secretariat Draft')" (6 June 1947) UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 222-224.

[800] UNGA, "Sixty-Third Meeting: Consideration of the Draft Convention on Genocide" (30 September 1948) UN Docs A/C6/SR63 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1291-1299; UNGA, "Sixty-Fourth Meeting: Consideration of the Draft Convention on Genocide" (1 October 1948) UN Doc A/C6/SR64 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1301-1309; UNGA, "Sixty-Fifth Meeting: Consideration of the Draft Convention on Genocide" (2 October 1948) UN Doc A/C6/SR65 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1311-1321; UNGA "Sixty-Sixth Meeting: Consideration of the Draft Convention on Genocide" (4 October 1948) UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1324-1331.UNGA UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1329; UNGA, "Agenda Item 32: Motion Submitted by the Delegation of the Philippines" (2 October 1948) UN Doc A/C6/213 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1976. The Drafting Committee was composed of Egypt; the future Africa Group (AG); China and Iran (APG); Brazil and Cuba – later to be replaced by Uruguay (GRULAC); Czechoslovakia, Poland and the Soviet Union (EEG); Australia, Belgium, France, the United Kingdom and the United States (WEOG). *See* Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960), p 27.

[801] UNGA, "Hundred and Twenty-Eighth Meeting: Continuation of Consideration of the Draft Convention on Genocide" (29 November 1948) UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1864-1870; UNGA, "Agenda Item 32: Report of the Drafting Committee" (23 November 1948) UN Doc A/C6/288 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2010.

B. The Chapeau: genocide is cultural

This section will identify a series of conceptual confusions during the legislators' 1946-1948 discussions that have led adjudicators – unanimously – and legal scholars predominantly – not to realise that, under any shape and form, genocide is in fact cultural, in terms of both the chapeau's intent and motive (1) as well as its protected groups (2).

1. Intent and motive

The chapeau of the definition of genocide in the convention contains both the intent and motive for the commission of the crime. It does, however, not explain what destroying a group means. A review of discussions regarding the Secretariat Draft (a), the Ad Hoc Committee Draft (b), and the Sixth Committee (c) helps clarify cultural genocide's doctrinal and judicial misconstructions.

a. The Secretariat Draft

The Secretariat Draft article I(I) and (II), in combination, and with overlaps, defined the mens rea of genocide. Entitled "Protected Groups", article I(I) focused on the human groups' destruction, without defining the types of destruction.[802] Although titled "Acts qualified as Genocide", article I(II) in fact elaborated on a combination of motive and intent, ie "with the purpose of destroying [the groups] in whole or in part, or of preventing [its] preservation or development".[803] In fact, by providing that genocide was a crime "committed on religious, racial, political or any other grounds", UNGA Resolution 96(I) had already alluded to the motive of the crime.[804] This heritage-centred approach, which considered the group's preservation and development is noteworthy. Only once does The Commentary of the United Nations Secretary-General to the Secretariat Draft ("UNSG Commentary") refer to the group's physical destruction.[805] Later, in States' comments to the Secretariat Draft, the United States indicated that political groups should be included in the Genocide Convention if it consisted of the group's "physical destruction", without further elaborating on the latter's meaning.[806]

The Secretariat draft's lack of precision regarding the mens rea, actus reus and motive would shape the negotiations until the convention's adoption.

---

[802] The text reads: "[t]he purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings", *see* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[803] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[804] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.
[805] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 231.
[806] ECOSOC, "Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat" (30 January 1948) UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 537.

b. The Ad Hoc Committee Draft

The Ad Hoc Committee discussions on the type of group destruction were often opaque, as it was not always clear whether delegates were contemplating the destruction of the group (mens rea) or of its individual members (actus reus).[807] At one point, the Soviet Union contemplated that genocide "essentially connotes the physical destruction of groups" and added a set of actus rei aimed at curtailing the group's cultural features.[808] Importantly, the United States confirmed – albeit proposing to further discuss it – Lebanon's understanding, which would also be agreed by Venezuela, that the verb "connotes" means that the destruction may also be otherwise.[809] By distinguishing "between the aim – the physical destruction of a group –" and its required actus reus, France was more clear, in terms of both the mens rea-actus reus distinction and its viewing the group's destruction as only physical.[810]

On motives, Lebanon was correct when it indicated that the group's destruction would be grounded on the "hatred of something different or alien, be it race, religion, language, or political conception, and acts inspired by fanaticism in whatever form".[811] Thus, genocide concerns the perpetrator's existential unease vis-à-vis everything represented by the group itself. Hence, the perpetrator must have intended "the destruction of the group, as such".[812] Genocide is thus grounded on the rejection of and is intended to result in the destruction of collectives, the definition and, importantly,

---

[807] *See* eg, ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 736; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 836 and 843.

[808] The Soviet proposal read:

> II. genocide […] essentially connotes the physical destruction of groups of the population on racial and national (religious) grounds.
>
> III. […] genocide must also cover measures and actions aimed against the use of the national language or against national culture (so-called "national-cultural genocide"), e.g.:
>
> (a) the prohibition or restriction of the use of the national tongue in both public and private life; the prohibition of teaching in schools given in the national tongue;
>
> (b) the destruction or prohibition of the printing and circulation of books and other printed matter in the national tongues;
>
> (c) the destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture (or of religious worship).

See ECOSOC, "Ad Hoc Committee on Genocide Ad Hoc Committee's Terms of Reference" (7 April 1948) UN Doc E/AC25/7 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 696-697.

[809] For the United States, *see* ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (15 April 1948) UN Doc E/AC25/SR4 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 722. For Venezuela, *see* ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 726-727.

[810] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR105 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 840 and 843.

[811] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Second Meeting" (5 April 1948) UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 691.

[812] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Tenth Meeting" (16 April 1948) UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.

perception of which is cultural. Despite the United States' support for the incorporation of Lebanon's phrase into a common chapeau to physical and cultural genocide,[813] the ensuing discussions resulted in having the motives expressly enumerated.

It is amidst these boisterous opinions that the Ad Hoc Committee eventually agreed to two distinct provisions dedicated to physical-biological genocide (article II) and cultural genocide (article III), in keeping with a United States proposal.[814]

> ARTICLE II ("Physical" and "biological" genocide)
> In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members:
> (1) killing members of the group;
> (2) impairing the physical integrity of members of the group;
> (3) inflicting on members of the group measures or conditions of life aimed at causing their deaths;
> (4) imposing measures intended to prevent births within the group.[815]

Article II's title reflects in fact the actus rei described in subparagraphs (1)-(4). In other words, the physical and/or biological destruction attach to the actus rei as opposed to the group. The chapeau further described both the intent ("with the intent to destroy") and the motives ("on grounds of").

On the other hand, and to cater for their emerging division with France and the United States, the delegations of China, Lebanon, Poland, the Soviet Union and Venezuela prepared a new cultural genocide draft, which initially read:

> In this Convention genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial or religious group on grounds of national or racial origin or the religious belief:
>
> 1) prohibiting the use of the language of the group in daily intercourse or in schools, or prohibiting the printing and circulation of publications in the language of the group;
> 2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[816]

The chapeau introduced a separate mens rea for cultural genocide, which focused on the destruction not of the group, but of its "language or culture". Paragraphs 1's actus reus was both anthropo-centred and tangible-centred while paragraph 2's actus reus was tangible-centred. Intriguingly, the forced transfer of children, the Secretariat Draft's only actus reus of cultural genocide which gathered all three experts' agreement, was

---

[813] The text read: "In this convention, genocide means any of the following acts directed against a national, racial, religious or political group as such"; *see* ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Twelfth Meeting" (23 April 1948) UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 861.
[814] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.
[815] ECOSOC, "Ad Hoc Committee on Genocide, Draft Convention on the Prevention and Punishment of The Crime of Genocide (Drawn Up by the Committee)" (19 May 1948) E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1155-1156 and 1162. *See* also ECOSOC, UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 868.
[816] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 892.

omitted. The chapeau was then successfully amended (France and the United States voting against) by two Lebanese proposals,[817] so that the modified version, now article III, would read:

> ARTICLE III ("Cultural" genocide)
> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members 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.[818]

As now will be seen, these two definitions would constitute the backbone of all future controversies and misunderstandings surrounding the so-called cultural genocide.

c. The Sixth Committee

At the Sixth Committee, the United Kingdom suggested deleting the motive from the chapeau because "Once the intent to destroy a group existed, that was genocide", regardless of the perpetrators' motive.[819] One group of States, including Australia, Brazil, Norway, Panama and Venezuela supported this viewpoint.[820] The opposing group, consisting of Egypt, Iran, New Zealand, the Philippines, the Soviet Union, Turkey, and Yugoslavia, argued for maintaining the motive so as to distinguish genocide from other crimes, since some of the actus rei of genocide could be tantamount to, for example, war crimes.[821] This mélange des genres was eventually brought to an end with the adoption of Venezuela's compromise proposal to return to Lebanon's Ad

---

[817] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 892.
[818] ECOSOC, "Ad Hoc Committee on Genocide, Draft Convention on the Prevention and Punishment of The Crime of Genocide (Drawn Up by the Committee)" (19 May 1948) E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1155-1156 and 1162. *See* also ECOSOC, UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 868.
[819] UNGA, "Agenda Item 32: United Kingdom of Great Britain and Northern Ireland: Amendments to Articles II and III of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/222 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977; and UNGA, "Seventy-Fifth Meeting: Consideration of the Draft Convention on Genocide" (15 October 1948) UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1415.
[820] *See* UNGA, "Sixty-Ninth Meeting: Consideration of the Draft Convention on Genocide" (7 October 1948) UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1360-1361 (Norway); UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1417-1418 and UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1357 (Venezuela) and 1416 (Australia and Panama); and UNGA, "Seventy-Sixth Meeting: Consideration of the Draft Convention on Genocide" (16 October 1948) UN Doc A/C6/SR76 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1428 (Brazil).
[821] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1416-1417 (Egypt, Iran, Soviet Union), 1418 (New Zealand, Turkey, Yugoslavia) and 1419 (the Philippines).

Hoc Committee proposal, by substituting the words "as such" for any explicit enumeration of the motive.[822]

On the types of group destruction, earlier cacophonies continued, as best illustrated by France's position that ""physical destruction" corresponded exactly to the text of article II, which dealt solely with biological genocide".[823] Most important was a failed Soviet Union proposal to substitute "aimed at the physical destruction" for "committed with the intent to destroy" in order to "very clearly" distinguish article II actus rei from article III's.[824] This rejected proposal had the merit of showcasing the debates' confusion as regards the destruction of the group (ie the collective as the sum of its natural persons) and the means to achieve it (measure against natural persons making up the group). It is therefore unclear how, as will be analysed in this Chapter's Section II, while discussing cultural genocide, the ILC, ICTY and ICJ could affirm decades later that the destruction of the group is only physical (and biological).

What emerges from the Secretariat Draft, the Ad Hoc Committee Draft and the Sixth Committee discussions is a sense of conceptual confusion, with the likes of France and the United States viewing genocide's destruction as physical and at times – albeit in an unclear manner – biological, while others like the Soviet Union opposed this restriction.

During the article III discussion, Pakistan proposed to amend that provision as follows:

> In this Convention, genocide also means any of the following acts committed with the intent to destroy the religion or culture of a religious, racial or national group:
>
> 1. Systematic conversions from one religion to another by means of or by threats of violence.
> 2. Systematic destruction or desecration of places and objects of religious worship and veneration and destruction of objects of cultural value.[825]

By focusing on the destruction, not of the group, but of its culture (with religion as a sub-category), the chapeau reflected Pakistan's – and earlier on Lebanon's – position on genocide's mens rea, ie its essence; in other words, the destruction of what defines a group as a cohesive collective. Paragraphs 1-2's actus rei were anthropo-centred and tangible-centred, respectively, with a larger reliance on the religious aspects of the groups' culture rather than on its secular components.

---

[822] UNGA, "Agenda Item 32: Venezuela Amendment to Article II of the Draft Convention on Genocide (E/794)" (13 October 1948) UN Doc A/C6/231 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1984; UNGA, "Seventy-Seventh Meeting: Consideration of the Draft Convention on Genocide" (18 October 1948) UN Doc A/C6/SR77 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1435.

[823] UNGA, "Seventy-Third Meeting: Consideration of the Draft Convention on Genocide" (13 October 1948) UN Doc A/C6/SR73 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1387. *See* also UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1410, wherein Sweden explained that the Ad Hoc Committee Draft article II "applied only to the most horrible form of the crime against a group, that of its physical destruction".

[824] UNGA, "Seventy-Third Meeting: Consideration of the Draft Convention on Genocide" (13 October 1948) UN Doc A/C6/SR73 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1386 and 1389.

[825] UNGA, "Agenda Item 31" (13 October 1948) UN Doc A/C6/229 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1983.

Earlier, when opening the article III discussions, Pakistan had explained that:

> [c]ultural genocide could not be divorced from physical and biological genocide, since the two crimes were complementary insofar as they had the same motive and the same object, namely the destruction of a national, racial or religious group as such, either by exterminating its members or by destroying its special characteristics.[826]

Instead of focusing on the very complex distinction between the type of the group destruction and it means, Pakistan placed the emphasis on the latter. Accordingly, the means of destroying the group could be the destruction of the collective's natural persons, a physical act, eg their extermination. But it could also consist of the destruction of the collective's defining features, which can be effected though tangible and intangible means, since culture is made of both. Pakistan then strengthened this heritage-centred approach by explaining that:

> cultural genocide represented the end, whereas physical genocide was merely the means. The chief motive of genocide was a blind rage to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence. Thus the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not to do the same for cultural genocide.[827]

In terms of criminal law, for Pakistan, the mens rea of genocide was to destroy a group, as such, with two sets of actus rei forming a whole: (i) the physical-biological elimination of its members; and (ii) the destruction of their specific characteristics. Both (i) and (ii) are committed in order to eliminate a group as such, ie for the mere fact of what it is. Under this heritage-centred approach, cultural genocide becomes a tautology, in that it is primarily the group, as a cultural collective, that is intended to be eliminated, regardless of whether this is achieved through (i) or (ii). This reasoning considers cultural genocide to be the crime's actual intent and motive.[828] It matters not how it is characterised, genocide is cultural. When killing the members of a group with the requisite mens rea, the target is that group, ie a collective that exists because of characteristic that are either cultural (eg religious/ethnic) or perceived through a cultural lens (eg racial/national) or, most often, both. But what does that group consist of?

2. Protected groups

Dropping the words "national" and "ethnical" from the original draft's exhaustive list of groups and adding "political" to a non-exhaustive list, UNGA Resolution 96(I) referred to the commission of genocide "[w]hen racial, religious, political and other

[826] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[827] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[828] This view was somewhat echoed by the Soviet Union and Czechoslovakia, which explained that "All those [Nazi] acts of cultural genocide had been inspired by the same motives as those of physical genocide; they had the same object – the destruction of racial, national or religious groups"; *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1516-1517.

groups have been destroyed, entirely or in part".[829] From then on, the groups were progressively defined during the Genocide Convention's various drafting stages. The travaux préparatoires show a heavily culturally influenced process, with cultural interconnections characterising the many overlaps between the groups (a) and a cultural evolution of their meaning then and now (b).

a. A cultural interconnection

Titled "Protected Groups", the Secretariat Draft article I(I) provided for the prevention of "the destruction of racial, national, linguistic, religious or political groups of human beings".[830] The UNSG Commentary explained that apart from the linguistic group, the other four had been mentioned in UNGA Resolution 96(I).[831] In fact, the UNSG Commentary must have meant the draft UNGA Resolution 96(I), since the actual resolution contained only racial, religious and political groups. In contrast to Lemkin's doubts about including political groups on the grounds that they "have not the permanency and the specific characteristics of the other groups", the United States supported their inclusion.[832] However, in order to prevent delaying the adoption of the convention, the Consultative Council of Jewish Organizations opposed this inclusion, suggesting, instead, "political as well as other grounds" in the Preamble.[833]

Except for political groups, the chapeau's protected groups were not debated during the Secretariat Draft and the Ad Hoc Committee Draft preparations. Only a handful of Sixth Committee sessions addressed, inter alia, the question of protected groups. What transpires is a culturally interconnected definition of the protected groups, as well as a generally outdated cultural understanding of those concepts.

i. National, racial and religious groups

At the Sixth Committee, the United Kingdom explained that national/religious groups were as unstable as political groups, since one was "as free to leave them as they were to join them".[834]

---

[829] The draft text read, inter alia, "when national, racial, ethnical or religious groups have been destroyed, entirely or in part", *see* UNGA,UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.
[830] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[831] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 230.
[832] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 230; and UNGA, "Annex 3a to Draft Convention on Genocide, Communications Received by the Secretary-General" (27 September 1947) UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 373.
[833] ECOSOC, "Committee on Arrangements for Consultation with Non-Governmental Organisations: List of Communications received from Non-Governmental Organisations" (30 July 1947) UN Doc E/C2/49 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 469-470.
[834] UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1359.

While one group of States supported the inclusion of religious groups, another opposed it. Norway and Iran supported their inclusion as, according to them, it is difficult to leave a religious group.[835] At the other end of the spectrum were countries like Belgium, which found that including such groups would expand the concept of genocide,[836] and the Soviet Union, which saw religious groups as a sub-category of national and racial groups. Claiming that "persecution was always directed against national groups, even when it took the form of religious strife", and that "religious "motive had always been connected with other motives of a national or racial character" the Soviet Union explained that by seeking to exterminate religious groups the Nazis had aimed for "the destruction of national groups".[837] The Soviet Union thus saw any ravage inflicted upon religious groups as the destruction of national and, at times racial, groups.

Disagreeing with the Soviet Union, Egypt supported the inclusion of religious groups, recalling that Saint Bartholomew and "recent events in India, Pakistan and Palestine" concerned religious rather than racial or national groups.[838] Yugoslavia cited Serb-Croat massacres as "cases of genocide for religious motives within the same nation".[839]

Already at that stage, these discussions illustrated the artificiality of systematically distinguishing between national, sometimes racial, and religious groups. This is best showcased by the concept of religion. While one expects for it to have been settled in the mid-twentieth century, it gave rise to diverging interpretations, uniting countries such as Iran and Norway against the likes of the United Kingdom.

ii. National, ethnical and linguistic groups

During the Secretariat Draft discussions, the United States opposed the inclusion of "linguistic" groups since it believed that genocide would not occur because of "linguistic, as distinguished from […] racial, national or religious, characteristics".[840] Linguistic groups were therefore dropped without any significant discussions.

At the Ad Hoc Committee, Lebanon expressed doubt about the word "national", explaining that legal systems understood the concept of nationality differently and that

[835] UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1360 (Norway); and UNGA, "Seventy-Fourth Meeting: Consideration of the Draft Convention on Genocide" (14 October 1948) UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1392 (Iran).
[836] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1401.
[837] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1399; and UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[838] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1414.
[839] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1414.
[840] UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 373; ECOSOC, UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 537.

ethnic groups were included in national groups.[841] The United States proposed, unsuccessfully, combining "nationality" and "national origin" so as to cater for ethnic groups not belonging to the majority of the nationals.[842] Lebanon and the United States thus saw a relationship between ethnic and national groups.

