The European Journal of International Law Vol. 29 no. 2

The Return of Cultural Genocide?

Leora Bilsky* and Rachel Klagsbrun**

Abstract

Cultural genocide, despite contemporary thinking, is not a new problem in need of normative solution, rather it is as old as the concept of genocide itself. The lens of law and history allows us to see that the original conceptualization of the crime of genocide – as presented by Raphael Lemkin – gave cultural genocide centre stage. As Nazi crime was a methodical attempt to destroy a group and as what makes up a group's identity is its culture, for Lemkin, the essence of genocide was cultural. Yet the final text of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) does not prohibit cultural genocide as such, and it is limited to its physical and biological aspects. What led to this exclusion? In this article, we examine the various junctures of law, politics and history in which the concept was shaped: the original conceptualization by Lemkin; litigation in national and international criminal courts and the drafting process of the Genocide Convention. In the last part, we return to the mostly forgotten struggle for cultural restitution (books, archives and works of art) fought by Jewish organizations after the Holocaust as a countermeasure to cultural genocide. Read together, these various struggles uncover a robust understanding of cultural genocide, which was once repressed by international law and now returns to haunt us by the demands of groups for recognition and protection.

1 Introduction

In September 2016, the International Criminal Court (ICC) rendered its first verdict that deals entirely with cultural destruction – *Prosecutor v. Al Mahdi*.[1] The decision

* Full Professor, Faculty of Law, Tel Aviv University, Israel; Benno Gitter Chair in Human Rights and Holocaust Research; Director, Minerva Center for Human Rights, Tel Aviv, Israel. Email: bilskyl@post.tau.ac.il. The authors wish to thank Rivka Brot, James Loeffler, Doreen Lustig, Samuel Moyn and the anonymous readers for their useful and insightful comments.

** Executive Director, Minerva Center for Human Rights, Faculty of Law, Tel Aviv University, Israel. Email: klags@post.tau.ac.il.

[1] Judgment and Sentence, *Prosecutor v. Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15–171), Trial Chamber VIII, 27 September 2016.

was lauded for its precedential value for recognizing the link between an attack on a group's cultural heritage and its destruction. However, in doing so, the Court did not invoke the crime of genocide that deals with the destruction of groups and indicted the accused for the more limited war crime of destruction of cultural property.[2] What can explain this gap between the popular understanding of cultural genocide and the legal conceptualization? Why was Al Mahdi not indicted for cultural genocide? In this article, we return to the early stages of developing the crime of genocide in order to understand the riddle of cultural genocide's disappearance.

Before we begin our exploration, a few words are due on the definition of cultural genocide. As a legal concept in international law, cultural genocide was devised as a sub-category, or aspect, of genocide – the attempt to systemically and wilfully destroy a group – alongside physical genocide and biological genocide. It denoted the destruction of both tangible (such as places of worship) as well as intangible (such as language) cultural structures. It envisioned negative and positive responses – a criminal prohibition alongside restitutive and reparative measures. As we show later in this article, this concept eventually did not survive treaty negotiations in the 1940s and lay dormant until the 1990s.

The original conceptualization of the crime of genocide, as presented by Raphael Lemkin, gave cultural genocide centre stage. In fact, Lemkin thought that a new legal category was needed precisely because genocide could not be reduced to mass murder.[3] The novelty of the Nazi crime lay in the methodical attempt to destroy a group – well beyond typical war crimes and acts of repression. For Lemkin, therefore, the essence of genocide was cultural – a systematic attack on a group of people and its cultural identity; a crime directed against difference itself. Ironically, the final text of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) does not prohibit cultural genocide as such.[4] Only a distant echo to this attempt is present in the Genocide Convention, where it prohibits the forced transfer of children (Article 2, paragraph e).

How was it that cultural genocide disappeared from the Genocide Convention? What led to this almost total inversion of the original meaning of genocide, from a holistic concept of genocide to one limited to its physical and biological aspects? How was the cultural essence of genocide detached from the international crime of genocide and then narrowed down to attacks on 'cultural property' or 'cultural heritage', protected

[2] Al Mahdi was convicted of a war crime under the Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 8(2)(e)(iv).

[3] 'Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations.' Lemkin, 'Genocide', 15 *American Scholar* (1946) 227, at 227.

[4] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948, 78 UNTS 277.

under international humanitarian law,[5] human rights law and indigenous-protection law?[6] What happened in the process to the original understanding that puts the cultural group in the centre and sees genocide as a collective, multi-dimensional crime that requires a structural response for its elimination?

The inherent tension between law and history is one of the explanations given to the gap between the popular and legal understandings of genocide. The law wishes to designate the crime of genocide to the most serious acts ('crime of crimes') and, thus, limits genocide to its physical and biological aspects, requires a special intent or a plan directed at the destruction of a group as such and affords protection to limited classes of groups. Historians, by contrast, unlimited by legal considerations, can account for the complexity and various aspects of genocides. They can study long-term processes (and not just one specific event or decision), take account of myriad of motives and go beyond legal definitions of protected groups to account for hybrid groups. Moreover, some of them reject an essentialist understanding of culture in recognition of the ability of groups to re-invent their culture in the aftermath of genocidal attacks.[7]

The tension between law and history is a well-known one and is not unique to the study of genocide. Yet tracing the trajectory of cultural genocide can offer a more complex explanation of their relations. First, we aim to show that the law does not merely restrict historical understanding but, rather, oftentimes enables such understanding. Second, law itself is not monolithic; one should differentiate between courts and legislators, between national and international law and between criminal law and private law. Third, the struggle over the definition of genocide cannot be adequately explained without studying the way in which politics influence both the legal and historical depictions of genocide.

