



FACULTY OF LAW
Lund University

Samantha Edin

Erasing Identity

A Study of the Legal Evolution of Cultural Genocide and its Implications
for the Protection against State-imposed Extinction

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Supervisor: Karol Nowak

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Contents

SUMMARY	1
SAMMANFATTNING	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	4
1.2 Purpose and Research Questions	5
1.3 Methodology and Material.....	6
1.4 Delimitations.....	7
1.5 Outline	8
2 THE HISTORY OF CULTURAL GENOCIDE.....	9
2.1 Introducing a New Crime.....	9
2.2 The Dismantle of Cultural Genocide	10
2.3 Understanding Cultural Genocide	13
3 THE GENOCIDE CONVENTION.....	15
3.1 The Purpose of the Convention	15
3.2 The Definition of Genocide	15
3.3 Criticism of the Modern Definition.....	17
4 THE XINJIANG UYGHUR AUTONOMOUS REGION.....	19
4.1 Background	19
4.2 Restrictions of Cultural Expressions	20
4.3 Destruction of Religious Sites and Monuments	21
4.4 Vocational Education and Training Centers	22
5 ANALYSIS	23
5.1 The Modern Crime of Genocide.....	23
5.2 The Original Concept of Cultural Genocide	24
5.3 Conclusion	26
6 BIBLIOGRAPHY.....	29
7 TABLE OF CASES	33

Summary

The crime of genocide is popularly referred to as “the crime of crimes”, indicating its severity and its status as a *jus cogens* norm of international law. However, the current legal definition of genocide solely incriminates physical and biological acts of genocide, unlike the original definition that emphasized the significance of cultural genocide. This essay aims to investigate whether the legal evolution of the crime of genocide has resulted in differences to the protection of ethnic minority groups. The aim of the essay will be met using a method of legal dogmatics, useful in adequately establishing the scope and content of each framework. Firstly, the essay presents a historic evaluation of the concept of cultural genocide, ranging from Raphael Lemkin’s original definition to its treatment in the development of the Genocide Convention. Secondly, the current crime of genocide is addressed with a thorough description of its elements. The final part of the investigation provides a description of the case study of the essay, namely the Chinese government’s policies in the Xinjiang region of China. The essay thereafter applies each framework on the case study at hand, intending to display an example of the frameworks’ scope in practice. Lastly, the essay concludes with a critical summary and discussion of the results of the application, including an analysis of its implications for the protection of ethnic minority groups. The findings of the essay suggest that the current definition insufficiently protects ethnic minority groups, specifically since it fails to recognize the significance of cultural existence.

Sammanfattning

Brottet folkmord kallas i folkmun för "brottets brott", vilket tyder på dess allvar och dess status som en jus cogens-norm i internationell rätt. Den nuvarande rättsliga definitionen av folkmord omfattar dock endast fysiska och biologiska handlingar, till skillnad från den ursprungliga definitionen som betonade innebörden av kulturellt folkmord. Denna uppsats syftar till att undersöka om den rättsliga utvecklingen av folkmord har medfört skillnader i fråga om skyddet av etniska minoriteter. Syftet med uppsatsen uppnås med hjälp av den rättsdogmatiska metoden, som används för att fastställa räckvidden och innehållet i respektive ramverk. Uppsatsen presenterar inledningsvis en historisk utvärdering av kulturellt folkmord, från Raphael Lemkins ursprungliga definition, till dess bearbetning i utvecklingen av folkmordskonventionen. Uppsatsen redogör därefter för den nuvarande innebörden av folkmord och dess rekvisit. Den sista delen av undersökningen innehåller en beskrivning av avhandlingens fallstudie, nämligen den kinesiska regeringens politik och lagstiftning i Kinas Xinjiang-region. Uppsatsen tillämpar sedan respektive ramverk på den aktuella fallstudien i syfte att visa ett praktiskt exempel på ramverkens räckvidd. Avslutningsvis ges en kritisk sammanfattning och diskussion av resultaten av tillämpningen, inklusive en analys av dess konsekvenser för skyddet av etniska minoriteter. Uppsatsens slutsats föreslår att det nuvarande brottet misslyckas i att skydda etniska minoriteter på ett adekvat sätt, framför allt eftersom det underlåter att erkänna innebörden av kulturell existens.

Abbreviations

ECOSOC	United Nations Economic and Social Council
HRW	Human Rights Watch
ICTY	International Criminal Tribunal of Yugoslavia
NGO	Non-governmental organization
OHCHR	United Nations Human Rights Office of the High Commissioner
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous peoples
UNGA	United Nations General Assembly
UN OSAPG	United Nations Office of the Special Advisor on the Prevention of Genocide
VETC	Vocational Education and Training Centre
WWII	World War II
XUAR	Xinjiang Uyghur Autonomous Region

1 Introduction

1.1 Background

In late August 2022, the United Nations Human Rights Office released a long-awaited report concerning the alleged human rights violations in the Xinjiang province of China. While China’s population largely consists of Han Chinese, the Xinjiang region has mainly been inhabited by the Uyghurs, a predominantly Muslim ethnic minority native to the region.¹ As a consequence of tumultuous riots and terrorist attacks in Xinjiang’s capital, as well as reports of Uyghur involvement in armed groups operating in Afghanistan and Syria, the Chinese government began targeting Uyghurs in the name of counterterrorism.² In May 2014, the Government announced a “Strike Hard” campaign, cracking down on the perceived religious extremism and separatism of the Xinjiang province.³