At the Sixth Committee, when proposing to add "ethnical" after "national",[843] Sweden explained, inter alia, that a minority might be characterised by its language. Accordingly, if it did not fall under "a national group", "a linguistic group" could benefit from protection "as an ethnical group".[844] Sweden thus recognised that the group could be linguistic, although it linked language to ethnicity, partly echoing the United States' aforementioned opposition to include linguistic groups. Furthermore, Sweden delinked ethnic from national groups.

To the Soviet Union, as a smaller "sub-group of a national group", ethnical groups were "of benefit to humanity".[845] The Soviet Union considered ethnic groups through heritage, ie in a cultural manner.

iii. Ethnical and racial groups

The term "racial" gave rise to limited discussions, and mainly in relation to the word "ethnical". When discussing its aforementioned amendment proposal in the Sixth Committee, Sweden explained that since a given group's dominating characteristic was not always the "ill-defined" racial group, that given group should better be defined "by the whole of its traditions and its cultural heritage", which would best be characterised by the addition of ethnical groups.[846] Thus, already questioning the concept of race's understanding, Sweden saw the word ethnic as a more holistic concept, which captures a collective's culture and heritage.

Belgium and Egypt saw no major difference between "ethnical" and "racial" groups, with Belgium suggesting that "ethnical" would add nothing.[847] On the same grounds, Uruguay reached a different conclusion by proposing "ethnical" to be substituted for "racial".[848] However, noting that the "intermingling between races in certain regions" had made it no longer possible to consider them as races, Haiti affirmed that they would

[841] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 843-844.
[842] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 844.
[843] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1390
[844] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.
[845] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1400.
[846] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.
[847] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1412-1413.
[848] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.

be better classified as ethnic groups.[849] Thus Haiti supported the inclusion of both racial and ethnical groups, which resulted in the adoption of Sweden's addition.[850]

The discussions thus showed a general sense of confusion wherein States understood the terms national, racial, ethnical and religious differently. Thus, already in 1946-1948, depending on States' historical experiences, controversies were in the making with respect to terms characterising the convention's groups. This makes the definition of groups, by any adjudicator of the crime, a cultural exercise at any moment in time. Indeed, not only the words national, racial, ethnical and religious were not understood uniformly by States in 1946-1948, but also their meaning has espoused cultural evolutions, whether locally-nationally or globally.

b. A cultural evolution

While the above-analysis shows the cultural interconnection in the debates surrounding the definition of groups, the following illustrates their cultural evolution. As will be seen, States used definitions that mainly reflected the 1940s' conceptions of national groups, race, culture and ethnicity, within the English language and among nations.

i. National groups

As rightly pointed out by Schabas, during the drafting of the Genocide Convention, national groups were synonymous with the European concept of "national minorities", which is broader than "nationality" as understood today and encompasses "racial, ethnic and religious groups as well".[851] It is also under this concept that the Soviet Union understood that of nationality. Other countries, such as Iran, which had never been a Western colony and whose State-centred foundation predated by a millennium that of Western countries, understood the concept in a manner very similar to the twenty-first century. Therefore, during the discussions, the understanding of the same word was dependent on each negotiator's background. In sum, nationality meant minority to some (as opposed to the country's majority) and a more regulated type of collective to others (ie nation State). The latter is how the word is understood today. For example, in *Akayesu* and based on the ICJ's *Nottebohm*, the Trial Chamber viewed national groups as a collective defined mainly through legal and administrative features, regardless of its biological and physiological features.[852]

Thus, when using the word "nationality" during the negotiations, different people meant different things. But in a 1940s' world still dominated by colonial powers and major European-minded countries, it was often associated with the word minority. But what was a minority? A race, an ethnicity, or a religion?

---

[849] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[850] Although with 18 votes to 17 and with 11 abstentions. *See* UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[851] Schabas, *Genocide in International Law* (n 15) p 118.
[852] *Akayesu* Trial Judgment (n 612) para 512: "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".

ii. Racial groups

It is first important to see how the convention's drafters understood "race". The 1949 Oxford Dictionary provides three definitions of race. First as:

> Group of persons or animals or plants connected by common descent, posterity of (person), house, family, tribe or nation regarded as of common stock, distinct ethnical stock, genus or species or breed or variety of animals or plants, any great division of living creates […].[853]

Second, as "descent, kindred"; and third, as "class of persons with some common feature".[854] The term race thus conveyed the idea of a collective, ranging from the family unit to tribe and, further, nation. This collective is such because of common features or, as put by the dictionary, "ethnical stock". This 1949 definition is best illustrated by the 1942 Joint Declaration by the Members of the United Nations Against Extermination of the Jews, which referred to "persons of Jewish race".[855] Rejected by today's Western parlance, this terminology is linked to Nazi Germany's "racial antisemitism" which, motivated by racial eugenics, racialised Jews so as to proceed with their segregation, isolation and Final Solution.[856] Violating the Nürnberg Laws, particularly the "Law for the Protection of German Blood and German Honor", which was based on protecting the "purity of German blood [as] the essential condition for the continued existence of the German people", was considered *Rassenschande* otherwise known as "racial pollution" or "race disgrace".[857] Notably, in *Der Ewige Jude*, the narration concludes with the phrase "the eternal law of nature, to keep one's race pure".[858] By basing the legal definition of a Jew not on religious affiliation but rather on race – viewed though birth, blood and genealogy – the Nürnberg Laws captured a

---

[853] HW Fowler, "Race" *in The Concise Oxford Dictionary of Current English* (3rd edn Oxford Clarendon Press 1949), p 954.
[854] "Race" *in* Fowler*, The Concise Oxford Dictionary* (n 853) p 954.
[855] UN, "Joint Declaration by Members of the United Nations Against Extermination of the Jews" (17 December 1942) <https://www.msz.gov.pl/resource/e7497fea-f446-4f82-80b1-169d609d697a:JCR> accessed on 14 April 2019. *See* "11 Allies Condemn Nazi War on Jews; United Nations Issue Joint Declaration of Protest on 'Cold Blooded Extermination'", *New York Times* (18 December 1942) <https://www.nytimes.com/1942/12/18/archives/11-allies-condemn-nazi-war-on-jews-united-nations-issue-joint.html>accessed on 14 April 2019.
[856] *See* "Antisemitism in History: Racial Antisemitism, 1875-1945" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945> accessed 14 April 2019; and Bianca Gubbay, "The Racialisation of Jews in Germany before WWI" (2012) CERS Working Paper <https://cers.leeds.ac.uk/wpcontent/uploads/sites/97/2013/05/Racialisation_of_Jews_in_Germany_Bianca_Gubbay.pdf> accessed 14 April 2019.
[857]*See* "Nürnberg Laws - Law for the Protection of German Blood and German Honor" (15 September 1935) 100/1935; and "Nuremberg Race Laws" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws> accessed 14 April 2019.
[858] *Der Ewige Jude*, dir. Fritz Hippler, Germany, Terra, 1940, [film]; Stig Hornshoj-Moller and David Culbert, "Der Ewige Jude: Joseph Goebbels' Unequaled Monument to Antisemitism" (1992) 12(1) *Historical Journal of Radio, Film and Television*, 67; Allison C Kirk, "Eugenics, race hygiene, and the Holocaust: Antecedents and consolidations" *in* Jonathan C Friedman (ed) The Routledge History of The Holocaust (Routledge 2011); Sarah Gordon *Hitler, Germans and the "Jewish Question"* (Princeton University Press, 1984), pp 100-101; and Benno Müller-Hill and George R Fraser, *Murderous science: Elimination by scientific selection of Jews, Gypsies, and others, Germany 1933-1945* (Oxford University Press, 1988, pp 182-183.

wider scope of persons, including those who had converted. Notwithstanding this, the IMT and the *Justice Case* found, respectively, the treatment of Jews to constitute "persecution on political and racial grounds" and "persecution on racial grounds".[859] The judgments thus reflected the then understanding of the term race, as reflected in the 1949 Oxford Dictionary and as perverted by those laws. This is illustrated by the IMTFE which, while unrelated to the Axis' European frontline, also referred to, with respect to the Axis' Pacific frontline, the prisoners of war's "racial needs", "racial habits" and "racial customs".[860]

To the Western educated readers, the aforementioned terminology and its use would sound obsolete. This is so given the 1950s' cultural turning point, as reflected in the 1950 UNESCO Race Question which, prepared by anthropologists, explained that:

> the term "race" designates a group or population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and or cultural isolation.[861]

The first part of this explanation acknowledged certain scientific foundations for races. Notwithstanding its characterisation of race through the combination of genetics, territory and culture, the 1950 UNESCO Race Question then explained that:

> National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connexion with racial traits.[862]

Here, genetics are disconnected from territory-culture. Reflecting on colonialism's atrocities, as justified by culture on the surface (but economic imperialism on the substance) and ultimate perversion by the Nazis, anthropologists appeared thus to have reached a turning point. Culture had to be separated from race once for all. Half a century later, the *Akayesu* Trial Chamber would confirm this by delinking "linguistic, cultural, national or religious" factors from the genetics-territory combination.[863] Finally, having explained the error of linking genetics to culture, the 1950 UNESCO Race Question went on to explain that:

> Because serious errors of this kind are habitually committed when the term "race" is used in popular parlance, it would be better when speaking of human races to drop the term "race" altogether and speak of ethnic groups.[864]

---

[859] IMT Judgment (n 490) p 304; and *The Justice Case* (n 625) p 64.
[860] *United States of America et al v Araki et al*, (IMTFE) Judgment (12 November 1948) 49688 and 49712-49713, *in* Neil Boister and Robert Cryer (eds) *Documents on the Tokyo International Military Tribunal, Charter, Indictment and Judgments* (Oxford, 2008), pp 567 and 576.
[861] UNESCO, "UNESCO and its Programme: The Race Question" (1950) <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf> accessed 14 April 2019, para 4.
[862] UNESCO, "The Race Question" (n 861) para 6.
[863] *Akayesu* Trial Judgment (n 612) para 514, holding that "The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factor".
[864] UNESCO, "The Race Question" (n 861) para 6.

In 2020, the Oxford Dictionary defines "race" as "[e]ach of the major divisions of humankind, having distinct physical characteristics".[865] Having adhered to the aforementioned genetics-based understanding of the term "race", the dictionary goes on, however, to propose, as a sub-definition "A group of people sharing the same culture, history, language, etc.; an ethnic group".[866] Having thus established a relationship between culture and ethnicity, the dictionary explains, on the usage, that:

> In recent years, the associations of race with the ideologies and theories that grew out of the work of 19th-century anthropologists and physiologists has led to the use of the word race itself becoming problematic. Although still used in general contexts, it is now often replaced by other words which are less emotionally charged, such as people(s) or community.[867]

This culturally sensitive-driven approach likely explains why the Oxford Thesaurus proposes "ethnic group" as a synonym for "race".[868] Following the footsteps of the 1950 UNESCO Race Question, the early twentieth century English language has opted for a cultural understanding of collectives rather than a genetic one.

iii. Ethnical groups

The 1949 Oxford Dictionary defined "ethnical" as "Pertaining to race, ethnological"; and "ethnically" as "gentile, heathen [especially in relation to] *ethnos* [as] nation".[869] Apart from linking the word ethnic to "race" as well as to some loaded – if not prejudiced – words (gentile, heathen), the definition refers to its Greek etymology "ethnos", which means nation, tribe or race. Thus, when considering the 1940s' understanding of nationality as synonymous with minorities, the latter seem to be encompassed in the term ethnical which, by implication, must have encompassed the understanding of national minorities as cultural units.

In fact, in 2020, the Oxford Dictionary defines "ethnic" as "[r]elating to a population subgroup (within a larger or dominant national or cultural group) with a common national or cultural tradition".[870] This shows that apart from dropping the prejudiced components of the definition, the twenty-first century has simply further refined the more "benign" understanding of that term. As seen under the definition of race, ethnicity and culture share a strong link, reinforced by the following sub-definition: "[r]elating to national and cultural origins".[871] This explains why on the synonyms, the Oxford Dictionary provides, first: "racial, race-related, ethnological, genetic, inherited".[872] This set relates to the hereditary understanding of race. But the second set of synonyms consists of eminently heritage-centred concepts, ie "cultural, national, tribal, ancestral, traditional, folk".[873] This understanding has been espoused by

---

[865] "Race" *in Oxford English Dictionary Online* (n 26) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.
[866] "Race" (n 865).
[867] "Race" (n 865).
[868] "Race" (n 865).
[869] "Ethnical" *in* Fowler, *The Concise Oxford Dictionary* (n 853) p 388.
[870] "Ethnic" *Oxford English Dictionary Online* (n 26).
[871] "Ethnic" (n 870).
[872] "Ethnic" (n 870).
[873] "Ethnic" (n 870).

Akayesu, where the Trial Chamber considered ethnic "as a group whose members share a common language or culture".[874] The *Kayishema* Trial Judgment used these terms verbatim, adding that, in the alternative, it can be a group based on self-identification or on identification by others.[875] On this, the 2020 Oxford Dictionary explains that:

> Ethnic is sometimes used in a euphemistic way to refer to non-white people as a whole, as in a radio station which broadcasts to the ethnic community in Birmingham. Although this usage is quite common, more specific terms such as 'black' or 'Asian' are preferable. Note that use of the word as a noun is often regarded as offensive, especially in British English, and is best avoided.[876]

This passage shows how, within the same culture, the term "ethnic" is constantly evolving so that at any given time, its meaning may not be universally understood.

Regardless of which of these subjective or objective approaches is prioritised, ethnicity is clearly linked to culture. Even when the ICTR cases mention culture and language, the latter is constitutive of the former. Thus, an ethnic group is a cultural collective. As Schabas rightly observes, the best course is to consider the word "ethnical" both "largely synonymous" with and "encompassing elements" of those groups, whether national, racial or religious.[877]

iv. Religious groups

As seen earlier, the travaux préparatoires do not show any specific consideration of religious groups other than that reflected fifty years later in *Akayesu*, wherein the Trial Chamber held that their "members share the same religion, denomination or mode of worship".[878] The 1999 Group of Experts on Cambodia proposed that the atrocities committed against the Monkhood could constitute genocide of a religious group, as evidenced by:

> the Khmer Rouge's policies to eradicate the physical and ritualistic aspects of the Buddhist religion; the disrobing of monks and abolition of the monkhood.[879]

By linking religion's tangible to its intangible, this passage confirms one of this study's propositions, ie to consider culture's tangible in relation to its intangible. Schabas has argued that the Khmer Rouge's acts aimed to destroy Buddhism as opposed to physically destroy its members[880] Alternatively, he explains, one could consider the "clergy itself as a religious group".[881]

In a very thought-provoking proposition, Lippman has considered that:

---

[874] *Akayesu* Trial Judgment (n 612) para 513.
[875] *Kayishema* Trial Judgment (n 708) para 98: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".
[876] "Ethnic" (n 870).
[877] Schabas, *Genocide in International Law* (n 15) p 127.
[878] *Akayesu* Trial Judgment (n 612) para 515.
[879] UNGA, "Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135" (18 February 1999), para 64.
[880] Schabas, *Genocide in International Law* (n 15) p 129.
[881] Schabas, *Genocide in International Law* (n 15) p 129.

> [r]eligious groups encompass both theistic, non-theistic, and atheistic communities which are united by a single spiritual idea.[882]

This all-inclusive proposition is most interesting as it allows for considering religion as more than the organisation of theistic beliefs. Either way, it shows that religion's understanding, like that of race and ethnicity, is couched in cultural considerations.

3. Outcome: genocide's intent, motive and consequences are cultural

The Genocide Convention's chapeau would eventually read:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[883]

As seen, the travaux préparatoires do not offer much guidance to understand these words. However, they are helpful as they illustrates the delegations' conceptual, misunderstandings, whether anthropological – ie the understanding of the groups – or legal – ie the crime's mens rea, actus reus and motive.

As regards the former, the discussions regarding the protected groups was clearly influenced by cultural conceptions. Indeed, the prism through which the concepts of nationality, ethnicity, race, and religion were envisaged was debatable then, now and fifty years onward because, beyond any possible scientific precision, they are deeply rooted in both geographic and temporal settings. Geographic, because understanding the convention's groups varies from country to country, region to region. Temporal, because within any given country or region, the meaning of these notions will always evolve with time. These geographic and temporal criteria are precisely factors that make culture a dynamic concept. And this in turn impacts on the definition of the four groups. As Schabas observes, these terms:

> necessarily involve a degree of subjectivity because their meaning is determined in a social context. […] They are social constructs, not scientific expressions, and were intended as such by the drafters of the Convention.[884]

> To many of the delegates [in] 1948, Jews, Gypsies and Armenians might all have been qualified as "racial groups," language that would be seen as quaint and perhaps even offensive a half-decade later. Their real intent was to ensure that the Convention would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. […]
>
> The four terms […] not only overlap, they also help to define each other, operating much as four comer posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. […] The

[882] Matthew Lippman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8(1) *Temple International and Comparative Journal* 1, p 29.
[883] Genocide Convention (n 105).
[884] William A Schabas, "Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda" (2000) 6 *ILSA Journal of International and Comparative Law* 375, p 384.

> drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.[885]

Challengingly enough, to define the groups is to define collective identities. This triggers the question as to the extent to which lawyers are well suited to define the highly complex question of identity, something that anthropologists, sociologists and ethnologists have been struggling with.