Explaining the riddle of cultural genocide is the aim of this article. We will examine the various junctures of law, politics and history in which the concept was shaped. We begin with the original conceptualization by Lemkin, then examine the various forums in which the struggle over its meaning has taken place – namely, national

[5] Today, the two main courses of protecting cultural property through international criminal law are either through Protocol II to the Convention on the Protection of Cultural Property in Times of Armed Conflict 1954, 249 UNTS 240, or the Rome Statute, *supra* note 2. They offer two different approaches to protection: 'cultural value' and 'civil use'. See Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency', 22 *European Journal of International Law* (*EJIL*) (2011) 203. There are also various international instruments to deal with illicit trafficking of cultural objects. See the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 823 UNTS 231; Convention on Stolen or Illegally Exported Cultural Objects 1995, 2421 UNTS 457; Council of Europe Convention on Offences Relating to Cultural Property 2017, ETS No. 221.

[6] See the United Nations Declaration on the Rights of Indigenous Peoples 2007, UN Doc. A/61/L.67/Annex (2007); Convention for the Safeguarding of Intangible Cultural Heritage 2003, 2368 UNTS 3. For elaboration and critical discussion, see the special issue of *European Journal of International Law* dedicated to the 'Human Dimension of International Cultural Heritage Law', 22 *EJIL* (2011).

[7] McDonnell and Moses, 'Raphael Lemkin as Historian of Genocide in the Americas', 7(4) *Journal of Genocide Research* (2005) 501, at 521–522. C.R. Browning, 'The Two Different Ways of Looking at Nazi Murder', *New York Review of Books*, 24 November 2016.

and international criminal tribunals – and the drafting process of the Genocide Convention. In the final section, we briefly turn to the struggle for cultural restitution (books, archives and works of art) fought in the late 1940s by Jewish organizations to cope with what they understood as cultural genocide. What began as a complementary route to the criminal process became an alternative path in civil law since the criminal course was frustrated. A gap thus opened between the criminal prohibition and the law of restitution.

2 Raphael Lemkin

A *A Holistic Understanding of Genocide*

Raphael Lemkin, a Polish-Jewish lawyer, coined the term 'genocide' in his 1944 book *Axis Rule in Occupied Europe*.[8] Vast literature exists analysing Lemkin's writing: What was his original understanding of genocide; did he mean to include cultural genocide; why did he later agree to its exclusion from the Genocide Convention? Another body of literature is devoted to a critique of the limitations of the legal concept of genocide: its bias towards a motive or a plan; the fact that there are only specific groups whose destruction can be considered genocide and the narrow understanding of the protected culture. Lately, Lemkin's writing also raises interest among legal historians who explore the various sources that influenced him, including the interwar minorities regime,[9] international and natural law's critique of imperialism,[10] Zionist thought[11] and sociological writings[12] on cultural groups.

We would like to change the direction of inquiry and ask what can be learned about the relations between law and history from the method that Lemkin employed in discovering the crime of genocide? We claim that Lemkin's understanding of the new crime of genocide benefited from a close reading of legal documents, of the minutiae of legal enactments and of the Nazi decrees that he later reproduced in his book *Axis Rule*.[13] His approach is unique in that it does not look for the archived, hidden texts or for evidence of secret meetings; rather, it analyses the manifest legal texts: the orders, decrees and laws that were directed at all aspects of the lives of the persecuted

[8] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), at 79–95.

[9] Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' 20(4) *EJIL* (2009) 1163.

[10] McDonnell and Moses, *supra* note 7.

[11] Loeffler, 'Becoming Cleopatra: The Forgotten Zionism of Raphael Lemkin', 19(3) *Journal of Genocide Research* (2017) 340.

[12] Dirk Moses, 'Lemkin, Culture, and the Concept of Genocide', in D. Bloxham and A.D. Moses (eds), *The Oxford Handbook of Genocide Studies* (2010) 19, at 25.

[13] This is not a claim about the 'origins' of Lemkin's concept of genocide but, rather, about the methodology he employed. For the controversy about the 'origins' of Lemkin's thought, see Loeffler, *supra* note 11.

groups.[14] Lemkin understood the law both as the source of the problem (genocide is facilitated through legal decrees) and as the key for its remedy.[15] The ingenuity of this approach, explains Philippe Sands, lies in its piecemeal method: 'Individually, each decree looked innocuous, but when they were taken together and examined across borders, a broader purpose emerged.'[16] Read together, decrees that dealt with the administrative, economic, cultural and political life of citizens in occupied states manifested a pattern of a methodical and all-embracing extermination plan against groups.

Why was law key to the historical understanding of genocide?