Despite China’s widespread propaganda efforts attempting to dement accusations of human rights abuses⁴, multiple reports confirm the Chinese government’s discriminatory treatment of Uyghurs. Various government documents demonstrate that the so-called Vocational Education and Training Centres, assertedly established for the purpose of educating and rehabilitating people influenced by “extremism”⁵, in fact seek to “wash brains” and “cleanse hearts” of Uyghurs.⁶ Former detainees have verified that they were forced to learn Chinese and prohibited from speaking other languages⁷, as well as kept from growing beards, praying or engaging in other supposed signs of religious extremism.⁸ Outside of the training centres, the government has destroyed

¹ Cunningham and Dou, *The Washington Post*, 2022

² Buckley and Ramzy, *The New York Times*, 2019

³ OHCHR, 2022, p. 5

⁴ Gianordoli, Marshall, Ramic and Shao, *The New York Times*, 2021

⁵ OHCHR, 2022, p. 12

⁶ Zenz, 2019

⁷ Jiang and Westcott, *CNN*, 2019

⁸ Stubley, *The Independent*, 2019

mosques and Muslim burial grounds, and implemented legislation forbidding certain types of religious and cultural expression.⁹

The UN report concluded that the Chinese government's counter-terrorism strategies constituted human rights violations and recognized that China's laws and policies could constitute crimes against humanity.¹⁰ However, the report made no remark of genocide, the offence popularly known as the "crime of crimes". Genocide is considered one of the most severe crimes of international law and imposes an *erga omnes partes* obligation on Parties to the Convention. In other words, State signatories to the Convention are required to interfere in instances of genocide, regardless of whether they are directly affected or not.¹¹ Multiple actors have criticised the UN for failing to recognize the situation as genocide¹², some of which have accused China of being guilty of cultural genocide. The concept of cultural genocide has previously been described as the destruction of cultural characteristics particular to a group¹³ but is not included in the current definition of the crime, giving rise to questions surrounding the modern scope of genocide and its implications for ethnic minority groups.

1.2 Purpose and Research Questions

The overarching aim of the essay is to examine the scope of the current legal definition of genocide compared to the concept of cultural genocide, specifically for the purpose of determining whether the legal evolution of the crime has resulted in any differences to the protection of ethnic minority groups against state-imposed extinction. The concept of cultural genocide is analysed in a broad sense by an evaluation of its history, interpretations and the provision on cultural genocide included in the drafts of the Genocide Convention. The treatment of Uyghurs in the Xinjiang province of China will be adopted as a case study, intended to provide an example of each frameworks' extent in practice.

⁹ Buckley and Ramzy, *The New York Times*, 2019

¹⁰ OHCHR, 2022 p. 44

¹¹ See e.g. *Gambia v. Myanmar*, para. 107

¹² See e.g., Abdul, *The Guardian*, 2022; Buckley and Wong, *The New York Times*, 2021

¹³ Lemkin, 1944, p. 84

The research aim will be met through the following sub-questions:

- To what extent does the current definition of genocide protect ethnic minority groups, compared to the original concept of cultural genocide?
- What are the implications of the legal evolution of the crime of genocide for the protection of ethnic minority groups, if any?

1.3 Methodology and Material

The essay aims to investigate the extent of the present legal definition of genocide, compared to the original concept of cultural genocide, specifically regarding the protection of ethnic minority groups. The concept of cultural genocide, as well as the current definition of genocide, will be investigated using the method of legal dogmatics. The method of legal dogmatics intends to achieve a “coherent picture of the law” through descriptive, logic and evaluative argumentation.¹⁴ Legal norms, mainly consisting of generally established sources of law, are useful in obtaining a cohesive understanding of the law.¹⁵ Legislation, jurisprudence, legislative work and legal doctrine are examples of commonly accepted legal sources.¹⁶

The investigation principally consists of determining any differences between the concept of cultural genocide and the contemporary definition of genocide regarding the protection of ethnic minority groups. Legal doctrine is mainly used to establish the external framework for the concept of cultural genocide, while the Genocide Convention constitutes the main source regarding the current definition of genocide. The legal doctrine utilized to determine what constitutes the concept of cultural genocide is entrenched in Raphael Lemkin’s original definition of genocide provided in *Axis Rule of Occupied Europe*, as well as the proposed provision of cultural genocide in the draft of the

¹⁴ Peczenik, 2001, p. 79

¹⁵ Nääv and Zamboni, 2018, p. 21

¹⁶ Ibid.

Genocide Convention. The prerequisites for the modern legal definition of genocide are interpreted through legal doctrine and practice from the ICTY.

China's laws and policies surrounding the "Strike Hard" campaign in the Xinjiang province is assessed through various reports, mainly drafted by NGO's. The reports constitute of investigations of Chinese government documents both provided by the government and leaked, along with interviews with formerly detained Uyghurs and unrestricted Uyghurs resident in the Xinjiang province. Translations of Chinese government documents surrounding policies in the Xinjiang Region are also treated. Reports, research and government documents are examined and compared with the objective of clarifying the aim, implementation and practice of measures concerning the Uyghur population.