Moving to the strained discussions regarding intent and motives, it has also been seen that confusion reigned among many of the negotiators who lacked a criminal law background. Even for those familiar with criminal law, their understanding of intent and motive differed according to their legal systems. This also impacted on the understanding of the meaning of the destruction of group. As seen, many negotiators often conflated the destruction of the group (mens rea) and that of its members (actus reus). By implication, it is not always clear whether delegates' references to the concepts of physical, biological and cultural genocide were made with respect to the mens rea or the actus rei. Judiciously, Lebanon suggested the "destruction of a group, even though the individual members survived".[886] On the mens rea/motive nuance, Lebanon further observed that the group's destruction was based on the perpetrator's "hatred of something different or alien"; hence the intent to destroy "the group, as such".[887] Indeed, genocide is the rejection of cultural collectives, regardless of their denomination, because the perpetrator seeks to rid the world of their presence. As if an otherwise healthy body needed to be cured from those viruses. To the perpetrator's mind, genocide is thus an act of cleansing. Any collective whose presence alters the perpetrator's world conception, which is perceived through the perpetrator's cultural prism (whether secular or religious), may be destroyed. Once again, Lebanon best characterised this heritage-centred feature when it noted that UNGA Resolution 96(I) had condemned genocide because of "the loss likely to be suffered by humanity if it were deprived of the possible or actual cultural contribution of the group destroyed".[888]

Finally, it is noteworthy that many States mixed human rights law with ICL. A majority of opposing States considered cultural genocide as a human rights (minority rights) issue rather than ICL.[889] Suggesting that "the punishment of cultural genocide was

---

[885] Schabas, "Groups Protected by the Genocide Convention" (n 884) p 385.
[886] ECOSOC, UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 690.
[887] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.
[888] ECOSOC, UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 690-691. While the convention (n 105) does not contain provisions on victims' participation and reparation, art XIII ("Reparations to Victims of Genocide") of the UNSG Commentary proposed as victims both the members of the protected group and the protected group itself. Reparations consisted of restitution and compensation for the former and, for the latter: "reconstitution of the moral, artistic and cultural inheritance of the group (reconstruction of monuments, universities, churches, etc. and compensation to the group for its collective needs"). *See* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 249-51.
[889] During the Human Rights Committee discussions on the Ad Hoc Committee Draft, some States such as the United Kingdom were already suggesting that cultural genocide was a minority rights rather than ICL issue. *See* UNGA, UN Doc E/SR218 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1224-25 and 1248; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Third Meeting" (13 April 1948) UN Doc E/AC25/SR3 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 701; ECOSOC, UN Doc E/AC25/SR10

logically related to the protection of human rights",[890] France was joined by a number of States, such as Canada and India.[891] Ignoring its pre-colonial culture, and in contrast to its twenty first century policy of multiculturalism, Canada specifically observed that as their "cultural heritage" was mainly composed of "a combination of Anglo-Saxon and French elements", Canadians would strongly resist undermining their influence in Canada.[892] Belgium, Brazil, the Netherlands, Sweden and the United States considered it more appropriate to cover the issue under minority rights.[893] Many of these States were concerned about accusations of cultural genocide for the treatment of their own minorities. For example, Sweden was concerned with accusations of cultural genocide in relation to the conversion "of the Lapps in Christianity".[894] Referring to the UN Trusteeship Council's opinion on Tanganyika that "the now existing tribal structure was an obstacle to the political and social advancement of indigenous inhabitants", New Zealand warned that the UN itself could be accused of cultural genocide if the latter were included in the convention.[895] South Africa warned against article III's misuse "where primitive or backward groups were concerned".[896] Denmark stated that if the convention's scope "were unduly extended" toward "the protection of minorities", the convention could become "a tool for political propaganda instead of an international legal instrument".[897] These States wanted to avoid risks arising from their national policies regarding their minorities, whether in the metropole or in colonies/territories. But Pakistan opposed the proposed transfer of the Genocide Convention discussion to the – then future – Universal Declaration of Human Rights ("UDHR") on the ground that the latter does not criminalise human rights breaches.[898] Pakistan was joined by

---

in Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 727; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighth Meeting" (17 April 1948) UN Doc E/AC25/SR8 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 811; ECOSOC, UN Doc E/AC25/SR14 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 889.

[890] UNGA, UN Docs A/C6/SR6 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1295.

[891] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1509-1510 and 1512. Adopted one day after the Genocide Convention, the UDHR did not cover the protection of minorities. The Sixth Committee delegations favouring cultural genocide's consideration by the Third Committee knew that the latter would not consider it, as evidenced by the United States' opposition in the Third Committee to such a provision. *See* Schabas, *Genocide in International Law* (n 15) p 186.

[892] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1510.

[893] UNGA, UN Docs A/C6/SR6 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1515-1516; UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1506-1507 and 1514.

[894] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1506.

[895] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1511-1512.

[896] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1513.

[897] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1508.

[898] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502, holding that the UDHR "could not declare cultural genocide to be a crime nor provide measures for its prevention and punishment". Pakistan did not dispute assimilation into a homogeneous unit, but warned of those cases where this policy was "a euphemism concealing measures of coercion designed to eliminate certain forms of culture"; *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1503.

Ecuador, the Byelorussian Soviet Socialist Republic, the Soviet Union,[899] and China, which argued that "Although it seemed less brutal", cultural genocide:

> might be even more harmful than physical or biological genocide, since it worked below the surface and attacked a whole population, attempting to deprive it of its ancestral culture and to destroy its very language.[900]

Interestingly, despite its exclusion from the groups, language was seen as a component of culture whose alteration impacted heritage, in the sense of group identity.

C. The actus rei: heritage-centred or tangible-centred?

The UNSG Commentary referred to Lemkin's distinction between:

> "physical" genocide (destruction of individuals), "biological" genocide (prevention of births), and cultural genocide (brutal destruction of the specific characteristics of a group).[901]

The UNSG Commentary asked whether all three actus rei or only the first two should be retained, already indicating tensions over cultural genocide.[902]

The UNSG Commentary viewed physical genocide (article II(I)(1)) as "Acts intended to "cause the death of members of a group, or injuring their health or physical integrity"".[903] It characterised biological genocide (article II(1)(2)) through acts intending the group's "extinction", through "systematic restrictions on births without which the group cannot survive"; by means ranging from sterilisation/compulsory abortions to the segregation of the sexes and imposing obstacles to marriage.[904] These explanations contemplate the physical and/or biological destruction of the *members* of the group (the word "extinction" being subject to multiple understanding) [emphasis added]. As regards cultural genocide, the UNSG Commentary explained that it:

> consists not in the destruction of members of a group nor in restrictions on birth, but in the destruction by brutal means of the specific characteristics of a group.[905]

The UNSG Commentary thus attached physical, biological and cultural genocide to the actus reus of the crime which targeted individuals, whether corporally-biologically,

---

[899] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1512, 1515 and 1516.
[900] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1507.
[901] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 224 and 234.
[902] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 224.
[903] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 233.
[904] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[905] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.

mentally or else the practice of their customs. In contrast, delegates would often conflate the nature of the group destruction and the means to achieve it. The Genocide Convention legislators' confusion between intent (and often motive) on the one hand and the actus reus on the other hand has in turn impacted the international adjudicators and commentators' understanding of cultural genocide. Navigating through the convention's travaux préparatoires is complex. Understanding cultural genocide requires a sequential analysis of the travaux préparatoires. As this section will show, only a detailed review of the travaux préparatoires combined with this study's proposed heritage-centred and tangible-centred approach helps properly determine the fate of cultural genocide within the convention (1). However, since the ICJ would be asked in *Bosnia* and *Croatia* to rule on article II(b)-(c) in relation to cultural genocide, a brief analysis of discussions surrounding those sub-provisions will be conducted later on (2).

1. Provisions directly addressing cultural genocide

Discussions directly focusing on cultural genocide took place in two main stages: the first one favoured both heritage-centred and tangible-centred actus rei (a); and the second stage retained only one heritage-centred actus reus (b).[906]

a. Proposing both heritage-centred and tangible-centred actus rei

i. The Secretariat Draft

The Secretariat Draft Preamble adopted a heritage-centred approach in terms of the consequences of genocide, by providing, inter alia, that genocide:

> inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed.[907]

This passage echoed both UNGA Resolution 96(I) and "Axis Rule in Occupied Europe".[908] Article I(II)(3) provided that genocide could consist of "Destroying the specific characteristics of the group by":

> (a) Forced transfer of children to another human group; or
> (b) Forced and systematic exile of individuals representing the culture of a group; or
> (c) Prohibition of the use of the national language even in private intercourse; or
> (d) Systematic destruction of books printed in the national language, or of religious works, or prohibition of new publications; or

[906] *See* also Abtahi and Webb, "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention" (n 7).
[907] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 214.
[908] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.

> (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.[909]

Paragraphs (d)-(e) were tangible-centred, as they addressed the destruction of culture's tangible, whether movable or immovable, secular or religious. They call for no comments additional to what has been explained throughout this study. However, paragraphs (a)-(c), which were anthropo/heritage-centred, require a brief explanation. The acts explained therein directly target the collective's members through intangible (language prohibition) and tangible measures. The latter, which consisted of the physical separation of individuals from the collective, were twofold: they concerned the children on the one hand and the adults on the other hand. According to the UNSG Commentary, under article I(II)(3)(a):

> the separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.[910]

As regards article I(II)(3)(b), the UNSG Commentary referenced cultural, scientific and societal leaders without whom "the group is no more than an amorphous and defenceless mass", something that would be echoed decades later in the rulings of the IACtHR (Part I, Chapter 2) and ICTY (this Chapter, Section II).[911]

Supported by France and the United States, Donnedieu de Vabres and Pella opposed the inclusion of article I(II)(3) on the basis that cultural genocide was "an undue extension" of genocide, which "amounted to reconstituting the former protection of minorities (which was based on other conceptions)".[912] Translated into the 2020s' language, the bracketed part means that minority protections were a human rights issue whereas genocide was a criminal law one. However, this should be nuanced since, as seen in this study, human rights issues involving attacks targeting culture may be tantamount to crimes, eg in case of CaH persecution (Part I, Chapter 2). In contrast to Donnedieu de Vabres and Pella's position, Lemkin believed that cultural genocide should be included, arguing that without preserving its spiritual and moral unity, a

---

[909] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 215.

[910] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235. The ICC Elements of Crimes provide that "forcible" ranges from physical to threat of force, through coercion (duress, psychological oppression or abuse of power). *See* ICC, "Elements of Crimes: Crimes Against Humanity, Deportation or Forcible Transfer of Population" (2011) art 7(1)(d).

[911] These were "chiefly, scholars, writers, artists, teachers and educators, ministers of religion, doctors of medicine, engineers, lawyers, administrators"; *see* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235. For Lemkin, attacking the "three basics phases of life in a human group; physical existence, biological continuity (through procreation), and spiritual or cultural expressions [qualify] as physical, biological, or cultural genocide. […] By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate. Religion can be destroyed within a group even if the members continue to subsist physically". *See* Raphael Lemkin, "Genocide as a Crime under International Law" (1948) 4(2) *United Nations Bulletin*, p 71, referred to in *United States of America v Ulrich Greifelt et al* ("RuSHA"), (United States Military Tribunal) Judgment (10 October 1947 and 10 March 1948) 13 LRTWC 1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 40.

[912] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.

"racial, national or religious group" would cease to exist.[913] Noting the groups' contribution "to civilization generally", he added that "[i]f the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations".[914] From this heritage-centred approach regarding attacks targeting culture, Lemkin went on to provide the following nuanced but firm vision:

> Cultural genocide was much more than just a policy of forced assimilation by moderate coercion – involving for example, prohibition of the opening of schools for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on. It was a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.[915]

Thus reiterating his "Axis Rule in Occupied Europe" vision, Lemkin remained cautious by linking the above-referred acts to "drastic methods" as opposed to "moderate coercion". Addressing this issue would thus be a case-by-case matter.

Intriguingly, despite opposing the inclusion of article I(II)(3), France and the United States agreed to include subparagraph (a), without any explanation.[916]

In subsequent discussions, Lebanon, Poland and Yugoslavia supported article I(II)(3).[917] On the other hand, the Netherlands and the United States agreed with Donnedieu de Vabres and Pella.[918] France simply opposed the inclusion of cultural genocide, stating that it was "unable to recognise any but physical genocide".[919] This was odd since France was not opposed to biological genocide. This inexplicable lack of distinction between physical and biological genocide requires a cautious reading of the travaux préparatoires with respect to the physical/biological/cultural genocide

---

[913] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[914] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[915] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[916] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[917] UNGA, "One Hundred and Thirty-ninth Meeting at Lake Success, New York" (12 February 1948) UN Doc E/SR139 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 589 (Lebanon); UNGA Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 193; UNGA, "Forty-First Meeting at Lake Success, New York" (3 October 1947) UN Doc A/C6/SR41 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 395 (Poland); and UNGA, UN Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 167 (Yugoslavia).
[918]UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 374; ECOSOC, "Prevention and Punishment of Genocide Comments of Governments on the Draft Convention Prepared by the Secretariat (Document E/447)" (22 April 1948) UN Doc E/623/Add3 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 636, para 2.
[919] UNGA, "Committee on the Progressive Development of International Law and its Codification: Summary Record of the Twenty-Eighth Meeting" (24 June 1947) UN Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 164; UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 383; ECOSOC, "Prevention and Punishment of Genocide: Historical Summary (2 November 1946 – 20 January 1948)" (26 January 1948) UN Doc E/621 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 527; ECOSOC, UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 538.

dichotomy. This gives credence to this section's proposition that postures were adopted as a matter of principle, for fear of accusation relating to colonialism's defects.

ii. The Ad Hoc Committee Draft

Initially, the Ad Hoc Committee decided, by six votes to one, that cultural genocide should, as a matter of principle, be included in the Genocide Convention.[920] Lebanon explained that UNGA Resolution 96(I)'s aforementioned heritage-centred approach had "made it a duty" for the Ad Hoc Committee to address cultural genocide".[921] For the United States, the convention resulted from the holocaust and genocide should encompass only "those barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide".[922] Later, France stated that, although their mens rea was the same, physical and cultural genocide "were not exactly the same crime", since their actus rei were different.[923] Thus, even though referring to it as "cultural *genocide*" [emphasis added], France still considered it as a crime, albeit distinct from genocide. France probably meant property crime, since it explained that physical genocide concerned "life", while cultural genocide concerned acts targeting "objects and things".[924] Importantly, though, France continued to ignore biological genocide, something that would echo throughout the drafting process and in the constant rejection of cultural genocide by the ILC and ICTY-ICJ (Chapter 3.II).

Eventually, as seen, a distinct provision on cultural genocide (article III) was agreed:

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members 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.[925]

Paragraph 1's actus reus was both anthropo-centred (use of language) and tangible-centred (publications). Paragraph 2's actus reus was tangible-centred (destruction of/prevention to use secular and religious items). The forced transfer of children, the Secretariat Draft's only actus reus of cultural genocide which gathered all three experts' agreement, was omitted. However, the chapeau addition of the words "such as" turned paragraphs 1-2 into a non-exhaustive list of actus rei of cultural genocide.

---

[920] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 731. The opposing vote presumably was the United States', which preferred a separate provision to "enable Governments to make reservations". *See* ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 837.
[921] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 730.
[922] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 727.
[923] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 839.
[924] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 839.
[925] ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.

b. Retaining only one anthropo-centred actus reus: the Sixth Committee

At the third and last stage, the divide between the supporters of and the opponents to the inclusion of cultural genocide came to a head.

i. Resuscitating the Secretariat Draft article I(II)(3)(a) under article II

The Sixth Committee's eighty-second session began oddly. When addressing article II titled "("Physical" and "biological" genocide)", Greece proposed adding a paragraph (e) on "forcibly transferring children of the group to another group" – originally the Secretariat Draft article I(II)(3)(a) on cultural genocide.[926] Greece rightly recalled that, as cultural genocide's only actus reus which had been agreed by all three experts, the forced transfer of children should not be opposed by France, as it was "an act far more serious and indeed more barbarous" than article I(II)(3)'s other actus rei.[927]

The ensuing discussion illustrates an eighty-second session marked by an incoherent set of exchanges, where conceptual ideas kept morphing back and forth. The proposed actus reus, added Greece, "had not only cultural, but also physical and biological effects"; since it imposed on the children "conditions of life likely to cause them serious harm or even death.[928] Thus, Greece saw this act as capable of consisting of any of the three forms of genocide, although it did not explain how it could be biological. Recalling that "Christian children were abducted and taken to the Ottoman Empire", Greece explained that the forcible transfer of children was:

> not primarily an act of cultural genocide. Although it could in certain cases be considered as such, it could be perpetrated rather with the intent to destroy or to cause serious physical harm to members of a group.[929]

Thus from an original consideration of that act as any of the physical-biological-cultural genocides, within minutes, Greece saw it mainly as the first two than the last one. Moments later, joined by the staunchest supporter of the inclusion of cultural genocide, the Soviet Union, Greece saw the proposal as physical rather than cultural genocide.[930]

---

[926] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[927] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1492.
[928] Greece also recalled that, while opposed to cultural genocide, the United States had made an exception by considering the forcible transfer of children as a form of physical and biological genocide; *see* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1492-1493.
[929] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1495.
[930] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1496-1497.

For Belgium, Poland and the Netherlands, the Greek proposal was too vague; they preferred discussing it after article III.[931] This showed that they saw it as a cultural genocide-related actus reus. Iran agreed to the same sequencing, because it saw in the provision both cultural and physical genocide, as did Czechoslovakia, which found the placement under article II rather than III illogical.[932] Joining these two, Siam said that this actus reus "must involve their complete absorption by a new group" with the resultant loss of their former identity.[933] Yugoslavia agreed that the transfer "with a view to their assimilation into another group constituted cultural genocide".[934] These States saw the said transfer *primarily* as an actus reus of cultural genocide. For Uruguay, since measures to prevent births had been included, one should also include:

> measures intended to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people.[935]

Furthering this eighty-second session's cacophony, moments later, Uruguay argued that "there was no reason why such acts of physical genocide should be associated with cultural genocide".[936] In the meantime, the United States had stated that:

> the Greek amendment should stand on its own merits and *not be associated too closely* with cultural genocide. *Even if it were subsequently decided to include cultural genocide in the convention, a judge considering a case of the forced transfer of children would still have to decide whether or not physical genocide were involved*. […] In the eyes of the mother, there was little difference between measures to prevent birth half an hour before the birth and abduction half an hour after birth.[937] [emphasis added]

So even the United States did not radically reject the association of this actus reus with cultural genocide; rather it saw this actus reus as a combination of physical and cultural – if not biological – genocide, with the final determination being judicial.[938]

Eventually, the Greek amendment was adopted as part of article II.[939]

However, as seen, the debates were confused and paradoxical. This may be partly due to Greece's premature placement of its amendment since, as expressed by many States, it was necessary to discuss it under article III on cultural genocide. States advocating that course were all linking the Greek amendment to cultural genocide, given that,

---

[931] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1495-1496 and 1498.
[932] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1496 1498.
[933] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[934] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[935] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1494.
[936] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1496.
[937] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1494.
[938] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1496.
[939] By 20 votes to 13 (with 13 abstentions); *see* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.

except for minor editorial changes, it reproduced the Secretariat Draft article I(II)(3)(a) on cultural genocide. In fact, the majority of the States that took the floor linked the Greek amendment to cultural genocide. During the subsequent article III discussion, despite the fact that the forcible transfer had already been voted to be included in article II, Venezuela saw in the Secretariat Draft's forcible transfer of children the fact that:

> a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm.[940]

For Venezuela, this provision was included because the forced transfer of children:

> to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization and living in conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such a case there would be no question of mass murder, mutilation, torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.[941]

Reminiscent of the then recent Nazi's Germanisation practice (Chapter 3.II) as well as the future IACtHR's tribal/indigenous rulings (Part I), this passage illustrates the effects of the anachronistic voting of the Greek proposal before discussing article III.

Even Greece, the United States and Uruguay, which eventually considered the amendment as physical – if not biological – genocide, did so with great confusion. In essence, none of the States that viewed the provision as physical or biological genocide seemed to radically *not* consider it as cultural genocide.

The Sixth Committee's eighty-second meeting is a most incoherent session. This was the case from the start with Greece bringing back an actus reus of cultural genocide from the Secretariat Draft that had been left out of the Ad Hoc Committee. Given the fact that even Donnedieu de Vabres and Pella had agreed with Lemkin only on this actus reus of cultural genocide, Greece's resuscitating of the provision under article II which was titled "("Physical" and "biological" genocide) only further confused the issue. The line-by-line reading the travaux préparatoires proves that scholar and judicial assertions that cultural genocide was rejected from the convention must be based on either a partial reading of the travaux préparatoires or a teleological one. This will matter when reviewing the ICR-based jurisdictions' practice (this Chapter, Section II).

ii. Rejecting the Ad Hoc Committee Draft, article III

Having discussed article II, States discussed article III on cultural genocide. Among the opponents of article III on cultural genocide, positions varied. Peru and the United

[940] UNGA, "Eighty-Third Meeting: Consideration of the Draft Convention on Genocide" (25 October 1948) UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1504.
[941] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1504.