- Organized crime: Genocide is a novel crime that aims at destroying a group as a whole. This makes it a systematic crime that leans for its execution on law, bureaucracy and the business sector; the legal decrees are essential in order to coordinate between these sectors, and, therefore, only by compiling and reading them together can we understand the meaning of the new crime and how it differs from mass killing.
- Group crime: Genocide is not a matter of targeting any civilian population but, rather, a matter of methodical persecution of a certain group aimed at its destruction. The humanitarian law approach that aims to protect civilians in war is ill-suited to address the historical reality in which individuals were targeted not simply as civilians but also because they were members of a particular group.[17] Law is needed to identify and coordinate the attack upon all elements of nationhood.
- Motive: Historians may criticize the demand of a special motive – an intent to destroy the group – as a strict legal demand (*dolus specialis* of the perpetrator) that gives too much weight to the mental state of mind of the perpetrator. However, according to Lemkin's method, motive is not to be found within the obscure state of mind of the individual perpetrator but, rather, in the pattern of actions and

[14] Lemkin started collecting decrees from various occupied lands when in Sweden, and when he left for America he stuffed several suitcases full of them and took them with him on his long journey to America. See P. Sands, *East West Street: on the Origins of Genocide and Crimes against Humanity* (2016), at 167–171. Writers show that Lemkin's interest in collecting and comparing decrees originated in his earlier work on comparative criminal law in the 1920s. See M. Lewis, *The Birth of the New Justice* (2014), at 187–191; Vrdoljak, *supra* note 9. The centrality of law to the advancement of Nazi policy was pointed to by various scholars. See, e.g., essays in C. Jeorges and N.S. Ghaleigh (eds), *Darker Legacies of Law in Europe* (2003). David Fraser criticizes the approach that sees Nazism as an 'extra-legal' phenomenon. D. Fraser, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (2004), at 35. See also J.Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (2017).

[15] Already in 1933 Lemkin wrote about the need for international rules to protect threatened groups through prohibiting 'barbarity' (the destruction of groups) and 'vandalism' (attacks on culture and heritage). R. Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations', Additional Explications to the Special Report presented to the 5th Conference for the Unification of Penal Law in Madrid (14–20 October 1933), available at www.preventgenocide.org/lemkin/madrid1933-english.htm.

[16] Sands, *supra* note 14, at 168–169.

[17] This incompatibility is also evident in the current protection of cultural property in international law, which protects civilian buildings (schools, hospitals or monuments) without differentiating between them according to their cultural value and importance. Frulli, *supra* note 5.

techniques that repeats itself in various locations and is manifested through the various decrees and laws read together.

The structure of *Axis Rule* illustrates Lemkin's unique investigation of first identifying the various 'techniques' of genocide in the various fields of life (political, social, cultural, economic, biological, physical, religious, moral) and then theorizing a new holistic crime of 'genocide' to encompass them. The second part of the book offers a state-by-state analysis of the various stages taken in each occupied state, and the third part compiles the various decrees collected by Lemkin. For a jurist, such a structure is perplexing. Indeed, Hersch Lauterpacht in his review of the book complained that 'it cannot be accurately said that the volume is a contribution to the law of belligerent occupation', and he concluded instead that it should be read as 'a scholarly historical record'.[18] Yet such criticism betrays a misunderstanding of the key role that the various legal decrees played in the piecemeal method that Lemkin employed in order to overcome the gap that opened between law and history.[19]

Lemkin's emphasis on culture is connected to his view of genocide as a crime with both 'negative' and 'positive' aspects, organically linked and manifested in various techniques of genocide. Thus, he describes a two-phased process: '[O]ne, destruction of the national pattern of the oppressed group [the negative aspect]; the other, the imposition of the national pattern of the oppressor [the positive aspect].'[20] He stresses that this process is aimed not only against states and armies but also against peoples: 'The enemy nation within the control of Germany must be destroyed, disintegrated, or weakened in different degrees for decades to come.'[21] There is, however, an ambiguity in Lemkin's treatment of cultural genocide. Sometimes he refers to it as a potential step towards genocide, sometimes as an aspect of the crime of genocide (one of its techniques) and, yet, at other times as representing the unique aim of the crime – to destroy the group's essence. This may explain, as we later show, why it became possible for lawyers to view cultural genocide in separation from genocide.

While law is jurisgenerative for Lemkin's investigation, it also presents a danger of obscuring and distorting historical understanding. Lemkin points to the statist bias of international law, providing strong protection of state sovereignty, as limiting our ability to understand genocide and cope with it.[22] The 1907 Hague Regulations, which existed at the time, provided only a partial solution as they protected individuals and not groups and did so only during wartime; civilians attacked by their own states were

[18] Lauterpacht, 'Review of Raphael Lemkin's Axis Rule in Occupied Europe', 9 *Cambridge Law Journal* (1945) 140, cited in Sands, *supra* note 14 at 109–110.

[19] The Nuremberg trials' architects also saw this as a structural problem stemming from the Nazification (*Gleichschaltung*) of the entirety of civil life and, accordingly, envisioned the trials as being complemented by a program of de-Nazification. This ambitious program faltered until its final abolition in 1951.

[20] Lemkin, *supra* note 8, at 79.

[21] *Ibid.*, at 81.

[22] Lemkin, *supra* note 3, at 228. Vrdoljak, *supra* note 9.

left unprotected.[23] Moreover, the war crimes approach favours a discrete approach that prohibits certain crimes without presenting the link between them, and, specifically, it disregards those measures taken to weaken or destroy the 'political, social, and cultural elements in national groups'.[24] Lemkin also criticizes the inadequacy of the legal term 'de-nationalization', which was prevalent at the time, because it only refers to what he saw as the negative aspect of genocide – annulment of citizenship or deportation – and not to the complementary, positive aspect of enforcing the national pattern of the oppressor on the remaining population or on the territory.[25]