Since the sources used to investigate China's policies in the Xinjiang region are mainly drafted by NGO's, it is important to highlight the risk of biased material. NGO's often implement a civil perspective on state matters, resulting in highly critical views. Furthermore, non-governmental organizations generally investigate issues through a Western liberal democratic lens. In this context, that could entail further bias considering China position as an Eastern communist non-democratic state.

1.4 Delimitations

In order to adequately meet the aim of the essay, several delimitations are necessary. Although the concept of cultural genocide carries significance to multiple branches of international law, the concept will only be discussed in relation to the crime of genocide. The essay applies a particular focus to genocide because of its special status as a *jus cogens* norm of international law, as well as its imposition of *erga omnes partes* obligations.

While the case study of the essay is composed of China's policies in the Xinjiang province, Chinese domestic legislation pertinent to the topic of cultural genocide will not be investigated within the framework of the essay. Instead, the essay's primary subject matter comprises of international sources of law.

1.5 Outline

Apart from the introduction, the essay is divided in four sections. The first section provides a historic evaluation of the concept of cultural genocide, and concludes with establishing a definition of cultural genocide, both through a historic and modern lens. The second section intends to describe the elements of the current crime of genocide. The third section of the essay delves into China's laws and policies surrounding the Uyghur population in the Xinjiang Autonomous Region. The fourth and final section aims to apply the established legal frameworks on the case at hand, in order to finally analyse the extent of which they respectively protect ethnic minority groups.

2 The History of Cultural Genocide

2.1 Introducing a New Crime

As the Second World War came to an end, Polish lawyer Raphael Lemkin published the prominent book *Axis Rule in Occupied Europe*, in which the term “genocide” was first introduced to international law. Although the concept sought to denote an old practice, the terminology was new, created from an amalgamation of the Greek word *genos*, meaning “race” or “tribe”, and the Latin word *cide*, which translates to “killing”. Lemkin intended for genocide to signify the destruction of a nation or of an ethnic group. However, the term was designed to encompass more than immediate and total destruction.¹⁷ Lemkin suggested a comprehensive definition of genocide, describing it 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 group themselves”.¹⁸ According to Lemkin, the act of genocide materialized in two phases, the first involved “destruction of the national pattern of the oppressed group”, while the second was accomplished through “the imposition of the national pattern of the oppressor”.¹⁹

The crime of genocide was coined during WWII, largely influenced by the actions of Nazi Germany.²⁰ Drawing inspiration from the German occupant’s conduct in occupied states, Lemkin suggested eight different techniques of genocide. The techniques of genocide expressed the fields in which genocide was carried out. According to Lemkin, the techniques represented “concentrated and coordinated attack(s) upon all elements of nationhood” carried out in political, social, cultural, economic, religious, moral, biological and physical fields.²¹ Contrary to the contemporary definition of genocide, which will be disclosed in detail later in the essay, only one of the eight techniques

¹⁷ Bloxham and Moses, 2010, p. 21

¹⁸ Lemkin, 1944, p. 79

¹⁹ Ibid.

²⁰ Akhavan, 2012, p. 93

²¹ Lemkin, 1944, p. 82

focused on mass killings and bodily harm; physical genocide.²² Meanwhile, the seven other techniques rather sought to demonstrate the way genocide manifested itself through the destruction of common patterns of certain national groups.²³

Lemkin's reluctance to reduce genocide to mass murder essentially implied the requirement of a new legal category. In his opinion, the Nazi crime was unique in its "methodical attempt to destroy a group – well beyond typical war crimes and acts of repression". Lemkin therefore considered the cultural aspect of genocide critical, since it more clearly expressed the motivation behind the crime.²⁴ Cultural genocide meant the destruction of linguistic, cultural and religious traits typical to a certain group.²⁵ The destruction could materialize through attacks on both tangible cultural structures, such as places of worship, as well as intangible cultural structures, such as language.²⁶ Although cultural genocide constituted the most significant part of Lemkin's definition, it was not met with the same enthusiasm during the negotiations of the imminent Genocide Convention.

2.2 The Dismantle of Cultural Genocide

Shortly after the publication of *Axis Rule*, WWII came to an end. The aftermath of the War provided incentives to prevent the recurrence of similar atrocities through international cooperation, ultimately resulting in the establishment of the United Nations. Although the concept of genocide was not fully entrenched in international law post-war, Lemkin's ideas prompted negotiations on a draft convention on the crime of genocide.²⁷

As a result of Lemkin's advocacy of the criminalization of genocide, the UN quickly started working on the issue. In December 1946, The United Nations General Assembly adopted a resolution²⁸ on "The crime of genocide" which

²² Lemkin, 1944, p. 89

²³ Novic, 2016 p. 19

²⁴ Bilsky and Klagsbrun, 2018, p. 374

²⁵ Lemkin p. 84

²⁶ Bilsky and Klagsbrun, 2018, p. 374

²⁷ Novic, 2016, p. 23

²⁸ UNGA Res 96 (1)

contained a definition of genocide. The preamble of the resolution stated that genocide constituted a “denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings”. Furthermore, the preamble highlighted that such denial of the right of existence would result in great losses to mankind, emphasizing the cultural contributions of these groups.²⁹ To this day, the use of the term “homicide” creates discussion and uncertainty regarding the scope of genocide, particularly concerning whether or not “homicide” involves murder.³⁰

Following the adoption of the resolution, the preparatory work on a convention was initiated. The process involved three phases, each of which generated a draft that called for revision. In every one of these phases, the concept of cultural genocide withstood a different outcome.³¹ The first draft, heavily influenced by Lemkin himself, contained quite an extensive definition of genocide, articulated as follows:

(...) the word ‘genocide’ means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.³²

Lemkin’s eight techniques were narrowed down to three categories, biological, physical and cultural genocide, which materialized as three paragraphs following the definition in Article II of the draft. Respectively, each category listed the criminal acts that genocide could consist of. The category of cultural genocide was described as the destruction of “specific characteristics of the group” by for example “forcible transfer of children to another human group” or “prohibition of the use of the national language even in private intercourse”.³³

The inclusion of a specific provision on cultural genocide incited disagreement amongst member states, many of which argued against including other

²⁹ Novic, 2016, p. 24

³⁰ Ibid.