Kingdom recommended its deletion.[942] Iran, favoured a supplementary convention on cultural genocide.[943] Among the supporters of cultural genocide, Egypt and Syria proposed simplifying article III, given the fact that cultural genocide was "less heinous" than the other forms of group destruction, warranting different penalty.[944]

Focusing on cultural genocide's tangible-centred means, Pakistan observed that:

> Some representatives appeared to consider cultural genocide as a less hideous crime than physical or biological genocide. […] [F]or millions of men in most Eastern countries the protection of sacred books and shrines was more important than life itself; the destruction of those sacred books or shrines might mean the extinction of spiritual life. Certain materialistic philosophies prevented some people from understanding the importance which millions of men in the world attached to the spiritual life.[945]

For Pakistan, depending on cultures, some tangible components of a group's culture – be it sacred books/buildings or else – may matter so much to the targeted group that their violent and brutal loss may be felt by its members as targeting the group's cement. Venezuela proposed that cultural genocide be considered only for:

> violent and brutal acts which were repugnant to human conscience, and which caused losses of particular importance to humanity, such as the destruction of religious sanctuaries, libraries, etc.[946]

Referring to the burning of the synagogues, of Jewish libraries, or of the Louvain University and the destruction of the Reims Cathedral, Venezuela explained that:

> crimes against the culture or the religion of certain groups could shock human conscience in the same way as did crimes of physical genocide.[947]

From the travaux préparatoires, the hierarchy between property crimes and crimes against persons (see also *Al Mahdi*, this Part, Chapter1) seems one of the reasons why many States opposed cultural genocide. Denmark's remarks best encapsulated this:

> it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.[948]

Put in that way, Denmark's point undermined the inclusion of cultural genocide. However, cultural genocide was precisely not just meant to cover "closing the libraries". Indeed, this over-simplified statement skipped a whole array of nuances

---

[942] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1513; and UN Doc A/C.6/222, 'Agenda Item 32', 7 October 1948, *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977.
[943] UNGA, UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1325.
[944] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1508-1510.
[945] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Web, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[946] UNGA, UN Doc A/C6/SR65 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1312.
[947] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1505.
[948] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1508.

viewed by those favourable to the inclusion of cultural genocide. In fact, just two years after Denmark's statement, the very people who constituted the main target of the Nazi gas chambers passed Israel's Nazi and Nazi Collaborators (Punishment Law), 5710/1950, which would define crimes against the Jewish people by importing the Genocide Convention's definition of genocide quasi-verbatim, by substituting "Jewish people" or "Jews" for the convention's groups and adding the tangible-centred actus reus of "destroying or desecrating Jewish religious or cultural assets or values".[949]

Eventually, during the article-by-article examination, a majority of States rejected the cultural genocide draft article.[950] A majority retained political groups, notwithstanding the latter's lack of permanency.[951] This duality is noteworthy since the votes confirm the prevalence of ideological-geopolitical affiliations over reasoned Cartesian stance. Most of the States aligned themselves either with the United States (mainly the future Western European and others Group "WEOG") or with the Soviet Union (mainly the future Eastern European Group "EEG"). As Novic has argued, cultural genocide's fate was thus determined between the nascent Cold War and tensions regarding colonialism.[952] This is illustrated by the subsequent debates on political groups where,[953] "in a conciliatory spirit" and to maximise support for the convention, the United States agreed with a proposal by Egypt, Iran and Uruguay, to remove article II's reference to political groups "primarily for practical reasons".[954] Many of the States that had previously voted to keep political groups followed suit.[955]

---

[949] The Nazi and Nazi Collaborators (Punishment Law), 5710/1950 defines, in Section I(b), provides:

> Crime against the Jewish people' means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
> (i) killing Jews;
> (ii) causing serious bodily or mental harm to the Jews;
> (iii) placing Jews in living conditions calculated to bring about their physical destruction;
> (iv) imposing measures intended to prevent births among Jews;
> (v) forcibly transferring Jewish children to another national or religious group;
> (vi) destroying or desecrating Jewish religious or cultural assets or values;
> (vii) inciting to hatred of Jews.

See "Law No 64 - Nazi and Nazi Collaborators (Punishment Law)" (passed on 1 August 1950) 5710/1950. This law differs from the Crime of Genocide (Prevention and Punishment) Law, 5710-1950, consequent to the Genocide Convention and passed by the Knesset on 29 March 1950. *See* "The Crime of Genocide (Prevention and Punishment) Law" (passed on 29 March 1950) 5710-1950.

[950] 25 votes to 16, with 4 abstentions (13 delegations absent); *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1518.

[951] 29 votes to 13 with 9 abstentions. *See* UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1411-12. *See* also UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1355-60; UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1393. From beginning to end, a large part of the discussion consisted of the cultural genocide versus political genocide debate. *See* eg ECOSOC, "Ad Hoc Committee on Genocide: Corrigendum to the Summary Record of the Third Meeting at Lake Success, New York" (20 May 1948) UN Doc A/C25/SR4 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 717; and UNGA, UN Doc E/SR218 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1219-1239.

[952] Novic, (n 15) p 23-30.

[953] UNGA, UN Doc A/C6/288 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2012.

[954] UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1865-68.

[955] Australia, Canada, Denmark, India, Syria and the United Kingdom (deletion); and Cuba, France, Luxembourg, New Zealand, Norway and Sweden (abstention). The Soviet Union and its supporters abstained; *see* UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The*

Chart 9: UN Member States' votes per regional groups on the inclusion/exclusion of political groups and cultural genocide

UN Regional groups	The retention of political groups			The exclusion of cultural genocide		
	In favour	Against	Abstention	In favour	Against	Abstention
AG		Union of South Africa	Egypt, Ethiopia	Liberia, Union of South Africa	Egypt, Ethiopia	
APG	Burma, China, India, Philippines, Saudi Arabia, Siam, Syria, Yemen	Iran	Afghanistan, Lebanon, Pakistan	India, Iran, Siam	China, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria	Afghanistan
EEG		Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Soviet Union	Yugoslavia		Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Soviet Union, Yugoslavia	
GRULAC	Bolivia, Chile, Cuba, Ecuador, Haiti, Panama, Paraguay, Salvador	Argentina, Brazil, Dominican Republic, Uruguay, Venezuela	Nicaragua, Peru	Bolivia, Brazil, Chile, Dominican Republic, Panama, Peru	Ecuador Mexico	Argentina, Cuba, Venezuela
WEOG	Australia, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States	Belgium	Greece	Australia, Belgium, Canada, Denmark, France, Greece, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States		

Later, as the Sixth Committee was finalising the draft convention, a series of Soviet Union amendments during the UNGA debates on 9 December 1948 attempted to restore a modified version of the Ad Hoc Committee Draft article III on cultural genocide:

Travaux Préparatoires (n 6) p 1870. This change of heart is unclear from the travaux préparatoires. Nersessian has suggested that this may have resulted from negotiations regarding the jurisdiction to an international criminal court; *see* David Nersessian, *Genocide and Political Groups* (Oxford University Press 2010), p 110.This view is strengthened by the fact that, when the United States sought to re-introduce a reference to "a competent international penal tribunal", several references to this "conciliatory spirit" were made; *see* UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1874 and 1877; UNGA, "Hundred and Thirtieth Meeting: Continuation of the Consideration of the Draft Convention on Genocide" (30 November 1948) UN Doc A/C6/SR130 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1887 and 1893. For Schabas, political groups were excluded "for 'political' reasons rather than reasons of principle." *See* Schabas, *Genocide in International Law* (n 15) p 160.

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or religious origin, or religious beliefs such as:
>
> (a) 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;
> (b) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[956]

The proposal was defeated on a roll-call vote, 31 votes to 14, with 10 abstentions.[957] By its resolution 260 A (III) of 9 December 1948, the UNGA approved and proposed for signature and ratification or accession the Genocide Convention.

Thus, in the end neither political groups nor article III of the Ad Hoc Committee Draft article III titled "cultural genocide" were included in the convention.[958] However, the Secretariat Draft's article I(II)(3)(a) ended in the convention under article II(e).

2. Provisions indirectly covering cultural genocide

Originally, the Secretariat Draft article I(II)(1) read:

> 1. Causing the death of members of a group or injuring their health or physical integrity by:
> […]
> (b) subjecting the conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or

[956]UNGA, "Agenda Item 32: USSR: Amendments to the Draft Convention on the Prevention and Punishment of Genocide proposed by the Sixth Committee (A/760)" (5 December 1948) UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; and UNGA, "Hundred and Seventy-Ninth Plenary Meeting: Continuation of the Discussion on the Draft Convention on Genocide, Amendments Proposed by the USSR to the Draft Convention and Amendment Proposed by Venezuela" (9 December 1948) UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 2079-2080.

[957] Against inclusion: India, Iran, and Siam (Asia); Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Honduras, Nicaragua, Panama, Paraguay and Peru (GRULAC); Australia, Belgium, Canada, Denmark, France, Greece, Iceland, Luxembourg, The Netherlands, New Zealand, Norway, Sweden, Turkey, the United Kingdom and the United States (WEOG). In favour of inclusion: Liberia (Africa); China, Lebanon, Pakistan, Philippines, Saudi Arabia and Syria (Asia); Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, the Soviet Union and Yugoslavia (EEG); Haiti (GRULAC). Abstention: Afghanistan, Burma and Yemen (Asia); Egypt, Ethiopia and Union of South Africa (Africa); and Guatemala and Venezuela (GRULAC). UNGA, UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; and UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080.

[958] UNGA, UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080. *See also* UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1411-12; UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1518; UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1870; UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080.

(c) mutilations and biological experiments imposed for other than curative purposes.[959]

At the Ad Hoc Committee, changing both in order and substance, article I(II)(1)(b)-(c) was placed under the new article II. The following is a brief analysis of their development, since ICR-based jurisdictions have used these articles to consider aspects of cultural genocide (Chapter 3.II).

a. Article II(b): from physical impairment to mental harm

Article I(II)(1)(c) morphed into "any act directed against the corporal integrity of members of the group",[960] before becoming the Ad Hoc Committee Draft article II(2) "impairing the physical integrity of members of the group".[961] During the discussions, China failed to include the distribution of narcotic drugs so as to bring about collectives' "physical debilitation".[962] The Ad Hoc Committee explained that this provision covered acts other than killing, such as "[b]lows and wounds, torture, mutilation, harmful injections, biological experiments conducted with no useful end in view."[963]

At the Sixth Committee, China amended this purely physical-centred provision, by adding the word "mental" as follows: "impairing the physical or mental health of members of the group".[964] China explained that the proposed addition reflected acts such as the Japanese distribution of narcotics among the Chinese population during the Second World War.[965] One day later, a United Kingdom amendment proposal dropped the word "mental" so as to read "causing grievous bodily harm to members of the group".[966] In subsequent discussions, this United Kingdom's proposal, as amended by

[959] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 215.
[960] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Thirteenth Meeting" (20 April 1948) UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 879.
[961] ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.
[962] ECOSOC, E/AC25/SR.5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 731.
[963] ECOSOC, "Ad Hoc Committee on Genocide Commentary on Articles Adopted by the Committee" (26 April 1948) UN Doc E/AC25/W1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 981.
[964] UNGA, "Agenda Item 32: China Amendment to the Draft Convention on Genocide (E/794)" (18 October 1948) UN Doc A/C6/232/Rev 1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1976.
[965] UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1477-1478.
[966] UNGA, UN Doc A/C6/222 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977. *See also* UNGA, "Eighty-First Meeting: Consideration of the Draft Convention on Genocide" (22 October 1948) UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1482. Other proposals included "impairing physical integrity"; *see* UNGA, "Agenda Item 32: Belgium Amendments to the Draft Convention on Genocide (E/794)" (5 October 1948) UN Doc A/C.6/217 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1973, and "the infliction of physical injury or pursuit of biological experiments"; *see* UNGA "Agenda Item 32: Union of Soviet Socialist Republics Amendments to Article II of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/223 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1978.

India, to add mental, was adopted as the Genocide Convention article II(b). It read: "causing serious bodily or mental harm to members of the group".[967]

Thus, an initially physical actus reus morphed into one that also included mental harm. As this study has already shown, the IACtHR has established in its so-called indigenous/tribal cases that the collective may suffer mental harm, including in the form of mental illness, through the disruption of its heritage as a result of attacks against its anthropical and natural environment (Part I, Chapter 2). Thus, there is potential for article II(b)'s mental harm to be used in such cases – with the existence of the requisite mens rea, as will be seen in Section II.

b. Article II(c): physical destruction of the group or slow death of its members?

The UNSG Commentary coined the concentration camps inclination of article I(II)(1)(b) as "slow death".[968] The actus reus indeed focused on life conditions, such as "lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion" that are likely "to result in the debilitation or death of the individuals".

At the Ad Hoc Committee, the above provision was first reworded as: "Subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group".[969] This proposal was intriguing as it imported partly the destruction of the group as envisaged in the Secretariat Draft's chapeau (article I(I)-(II)). But even more so, it emphasised that in such instances, the physical existence of the group would be the end result. Thereafter, a Soviet Union proposal read: "The premeditated infliction on these groups of such conditions of life which will be aimed at destroying totally or partially their physical existence".[970] The United States, however, proposed an amendment: "Subjecting members of a group to such physical conditions or measures as will cause their death or prevent the procreation of the group".[971] This was a more accurate definition of the actus reus as it avoided repeating the chapeau. As a consequence, it avoided entering into the conceptually complex and non-conclusive debate on the type of group destruction as opposed to the means to achieve it. The United States amendment was concerned with the group members' death or the prevention of its procreation. While the amendment failed to gather momentum, Venezuela successfully proposed an amended version of the Soviet Union text minus the chapeau, as the Ad Hoc Committee Draft article II(3): "Inflicting on the members of the group such measures or conditions of life which would be aimed

[967] UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1482-1483.
[968] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 233.
[969] ECOSOC, "Ad Hoc Committee on Genocide, Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China" (16 April 1948) UN Doc E/AC25/9 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 833.
[970] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 876.
[971] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 877.

to cause their deaths".[972] Thus, the amendment rightly focused on the type of actus reus as opposed to that of the destruction. The Ad Hoc Committee explained that this covered both the ghetto-type deprivation and the victims' denial of means of existence otherwise available to other inhabitants.[973]

At the Sixth Committee, however, the physical destruction of the group resurfaced. Titled "("physical" and "biological" genocide)", the Ad Hoc Committee Draft article II's chapeau simply referenced the "intent to destroy" the group. It specified neither the nature nor the scope of that destruction. First, a Belgian amendment proposal read: "Inflicting enforced measures or conditions of life, aimed at causing death".[974] A couple of days later, the Soviet Union brought back the chapeau's mens rea by proposing: "The deliberate creation of conditions of life for such groups as is aimed at their physical destruction in whole or in part".[975] As the Soviet Union agreed to substitute "as are calculated to bring about" for "as is aimed at", Belgium withdrew its amendment.[976] A further slight amendment to the Soviet Union text resulted in the text known as article II(c): "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".[977]

Article II(c) is the only actus reus of genocide to repeat part of the chapeau's mens rea and to specify the type of group destruction. According to the *Karadžić* Trial Chamber, under this provision, the perpetrator uses methods that do "not immediately kill the members of the group, but which, ultimately, seek their physical destruction".[978] This interpretation is thus about the *physical destruction of the members* of *the group*. The Chamber, however, added that article II(c) applies to acts that are:

> deliberately calculated to cause a *group's physical destruction* and, as such, these acts must be clearly distinguished from those acts designed to bring about the *dissolution of the group*.[979] [emphasis added]

Thus, the Chamber viewed the crime under article II(c) as the physical destruction of both the group and its members as opposed to its "dissolution". When it comes to the destruction of abstract entities, such as cultural units, it is hard to nuance between their physical destruction and their dissolution. In other words, what is the precise difference between, eg, the destruction and dissolution of Incas, not an individual, but as a group? Be that as it may, from the travaux préparatoires, it is not possible to ascertain why the

---

[972] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 880.
[973] ECOSOC, UN Doc E/AC25/W1*in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 981-982.
[974] UNGA, (E/794) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1972.
[975] UNGA, UN Doc A/C6/223 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1978.
[976] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighty-Second Meeting" (23 October 1948) UN Doc E/AC25/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1487.
[977] UNGA, "Eighty-Second Meeting: Continuation of the Consideration of the Draft Convention on Genocide" (23 October 1948) UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1488.
[978] *Karadžić* Trial Judgment (n 721) para 546, citing *Akayesu* Trial Judgment (n 612) para 505. See *Stakić* Trial Judgment (n 745) paras 517-518.
[979] *Karadžić* Trial Judgment (n 721) para 547, citing *Brđanin* Trial Judgment (n 758) paras 692 and 694; and *Stakić* Trial Judgment (n 745) para 519.

Soviet Union used the formulation "physical destruction" of the group at the Ad Hoc Committee nor why it brought it back at the Sixth Committee. Given specifically the 1946-1948 negotiators' confusion surrounding the mens rea, actus reus and motive of genocide, no inordinate amount of attention should be placed on the odd import of the chapeau's "physical destruction" of the group in the article II(c) actus reus. For instance, could it be reasonably argued that article II(a) ("killing members of the group") is not concerned with its physical destruction merely on the basis that it does not refer to it? This question has been sophisticatedly posed by Judge Shahabuddeen in his *Krstić* Appeal Judgment partially dissenting opinion.[980] The *Karadžić* Trial Chamber's ruling may thus be an attempt to (i) explain this oddity; and/or (ii) distance the provision from cultural genocide which was often associated with the group's "dissolution". Implicit to this is the Chamber's further holding that in the absence of any direct evidence, judges will be guided by factors such as the characteristics of the group like its vulnerability.[981] This is important since a distinction must be drawn between targeting a protected group that is demographically minuscule and geographically focused (such as the IACtHR's indigenous/tribal cases as seen in Part I, Chapter 2), and that of a demographically large geographically dispersed group.

Accordingly, while this provision had no connection with cultural genocide, this brief review was required in order to better analyse the instances where the ICTY-ICJ have been seized of this provision to address cultural genocide (Chapter 3.II).