B *Cultural Genocide*

The prevalent view of genocide is that there are different types of genocide – physical, biological, economic, political, cultural – with varying degrees of severity differentiating between them. At the core, we find physical genocide, an attempt to physically destroy the group by killing its members, and, in the margins, we can find cultural genocide that manifests itself, for instance, in forced assimilation policies towards a group. Currently, international law limits genocide to physical or biological extermination.[26] Some even attribute this limitation to Lemkin himself who was involved in the drafting of the Genocide Convention and agreed to the compromise that left cultural genocide out of it.[27]

Lemkin's analysis of the various 'techniques' of genocide is read by some to mean a hierarchy or a clear division between the 'types' of genocide. In fact, for Lemkin, genocide is not only, or even mainly, mass murder, and prioritizing the physical over the cultural techniques of genocide can lead back to the old conceptualization that he aimed to replace.[28] Rather, Lemkin articulated the rationale for the new crime in cultural terms – the need to protect a group for its own sake and for the sake of protecting

[23] Lemkin's famous quote in this regard: 'The Hague Regulations deal also with the sovereignty of a state, but they are silent regarding the preservation of the integrity of a people.' Lemkin, *supra* note 8, at 90. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land 1907, 205 CTS 277.

[24] Lemkin, *supra* note 8, at 92.

[25] *Ibid.*, at 79–80. See also Stiller, 'Semantics of Extermination: The Use of the New Term of Genocide in the Nuremberg Trials and the Genesis of A Master Narrative', in K.C. Priemel and A. Stiller (eds), *Reassessing the Nuremberg Military Tribunals* (2012) 104, at 106; A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006), at 166.

[26] See W. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, 2009), at 271–272. Novic shows that the prevalent view in the judgments of the International Criminal Tribunal of the former Yugoslavia as well as in the International Court of Justice was a physical understanding of genocide. E. Novic, *The Concept of Cultural Genocide: An International Law Perspective* (2016), at 52–56.

[27] Moses shows, however, that Lemkin 'only reluctantly acceded to its eventual exclusion on tactical grounds'. Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History', in D. Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (2008) 3, at 12–13.

[28] Moses maintains that '[c]areful inspection of his writings reveals that, true to his concept of group life, he did not consider cultural destruction in isolation from attacks on the physical and biological elements of a group. Culture was inextricably interwoven with a broader assault encompassing the totality of group existence'. Moses, *supra* note 12, at 34. See also Vrdoljak, *supra* note 9, at 1184.

the cultural diversity of humanity.[29] Lemkin's perception of culture is debatable and later became the focus of criticism by historians and anthropologists, who pointed to its elitism and essentialism.[30] However, this debate cannot undermine Lemkin's basic insight that genocide is intrinsically connected to an attack on a group's culture with the aim of destroying it.

3 Cultural Genocide in the Courtroom

Unlike the common assumption that the definition of genocide in the Genocide Convention is what limited the category,[31] in actuality, genocide began as a 'common law' category, a legal category that was first employed in the Nuremberg trials prior to the Genocide Convention. Moreover, contrary to those who attribute the problem to the fact that the Holocaust was taken as an 'ideal type' for genocide, and thus limited its applicability to other historical cases, we shall see that the attempt of the prosecution in Nuremberg to use the crime of genocide largely failed even in relation to the Holocaust. Thus, we should seek to understand differently the reasons for excluding cultural genocide from the scope of the prohibition.

A *The Nuremberg Trials*

The prevalent account of the International Military Tribunal at Nuremberg (IMT) is that due to criminal law's special requirements, such as the rule against retroactivity and the need to rely on precedents from international law, genocide disappeared from the trial. As a result, international law tells a distorted historical narrative of Nazi repression, with aggressive war and war crimes at its centre.[32] The judgment only acknowledged crimes against humanity – and not genocide – and these too were limited to wartime.[33] Thus, the novel understanding of a group's persecution by its own state, with every means at its disposal during peace and wartime – disappeared.[34] One explanation for prioritizing aggressive war is the lack of historical understanding at the time

[29] Lemkin, *supra* note 8, at 91.

[30] See Novic, *supra* note 26; McDonnell and Moses, *supra* note 7, at 523.

[31] Known as the problem of 'definitionalism'. See Bloxham and Moses, 'Editors' Introduction: Changing Themes in the Study of Genocide', in Bloxham and Moses, *supra* note 12, 1, at 7–8.

[32] There is, however, a controversy about how much the International Military Tribunal (IMT) did neglect the Holocaust and why. Some argue that the Holocaust was acknowledged by the IMT and took a central place in the Nuremburg Military Tribunal (NMT). Others believe that the marginality of the Holocaust was due to prioritizing aggressive war over atrocities as the main goal of international criminal law. See Marrus, 'The Holocaust at Nuremberg', 26 *Yad Vashem Studies* (1998) 5; D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (2001); Moyn, 'From Aggression to Atrocity: Rethinking the History of International Law', draft article for K.J. Heller *et al.* (eds), *Oxford Handbook of International Criminal Law* (forthcoming).

[33] 'Crimes against Humanity' too had created obstacles at Nuremberg due to a lack of precedence, and, as a result, it took a secondary role to aggressive war and war crimes in the trial. For a critique, see J. Shklar, *Legalism: Law, Morals, and Political Trials* (1964), at 162–164; Fraser, *supra* note 14, at 129.