³¹ Novic, 2016, p. 25

³² ECOSOC, 1947

³³ Ibid.

acts than those related to physical violence.³⁴ On the one hand, The United States and France asserted that a provision on cultural genocide could provoke political interference in the domestic affairs of States, while Egypt claimed that it could not constitute an international crime. On the other hand, states such as Poland and Lebanon advocated a broad definition of genocide.³⁵

With time, the discussion became increasingly sensitive, further widening the gap between the different sides of the issue. However, the States eventually managed to reach a compromise which involved isolating the provision on cultural genocide in a separate article of the Convention. This solution ultimately catered to the States that would be reluctant to ratify a Convention containing a provision on cultural genocide, namely because it enabled them to facilitate reservations, as well as potential deletions of the provision.³⁶ The isolated provision on cultural genocide constituted Article III of the Convention, articulated as follows:

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 the 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 groups.³⁷

The new draft was sent for review in the third and final phase of the process. During negotiations of Article II of the Convention, which included acts of physical and biological genocide, it became clear that the provision on cultural genocide would be rejected from the Convention.³⁸ The most prominent arguments against the inclusion of cultural genocide in the Convention made

³⁴ States found that the closing of libraries, for example, could not be equated to mass murder, see Bloxham and Moses, 2010, p. 38

³⁵ Novic, 2016, p. 25

³⁶ Novic, 2016, p. 26

³⁷ ECOSOC, 1948

³⁸ Novic, 2016, p. 27

references to the ongoing review of the imminent UDHR³⁹ Early in the discussions, France stated that it would not vote through an article on cultural genocide, mainly due to the fear that its aim would not be achieved. The negotiations ultimately culminated in the deletion of the article, leaving the legal definition of genocide in force today.⁴⁰

The isolated provision excluded the previously included paragraph on “forcible transfer of children”. However, once it was clear that the article on cultural genocide would be rejected, Greece proposed the inclusion of aforementioned paragraph in the provision on physical and biological genocide, emphasizing the effect of such acts on children’s conditions of life. Despite the large pushback on efforts to include other acts of cultural genocide, most States showed support of implementing the paragraph proposed by Greece.⁴¹ Today, the paragraph on “forcible transfer of children” constitutes the last remnant of cultural genocide in the current Genocide Convention.

2.3 Understanding Cultural Genocide

While Raphael Lemkin introduced the concept of cultural genocide as a method of ultimately achieving genocide as such, today’s understanding of cultural genocide is rather described as a process of its own.⁴² The core difference between Lemkin’s ideas and the modern perception of the concept is embedded in the level of analysis. Lemkin focused on the means of genocide, whereas the contemporary view focuses on the results of genocide.⁴³ In modern debate, cultural genocide has therefore been described as the “total destruction of a culture, so that the identity of a people ceases to exist”.⁴⁴

Despite its differences, Lemkin’s more narrow definition shares common characteristics with today’s broader interpretation. To begin with, both scholarly definitions have described cultural genocide as a “subtle” genocide.

³⁹ Gilbert, 2018, p. 325

⁴⁰ Novic, 2016, p. 27

⁴¹ Novic, 2016, p. 27

⁴² Novic, 2016, p. 4

⁴³ Novic, 2016, p. 5

⁴⁴ Novic, 2016, p. 4-5

Cultural genocide illustrates an extended, less bloody, process, intended to destroy a human group through assimilationist policies.⁴⁵ Furthermore, both definitions have referred to effects of such destruction as far reaching and intergenerational, emphasizing that they inhibit the transfer of group culture to the next generations. The ongoing consequences of cultural genocide therefore carry significance not only to individuals, but also to communities and to humanity as a whole.⁴⁶ Lastly, acts of cultural genocide have commonly been said to manifest themselves through state practice or policy, although some form of individual criminality is assumed through the criminal rhetoric connected to the term “genocide”.⁴⁷

⁴⁵ Novic, 2016, p. 5

⁴⁶ Ibid.

⁴⁷ Ibid.

3 The Genocide Convention

3.1 The Purpose of the Convention

The two overarching goals of the Convention are presented in its very first article. Article I of the Genocide Convention initially holds that genocide is an international crime which can be committed during both times of war and times of peace. Thereafter, the provision establishes the purposes of the Convention, namely Contracting Parties' obligation to prevent and punish the crime of genocide. These goals not only serve as general guidelines for State Parties, but rather impose requirements to also implement measures that in effect uphold the goals of the Convention. Contracting Parties must therefore establish necessary legislation⁴⁸ and punish offender's "whether they are constitutionally responsible rulers, public officials or private individuals".⁴⁹ The obligations prescribed from Article I of the Convention are considered norms of international customary law, and are thereby binding on all States, regardless of whether they have ratified the Convention or not.⁵⁰

3.2 The Definition of Genocide

The current legal definition of genocide is established in Article II of the Genocide Convention:

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

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

⁴⁸ Genocide Convention, art. 5

⁴⁹ Genocide Convention, art. 4

⁵⁰ UN OSAPG, (n.d.)