3. Outcome

Against the confusing background of the above-analysed back-and-forth discussions, the 1996 ILC Report has stated that:

> as clearly shown by the [travaux préparatoires], the *destruction in question is the destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group*. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of *the word "destruction", which must be taken only in its material sense, its physical or biological sense*.[982] [emphasis added]

The first sentence's distinction between the destruction of the group (by physical/biological means) and the destruction of its defining features (national, linguistic, religious, cultural, etc.) accurately reflects the way in which the Ad Hoc Committee explicitly created two separate mentes reae for physical/biological genocide and cultural genocide, each. However, the next sentence lacks clarity. Does it mean that the *group's* destruction (i) can be only physical/biological; or (ii) can be only effected by physical and biological means against its individual members? Regardless of the

[980] *Prosecutor v Krstić*, (ICTY) Appeal Judgment (19 April 2004) Case No IT-98-33-A, partial dissenting opinion of Judge Mohamed Shahabuddeen, para 48; *see* also paras 49-50. *See* also *Stakić* Appeal Judgment (n 980) paras 20-24.
[981] *Karadžić* Trial Judgment (n 721) para 548, citing *Prosecutor v Tolimir*, (ICTY) Judgment (12 December 2012) Case No IT-05-88/2-T, para 742; *Prosecutor v Popović et al*, (ICTY) Judgment (10 June 2010) Case No IT-05-88-T, para 816; *Brđanin* Trial Judgment (n 758) para 906. *See also Prosecutor v Krajišnik*, (ICTY) Judgment (27 September 2006) Case No IT-00-39-T, para 863 and *Kayishema* Trial Judgment (n 708) para 548.
[982] 1996 ILC Report (n 594) p 46.

answer to the question, rather than factual, the ILC's second sentence is an opinion. If it refers to (i), then is not unequivocally supported by the travaux préparatoires. As seen, the drafting phases of the Genocide Convention show a great deal of confusion on the distinction between the mens rea, motives and actus reus on the one hand and the destruction of the group and that of its individual members on the other hand. It is recalled that the Secretariat Draft had considered physical, biological and cultural genocide, ie the destruction, in whole or in part, of the group, although the UNSG Commentary had explained that the actus rei of cultural genocide consisted of the destruction of the characteristics of a group. The 1996 ILC Report then explains that:

> It is true that [the Secretariat Draft and the Ad Hoc Committee Draft] contained provisions on "cultural genocide" covering 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 cultural institutions and objects of the group.[983]

In fact, what the ILC cites here is not the Secretariat Draft, but the Ad Hoc Committee Draft article III. The Secretariat Draft was different. As seen, its article I(II)(3) contained both tangible-centred and heritage-centred actus rei, not least the forced transfer of children. Therefore, the passage attributed by the ILC to *both* the Secretariat Draft and the Ad Hoc Committee Draft does not present an accurate picture of the discussions. This creates confusion. As a consequence of its own reasoning, the 1996 ILC Report then goes on to explain that:

> However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the [Secretariat Draft and Ad Hoc Committee Draft] and simply listed acts which come within the category of "physical" or "biological" genocide. *Subparagraphs (a) to (c) of the article list acts of "physical genocide" while subparagraphs (d) and (e) list acts of "biological genocide"*.[984] [emphasis added]

This paragraph is most intriguing as a close reading of the travaux préparatoires has provided a far more nuanced picture. First, and as seen before, unlike article II(a)-(b), article II(c) refers to the physical destruction of the group. If one followed the 1996 ILC Report, then paragraphs (a)-(b) should have also made this reference. But most importantly, as significantly analysed in this Section, the Secretariat Draft article I(II)(1)-(3) listed physical, biological and cultural genocide, respectively.[985] Article I(II)(3)(a) ("Forced transfer of children to another human group") was the only sub-provision under article I(II)(3) that both Donnedieu de Vabres and Pella – who otherwise opposed cultural genocide – and Lemkin – who favoured it – agreed should be included in the Genocide Convention.[986] As seen earlier, reference to the "forced transfer of children to another human group" was subsequently removed from the Ad Hoc Committee Draft, as transmitted to the Sixth Committee.[987] However, Greece

[983] 1996 ILC Report (n 594) p 46.
[984] 1996 ILC Report (n 594) p 46.
[985] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 228-234.
[986] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[987] UNGA, "Report of the Ad Hoc Committee on Genocide, Annex Draft Convention on The Prevention and Punishment of The Crime of Genocide" (24 May 1948) E/794, *in* Abtahi and Webb,

successfully brought back the Secretariat Draft article I(II)(3)(a) from the brink during the discussions on article II, which concerned physical and biological genocide. As further seen, the ensuing Sixth Committee discussions revealed a sense of confusion and uncertainty on the characterisation of that provision. The majority of those States taking the floor, including some of those that would eventually vote against the inclusion of the Ad Hoc Committee Draft article III on cultural genocide, found the discussion on the forcible transfer of children out of place as they saw it fit for discussions under article III. Moreover, the majority of States taking the floor linked the forcible transfer of children *also* to cultural genocide, even if some considered it to be physical/biological genocide *too*. Such was the confusion that even after the inclusion of the forcible transfer of children in article II, its characterisation as cultural genocide resurfaced during the article III discussion. Furthermore, observing that while the Ad Hoc Committee article III "dealing with "cultural Genocide"" was left out, Nehemiah Robinson, who closely followed the negotiations, has explained that:

> *Instead*, [the convention] included, on a Greek motion, point (e) dealing with forced transfer of children (as was envisaged in the Secretariat's draft) *as one of the acts of cultural genocide*.[988] [emphasis added]

In a more nuanced manner, Schabas has observed, in discussing the mental element of article II(e), that the provision:

> is somewhat anomalous, because it contemplates *what is in reality* a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide form the scope of the Convention. As a result, […] the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense.[989] [emphasis added]

Schabas has further called the forcible transfer of children "an exception to [the] general rule" of excluding cultural genocide from the Genocide Convention.[990]

The forcible transfer of children is the physical separation of children with cultural results, ie their cultural alienation from their group, with its harmful impact on both the children and the group as such. For this to be effective, the question of the child's age arises. As seen in Chapter 2, the Nazis believed that "racially valuable" Polish children must "not be over 8 to 10 years of age" since only up to that age would "a genuine ethnic transformation, that is, a final Germanization" be possible.[991] The pre-puberty age-limit here was of course not for reproductive purposes, but for the children's cultural malleability. Notably, both the Convention on the Rights of the Child and the ICC Elements of Crimes define "children" as persons under the age of eighteen.[992] This raises also the question as to how malleable a child aged seventeen could be. Were it to

---

The Genocide Convention: *The Travaux Préparatoires* (n 6) p 1156. *See* also ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.

[988] N Robinson (n 800) p 64.

[989] Schabas, *Genocide in International Law* (n 15) pp 185, 187 and 245.

[990] William A Schabas, "Convention for the Prevention and Punishment of the Crime of Genocide" (United Nations Audiovisual Library of International Law, 2008) <http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf> accessed 14 April 2019, p 2.

[991] *RuSHA* (n 911) p 9.

[992] ICC, "Elements of Crimes: Genocide by Forcibly Transferring Children" (2011), art 6(e), and Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

be a physical act with biological consequences – ie limiting reproduction within the group – then the age limit would have been set at puberty so that, individuals' forcible transfer would prevent them from engaging in reproductive functions within the group.

It is therefore inaccurate to suggest that, unlike physical and biological genocide, cultural genocide was not included in the Genocide Convention, particularly in light of the aforementioned Sixth Committee discussions to assimilate article II(e) to biological genocide.[993] Relying seemingly exclusively on the 1996 ILC Report, the ICTY *Krstić* Trial and Appeals Chambers have reached the same conclusion, as relayed not only by subsequent ICTY judgments,[994] but also by the ICJ (see this Chapter, Section II).[995]

That the ICTY and ICJ have followed the 1996 ILC Report stems from the fact that all three bodies appear to have analysed cultural genocide mainly through a tangible-centred approach. Accordingly, it would have been more accurate for them to state that while the Sixth Committee did not retain the tangible-centred actus rei of cultural genocide, as originally foreseen in the Secretariat Draft article I(II)(3)(d) and (e) and the Ad Hoc Committee Draft article III, it did so with one of the Secretariat Draft's anthropo-centred actus rei, ie article I(II)(3)(a) in the form of the forcible transfer of the children of the group to another group. This is incontestably cultural genocide, as it seeks to alter the cultural features of the youth, as confirmed in the post-Second World War trials and national cases.[996] However, depending on the circumstances, it is not excluded that the act also qualifies as biological genocide (Chapter 3, III) or physical genocide, as accurately suggested by the 1996 ILC Report:

> The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. […] Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).[997]

---

[993] For an account confirming the authors' view, *see* N Robinson (n 800) pp 64-65. The votes of individual States were not recorded on this motion. However, despite earlier voting for the inclusion of cultural genocide, it appears that Czechoslovakia, Poland, the Soviet Union and Yugoslavia opposed this proposal. Conversely Syria, Uruguay and the United States expressed their intention to vote for the amendment. *See* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1492-1498.

[994] *Prosecutor v Krstić*, (ICTY) Judgment (2 August 2001) Case No IT-98-33-T, paras 576 and 580 and *Krstić* Appeal Judgment (n 980) paras 24-25, *Karadžić* Trial Judgment (n 721) para 553.

[995] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 344 and 194.

[996] It is noteworthy that the Australian Human Rights and Equal Opportunities Commission concluded on Australia's violation of art II(e) on the basis that:

> [t]The predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture […] Removal of children with this objective in mind is genocidal because it aims to destroy the "cultural unit" which the Convention is concerned to preserve.

See Australian Human Rights and Equal Opportunities Commission, "Bringing Them Home: Report of the National Inquiry on the Separation of Aboriginal and Torres Strait Islander Children from their Families" <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf> accessed 14 April 2019, pp 270-275.

[997] 1996 ILC Report (n 594) p 46.

While it is correct to consider the forcible transfer of children also under article III(c), unfortunately, it only reemphasises the mantra that the convention only retained physical and biological genocide.

D. Synthesis: confusing genocide's tangible- and heritage-centred means

Among war crimes, CaH and genocide, the latter is the most opaquely defined crime. This is not surprising since the Genocide Convention was prepared and adopted in just two years, under the auspices of a nascent UN, immediately after the Second World War, the most globally devastating armed conflict, to date. This was, in and of itself, an incredible achievement, when considering subsequent treaty making processes.

Be that as it may, while one would want to rely on the literal meaning of the provisions contained in the Genocide Convention, the degree of subjectivity flowing from most of the phrases contained in both the mens rea and actus rei of article II leads one to proceed with a recurring exercise of interpretation of that provision in general and, specifically, in relation to the so-called cultural genocide. As seen, the 1996 ILC Report referred to the travaux préparatoires. The latter's very close study, however, offers a more nuanced picture insofar as cultural genocide is concerned, thus enabling to better interpret and apply the convention in this regard. As will be seen shortly, both the ICTY and the ICJ have rejected the concept of cultural genocide from the Genocide Convention, having based their findings on the ILC reading of the travaux préparatoires. This study's very close review of the travaux préparatoires on both the chapeau and the actus rei calls, however, for a more cautious and less assertive approach in this regard.

As seen, the travaux préparatoires do not offer much assistance in terms of understanding the intent, motive and protected groups. But they are useful in that they help understanding where the legislators were confused. Starting with the protected groups, the words national, ethnical racial and religious are deeply rooted in both geographic and temporal settings, which are two of the fundamental pillars of culture as an evolving concept. As Schabas observes, being "subjective", these terms are a "social construct", rather than scientific statements. The post-Second World War trials' referencing Jews as a race will be considered as loaded at the very least, to the early twenty-first century readers. In interpreting this social construct-based subjectivity across decades, State responsibility and ICR-based jurisdictions will thus necessarily conduct a cultural exercise. This is so because their understanding of the meaning of the protected groups will result from comparing and contrasting each judge member of the bench's fourfold cultural conceptions. These are (i) judicial legal systems (Common Law, Romano-Germanic Law and others, such a Sharia Law); (ii) professional (diplomatic, academic, criminal law background); (iii) social/societal (geographic, gender, religion, etc.); and (iv) linguistic. On the latter, the choice of the bench's working language will warp the outcome as even the literature used therein as a source will be culture-specific. Specifically, as the twenty-first century's lingua franca (anglica?), the English language will constitute, at best, the mother tongue of only a very small minority of the bench members. While these multicultural judicial settings do enrich the debate and lead to less subjective outcomes, the definition of the protected groups will never escape the judges' geographical and temporal cultural prism.

Moving more specifically to the somewhat inconclusive discussions on intent and motives, the above judicial cultural difference among many of the negotiators (let alone those who did not have criminal law background) distorted their understanding of intent and motive. This also resulted in many negotiators mixing the destruction of the group (mens rea) with that of its members (actus reus). This further confused the distinction between physical and cultural genocide wherein it was not always clear whether delegates' reference to those concept contemplated the mens rea or the actus rei. Be that as it may, Lebanon's Ad Hoc Committee remarks about the perpetrator's "hatred of something different or alien, be it race, religion, language, or political conception", ie his/her intent to destroy "the group, *as such*", showed that genocide was in fact a cultural aversion for the protected group.[998] Lebanon also pointed that the result of the application of that intent would be humanity's loss of the destroyed group's "possible or actual cultural contribution". [999]

Culture shapes the definition of the protected group and the intent/motive to destroy the group, as such. Culture also constitutes the victim of the destruction of the group. Thus, the chapeau elements are shaped by evolving cultural considerations. In a way, as Pakistan pointed out during the Sixth Committee's article III discussions, not only cultural hatred shapes genocide's intent/motive, but also genocide's outcome is cultural loss. Somehow, thus, cultural genocide is a tautology, since genocide *is* cultural, *regardless* of its actus rei, as Pakistan also stated.

Finally focusing on genocide's actus rei, as thoroughly explained, the Secretariat Draft considered cultural genocide to be made of heritage-centred and tangible-centred actus rei that shared their mens rea with physical and biological genocide. This changed expressly in the Ad Hoc Committee Draft which not only attributed to cultural genocide a distinct mens rea, but also simplified its actus rei by dropping, notably, the forcible transfer of children to another group. The latter was brought back at the Sixth Committee, but placed in article II, titled "("Physical" and "biological" genocide)", through a set of particularly confused and confusing discussions, on the basis of which it is not possible to rule out the cultural genocide character of the forcible transfer of children. Finally, article III, titled "("Cultural" genocide)" was rejected. Importantly, like all other provision of the Genocide Convention, article II bears no title.

A detailed analysis of the travaux préparatoires reveals that cultural genocide as an express set of tangible-centred actus rei was not retained in the convention. However, one of cultural genocide's heritage-centred actus rei, namely "forcibly transferring children of the group to another group", was included in the convention under article II(e). During that process, while most States that took the floor characterised that actus reus as cultural genocide, some saw in it both physical and cultural genocide. Only the United States characterised it as physical and biological genocide, although it too

[998] Schabas, *Genocide in International Law* (n 15) p 255.
[999] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Second Meeting" (5 April 1948) UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 691. On motive and intent to commit genocide, *See* Hannah Arendt's position that individuals who commit mass atrocities may not harbour genuine hatred for the victims but rather out of "sheer thoughtlessness" of everyday bureaucrats who may "never realise what [they] were doing." Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006), p 287.

maintained its link with cultural genocide, while Greece and the Soviet Union characterised it as physical genocide.

Any failure to consider cultural genocide's heritage-centred component will reduce its scope to an exclusively tangible-centred one. This in turn results in the assertion that the destruction of the group can only be physical/biological. Accordingly, the 1996 ILC Report's conclusion that, on the basis of the Sixth Committee discussions, the forcible transfer of children should be characterised as biological genocide is therefore particularly unsettling. The travaux préparatoires do show that regardless of whether that provision is about physical or biological genocide, it primarily concerns cultural genocide. Unfortunately, turning opinions into facts and assimilating virtuality into reality have severely limited the adjudication of cultural genocide claims.

III. Practice of international criminal jurisdictions and the ICJ

A. Introduction: the group's physical/biological destruction – a questionable mantra

The practice of ICR-based jurisdictions reveals two trends: a heritage-centred approach, wherein attacks targeting culture could be envisaged through the Genocide Convention article II(b)-(c) (A); and a tangible-centred approach, wherein the attacks against culture's tangible may be indicative of the genocidal intent (B). While the ICJ is a State responsibility-based jurisdiction, its genocide cases will be considered here, not least because it has referred to the ICTY jurisprudence for many of its legal findings.

Throughout this analysis, it is important to bear in mind the travaux préparatoires' prevalent confusion between the chapeau's destruction (mens rea) and the means to achieve that (actus reus). As seen, this was perpetuated by the 1996 ILC Report. Later on, these coalesced in the *Krstić* Trial Judgment and Appeals Judgment. The travaux préparatoires-1996 ILC Report-*Krstić* confusion between mens rea and actus reus has become the foundation on which subsequent ICTY-ICJ reasoning has relied to reject cultural genocide. Before looking at their jurisprudence, it is therefore important to briefly consider *Krstić*. Having observed that one could conceive the destruction of a group by attacking its culture and identity, the Trial Chamber added that:

> [a]lthough the Convention does not specifically speak to the point, the preparatory work points out that *the "cultural" destruction of a group was expressly rejected* after having been seriously contemplated. The notion of cultural genocide was considered too vague and too removed from the physical or biological destruction that motivated the Convention.[1000] [emphasis added]

In the footnote to the first sentence, the Chamber pointed to the Sixth Committee's rejection of cultural genocide. However, it did not explain that that rejection concerned

[1000] *Krstić* Trial Judgment (n 994) paras 574 and 577.

the Ad Hoc Committee Draft article III, which did not include the Secretariat Draft's forcible transfer of children, which would morph into the Genocide Convention article II(e). Having referred to the 1996 ILC Report, the Chamber held that:

> *despite recent developments*, customary international law limits the definition of genocide to those acts seeking *the physical or biological destruction of all or part of the group*. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[1001] [emphasis added]

Like the ILC, and later the ICJ, the Chamber found it necessary to mix the mens rea and actus reus in order to reject cultural genocide. However, the words "despite recent developments" left the door open for further evolutions.[1002] The *Krstić* Appeals Chamber did the same, since it held that the 1996 ILC Report "had examined closely the *travaux préparatoires*" so as "to elucidate the meaning of the term "destroy"" [emphasis in original].[1003] As seen however, the travaux préparatoires' *close* examination provides a more nuanced picture, given the negotiators' mens rea-actus reus confusion and the eventual inclusion of the forcible transfer of children (this Chapter 3, Section II.). A few years later, to counter the applicant's submission that the destruction of the group required under article II(b) and (e) need not be physical,[1004] the ICJ explained in *Croatia* that:

> even if it does not directly concern the physical or biological destruction of members of the group, [article II(b)] must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part.[1005]

The ICJ did not explain how it reached this conclusion. It is not clear how inflicting mental pain on group members can result in the physical destruction of the group, even when the perpetrator so intends. With such enigmatic reasoning everything can become the group's physical destruction, whatever this term means. Perhaps the ICJ relied on the 1996 ILC Report which, without providing any explanation, characterised the actus reus contemplated in article II(b) as physical genocide. These only confirm one point: that the ICTY-ICJ appear to have pursued a teleological path when holding that the destruction of the group is only physical/biological. Along the same line of reasoning, Jeßberger has proposed that to find the "mere dissolution" of a group as cultural genocide would undermine the "drafters' clear decision not to include cultural

---

[1001] *Krstić* Trial Judgment (n 994) para 580.