[34] L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001), at 89–90.

of the trial about the enormity and meaning of the Holocaust. Other explanations are more political in nature; the Allies' fear that an international precedent could be set that would weaken state sovereignty and justify international interference with its internal affairs.[35] According to some historians, the marginality of the Holocaust in the IMT proceedings (or at least in the judgment) stems also from the prosecution's preference for using Nazi 'objective' documents rather than victims' testimonies that were considered to be subjective and biased and, therefore, legally unreliable.[36]

A closer look reveals a more nuanced picture. Lawrence Douglas argues that, although the crime of aggressive war was the focal point at the IMT, in the subsequent Nuremburg Military Tribunal (NMT) trials, crimes against humanity was the prevalent category. Thus, for him, law demonstrates a process of learning and adapting to the historical reality revealed in the trial.[37] Kim Priemel argues, based on the protocols and decisions of the Nuremberg trials, that genocide, while not apparent in the judgment, was nevertheless prevalent in the discussions and influenced the punishment. He, too, supports the finding that genocide was more evident in the NMT trials.[38] Yet the priority given to the aggressive war paradigm shaped the historical narrative to a large degree and limited the role of genocide in it.

At this point, we would like to ask what the place of cultural genocide within the Nuremberg proceedings was. Generally speaking, genocide entered the indictment as a description and not as a crime.[39] Yet Alexa Stiller detects an attempt by the prosecution to adopt Lemkin's holistic approach so it could better deal with the 'positive' aspect of the race and Germanization policies in the occupied countries. She focuses on the Race and Settlement Main Office of the Schutzstaffel (SS) trial, where such an attempt was manifest when the prosecution quoted Lemkin to strengthen its strategy[40] and explicitly explained that the subject matter of this trial was not genocide as mass murder but, instead, the other techniques of group destruction.[41] Whereas the other

[35] *Ibid.*, at 50.

[36] Jockusch, 'Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany', 19(1) *Jewish Social Studies* (2012) 107.

[37] Douglas, 'Crimes of Atrocity, the Problem of Punishment and the Situ of Law', in P. Dojčinović (ed.), *Propaganda, War Crimes Trials and International Law* (2012) 269, at 271, 272.

[38] Priemel, 'Beyond the Saturation Point of Horror: The Holocaust at Nuremberg Revisited', in D. Hedinger and D. Siemens (eds), *The Trials of Nuremberg and Tokyo revisited* (2016) 522, at 536–537.

[39] The IMT in count no. 3 – war crimes – charged the defendants with the murder and ill treatment of civilian populations. In particular, the defendants were alleged to have 'conducted deliberate and systematic genocide; viz., the extermination of racial and national groups, against the civilian population 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'. *Trial of the Major War Criminals before the International Military Tribunal* (1947), vol. 1, 43–44. The facts pleaded under count no. 3 also are considered to constitute crimes against humanity under count no. 4. In addition, the second charge under the crimes against humanity count alleges the commission of genocidal practices in that Jews were systematically persecuted, deprived of liberty, thrown into concentration camps, murdered and ill-treated. *Ibid.*, at 66. See also Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later', 15 *Arizona Journal of International and Comparative Law* (1998) 415, at 426.

[40] See Stiller, *supra* note 25, at 113.

[41] Opening Statement of the Prosecution, *Rasse- und Siedlungshauptamt der SS* case, 20 October 1947, reprinted in *Trial of the Major War Criminals*, *supra* note 39, vol. 4, at 627, quoted in Stiller, *supra* note 25, at 113.

trials dealt with the 'negative' side of genocide, this case was dedicated to the 'positive' side of Germanization.[42]

Despite these attempts, the judges in this trial were also not persuaded that the crime of genocide was indeed part of international law and, hence, did not use it as a legal category but, rather, particularized the Germanization plan into discrete war crimes: a complete reversal of Lemkin's understanding.[43] Stiller also identified this process of narrowing in other NMT trials – from a broad perception of genocide, with negative and positive aspects, to a narrow one, focusing only on the physical extermination of the Jews. This approach turned the SS into the ultimate accused.[44] Eventually, the mass murder of the Jews underwent de-contextualization – from a broad Nazi policy executed in stages and by various techniques to a narrow perception of murder perpetrated by SS men.[45] Supposedly, this was a problem of criminal law – the absence of a precedent and the rule of *nullum crimen sine lege* – but, as we shall shortly see, a similar process occurred during the drafting of the Genocide Convention.

Another limiting factor was the absence of victims' testimonies from the IMT. New historical research reveals the many attempts of Jewish organizations to join the process, not only as witnesses but also as prosecutors, *amici curiae* and as those who suggested designating a special crime 'against the Jewish people' or even dedicating a separate trial to the Holocaust.[46] The underlying assumption of such revisionist history is that had the victims participated in the trials in a meaningful way, genocide would have taken a more central place. Only two Jewish victims were summoned to testify at Nuremberg (by the Soviet team).[47] Their testimonies focused on the physical extermination of the Jews and not on cultural genocide. This absence is especially evident in the testimony of Abraham Sutzkever, an acclaimed Yiddish poet who also had a central role in the efforts to rescue Jewish cultural property in Vilna during and immediately after the war.[48] Despite these unique experiences, Sutzkever's testimony focused on the collective murder, and he was not questioned about the cultural destruction.[49] One remote echo for the cultural side of the genocide appeared in

42 Stiller, *supra* note 25, at 113–114.

43 *Ibid.*, at 114.

44 *Ibid.*, at 118–119.

45 *Ibid.*, at 120, 121.