The provision contains two elements that must be fulfilled for an act to be deemed as genocide. The first element relates to the mental state, the *mens rea*, of the offender. The offender must display the specific “intent to destroy, in whole or in part” a protected group as such.⁵¹ Determining the specific intent carries difficulties and has been disputed in its relation to the concept of cultural genocide. The ICTY has previously used acts of cultural genocide as evidence of perpetrator’s specific intent⁵², arguing that the offender’s practice and perception of acts detrimental to the “the very foundation of a group”⁵³ clarifies the offender’s substantial mental state towards the protected group as such.⁵⁴ However, cultural destruction does not in itself suffice as evidence of a specific intent.⁵⁵ Instead, it is cultural destruction in combination with physical and biological attacks of protected groups that collectively constitute evidence of the perpetrator’s *mens rea*.⁵⁶

Determining whether a collective can be considered a protected group in accordance with the first paragraph of Article II of the Genocide Convention, as well as deciding if the collective concerned has been targeted “as such”, can sometimes be complicated. Since every group possesses different qualities, no universal definition has been established, instead prompting a case-by-case assessment.⁵⁷ The concept of cultural genocide has therefore served as a useful tool in such ambiguity. An offender’s attack on specific markers of a collective’s unique linguistic, social, historical and cultural existence has helped define the contours of the group as such.⁵⁸

The second element of the crime of genocide relates to the physical act, referred to as the *actus rea*. Article II of the Convention exhaustively establishes five acts through which genocide can be committed.⁵⁹ The three first enumerated acts demonstrate physical means, while the two subsequent acts

⁵¹ Nersessian, 2019, p. 71

⁵² See e.g. Krstić, para. 580

⁵³ See Karadžić and Mladić, para. 94

⁵⁴ Nersessian, 2019, p. 71

⁵⁵ UN OSAPG, 2018

⁵⁶ Gilbert, 2018, p. 328

⁵⁷ Nersessian, 2019, p. 71

⁵⁸ Ibid.

⁵⁹ UN OSAPG, 2018

show biological means of genocide. The fifth and final act constitutes the last remnant of cultural genocide as it was negotiated in the drafts of the Convention.

3.3 Criticism of the Modern Definition

The modern definition of genocide has faced great criticism, mainly due to its overly restrictive scope. The *mens rea* presents a restrictive list of potential victim groups, while the *actus rea* imposes a restrictive list of potential genocidal acts, solely focusing on physical and biological aspects.⁶⁰ The ongoing challenge of the definition has eventually entailed acceptance of cultural genocide as a part of the “process of genocide”.⁶¹

The common acceptance of cultural genocide as a process of genocide stems from the larger discussion and conceptualization of the “process” of genocide itself. The Holocaust has always been studied in the context due to its stance as a “prototypical” genocide. However, new trends related to Holocaust studies have recently emerged, mainly aimed at establishing the deeply rooted long-term origins of the Holocaust.⁶² Most prominently, Patrick Wolfe has focused on the imperial roots of genocide, highlighting the “logic of elimination” inherent to settlers in processes of colonialism. The shift of focus in Holocaust studies has thereby shed light on the types of societies involved in genocidal processes, mainly illustrating that genocide might be a consequence of so-called “Western liberal democracies”, the very democracies that participated in the negotiations of the Genocide Convention.⁶³

The newly established perspective of Holocaust studies thus highlights cultural genocide as an undercurrent of the genocidal process, which holds different implications depending on what definition of cultural genocide is applied. Viewed as a technique of genocide in accordance with Lemkin’s writings, cultural genocide could comprise an initial step towards full scale genocide. In that context, cultural genocide mainly gains significance with

⁶⁰ Novic, 2016, p. 6

⁶¹ Novic, 2016, p. 7

⁶² Ibid.

⁶³ Novic, 2016, p. 7-8

respect to genocide prevention, one of the previously mentioned goals of the Genocide Convention. Since international law has faced criticism of its inability to adequately prevent genocide, the concept of cultural genocide might gain traction in this field of study.⁶⁴ When viewing cultural genocide as a process of its own, the discussion on “genocide without murder” is brought forth. The destruction of a group in the absence of physical and biological attacks, more specifically killings, is generally more difficult to consider a great crime. In this context, cultural genocide opens a larger debate on the extent of genocide and possible expansion of its scope.⁶⁵

Lastly, the aspect of culture in processes of genocide is also important when discussing consequences of genocide. Apart from the death of group members, the destruction of a group further entails the extinction of an entire culture, which is often acknowledged as one of the great harms of genocide.⁶⁶

In conclusion, the conceptual intersection between culture and genocide is noticeable. Nevertheless, the legal significance of cultural genocide in the current definition of genocide remains disputable. The implications of cultural genocide and its relationship with genocide is often brought up against the backlash of the draft Convention, which initially included a provision on cultural genocide. However, this discourse could impose an inadequate perspective on the matter. International law has evolved since the introduction of the crime of genocide, bringing new circumstances imperative to the discussion.