[1002] The Chamber here referred to a German Federal Constitutional Court interpretation of the Genocide Convention (n 105) art II, that the definition of genocide:

> defends […] the *social* existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination [...] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.

The Trial Chamber also referred to Violations of Human Rights in Southern Africa: Report of the Ad Hoc working Group of Experts, UN Doc. E/CN.4/1985/14, 28 January 1985, paras 56-57 as well as other declarations. *See Krstić* Trial Judgment (n 994) paras 575-577.

[1003] *Krstić* Trial Judgment (n 994) para 25, fn 39.

[1004] *Genocide (Croatia v Serbia)* (n 147) para 134.

[1005] *Genocide (Croatia v Serbia)* (n 147) para 136.

genocide".[1006] As seen, however, and as noted by Novic, the travaux préparatoires do not support this proposition.[1007]

Perhaps, it is Judge Shahabuddeen's partial dissenting opinion in *Krstić* that clarifies best the source of this confusion:

> The stress placed in the literature on the need for physical or biological destruction implies, correctly, that a group can be destroyed in non-physical or non-biological ways. It is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention […], provided that that intent attached to a listed act, this being of a physical or biological nature.[1008]

The forcible transfer of children is a physical act. But its consequences on the group may be both physical-biological (eg non-reproduction) but also cultural (non-transmission of the group's identity). There is no reason to consider these concepts as being antagonistic to each other.

B. Anthropo-centred violence through the Genocide Convention's actus rei

Both the ICTY-ICTR and the ICJ have addressed anthropo-centred attacks targeting culture under article II(b)-(c) (1) as well as II(e), ie the forcible transfer of children (2).

Before embarking on the above analysis, it is important to recall that often, in assessing evidence of mens rea with respect to charges under the ICTY Statute's equivalent of Genocide Convention article II(b)-(c),[1009] instead of considering the accused's intent to destroy a protected group through each of those actus rei, the Trial Chambers, eg in *Karadžić*, consider whether "all of the evidence, taken together", demonstrate the mens rea of genocide.[1010] Chambers have further held that absent direct evidence, the genocidal intent may be inferred from all the facts and circumstances.[1011] Thus, despite the foregoing's separation between article II(b)-(c) and (e), overlaps will often exist.

[1006] Florian Jeßberger, "The Definition and the Elements of the Crime of Genocide" *in* Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009), p 101

[1007] For a comprehensive discussions, see Novic (n 15) pp 50-95.

[1008] *Krstić* Appeal Judgment (n 980) partial dissenting opinion of Judge Mohamed Shahabuddeen, para 49.

[1009] These were detailed under art: 4(2)(a) (killings); 4(3)(b) (causing serious bodily or mental harm during detentions, where the members of the group were subjected to cruel or inhumane treatment; as well as in Srebrenica through, inter alia, the separation of men and boys from their families and the forcible removal of the women, young children and some elderly men from the enclave); and 4(3)(c) (detention of members under conditions of life calculated to bring about their physical destruction, namely through cruel and inhumane treatment, including torture, physical and psychological abuse, rape, other acts of sexual violence, inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities). *See Prosecutor v Karadžić*, (ICTY) Indictment (14 November 1995) Case No IT-95-5/18-T, para 40(a)–(c) (and Schedule C Detention Facilities) and 47(a)–(b) (and Schedule E Killing Incidents).

[1010] *Karadžić* Trial Judgment (n 721) para 550, referring to *Stakić* Appeal Judgment (n 980) para 55; *Karadžić* Trial Judgment (n 721) para 56. *See also Prosecutor v Tolimir*, (ICTY) Appeal Judgment (8 April 2015) Case No IT-05-88/2-A, paras 246-247.

[1011] These ranged from the general context, the scale of atrocities, the systematic targeting of victims, the repetition of destructive and discriminatory acts, the existence of a plan or policy, through to the display of intent through public speeches/meetings. *See Karadžić* Trial Judgment (n 721) para 550.

1. Physical genocide: article II(b)-(c)'s relationship with ethnic cleansing

As seen in this Parts' Chapter 2, ethnic cleansing is not a standalone concept. Rather, it consists of legislative (curtailed rights and oppressive obligations) and physical measures (bodily and psychological) that, in isolation or in combination, eventually lead to the forcible transfer of populations. The following will show how ICTY-ICTR and ICJ's jurisprudence can address some ethnic cleansing means that can be used in scenarios of attacks targeting culture through article II(b) (a) and (c) (b).

a. Article II(b)

As seen before, the travaux préparatoires do not offer much guidance on article II(b). The Preparatory Committee of the International Criminal Court has explained that mental harm under article II(b) means "more than the minor or temporary impairment of mental faculties.[1012] Around the same period, the *Kayishema* Trial Chamber held that more than "temporary unhappiness, embarrassment or humiliation", article II(b)'s mental harm should lead to "a grave and longterm disadvantage to a person's ability to lead a normal and constructive life".[1013] Noting that mental suffering need not result from physical harm, the Chamber concluded that it may be possible to hold an accused thus liable if, at the time of the commission of the acts, (s)he had an "intention to inflict serious mental harm" with a view to destroying a protected group.[1014] Accordingly, the Chamber found that mental and physical harm should be determined on a case-by-case basis, using a common sense approach.[1015] This is most useful in the adjudication of attacks targeting culture for two reasons. First, by considering that mental harm can be sustained independently from physical harm, there is a potential for addressing the targeting of culture, which is not connected to the body of victims. Second, the case-by-case common sense approach enables to consider the indigenous/tribal cases where the breakdown of the collective-anthropical-natural environment symbiosis leads to the illness of the individuals making up the group (Part I, Chapter 2).

Importantly, rape has also been considered as an instrument of genocide under article II(b) – with cultural dimensions. As noted by the *Akayesu* Trial Chamber:

> These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of

[1012] UNGA, Draft Statute for the International Criminal Court, Part 2. Jurisdiction, Admissibility, and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, p 2.
[1013] *Kayishema* Trial Judgment (n 708) para 110; *Krstić* Trial Judgment (n 994) para 513; *Karadžić* Trial Judgment (n 721) para 543. In contrast, *see Akayesu* Trial Judgment (n 612) para 502, holding that The *Akayesu* Trial Chamber held that serious harm, whether bodily or mental, need not be permanent or irremediable. *See* also, eg *Tolimir* Trial Judgment (n 981) para 738; *Krstić* Trial Judgment (n 994) para 513; *Karadžić* Trial Judgment (n 721) para 543.
[1014] *Kayishema* Trial Judgment (n 708) paras 110 and 112.
[1015] *Kayishema* Trial Judgment (n 708) paras 110 and 113; *Prosecutor v Popović et al*, (ICTY) Judgment (13 January 2015) Case No IT-05-88-A, paras 811. *See also Blagojević & Jokić* Trial Judgment (n 49) para 646; *Krstić* Trial Judgment (n 994) para 513; and *Karadžić* Trial Judgment (n 721) para 545.

> destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[1016]

This description leaves no doubt whatsoever that beyond the individual's mental and physical harm, it is the collective that will be destroyed. Beyond the victims' reproductive limitations (biological consequences of the actus reus) flowing from their physical and psychological ordeal during and following rape, it is the consequences on what Novic has referenced as their "expanded victimhood" – ie their families and broader communities – that encapsulates the targeting the of victims' cultural unit.[1017] The Chamber confirmed this by noting the Interahamwe's words and acts that, "in order to display the thighs of Tutsi women", they made them run naked.[1018] The Chamber also referenced perpetrators' remarks during gang rapes "let us now see what the vagina of a Tutsi woman takes like" [sic], to which the accused would respond: "don't ever ask again what a Tutsi woman tastes like".[1019] The ICTR then held that:

> This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence *because* they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.[1020] [emphasis added]

This is a reminder of what this study has proposed by reference to Lebanon and Pakistan's stance during the travaux préparatoires, and which is found in the chapeau's "the group, as such". In other words, there is an intent to destroy the group *because* of what it is. This is based not only on the group's self-identification but also on how it is viewed by the perpetrator, which goes through his/her own cultural lens. The perpetrator's intent is based on his/her revulsion of that group. This intent aims at cleaning society of its infection, as propagated by the undesired group. Under this angle, no matter what type of actus is used, it is the chapeau that matters: genocide *is* cultural. Here parallels may be drawn with the societal impacts of rape victims within indigenous/tribal cases of the IACtHR (Part I, Chapter 2). The Trial Chamber found that those exactions were serious bodily and mental harm in the sense of article II(b).[1021]

The ICTY-ICTR have also included forcible transfer as one of the acts constitutive of article II(b)'s actus reus.[1022] Although they have held that it does not of itself constitute an act of genocide, the ICTR-ICTY have found it relevant in the overall factual assessment.[1023] In *Bosnia*, discussing intent and ethnic cleansing, the ICJ held that:

[1016] *Akayesu* Trial Judgment (n 612) para 731.
[1017] Novic (n 15) p 64.
[1018] *Akayesu* Trial Judgment (n 612) para 732.
[1019] *Akayesu* Trial Judgment (n 612) para 732.
[1020] *Akayesu* Trial Judgment (n 612) para 732.
[1021] *Akayesu* Trial Judgment (n 612) para 734.
[1022] Torture, inhumane or degrading treatment, sexual violence, interrogations with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to the external or internal organs of members of the group; *see Prosecutor v Seromba*, (ICTR) Judgment (12 March 2008) Case No ICTR-2001-66-A, para 46; *Blagojević & Jokić* Trial Judgment (n 49) para 645; *Brđanin* Trial Judgment (n 758) para 690; *Krstić* Trial Judgment (n 994) para 513. *See also Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 319; *Karadžić* Trial Judgment (n 721) para 545.
[1023] *Tolimir* Appeal Judgment (n 1010) paras 209 and 212; *Blagojević & Jokić* Trial Judgment (n 49) paras 123 and 646; *Krstić* Trial Judgment (n 994) para 513; *Krstić* Appeal Judgment (n 980) paras 33 and 133, referring to *Stakić* Trial Judgment (n 745) para 519; *Blagojević & Jokić* Trial Judgment (n 49) para 123; and *Karadžić* Trial Judgment (n 721) paras 545 and 553.

> [n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part,' a particular group, and deportation or displacement of the members of a group, even if effected by force, *is not necessarily* equivalent to destruction of that group.[1024] [emphasis added]

This passage is symptomatic of the over-emphasis of the type of group destruction as opposed to the means to achieve it. Something that, should it be repeated, was not contemplated during the Genocide Convention drafting. The Secretariat Draft and the Ad Hoc Committee Draft used expressions such as physical and biological genocide to designate the means, or actus rei, to achieve the destruction of the group. Notwithstanding this, the last phrase encapsulates some oscillation, where the ICJ conceives that in some cases, forcible deportation or displacement may result in the group's destruction. This is reminiscent of the "mass displacements of populations from one region to another" which, as explained by the UNSG Commentary, does not constitute genocide, unless it was intended to cause the death of group members through exposure to starvation or other similar measures.[1025]

b. Article II(c)

As regards article II(c), citing a series of examples of "slow death", ranging from food-medical deprivation to excessive work, the *Karadžić* Trial Chamber specifically included: "systematically expelling members of the group from their homes".[1026] Akin to the Secretariat Draft's "slow death", these measures may also form part of ethnic cleansing. Here, not only the above-mentioned UNSG Commentary is recalled, but also Syria's unsuccessful Sixth Committee proposal to consider as a distinct actus reus "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment".[1027] In both *Bosnia* and *Croatia*, the ICJ examined, inter alia, the deportation and expulsion of the members of the group under article II(c).[1028] In *Bosnia*, the ICJ held that ethnic cleansing may constitute genocide under article II(c), if accompanied with the requisite mens rea, ie "with a view to the destruction of the group, as distinct from its removal from the region".[1029] In the case

---

[1024] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 190, referring to *Stakić* Trial Judgment (n 745) para 519; *Tolimir* Trial Judgment (n 981) para 739; *Popović et al* Trial Judgment (n 981) para 813.

[1025] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 232.

[1026] *Karadžić* Trial Judgment (n 721) para 547, citing *Brđanin* Trial Judgment (n 758) para 691; *Stakić* Trial Judgment (n 745) para 517; *Prosecutor v Musema*, (ICTR) Judgment (27 January 2000) Case No ICTR-96-13-T, para 157; *Kayishema* Trial Judgment (n 708) paras 115-116; *Akayesu* Trial Judgment (n 612) para 506.

[1027] UNGA, "Agenda Item 32: Syria Amendment to Article II of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/234 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1946, as referred to *in* UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1479.

[1028] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 323; *Genocide (Croatia v Serbia)* (n 147) paras 373-377 and 386-390.

[1029] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 190. For a different position, *see* the 1996 ILC Report (n 594) according to which:

> The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although [art II(e)] does not extend to the transfer of adults, this type

at hand, however, while finding that the evidence showed that such deportations and expulsions took place, the ICJ held that even if these "may be categorized as falling within" article II(c), their requisite mens rea could not be established in that instance.[1030] In *Croatia*, the ICJ simply found that the evidence did not permit to establish that the forced displacements fell under article II(c), without engaging in *Bosnia*'s legal consideration.[1031] Like article II(b), the ICJ has thus left the door open for a case-by-case approach. Depending on the collective's size and nature, it should be thus possible to consider a heritage-centred approach. For example, Lenzerini has proposed that the forcible displacement of and confrontation with Western style societies of the indigenous/tribal collectives could bring their members "to a physical and psychological decline that may eventually bring them to death", which could be covered by article II(b)-(c).[1032] Of course, this would require genocide's requisite mens rea.

2. Cultural genocide provision: article II(e)

A brief case analysis of CCL 10 will be included below in order to show how judicial instinct foresaw article II(e) while the Genocide Convention was barely in the making (a). Due to the nature of the cases before the ICTY-ICTR and ICJ, the former have not been expansive on the question (b), while the ICJ has done so remotely (c).

a. CCL 10

Before proceeding, it is important to warn against a methodological trap. When discussing the crime of genocide, the ICTY (and commentators) have referred to the post-Second World War trials, ie the IMT, IMTFE and CCL 10. Predating UNGA Resolution 96(I), neither the IMT Charter nor the IMTFE Charter included genocide in their competence ratione materiae.[1033] The IMT judgment was rendered before the issuance of the Secretariat Draft and the IMTFE judgment was rendered before the start of the Sixth Committee discussions. In the subsequent CCL 10, the *Greiser*, *Goeth* and *RuSHA* trials approached the concept of cultural genocide. However, the first two occurred before even UNGA Resolution 96(I) was issued, while *RuSHA* occurred

---

of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20, subparagraph (a) (vii). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).

1996 ILC Report (n 594) p 46; and 1991 ILC Report (n 425) p 104.

[1030] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 334.

[1031] *Genocide (Croatia v Serbia)* (n 147) para 377.

[1032] Lenzerini Federico, "The Trail of Broken Dreams: the Status of Indigenous Peoples in International Law" *in* Lenzerini Federico (ed) *Reparations for Indigenous Peoples: International and comparative Perspectives* (Oxford University Press 2008), p 103.

[1033] Their competence ratione materiae consisted of Crimes against Peace, War Crimes ("Conventional War Crimes" in IMTFE Charter (n 488) art 5), and Crimes against Humanity. The prosecutor however referred to genocide in count three, under War Crimes, in the indictment of 6 October 1945. *See* IMT Judgment (n 490) pp 43-44, wherein the accused were charged with "deliberate and systematic genocide, *viz.*, the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others".

between the Secretariat Draft and Ad Hoc Committee Draft release. As these trials were compiled and commented in 1949 by the UNWCC, the latter's ex post facto characterisation of aspects of the crimes as genocide have further confused the debate.

Chart 10: Chronology of Second World War related trials and of the drafting of the Genocide Convention

1945	1946							1947			1948				
Nov. 20	May 3	June 21	July 7	August 27	Sept. 5	Oct.	Dec. 11	May	June 26	Oct.	March 10	May 24	Sept.	Nov. 4	Dec. 09
IMT (ended 01 Oct)															
	IMTFE														
		Greiser													
				Goeth											
						RuSHA (started 10 October)									
							UN res. 96(I)								
									Secretariat Draft						
												Ad Hoc Committee Draft			
													Sixth Committee Discussion		
															UNGA res. 260 A(III)

Throughout their existence, the ICTY-ICTR regularly referred to these, further exacerbating this legal anachronism that has characterised their methodological flaw. This has escaped the legal literature. The following analysis will thus be very brief and mainly in order to illustrate the fact that, even before its criminalisation under the Genocide Convention, and the ensuing doctrinal and judicial debates, the judges conceived the forcible transfer of children as a culturally oriented atrocity.

Starting with *Greiser*, the prosecution characterised the forcible transfer of Polish children as an act of persecution, and the judgment described "physical and spiritual genocide" which consisted of the "complete destruction of Polish culture and political thought" through the adults' deportation and mass extermination but also the Germanisation of "racially suited" Polish children.[1034] It is reasonable to propose that the terms "spiritual genocide" were, in the tribunal's mind, if not synonymous with cultural genocide, certainly a component of it. This is corroborated by the tribunal's holding that Greiser brought its "totalitarian genocidal attack" to countries' "rights […] to exist, and to have an identity and culture of their own".[1035] When placed within this context, the forcible transfer of children is understood to have cultural (and also physical) consequences. As seen above, however, due to its predating even UNGA Res 96(I), the above *Greiser* holding is useful only to the extent that it provides clues with respect to the judges' understanding of the cultural dimensions of the Germanisation of Polish children.

[1034] *Greiser* (n 656) p 114.
[1035] *Greiser* (n 656) p 114.

In *RuSHA*, the indictment alleged that the "Germanization program" was implemented in part by:

> (a) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of 'racial value';
> […]
> (c) Taking away, for the purpose of exterminating or Germanization, infants born to Eastern workers in Germany;[1036]

RuSHA took place before the Genocide Convention's adoption. Although the trial was concurrent with UNGA Res 96(I) and the Secretariat Draft, it did not benefit from the Ad Hoc Committee Draft, let alone the Sixth Committee discussions. Thus the legal value of the aforementioned passage in terms of genocide is anecdotal at best. Subsequently, the UNWCC viewed the *RuSHA* case as covering article II, particularly "the measures undertaken for forced Germanization, including the kidnapping and taking away of children and infants".[1037] However, the UNWCC did so after the Genocide Convention's adoption. Notwithstanding, this shows that the UNWCC too understood the forcible transfer of children's cultural dimensions.

b. The ICTY-ICTR

Article II(e) did not provide much of a factual basis for substantive ICTY-ICTR jurisprudence. It may, however, be obliquely relied on in *Krstić* and *Akayesu.* In the latter, the Trial Chamber held that:

> as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[1038]

This does not provide much assistance other than this actus reus resulting in mental harm, perhaps taking it further away from its cultural dimensions.