46 This demand for a 'Holocaust trial' stood in opposition to the functional/structural approach of the prosecution in the NMT (devoting different trials to the involvement of various sectors). Mark Lewis shows how the World Jewish Congress (WJC) propelled ideas about criminal prosecution and other forms of justice that previous legal organizations had hardly touched. Lewis, *supra* note 14, at 150–180. Priemel mentions that the WJC's and Lemkin's efforts did not fare well with Jackson or Telford Taylor, this was partly due to concerns about subjective biases of victims and the belief that a stronger case for the prosecution could be made by relying on German incriminating documents. Priemel, *supra* note 38, at 528, 538.

47 Douglas, *supra* note 34, at 78. A third Jewish witness, Izrael Eizenberg, was summoned by the British prosecution. See Jockusch, *supra* note 36, at 120, referring to *Trial of the Major War Criminals*, *supra* note 39, vol. 20, at 484–485.

48 M. Glickman, *Stolen Words: The Nazi Plunder of Jewish Books* (2016), at 158–166.

49 See testimony of Abraham Sutzkever, *Nuremberg Trial Proceedings*, 27 February 1946, vol. 8, at 301–307.

Sutzkever's request to testify in Yiddish – the language of most of the murdered victims – a request that was denied because of the lack of translators for this language.[50]

Should we suppose that genocide stands a better chance in domestic courts of the victim groups? We will examine two such attempts: the Polish trials of 1946–1948 and the Israeli *Eichmann* trial of 1961.[51] In both cases, a special national legislation bestowed jurisdiction to domestic courts over Nazi perpetrators and their collaborators.[52] Both cases had to overcome suspicions by the international community of politicization, a fact that led the trials' architects to stress their commitment to due process requirements of fair trial and to refer to international precedents.[53] Significantly, in both cases, the aggressive war paradigm was replaced with what later came to be known as the 'atrocity paradigm', detailing the genocide that befell the respective national groups.[54] One important procedural innovation that can explain the centrality of genocide was to allow historians as 'expert-witnesses' and to invite victims as witnesses for the prosecution.[55] Our interest lies in the question: what happened to the story of cultural genocide in each of these instances?

B *The Polish Trials*

The Polish criticized the Nuremberg trials for its disregard for the Polish (and Jewish) cultural destruction by the Nazis.[56] By conducting their own trials simultaneously with the IMT, they sought to advance a competing narrative with Lemkin's holistic, two-pronged, approach at its centre. The Supreme National Tribunal (SNT) was established in 1946 for the trial of major Nazi criminals active in Poland during the

[50] Jockusch, *supra* note 36, at 108. There were only four 'official' languages to the Nuremberg proceedings: English, Russian, French and German.

[51] District Court of Jerusalem, *A.-G. Israel v. Eichmann* (1961) 36 ILR 5.

[52] In Poland, it was Decree Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-Treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation (Polish Decree), 31 August 1944, as amended on 16 February 1945 and 10 December 1946, final consolidated text on 11 December 1946. This decree applied to acts committed in Poland between 1 September 1939 and 9 May 1945. In Israel, it was the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950 (Nazi Punishment Law), whose temporal scope applied to acts performed between 1933 and 1945.

[53] Prusin, 'Poland's Nuremberg: the Seven Court Cases of the Supreme National Tribunal, 1946–1948', 24(1) *Holocaust and Genocide Studies* (2010) 1, at 16. In Israel, see *Eichmann*, *supra* note 51, reprinted in E. Lauterpacht (ed.), *The Eichmann Judgments* (1968), at 19, para. 2 (regarding due process), 29–30, para. 16 (regarding the lineage of international law). See also the discussion in *Hannah Arendt/Karl Jaspers Correspondence, 1926–1969* (1993), at 413–419.

[54] This change can be partly attributed to the division of labour between the IMT, dealing with the perpetrators whose crimes cannot be confined to one territory or state, and national tribunals. Hence, the aggressive war paradigm seems to fit better the jurisdiction of an international tribunal dealing with transnational crimes. We thank the anonymous reader who pointed to this aspect.

[55] The Polish trials relied on documentary materials alongside survivor testimonies (in the trials of the concentration camp personnel). E.g., 219 individuals testified against Höss and other Auschwitz functionaries. Prusin, *supra* note 53, at 8. In the *Eichmann* trial, approximately 100 witnesses testified, most of them Holocaust survivors.

[56] Prusin, *supra* note 53, at 4.

occupation in accordance with international and Polish criminal law.[57] Its formal jurisdiction was to adjudicate war crimes, but seeing their inadequacy to capture Nazi criminality, the tribunal adopted Lemkin's definition of genocide (and the word itself, in its Polish translation) and interpreted the term as incorporating all crimes stipulated by the Polish decree, adding the concept of 'cultural extermination'.[58]

Thus, in Arthur Greiser's trial, the SNT explored the 'negative' and 'positive' aspects of genocide and – unlike in the Nuremberg trials – devoted a major share of the judgment to cultural genocide. It identified six groups of crimes that were perpetrated against the Polish population, two of them were titled 'genocidal' and referred to the cultural aspects rather than the physical ones: one pertained to religious repression and the other to cultural repression.[59] The tribunal detailed the Nazi plan towards the occupied land:

> There were three ways of arriving at such a germanization of the territory …: *by deportation of adult Poles and Jews, germanization of Polish children racially suited to it, the new method of mass extermination of the Polish and Jewish population, and complete destruction of Polish culture and political thought, in other words by physical and spiritual genocide*.[60]

An important departure from the Nuremberg trials was the procedural change that allowed the testimony of experts. Thus, in the Greiser trial, several experts testified (historians and legal experts),[61] and, in Amon Göth's trial, the chairman of the Central Jewish Historical Commission,[62] Nachman Blumental, was called to testify regarding the significance of the death camps in Poland.[63] In addition, victims were also called to testify.[64]

Although the Tribunal recognized the genocide against the Jews, it subsumed it under the genocide against the Polish people.[65] It was the centrality of cultural

[57] *Ibid*. See also Art. 1, para. 1 of the Polish Decree.