⁶⁴ Novic, 2016, p. 8

⁶⁵ Ibid.

⁶⁶ Novic, 2016, p. 9

4 The Xinjiang Uyghur Autonomous Region

4.1 Background

The XUAR is China's largest region⁶⁷, located in the northwestern part of the country.⁶⁸ The area borders to several Central Asian countries, providing important routes and access to Central Asian markets.⁶⁹ Although China's population mainly composes of the Chinese speaking Han Chinese, Xinjiang is dominated by the ethnically Turkic Uyghur, Kazakh and Kyrgyz populations that are predominantly Muslim and have their own languages.⁷⁰ The region's largest group are the Uyghurs, which constitute just under half of the region's total population.⁷¹

In 1949, the Chinese government began enacting discriminatory policies aimed at the Uyghur population. The fall of the Iron Curtain and the following disintegration of the Soviet Union in 1990 instigated Beijing's fear of instability in the region, inciting additional assimilationist actions in Xinjiang.⁷² As a result of this, the government decided to implement the "Big Development of the Northwest" plan, using economic incentives to attract Han Chinese migrants to the XUAR. However, Beijing's efforts to impose stability in the area only resulted in further marginalization of the Turkic Muslim population. The surge of Han Chinese migrants affected local culture, language and traditions, spawning resentment of the new settlers and provoking increased tension between the different populations.⁷³

The Chinese government has continued to crack down on the Uyghur population since, increasing police presence in the area as well as carrying out

⁶⁷ OHCHR, 2022, p. 3

⁶⁸ HRW, 2021

⁶⁹ OHCHR, 2022, p. 3

⁷⁰ HRW, 2021

⁷¹ OHCHR, 2022, p. 4

⁷² HRW, 2021

⁷³ Ibid.

arbitrary arrests, extrajudicial killings and executions following unfair trials.⁷⁴

In 2009, following rape allegations targeting Turkic Muslim men, the Turkic population started a protest in the region's capital Urumqi which quickly resulted in violent riots. Though the reason behind the escalation was unknown, the Chinese government did not hesitate to blame the World Uyghur Congress, an international organization of exiled Turkic Muslims.⁷⁵ Beijing's accusations fell in line with its previous rhetoric and claims of terrorist attacks in Xinjiang that assertedly generated large numbers of casualties and damages to property.⁷⁶ The violent outcome of the 2009 protest intensified the government's attempts at pressuring the local populations, ultimately resulting in the implementation of the Strike Hard campaign for the purpose of combating terrorism in the region.⁷⁷

4.2 Restrictions of Cultural Expressions

The Government's comprehensive counter-terrorism strategies have materialized through increasingly tight regulation of religious expressions and practice, contrary to the freedom of religion protected in China's constitution. Such regulations stipulate that religious activities are only allowed in Government approved locations, conducted by Government accredited personnel and based on Government approved teachings and publications.⁷⁸ Moreover, religious activity is strictly forbidden in all state and public institutions, as well as in schools of national education. The Government does, however, allow "Islam with Chinese characteristics", a form of Islam better adapted to Chinese society.⁷⁹

The established legal instruments that regulate religious activity include a list of "primary expressions of extremism" that aims to provide officials and the

⁷⁴ HRW, 2021

⁷⁵ Ibid.

⁷⁶ OHCHR, 2022, p. 4

⁷⁷ Ibid.

⁷⁸ OHCHR, 2022, p. 25-26

⁷⁹ OHCHR, 2022, p. 26

general public with signs of supposed religious extremism, useful for identifying extremist behavior in the community.⁸⁰ Such “expressions” or “signs” include wearing hijabs and “abnormal beards”, labelling food products “Halal”⁸¹, closing restaurants and fasting⁸² during Ramadan, engaging in cross-country religious activity “without valid reason”, using the internet to teach scriptures and preach, and giving one’s child a Muslim name, among other things.⁸³ The list thus encompasses an extremely wide range of people and specifically targets standard practitioners of Islam religion, in effect declaring all such expressions extremism.

In addition to prohibiting and restricting various forms of religious expression, the Government has also sought to inhibit linguistic expressions. A 2017 Government directive requested authorities in Xinjiang to introduce teaching of Mandarin Chinese, while also forbidding the use of Uyghur language in educational material and school activities. Multiple schools that provide instruction in Uyghur and Kazakh language have been closed, and teachers have been removed from their bilingual duties.⁸⁴ In conclusion, the Chinese Government has actively imposed restrictions on minorities’ ability to participate in cultural life by restricting linguistic rights.

4.3 Destruction of Religious Sites and Monuments

Alongside regulation of religious, linguistic and other cultural expressions, reports show recurring destruction of Islamic sites and monuments. Research of publicly available satellite imagery has found that multiple mosques have been destroyed in Xinjiang, mainly during the Strike Hard campaign. Furthermore, satellite imagery shows that many religious sites have been altered in their characteristic identifying features, for example through the removal of minarets⁸⁵ and through the installation of framed copies of state policies that

⁸⁰ OHCHR, 2022, p. 26

⁸¹ Maizland, *Council on Foreign Relations*, 2022

⁸² Ibid.