Moving to *Krstić*, as seen in this Section's introduction, having observed that one could conceive the destruction of a group by attacking its culture and identity, the Trial Chamber added that, unlike the group's physical-biological destruction, the travaux préparatoires rejected its cultural destruction.[1039] As further seen, the *Krstić* Appeals Chambers confirmed this since, as it held, the 1996 ILC Report "had examined closely the *travaux préparatoires*" in order to clarify the term "destroy" [emphasis in original].[1040] The Appeals Chamber also cited Schabas – who actually was first to refer to the 1996 ILC Report.[1041] What the Appeals Chamber failed to notice is that the *close* examination of the travaux préparatoires does not substantiate this unequivocally nor did the Chamber mention that in his monumental work "Genocide in International

[1036] *RuSHA* (n 911) pp 3 and 9. The same document provide for Polish-German children to be educated in Germany and in German educational institutions with the exclusion of their parents' influence.
[1037] *RuSHA* (n 911) pp 39-40.
[1038] *Akayesu* Trial Judgment (n 612) para 509.
[1039] *Krstić* Trial Judgment (n 994) paras 574 and 577.
[1040] *Krstić* Trial Judgment (n 994) para 25, fn 39.
[1041] *Krstić* Trial Judgment (n 994) para 25, fn 39.

Law", about sixty pages after having espoused the 1996 ILC Report, Schabas had observed that article II(e):

> is somewhat anomalous, because it contemplates what is in reality a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide form the scope of the Convention. As a result, […] the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense.[1042]

Mettraux has illustrated these complications by not rejecting article II(e) as cultural genocide, conceptually, but by listing its rejection by ICR-based jurisdictions.[1043]

c. The ICJ

In *Bosnia*, the applicant proposed a new interpretation of article II(e), by claiming that:

> rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". […] children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.[1044]

Bosnia thus seemed to have characterised article II(e) as a mix of physical, biological and cultural genocide. Physical, as it was the demographic balance that was contemplated, biological as it addressed procreative rape, and cultural since the children conceived as a mixture of Serb male and Bosnian Muslim female genes would not be accepted as part of the Bosnian group. The ICJ found that the evidence did not permit to establish "that there was any aim to transfer children of the protected group to another group within the meaning of Article II(e)".[1045] Importantly, the ICJ seemed to dispute the proposition not legally, but on the basis of evidence. Once again, this leaves the door open for an evolution of the jurisprudence depending on the cases at hand.

As seen earlier, in *Croatia*, to address Croatia's submission that the destruction of the group required under article II(b) and (e) need not be physical,[1046] the ICJ replicated its *Bosnia* reasoning on cultural genocide, further explaining that:

> even if it does not directly concern the physical or biological destruction of members of the group, [article II(b)] must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group […].[1047]

Again, the travaux préparatoires do not unequivocally support this holding, not only because of the negotiators' confusion during the Sixth Committee discussions of the forcible transfer of children, but also the fact that they often discussed the consequences of that actus reus rather than the intention behind it. Thus, according to the UNSG Commentary, the Secretariat Draft article I(II)(2) on biological genocide consists of:

[1042] Schabas, *Genocide in International Law* (n 15) pp 185, 187 and 245.
[1043] Mettraux, *International Crimes: Law and the Practice. Genocide, vol 1* (n 15) pp 282-285.
[1044] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 362.
[1045] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 367.
[1046] *Genocide (Croatia v Serbia)* (n 147) para 134.
[1047] *Genocide (Croatia v Serbia)* (n 147) para 136.

> [m]easures aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive.[1048]

Moreover, this type of genocide was to include sterilisation and compulsory abortions, as well as the segregation of the sexes and obstacles to marriage, to prevent reproductive activities.[1049] If so, then the Secretariat Draft article I(II)(3)(a) must have meant that the forcible transfer of children was an act designed to do more than just preventing reproductive activities. Immediately after its reasoning, the ICJ held that article II(e):

> *can also* entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.[1050] [emphasis added]

In light of the ICJ's firm stance that genocide may only be physical and biological, the words "can also" probably mean "can, *in addition to the biological destruction of the group*, entail the intent to destroy physically" [emphasis added].[1051] As explained earlier, the ICJ's refusal to consider article II(e) under the cultural genocide angle leads to the proposition that the ICTY-ICJ reasoning has been at least partly teleological. This is so because, both bodies have followed the ILC by conflating the chapeau's type of group destruction and the means of achieving it. Once again, they have all relied directly or indirectly on the travaux préparatoires which, as seen, do not unequivocally support this proposition. As explained, while a physical act, the forcible transfer of children will often have physical, biological and cultural repercussions on the group. This is how the Nazis saw it. This is how the CCL 10, untainted by subsequent doctrinal debates saw it. This is how many national bodies have seen it.[1052]

C. Tangible-centred violence indicative of genocidal intent

Despite the non-retention of article III of the Ad Hoc Committee Draft in the Genocide Convention, the destruction of culture's tangible has kept returning before the ICTY (1) and the ICJ (2), both of which have considered those acts as indicative of the genocidal intent rather than constitutive of genocide as such.

1. As part of ethnic cleansing: the ICTY's *Karadžić & Mladić* and *Krstić*

As seen in this Part, Chapter 2, in the *Karadžić & Mladić* Rule 61 Review, the Trial Chamber considered that the systematic destruction of the targeted population's cultural tangible was part of a "memory-cide", a policy of "cultural cleansing" which aimed at

[1048] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[1049] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[1050] *Genocide (Croatia v Serbia)* (n 147) para 136.
[1051] *Genocide (Croatia v Serbia)* (n 147) para 136.
[1052] For a comprehensive review of national practice, see Novic (n 15) pp 69-74.

"eradicating memory".[1053] Considering that these exactions amounted to ethnic cleansing, the Chamber legally characterised them as a CaH rather than genocide. On genocide, the Trial Chamber indicated that it was necessary to evaluate whether the pattern of conduct, ie ethnic cleansing, "taken in its totality" reveals a "genocidal intent" which may "be inferred":

> from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.[1054]

The Trial Chamber cited three specific acts, the perpetration of which highlights the intent "to reach the very foundation of the group or what is considered as such".[1055] These were the systematic rape of women with the intent to procreate ethnically modified children (see earlier discussion); the humiliation and terror of the member of the targeted group; and:

> [t]he destruction of mosques or Catholic churches [which] is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries [which] is intended to annihilate a culture which was enriched through the participation of the various national components of the population.[1056]

The Trial Chamber thus viewed this tangible-centred damage to encompass both secular and religious elements, thereby equating it to CaH persecution, in the context of ethnic cleansing. Like *Al Mahdi* years later (Part, Chapter 1), the Chamber linked these destructions to the collective's identity. In the ICTY case, this was viewed as a local-national diptych. The Chamber also found that this could evidence the perpetrator's genocidal intent. Hence, the Trial Chamber's holding that some of these acts "could have been planned or ordered with a genocidal intent".[1057] Although it is not clear what precisely those acts are, the *Karadžić & Mladić* Rule 61 Review leaned towards a tangible-centred approach.

A few years later, *Krstić* was charged, inter alia, with genocide for "intending to destroy in part the Muslim people as a national, ethnical or religious group" under the ICTY Statute, article 4(2)(a)-(b), ie killing members of the group and causing serious bodily or mental harm to members of the group.[1058] The Trial Chamber held 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.[1059]

This passage reiterates the travaux préparatoires and the 1996 ILC Report's imprecision as regards the word "destruction". As seen, the destruction attaches to the mens rea

[1053] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 60 and 62.
[1054] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 94-95.
[1055] *Karadžić & Mladić* International Arrest Warrant (n 770) para 94.
[1056] *Karadžić & Mladić* International Arrest Warrant (n 770) para 94.
[1057] *Karadžić & Mladić* International Arrest Warrant (n 770) para 95.
[1058] *Krstić* Trial Judgment (n 994) paras 21-26.
[1059] *Krstić* Trial Judgment (n 994) para 580.

whereas "physical" and "biological" attach to the means of achieving it, ie the actus rei. As explained before, this inordinate focus on the type of destruction is either the result of a partial reading of the travaux préparatoires or a teleological exercise to demonstrate that cultural genocide cannot be genocide. Be that is it may, joining the *Karadžić & Mladić* Rule 61 Review, the Trial Chamber held that the destruction of a defined group's cultural tangible, while not genocide, may be proof of the perpetrator's genocidal intent, provided that it accompanies physical/biological genocide.

In the subsequent *Karadžić* Trial Judgment, citing *Krstić*, the Trial Chamber made the same conflation of the destruction contemplated in the mens rea and the means to achieve that, ie the actus rei by holding that the Genocide Convention and customary international law prohibit only the physical and biological destruction of a group, not attacks on its cultural or religious property or symbols.[1060] Notwithstanding this, the Chamber held that "while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group".[1061] The Chamber did not elaborate further; it merely made a series of references to prior cases, each of which referred to a previous one, with their source, in terms of substance, being traced back to the *Krstić* judgments and the *Karadžić & Mladić* Rule 61 Review. In sum, the ICTY has, in line with the travaux préparatoires, rightly refused to consider the destruction of culture's tangible, whether secular or religious, as cultural genocide. This may be different from an anthropological viewpoint. But in law, it is a posture in conformity with the Genocide Convention discussions and the *Karadžić & Mladić* Rule 61 Review. On the positive note, however, rather than focusing on this limitation as such, the ICTY has used it as an opening by considering that genocidal intent may be inferred from attacks targeting culture's tangible.

As seen in Chapter 2, considering attacks targeting culture from a tangible-centred approach has enabled the ICTY to view the destruction of culture's tangible as part of ethnic cleansing which, in legal terms, translates as CaH persecution. Given the heightened mens rea of this "lower genocide", it is logical to consider that the destruction of culture's tangible may be a proof of genocidal intent.

[1060] *Karadžić* Trial Judgment (n 721) para 553, referring to *Krstić* Appeal Judgment (n 980) para 25.

[1061] *Karadžić* Trial Judgment (n 721) para 553; *Tolimir* Appeal Judgment (n 1010) para 230 (the Trial Chamber erred in considering that the mosques' destruction was an act of genocide under ICTY Statute (n 52) art 4(2)(c)); *Krstić* Trial Judgment (n 994) para 580. In contrast, Greiser was found guilty of:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; and by destruction of churches, cemeteries and the property of the church;
>
> (c) Equally genocidal attacks on Polish culture and learning.

Greiser (n 656) p 112. Like *Greiser*, the *Goeth* Indictment did not refer to genocide. But the UNWCC dedicated a full section to it, observing that, beyond genocide's "physical and biological aspects and elements", the prosecution established its "other components […] such as its economic, social and cultural connotations", based on the *Goeth* judgement that "[t]he wholesale extermination of Jews and also Poles […] embraced […] the destruction of the cultural life of these nations." *See* Hauptsturmführer Amon Leopold Goeth was an Austrian member of the German National Socialist Workers' Party ("NSDAP") and a Waffen SS. *See Poland v Hauptsturmführer Amon Leopold Goeth*, (Supreme National Tribunal of Poland) Judgment (31 August and 5 September 1946) 7 LRTWC 1, pp 7-9.

In *RuSHA*, the indictment alleged that the "Germanization program" was implemented in part by:

> (h) Plundering public and private property in Germany and in the incorporated and occupied territories, *e.g.*, taking church property, real estate, hospital apartments, goods of all kinds, and even personal effects of concentration camp inmates [.]

See RuSHA (n 911) p 3.

2. As part of article II(c) claims: the ICJ practice

In both *Bosnia* and *Croatia*, the ICJ examined under article II(c), inter alia, the destruction of the protected group's cultural tangible.[1062] In *Bosnia*, the ICJ found that there was conclusive evidence establishing "the deliberate destruction of historical, religious and cultural property".[1063] However, it found that these fell outside article II more generally.[1064] In reaching this conclusion, the ICJ referred to the 1996 ILC Report and *Krstić* judgments.[1065] In *Croatia*, referring to *Bosnia*, the ICJ found it unnecessary to further examine whether the destruction of culture's tangible established the actus reus within the meaning of article II(c).[1066] In both *Bosnia* and *Croatia*, the ICJ held that such destruction of culture's tangible may be taken into account in order to establish intent to destroy the group physically.[1067]

Once again, like the ICTY, the ICJ relied on the 1996 ILC Report passage that speaks to the "material destruction" of the group which, unlike the ILC's claim, is not unequivocally supported by the travaux préparatoires. Unfortunately, the ICJ's further reliance on *Krstić* which conflated the destruction (mens rea) and actus rei (eg "physical" and "biological") did not simplify the matter. It would have been sufficient for the ICJ to first refer to the Sixth Committee's rejection of the Ad Committee Draft article III on cultural genocide which contained the tangible-centred means of attacking culture, as well as the Soviet Union's failed attempt to reintroduce a variation of it right before the adoption of the Genocide Convention. Second, the ICJ could have considered the drafting evolution of article II(c), which shows its association with the "slow death" ghetto scenario that was contemplated in the UNSG Commentary, which was reflected in the Ad Hoc Committee Draft. The idea behind the various draft proposals up until the adoption of the convention being that the actus reus in question was meant to result in the eventual death of the members of the group. As seen, article II(c)'s repetition of the chapeau is an oddity which is partly linked to the 1946-1948 negotiators' confusion surrounding the mens rea, actus and motive of genocide. But it may also be linked to the drafters' wish to enable as wide a scope as possible for the UNSG commentary's eventual "slow death" scenario. Otherwise, as seen earlier, the convention should have also imported "physical destruction", a fortiori, in article II(a).

Be that as it may, the ICJ cases concerned the more "urban" type scenarios. However, as discussed earlier, this is not necessarily the case in smaller collectives, like the IACtHR's indigenous/tribal cases where the breakdown of symbiotic relationship between the collective and its anthropical-natural environment can result in mental harm and shorter life expectancy. This illustrates the challenges of generalising legal findings instead of linking them to the facts of a case.

[1062] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 322; ICJ, *Genocide (Croatia v Serbia)* (n 147) paras 373-377 and 386-390.
[1063] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1064] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1065] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1066] *Genocide (Croatia v Serbia)* (n 147) para 389.
[1067] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 344 and 186. *See also Genocide (Croatia v Serbia)* (n 147) paras 136 and 390.

D. Synthesis: ethnic cleansing's heightened mens rea

The ICTY-ICJ jurisprudence has rejected the proposition that cultural genocide may contain tangible-centred actus rei. On the other hand, it seems not to have ruled out the heritage-centred one, although short of referring to it as cultural genocide. On the mens rea, as detailed by Mettraux,[1068] the jurisprudence has systematically maintained that the destruction of the group may only be physical and biological, with the latter being sometimes viewed as a sub-category of the former. As explained in details in this Chapter, however, the reality is far more nuanced, inviting all to pause and reconsider this mantra which sometimes defies the obvious. Here, one should recall the prosecution's submission in *Krstić* that:

> what remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. It's a community in despair; it's a community clinging to memories; it's a community that is lacking leadership; it's a community that's a shadow of what it once was.[1069]

Srebrenica concerned the killing of a significant number of the male members of the group under article II(a). From this vantage point, the physical destruction (the killing) of the members of the group perturbed the group's functioning and identity. By insisting that the type of group destruction can be only physical-biological in order to justify the exclusion of cultural genocide appears thus more of a teleological approach. Even so, it remains more of a theoretical discussion – bordering the impossible as it conflates mens rea and actus reus. It is also a perilous territory as it leads the adjudicator to the confines of group biology, race and other controversial – because non-universally agreed – considerations. One example illustrates why the aforementioned reasoning is not needed. Children A and B from group X are forcibly transferred at the age of 5 to group Y, never to see again group X. This actus reus is unequivocally physical. The ILC-ICTY-ICJ view destruction associated with it as only physical/biological. If A and B later have children together, have they reconstituted group X physically/biologically? Yes. But have they done so culturally? No since they have lost their identity. This is most prominently explained in Judge Shahabuddeen's *Krstić* Appeal Judgment his partially dissenting opinion:

> The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed "acts" and the "intent" with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character. There are exceptions. Article 4(2)(c) of the Statute speaks of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," and an intent to cause physical or biological destruction of the group in whole or in part is also implied in the case of article 4(2)(d) proscribing "measures intended to prevent births within the group." However, *a contrario*, it would seem that, in other cases, the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.[1070]

[1068] Mettraux, *International Crimes: Law and the Practice. Genocide*, vol 1 (n 14) pp 173-178.
[1069] *Krstić* Trial Judgment (n 994) para 592.
[1070] *Krstić* Appeal Judgment (n 980) partial dissenting opinion of Judge Mohamed Shahabuddeen, para 48; *see* also paras 49-50. *See* also *Stakić* Appeal Judgment (n 980) paras 20-24.

This passage calls for no comments as it perfectly encapsulates the propositions developed in this Chapter. Beyond any doctrinal discussions, it is useful to refer to *RuSHA*, where the tribunal pointed to a Racial-Political Office of the Nazi Party Germanization document, according to which:

> a continuation of a national Polish cultural life is definitely out of question. The Polish orientated population, in as far as it cannot be assimilated, is to be deported, the remainder to be Germanized. Therefore, a basis for a national and cultural autonomous life must no longer exist. In future there will be no Polish schools in the Eastern territories. In general there will be only German schools. […]
> Any religious service in Polish is to be discontinued. The Catholic and even the Protestant religious service are only to be held by especially selected German–conscious German priests and only in German. […]
> In order to prevent any cultural or economic life, Polish corporations, associations and clubs cease to exist; Polish unions are also to be dissolved.
> Polish restaurants and cafés as centres of the Polish national life are to be closed down. Poles are not permitted to visit German theatres, variety shows, or cinemas. Polish theatres, cinemas and their places of cultural life are to be closed down. There will be no Polish newspapers, nor printing of Polish books nor the publishing of Polish magazines. For the same reasons Poles must not have radios and should not possess a phonograph. […]
> [Poles] are not to have any independent political parties, and associations which might provide a possible nucleus for a future national concentration must be forbidden. Non-political clubs should not be allowed either, or only from very special points of view. Cultural associations, for instance, vocal societies, clubs for the study of the home country, gymnastic and sports clubs, social clubs, etc., can by no means be regarded without misgivings, as they can easily promote nationalism amongst their members.[1071]

The Nazis conceived the destruction of the group in the broadest understanding of the notion of "culture". It included every aspect of the social life of the group, that is, any factor that could contribute to its cohesion and could emulate its sense of identity. Basically, Germanisation meant that "the final aim must be the complete elimination of the Polish national spirit".[1072]

Notwithstanding the above, the ICTY-ICJ have systematically held that the destruction of the group can only be physical/biological, contrary to the fact that the travaux préparatoires do not unequivocally support this. Furthermore, the ICTY-ICJ have made legal findings that they seem to hold as generic, whereas in reality they were related to the facts of the cases at hand. As seen, what stands for an urban-type scenario (the former Yugoslavia) may not necessarily apply to other instances, eg the indigenous/tribal groups as reviewed in Part I, Chapter 2.