[58] Prusin, *supra* note 53, at 6, 9.

[59] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1948), vol. 7, Case no. 74 – Trial of Gauleiter Artur Greiser, Supreme National Tribunal of Poland, at 112. The comments by the editor of the volume clearly show that there was a reliance on Lemkin's two-phased conceptualization of genocide.

[60] *Ibid.*, at 114 (emphasis added).

[61] *Ibid.*, at 95–103.

[62] The Central Jewish Historical Commission was founded by a handful of surviving Jewish historians in Poland with the government's support. The commission opened branches in several Polish cities and dedicated itself to gathering documentation of the Holocaust. Its activity paralleled that of Polish historians working in the Polish High Commission to Investigate Nazi Crimes in Poland. In 1947, it moved permanently to Warsaw and became the repository of archives relating to Jewish life before and during the Holocaust, including the Ringelblum Archives, which were dug out of the rubble of the Warsaw Ghetto in 1946 and 1950. Michael C. Steinlauf, *Bondage to the Dead: Poland and the Memory of the Holocaust* (1997), at 46–61. For further discussion on the Central Jewish Historical Commission, see L. Jockusch, *Collect and Record!: Jewish Holocaust Documentation in Early Postwar Europe* (2012), at 84–120.

[63] Prusin, *supra* note 53, at 10.

[64] *Ibid.*, at 12.

[65] Drumbl, 'Stepping beyond Nuremberg's Halo', 13 *Journal of International Criminal Justice* (*JICJ*) (2015) 903, at 905. C. Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland* (2010), at 317, quoted in Drumbl, *ibid.*, at 910. Greiser was indicted, *inter alia*, of participating 'in the persecution and wholesale extermination of Polish citizens of Jewish race or origin residing in the territory under his authority'. United Nations War Crimes Commission, *supra* note 59, Trial of Gauleiter Artur Greiser, at 72.

genocide that allowed the tribunal to focus attention on the suffering of the Polish people (and other groups), whereas physical genocide would have posited the final solution against the Jewish people at the centre.[66] The Polish example shows that conducting the trial by the attacked group, in combination with testimonies by expert historians and survivors, allows for the shift of focus towards cultural genocide while overcoming the deficiencies of international law.[67] Is this conclusion necessarily applicable to all cases of victims' tribunals?

C *The* Eichmann *Trial*

The common critique of the *Eichmann* trial at the time was that it was a sort of 'victims' justice'.[68] Indeed, the Israeli prosecution called around 100 witnesses to the stand, most of whom were Holocaust survivors.[69] The Nazi Punishment Law defined a 'crime against the Jewish people', which was modelled on the definition of genocide in the Genocide Convention.[70] It severed the link to aggressive war present in the Nuremberg trial, thus shifting attention to the Holocaust.[71] Yet, as opposed to the Polish example, the Israeli trial did not position cultural genocide at its centre.[72] Significantly, here as in Nuremberg, the trial was not translated into Yiddish, a fact that carried great weight in this case, since much of the direct audience of this trial – survivors and victims' families residing in Israel – were Yiddish speakers.[73] Moreover, despite the fact that Abraham Sutzkever, who testified in Nuremberg, had immigrated to Israel already in 1946, the Israeli prosecution did not call him to testify. In the literary Yiddish

[66] Thus, we see that the indictment includes items such as granting Poles 'exceptional status' – i.e., controlling various aspects of civil life (property ownership, employment, education) by legislation; a strong repression of the church; or taking measures against Polish culture and science (liquidation of intelligentsia and clergy, seizure of libraries). United Nations War Crimes Commission, *supra* note 59, Trial of Gauleiter Artur Greiser, at 78–84.

[67] Significantly, one of the judges was a Jewish jurist who was well acquainted with Lemkin and a victim of the Gestapo – Emil Rappaport. *Ibid.*, at 5.

[68] The most famous critique was that made by H. Arendt in her book *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964).

[69] See Douglas, *supra* note 37, at 277. In relation to the legacy of victims' testimonies in the *Eichmann* trial in international criminal law, see Bilsky, 'The Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocity', 12(1) *JICJ* (2014) 27.

[70] Nazi Punishment Law, *supra* note 52.

[71] Douglas, *supra* note 34, at 118: '[C]rimes against the Jewish people were not to be considered a mere subset of crimes against humanity; rather, Judeocide defined an independent offense that marked the furthest and most horrific extremes of crimes against humanity.'

[72] The Nazi Punishment Law, *supra* note 52, includes within the definition of crimes against the Jewish people these two elements: '(5) forcibly transferring Jewish children to another national or religious group; (6) destroying or desecrating Jewish religious or cultural assets or values'. Yet, Eichmann was not charged with any of these. The drafters were aware that the cultural element was absent from the Convention and wanted to rectify such omission by adding sub-paragraph 6. See Ben-Naftali and Tuval, 'Punishing International Crimes Committed by the Persecuted', 4 *JICJ* (2006) 128, at 133.