⁸³ OHCHR, 2022, p. 26

⁸⁴ OHCHR, 2022, p. 27-28

⁸⁵ OHCHR, 2022, p. 27

promote “de-extremification” and “ethnic unity”.⁸⁶ Burial grounds with generations of buried Turkic Muslim families have also been demolished, which has been described as attempts to disconnect Turkic Muslims from their history and ancestry.⁸⁷

4.4 Vocational Education and Training Centers

The most significant measures conducted as a part of the Government’s counter-terrorism strategies are carried out through so-called Vocational Education and Training Centers, where “minor” cases of extremism are said to be treated with leniency, education and rehabilitation.⁸⁸ The Government has reported that the purpose of the VETC’s is to “eradicate the breeding ground and conditions for the spread of terrorism and religious extremism”.⁸⁹ However, multiple Government documents clearly state the Training Center’s purpose of “washing brains” of Uyghurs and other Turkic Muslim groups.⁹⁰

Former detainees have reported that they were kept from leaving the Center’s until they learned a certain number of Chinese characters or spoke Chinese fluently. In addition, detainees have concluded that officials forced them to engage in criticism of themselves and others for their cultural and religious practices, along with being prohibited from using any religious or cultural expression, including growing beards and praying. It was also reportedly mandatory to sing the praises of the Chinese Communist Party and memorize the very rules that prevented Turkic Muslims from exercising their religion.⁹¹

⁸⁶ [HRW](#), 2021

⁸⁷ [Ibid.](#)

⁸⁸ [OHCHR](#), 2022, p. 11

⁸⁹ [OHCHR](#), 2022, p. 12

⁹⁰ [HRW](#), 2021

⁹¹ [HRW](#), 2021

5 Analysis

In its report, the OHCHR condemns China's policies on multiple accounts, mainly as human rights violations. While the OHCHR predominantly investigates human rights issues, international criminal law was discussed briefly. The report states that "the extent of arbitrary and discriminatory detention of members of Uyghur and other predominantly Muslim groups (...) may constitute international crimes, in particular crimes against humanity".⁹² However, the report does not mention the crime of genocide, despite highlighting that the policies often directly or indirectly affect Turkic Muslim communities through restrictions on religious identity and expression.⁹³ The UN has been criticized of failing to mention genocide in its report⁹⁴, giving rise to the question of whether the Chinese government's actions actually constitute genocide or not. In the following, Beijing's actions will be analyzed using the current definition of genocide, as well as the concept of cultural genocide. That way, the essay seeks to clarify to what extent the modern crime of genocide offers protection to ethnic minority groups, in comparison to the original concept of cultural genocide.

5.1 The Modern Crime of Genocide

As previously mentioned, the current definition of contains two elements, the first involving the establishment of the offender's specific intent. The ICTY has precluded that acts detrimental to "the very foundation of a group" can speak to a perpetrator's mental state towards the protected group as such. In this case, the Chinese government has implemented legislation restricting Uyghur's possibilities of exercising and maintaining their cultural and religious identity. For instance, the "list of primary expressions of extremism" prevents Uyghurs and other Turkic Muslim groups from using religious characteristics such as Hijabs and typical Muslim names, in fear of being imprisoned or placed in VETCs. Furthermore, the Government has demolished religious sites, monuments and burial grounds, in effect erasing important history of

⁹² OHCHR, 2022, p. 44

⁹³ OHCHR, 2022, p. 43

⁹⁴ Abdul, *The Guardian*, 2022

the Turkic Muslim community, as well as preventing future handover of religious traditions. Inside and outside of the VETC's, the Government has made extensive efforts to restrict Uyghurs from speaking and teaching their language, further hindering them from maintaining and transferring cultural characteristics to new generations. All cultural traits affected are specific to the ethnic minority groups of Xinjiang, and cumulatively represent the very foundation of these groups. Beijing's actions must therefore be considered harmful to the foundation of Turkic Muslim groups, which in turn speaks to their specific intent of destroying the group as such.

Even though a specific intent can be established, it is not enough to constitute genocide. The second element of the crime requires that at least one of the physical or biological acts listed in Article II have been committed. These acts include killings, causing bodily harm or mental harm, deliberately inflicting on the group conditions of life, imposing measures intended to prevent births or forcibly transferring children of the group to another group. No clear evidence of physical or biological acts aimed at Uyghurs has been brought forward. There are no records of killings, infliction of bodily harm or control of reproduction. The second element of the crime is thereby unfulfilled, resulting in the inability to conclude that the Chinese government's actions constitute genocide in accordance with the modern legal definition in Article II of the Genocide Convention.

5.2 The Original Concept of Cultural Genocide

In Article II of the first draft of the Convention⁹⁵, the first element of the crime introduced a less restrictive intent than the one in force today. The draft article proposed the requirement of an intent to destroy a protected group, in whole or in part, or of preventing its preservation or development. Beijing has introduced policies that essentially aim to wipe out the linguistic, cultural and religious traits of Turkic Muslims, the very traits that establish the foundation of these groups. As previously stated, these actions show an overall attitude

⁹⁵ ECOSOC, 1947

toward the group, which can translate to an intent of annihilating the group as such. However, the first draft article on genocide provides several other ways to identify an offender's intent. This means that an offender may be held liable on other accounts, even if a specific intent to destroy a protected group as such cannot be proven. According to the first draft article, the intent of the Chinese government could also be established by proving that its actions towards the Turkic Muslim groups are carried out in purpose of preventing the groups preservation or development. In this instance, it is quite clear that the Government's actions, at the very least, result in detriment to Turkic Muslim group's abilities of preservation or development. Most prominently, the Government's destruction of Mosques and Muslim burial grounds inhibit Turkic Muslim from exploring their history and heritage, as well as carrying their traditions to future generations.