On the other hand, however, the ICTY-ICJ jurisprudence has favourably entertained the relationship between ethnic cleansing and genocide. In *Sikirica*, the Trial Chamber explained what differentiates persecution from genocide is that the former targets individuals on discriminatory grounds, whereas genocide targets the group as the sum of its members, through exactions committed against them.[1073] This, as held by the Chamber, is what "establishes a demarcation between genocide and most cases of ethnic cleansing".[1074] Prospectively, one may refer to Fournet and Pégorier who have shown that many ICTY indictments have encompassed a system of charging the

[1071] *RuSHA* (n 911) pp 7-8 and 10.
[1072] *RuSHA* (n 911) p 9.
[1073] *Sikirica et al* Trial Judgment (n 720) para 89.
[1074] *Sikirica et al* Trial Judgment (n 720) para 89.

accused that escalates from persecution to genocide.[1075] As seen (Chapter 2), the ICTY's *Kupreškić* Trial Judgement has held that:

> the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] [P]ersecution [...] is an offence belonging to the same *genus* as genocide. […] In both categories what matters is the intent to discriminate […]. [F]rom the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution. […] [W]hen persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.[1076]

Novic has noted that a number of ICTY judgments have reflected this escalation by establishing first persecution and then finding that they had materialised as a genocide-related actus reus, such as article II(c).[1077] Could it thus be argued that if the persecutory mens rea were to evolve from its enumerated grounds towards the genocidal intent, then attacks targeting culture may fall under article II(b)-(c)'s actus rei? Referring to *Krstić*, Novic has noted the difficulty to establish the genocidal mens rea in a case where attacks against culture constituted a significant part of the evidence. On this basis, Novic argues that "if acts of physical persecution are likely to constitute the actus reus of genocide, acts of socio-cultural persecution may only be taken into account at the level of the mens rea".[1078] A literal approach would militate against the proposition that culture-based crimes may go "beyond temporary unhappiness, embarrassment or humiliation", and result in slow death or "in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life". However, in line with Pakistan's comments that there are societies where cultural features may be "more important than life itself",[1079] there may be situations like those addressed by the IACtHR, where the members of a group have, as a result of severe cultural curtailment experienced "deep anguish and despair" in that "spiritually-caused illnesses" would inter-generationally "affect the entire natural lineage" (Part I, Chapter 2). This would require a human rights-based "dynamic interpretation" combined with a case-by-case approach as to whether certain cultural violations of a group would qualify as "serious mental harm".

IV. Conclusion to Chapter 3: cultural genocide is a tautology

As seen, genocide may consist of attacking culture in a heritage-centred manner. But as analysed, a relationship may also exist between genocide and tangible-centred attacks targeting culture. Furthermore, the analysis of the travaux préparatoires has shown that the non-adoption of the aforementioned approach by the negotiators led to confusing debates that conflated human rights and criminal law. To understand this, it is noteworthy that, among the three crimes most commonly recognised internationally, ie war crimes, CaH and genocide, the latter has given rise to the widest possible margin of interpretation, speculation and controversy. This is so for three reasons.

[1075] Fournet and Pégorier (n 623) p 718.
[1076] *Kupreškić et al* Trial Judgment (n 624) para 636.
[1077] Novic (n 15) p 153.
[1078] Novic (n 15) p 153.
[1079] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.

First, genocide is the ultimate anthropological crime. Its foundation is laid on the abstract: genocide is not about the destruction of individuals. It is about the destruction of the group, even though it requires the former to prove the latter. This was definitely an avant-garde posture, since it would take, for example, the twenty first century for the IACtHR to recognise the rights of the collective as the sum of its natural persons (Part I, Chapter 2). Structurally, the crime is defined through its chapeau, which contains the requisite mens rea for the destruction of the protected groups, and five actus rei, which concern the way in which the protected group's destruction may be achieved, through exactions against its individual members. This has led to a vulgarisation of the crime of genocide, particularly at the hands of politicians who often use the term in an abusive manner, progressively depriving it of its object and purpose.

Second, the Genocide Convention was drafted in extreme circumstances, in only two years: 1946-1948. The words "extreme" and "only" are not to be taken lightly. The Second World War had just ended, with the dropping of Little Boy and Fat Man over Hiroshima and Nagasaki. The planet had experienced an unprecedented staggering death toll of over 70 million persons worldwide, and, in some cases, such as Poland and the Soviet Union, a population loss of around 17% and 13%, respectively. Specifically, the ashes of the Holocaust, which destroyed over half of European Jews, were still fresh. It is upon these ruins that States embarked on the construction of a new world order that they hoped would be just. One tool to achieve this was the then nascent UN, under whose auspices and embryonic bureaucracy the UDHR, a human rights instrument, and the Genocide Convention, a partly criminal law instrument were prepared.

Third, and as a result of the above, various features of the fabric of the international community were amalgamated into the process. In 1946, slightly less than 50% of the early twenty-first century's States existed, with the bulk of that deficit being borne by Africa, from where only Egypt, Ethiopia, Liberia and South Africa were present during the drafting and negotiation process. In Asia, some key States such as India, Israel and Pakistan were yet to gain independence or be created during the two-year negotiations of the convention. The gender factor was abysmal during the convention's negotiations, as State representatives were quasi-unanimously male. Of those present, many lacked a criminal law background and often mixed-up various criminal law concepts. Even among those who had solid criminal law practice/knowledge, many diverged on the understanding of criminal law concepts due to the specifics of their legal traditions. Both groups also often confused human rights and criminal law, particularly when discussing the inclusion/exclusion of the concept of cultural genocide.

The above three factors explain the multiple ambiguities, whether perceived or actual, in the convention's definition of the crime of genocide.

Rather than glossing over the specific technicalities of the definition of genocide, this Chapter attempted to explore whether, and if so, to what extent the concept of cultural genocide falls within the scope of article II. To do so, extensive recourse was had to the travaux préparatoires which, surprisingly, *do* shed light on the issue. As seen, cultural genocide first materialised in the Secretariat Draft as one of the three sets of actus rei, namely physical, biological and cultural genocide, to achieve the mens rea of part or total destruction of protected groups. As an actus reus, cultural genocide was then subdivided into both tangible-centred and anthropo-centred means, with the latter

including the forcible transfer of children to another group. Already at that early stage, disagreements on the inclusion of cultural genocide, except for the forcible transfer of children, were manifest. Matters however changed in article III of the Ad Hoc Committee Draft, where cultural genocide as an actus reus was simplified and endowed with its own mens rea, that is the destruction not of the protected group but of its features. The Ad Hoc Committee Draft article II kept the mens rea of destruction of the protected group, together with its actus rei of physical and biological genocide. At the Sixth Committee, however, while article III was rejected, the forcible transfer of children morphed into article II(e).

What transpires from the travaux préparatoires is the negotiating States' dual confusion, one that has continuously impacted both international jurisdictions and legal scholars. The first prong of this confusion lies within the chapeau. There, uncertainties prevailed throughout the drafting of the convention with regard to the destruction of the group, which was understood as physical, biological – sometimes perceived as a sub-category of the former – and, timidly cultural. The definition of the groups gave also rise to diverse interpretations. The understanding of racial, ethnical and religious –and to a lesser extent national – groups is cultural, in that they are evolving concepts, depending on cultural trends, both nationally and internationally. However, these terms also comprise a strong cultural component. For example, the word "ethnic" comprises elements such as language and spirituality, both of which are manifestations of culture. In other words, to destroy a racial, ethnical or religious group is to destroy collective cultural units. Furthermore, to destroy a racial, ethnical or religious group, *as such*, is to destroy them because of what they represent, ie the materialisation of humans' cultural diversity.

The second prong is that, within cultural genocide as an actus reus, a distinction was made, early on, between tangible-centred and anthropo-centred actus rei. The first, ie the destruction of the group's cultural tangible, was rather clearly rejected at the Sixth Committee. However, the second, which concerned the more anthropo-centred means such as language/religious restrictions or forcible transfer of individuals, was only partly rejected, since the Sixth Committee eventually decided to include the forcible transfer of children as article II(e) of the Genocide Convention. Although this happened when delegates were discussing article II of the Ad Hoc Committee which was on physical and biological genocide, most States that took the floor, regardless of their views on cultural genocide, found that it should be discussed under the Ad Hoc Committee Draft's article III, which had been left out by the Ad Hoc Committee itself. The premature nature of the discussion was manifest in the Sixth Committee, since most States were confused as to whether, and to what extent, the forcible transfer of children was *also* physical and/or biological genocide. Notwithstanding this, the forcible transfer of children was included as an actus reus accompanying the mens rea of destroying in whole or in part protected groups.

Therefore, as also observed by Novic, Stahn and Vrdoljak, the travaux préparatoires do not crisply support the ILC, ICTY-ICTR, ICJ and most legal scholars' mantra that the destruction of the protected group can only be physical or biological.[1080] The travaux préparatoires permit to conceive cultural genocide in two ways. The first is the actus

[1080] *See* Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019), p 47 and Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law" (n 15) p 299; and Novic (n 15) pp 50-95.

reus of the forcible transfer of children to another group. The second, perceivably avant-garde, but in fact plainly factual, consists of considering the intent to destroy the groups as such as cultural genocide in and of itself. To attack groups for what they are, ie collective cultural units, is to attack culture. Under this understanding, cultural genocide becomes a tautology for, regardless of its actus rei, genocide, in both its intent and result, is simultaneously shaped culturally and by cultural rejection.

International judicial practice has rejected cultural genocide's tangible-centred actus rei, although it accepted it as indicative of the perpetrator's genocidal intent. Notwithstanding this, it remains to be seen whether, and if so to what extent, international courts are willing to consider the question of persecution's mens rea evolving toward genocidal mens rea, particularly under article II(b)-(c). As regards the heritage-centred understanding of cultural genocide, international courts are yet to fully address the question, for lack of relevant cases before ICR-based jurisdictions, such as the ICC, or claims before the ICJ. Once this happens, these jurisdictions may be able to determine whether article II(e) is cultural genocide alone or in combination with physical and biological genocide. Here, one may recall Judges Guerrero, McNair, Read, and Mo's joint dissenting opinion that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."[1081] By recognising article II(e) as cultural genocide, regardless of it being ruled also as physical or biological, the ICC and the ICJ would not even have to proceed with "the most generous interpretation". As Novic and Schabas have suggested, by focusing on the literal reading of the provision, the object and purpose of the convention, the dynamic interpretation of human rights instruments and, guided by the travaux préparatoires,[1082] they would merely need to transcend the questionable mantra that article II(e) is only physical/biological.

Had cultural genocide been unequivocally rejected during the negotiations, it would not have systematically come back both in the legal literature and in international judicial practice. For example, the ICC OTP's 2021 Draft Policy on Cultural Heritage provides:

> The Office recognises that children are the conduit of cultural heritage to future generations. If children are forcibly removed from a group, this will constitute an underlying act of genocide that will likely have a profound effect on the access to, practice of and continuation of a group's cultural heritage. In relation to the children themselves, the forcible transfer may create a severe dislocation from their cultural heritage."[1083]

By better understanding the broader context of the negotiations, one may place the crime of genocide in its proper anthropological context. Thus, it is noteworthy that a few hours before the UNGA adoption of the convention, Shaista Suhrawardy Ikramullah, the only prominent female representative among the fifty-eight States present at the Sixth Committee,[1084] observed in relation to cultural genocide and on behalf of her then just born Muslim Pakistan, that:

[1081] *Genocide* Advisory Opinion (n 783) p 36.
[1082] Schabas, *Genocide in International Law* (n 15) p 230; and Novic (n 15) pp 50-95.
[1083] OTP, "Draft Policy on Cultural Heritage" (22 March 2021) <https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf> accessed 2 April 2021, para 85.
[1084] Two of which were the Soviet Union's Byelorussian and Ukrainian Soviet Socialist Republics.

> It had been argued that such acts, heinous though they might be, were not so outrageous as physical genocide. It might be that some people regarded the destruction of religious edifices as a thing of little importance, but, for the majority of Eastern peoples, such an act was a matter of grave concern. In that part of the world, a far greater value was placed upon things of the spirit than upon mere material existence. Religious monuments were a source of inspiration to those peoples and a symbol of their spiritual personality.[1085]

Over seventy years later, this statement echoes as it did then, reminding of the need for genuine dialogue among civilisations. The crime of genocide was drafted in 1946-48. In interpreting and applying it, judicial bodies must take proper account of the pivotal role of culture in the concept of genocide. Thus, in its 2021 Draft Policy on Cultural Heritage, the ICC OTP explained that "Whenever charging genocide, the Office will ensure that its case accurately encapsulates all aspects of the crime [of genocide] that affect cultural heritage."[1086]

CONCLUSION TO PART III: INDIVIDUAL CRIMINAL RESPONSIBILITY'S PROMISING POTENTIAL

Both ICL and IHL, including when the latter forms part of the former, are capable of addressing attacks that target culture. Among this study's tripartite ICL crimes, war crimes were first to be recognised internationally, followed by CaH and genocide. Unlike war crimes' requirement of an armed conflict nexus, CaH and genocide apply regardless of the existence of armed conflicts. They are thus capable of addressing gross violations of human rights provided that they occurred within a widespread or systematic attack against any civilian population – for CaH – or with the intent to destroy in whole or in part any of the Genocide Convention's protected groups. Once these requirements have been met, war crimes, CaH and genocide may address attacks targeting culture, whether anthropo-centred or tangible-centred.

Perceivably, while war crimes are essentially tangible-centred, CaH and genocide are anthropo-centred. This is so because war crimes describe in astonishing details not only culture's tangible, whether anthropical or natural, secular or religious, movable or immovable; but also the modalities of its attack, ranging from destruction to pillage, through to its use and location. As a living corpus of law, which is regularly updated and complemented, the Hague and Geneva Law are deeply anchored in a tangible-centred foundation. International judicial practice has, however, progressively linked the tangible-centred means of attacks targeting culture to heritage. Both the ICTY and ICC have thus progressively, though naturally, linked attacks against culture's tangible to the broader inter-generation heritage alteration. In so doing, they have rendered moot the peacetime versus wartime debate regarding the applicability of international legal instruments protecting culture's tangible and, more limitedly, intangible. In so doing, it is the varying relationship between local-national-international manifestations of culture as a diptych or triptych that has been taken into account.

[1085] UNGA, "Hundred and Seventy- Eighth Plenary Meeting: Draft Convention on Genocide: Reports of ECOSOC and the Sixth Committee" (9 December 1948) UN Doc A/PV178.9 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2050.
[1086] Draft Policy on Cultural Heritage (n 1083).para 86.

In contrast to war crimes' evolutionary codification, genocide is a crime legislatively frozen in time. Since 1948, States have systematically refused to "update" the Genocide Convention, specifically its definition of the crime. This is evidenced not only by the ILC attempts, but also by the statutes of ICR-based jurisdictions that have systematically imported a definition from 1948 that uses a somehow obsolete terminology, certainly within the Western civilisation's cultural codes of the early 21th century. As seen, this definition remains particularly opaque, both in terms of the mens rea and some actus rei of genocide. Otherwise, why have international judges and scholars felt the need to dedicate so much effort to repeatedly explain this or that aspect of the crime? Anyone involved in the drafting of genocide judgments will attest to the fact that this crime needs to be regularly deciphered. This ambiguity in the crime of genocide's definition has been such that it has resulted in feeling compelled to find ambiguities even in those parts of the definition that are not ambiguous. The prominent example relevant to attacks targeting culture concerns the characterisation of the forcible transfer of children to another group as cultural genocide or physical/biological genocide. In fact, an objective and non-teleological recourse to the travaux préparatoires shows both the legal chaos and clarity that surrounded the negotiations of the definition of genocide in 1946-1948. This explains why States have refused to revisit the definition since, in hindsight, the adoption of the Genocide Convention appears to have been in and of itself a miracle. So it has been felt that reopening the debates would risk opening the Pandora's box. A non-teleological recourse to the travaux préparatoires also invites for more humility when interpreting and applying the definition of genocide, specifically when it comes to attacks targeting culture. Thus, while the travaux préparatoires do indeed show that the negotiators rejected the tangible-centred actus rei of genocide, they do not permit to establish that the forcible transfer of children was rejected as a culture-oriented actus reus of genocide, despite the ILC's assertion to the contrary, as incorporated uncritically by the ICTY-ICJ. This is so because no attempt has been made by any of the aforementioned bodies to draw a distinction between the tangible-centred and anthropo-centred means of genocide (Chapter 3). Instead, it is the misleading expression of "cultural genocide" that the drafters of the Genocide Convention, the ILC, ICTY-ICJ, scholars and civil society have opted for. "Cultural genocide" is a tautology, for genocide *is* cultural. As seen, defining the groups listed in the chapeau is part and parcel of cultural understandings because their definition is subject to time and space, two fundamental pillars of culture. Furthermore, the grounds of genocide, as cryptically materialised in the words "as such", explain that the national, ethnical, racial or religious groups are attacked because of what they are. The perpetrator targets them because of an aversion for them. These alien collectives that have infected society's otherwise clean body must be eliminated in whole, or altered in part, so as to help the body regenerate itself. That body *is* culture, both intangible and tangible. Jews had to be eliminated from the Nazi aspirational society because they infected it economically, financially, scientifically and artistically. Shias had to be eliminated from the Daesh aspirational society because they infected Islam linguistically, cosmogonically and eschatologically.

Although second in terms of appearance in the ICL's tripartite corpus of crimes, CaH borrow elements from both war crimes and genocide. They resemble war crimes as they were legally conceptualised as an extension of war crimes. Like the latter, they have also gone through a series of transformations. However, war crimes have given rise to complementary legal instruments which have not questioned the fundamentals of the Hague and Geneva Law. In contrast, CaH have been constantly defined and redefined,

with the most authoritative definition being, in the absence of a convention specifically devoted to them, that of the ICC Statute, since it was adopted by 120 States in 1998. In this sense, CaH differ from the 1948 fixed definition of genocide. In terms of actus reus, CaH do not provide expressly for a tangible-centred approach to attacks that target culture. However, under the crime of persecution, the post-Second World War trials, the ICTY and the ICC have proven that persecution is capable of embracing both anthropo-centred and tangible-centred approaches. Persecution is a cultural crime by virtue of its mens rea, regardless of any accompanying actus reus. This is so because persecution discriminates against individuals on grounds that identify victims as part of collective cultural units. Thus, like genocide, CaH are concerned with the attacking of culture in terms of both intent and means. Beyond its mens rea, persecution's actus reus allows adopting both anthropo-centred and tangible-centred approaches. As regards the former, both the ECCC and ICC have, after a twenty year-long academic speculations, finally realised the inevitable. In other words, these jurisdictions have considered that some acts targeting culture's intangible may amount to persecution. With respect to the tangible-centred attacks targeting culture, both the ICTY and ICC have first considered such attacks as part of their war crimes provisions. Applying thereafter persecution's discriminatory grounds, these jurisdictions have thus characterised the said acts as persecution. In this sense, CaH remain connected to war crimes, even if they no longer need the armed conflict nexus.

This Part has thus shown that the full potential of the ICL tripartite crimes remains untapped with regard to the adjudication of attacks targeting culture. A properly defined scope of culture, as manifested through culture's local-national-international diptych and/or triptych is a first step. This will in turn assist in separating the virtual ambiguities from the actual ones, so as to focus on the latter with lucidity – dispensing with recourse to the HRCts' dynamic interpretation.