The first draft article subsequently lists an extensive list of actions that constitute genocide, provided that they are carried out with the previously mentioned intent. Contrary to the current legal definition of genocide, the second element of the first draft article also comprised of acts of cultural genocide. Genocidal acts could consist of "destroying the specific characteristics of a group by (c) prohibition of the use of the national language even in private intercourse", among other things. As a part of the Strike Hard campaign, the Chinese government implemented directives that forced authorities to prohibit local languages in educational material and school activities. Such acts could be deemed genocidal, if similar provisions on cultural genocide were included in today's legal definition of the crime.

The draft article on cultural genocide presented in the second draft of the Convention⁹⁶, the isolated provision on cultural genocide, included even further possibilities of establishing an offender's intent. The article stated that genocide meant "any deliberate act committed with the intent to destroy language, religion or culture" of a protected group, specifically "on grounds of the national or racial origin or the religious belief of its members". This article clearly reflected Lemkin's view of cultural genocide as pivotal to the

⁹⁶ ECOSOC, 1948

genocidal process, since it expressed methodical approaches of destroying a group. In contrast to physical and biological genocide, the article in question put the disintegration of core foundations of groups center-stage. That way, genocide could be recognized at an earlier stage in the process, rather than having to result in complete physical elimination of a group.

Physical and biological acts of genocide have not yet been proven in the Xinjiang province of China. However, the policies in place today clearly aim to erase linguistic, religious and cultural features of Turkic Muslim, meaning that they would be encompassed as crimes of genocide according to the article of the second draft convention. Unfortunately, the current definition of genocide does not consider the withstanding consequences of cultural destruction, thereby failing to recognize that it essentially wipes out differences between ethnic groups, eventually resulting in the destruction of groups. The differences between the original definitions and the legal definition in place today will be summarized and further problematized below.

5.3 Conclusion

In conclusion, the current legal definition undoubtedly restricts the scope of the crime, compared to Lemkin's original definition of cultural genocide. While the *mens rea* element of the crime is more restrictive in today's definition compared to the earlier ones, the concept of cultural genocide can still be useful as a tool of determining whether a perpetrator in fact carries an intent to destroy a protected group as such. The differences between the definitions are therefore mainly prevalent when considering the *actus rea* of the crime of genocide. The definition of the current Convention only provides examples of physical and biological acts of genocide, while the previous definitions have included acts of cultural genocide. The modern definition of genocide thereby contradicts the very foundation of Lemkin's proposal put forward in *Axis Rule*. Lemkin clearly stated that the crime would not solely focus on the destruction of groups through mass murder, since such a focus would strip the crime of its overall motive. Simply attributing genocide to the physical annihilation of a group means the disregard of offender's systematic, methodical and more subtle approaches of destruction that ultimately result in the

loss of an entire culture and identity. Such loss of culture could result in the subsequent destruction of groups since differences between national groups are eliminated, with the outcome of an entirely homogenous population. The removal of the aspect of cultural genocide in today's definition therefore entails insufficient protection of ethnic minorities from state-imposed extinction, mainly by disregarding the effects of cultural destruction.

The scope of the current legal definition entails several consequences for international law in general, and the protection of ethnic minority groups in particular. Firstly, the failure to recognize systematic methods of destroying groups, such as assimilationist policies, can in turn result in the inability to prevent genocide altogether. The current design of the crime of genocide may therefore be inadequate in upholding the goals of the Convention. Moreover, the current focus on genocide as a physical crime means the failure to adequately protect ethnic minority group's essential foundations of life. Although minority group's culture is protected in other aspects of international law, through for example human rights or the crime of persecution, genocide constitutes the "crime of all crimes". Genocide entails an obligation *erga omnes partes*, meaning that crimes of genocide are a concern for all parties of the Convention, regardless of whether an ongoing genocide directly injures them or not. Declaring that a state violates human rights, in comparison with declaring that a state has committed genocide, does not provide other states with the same incentives to interfere. The absence of acts of cultural genocide in the current definition thus enables states, such as China, to continue their conduct without much repercussion.

Multiple states, particularly Western liberal democracies, have condemned Beijing's actions in the XUAR and have concluded that the Chinese government is guilty of genocide. However, these very states participated in the negotiations of the Genocide Convention, and ultimately agreed to remove provisions relating to cultural genocide. The purpose of the omission can presumably be attributed to Western liberal democracies conduct in colonized states, where they themselves applied assimilationist policies with the aim of eliminating cultural differences. The willingness to condemn Beijing's

actions thereby poses an interesting topic of discussion for the future, since it may ultimately result in an extension of the scope of genocide. In other words, there might be a shift of perspective on the crime of genocide, perhaps because the crime is now performed by a non-democratic state that challenges Western values.

In summary, the original concept of cultural genocide is far more encompassing than the definition in place today. The current legal definition in fact contradicts the original concept and fails to adequately prevent genocide, as well as protect and recognize the importance of the culture and identity of ethnic minority groups. However, States are increasingly applying a harsher rhetoric in matters of genocide, sparking hope of its future expansion.

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