[73] Bar-Am, 'The Holy Tongue and the Tongue of the Martyrs: The Eichmann Trial as Reflected in Letste Nayes', 28(1) *Dapim: Studies on the Holocaust* (2014) 17, at 26–27, 36.

journal he edited, Sutzkever published an implied critique of the trial for failing to call to the stand the most important witness of all – the Yiddish language.[74]

The *Eichmann* trial did not only try to correct the absence of the Holocaust from the Nuremberg trial, but it also tried to do so under the Zionist narrative that saw the national home solution as the proper response to the Holocaust. Sutzkever, an important promoter of the Yiddish culture, did not fit the Zionist story that associated Yiddish with the Diaspora and accentuated the revival of the Jewish people in the land of Israel, linking it to the revival of Hebrew. An interesting example of the tension between the Zionist narrative and cultural genocide appears in the testimony given in the *Eichmann* trial by the expert historian, Salo Baron, who was invited to testify on the fate of European Jewry before and after the war. In contrast to the victims' testimonies that came to shape the memory of the trial and the Holocaust in world consciousness, Baron's testimony has been largely forgotten. This is no coincidence as Baron was harshly criticized at the time by Prime Minister David Ben-Gurion and others.[75] Historian Hanna Yablonka argues that this criticism stems from ideological differences regarding the Jewish Diaspora.[76] Accordingly, whereas the Israeli prosecution wanted to emphasize the physical extermination, Baron turned time and again to the cultural aspects of Nazi genocide and to the creative powers of Jewish renewal, both in Israel and outside it. Moreover, while Baron emphasized the cultural aspects of genocide, the prosecution saw cultural genocide mainly as a means to prove the physical one.[77]

Baron, a professor of Jewish history at Columbia University, was also a prominent figure in the post-Holocaust rescue efforts of Jewish cultural restitution, led by Jewish organizations. This part of his biography, though, was not addressed by the prosecution. Yet Baron tried repeatedly to bring up cultural genocide and referred to the organized Jewish campaign for cultural restitution. Interestingly, when Baron laments the Nazi-led devastation as irreparable, it is not in relation to the physical genocide but, rather, in relation to cultural genocide – the destruction of whole libraries:

> [I]t would, perhaps, be worthwhile mentioning that, both in Jewish and general culture, the Jews in the course of generations amassed for themselves exceptional cultural treasures … These things it is impossible to replace since they develop over generations, in the course of centuries. It is impossible to establish a national library even here despite the fact that you have worked wonders in building up a library. But libraries develop in the course of decades, in the course of generations, throughout hundreds of years.[78]

[74] *Ibid.*, at 35–36.

[75] H. Yablonka, *The State of Israel vs. Adolf Eichmann* (2004), at 103–105.

[76] *Ibid.*, at 106.

[77] Current international criminal law sees the cultural aspects of genocide mainly as a means to prove the special intent to commit genocide. See Schabas, *supra* note 26, at 216–219. In a precursory move, three decades earlier, Hausner wrote to Baron prior to the trial: 'It is important to prove the Nazi intention to annihilate the Jewish people, and therefore it is vital for the trial to present documentation that will expose the national and cultural value of the Jewish centers that were destroyed in the Holocaust.' Yablonka, *supra* note 75, at 102.

[78] Nizkor Project, *The Trial of Adolf Eichmann*, Testimony of Salo Baron, Session no. 12, 24 April 1961, at 152 (English translation available from www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-012-06.html).

Although cultural genocide is central to Baron's thesis, he does not adopt an essentialist, static or frozen understanding of culture, such as the one promoted by Lemkin. The historical thesis that Baron advances is of the powers of renewal and adaptation of the Jewish people facing its many enemies over the centuries, including the Nazis. Robert Servatius, Eichmann's defence attorney, was quick to notice the tension of such an approach with the criminal law approach to genocide, and he asked Baron whether the Germans were perhaps only an instrument of history: 'Here the [leaders] wanted to destroy and annihilate the Jewish people and the purpose of those plotting to do so came to naught. A prosperous state arose instead of this evil plan of theirs.'[79] Eventually, Baron's references to the cultural genocide did not appear in the judgment. The Court referred to his testimony only to establish the number of Jews murdered during the Holocaust.

4 The Drafting of the Genocide Convention

What was the fate of cultural genocide under the Genocide Convention when jurists were no longer confined by legal precedents? Lemkin, who tried to influence the IMT and failed, shifted his efforts to drafting an international convention. In many respects, the 1948 Genocide Convention did manage to succeed where the IMT had failed – by severing the link to war and prohibiting genocide in peacetime as well as in wartime.[80] Yet, in a deeper sense, one can trace a similar process of constriction of the broader meaning of genocide as a multifaceted crime by first distinguishing among the different types of genocide and then limiting the scope of the prohibition to physical and biological genocide to the exclusion of cultural genocide. It is this exclusion, we argue, that undermines the notion of a progressive process from Nuremberg to the Genocide Convention since it reveals that in both cases resistance to a broad norm of genocide was due to the same fear of weakening state sovereignty and, specifically, of international meddling in a state's treatment of its minorities.[81] In Nuremberg, such intervention was curtailed by the demand for a nexus to an aggressive war through Article 6(c) of the London Charter; in the Convention, it was achieved by the almost total exclusion of cultural genocide.[82]

This exclusion also shapes the common narrative of the crime of genocide epitomized in the Genocide Convention as an ideological crime that is perpetrated by totalitarian regimes and not by democratic ones. Narrowing down the definition prevents us from referring to the acts perpetrated by democracies towards their minorities, or

[79] *Ibid.*, Testimony of Salo Baron, Session no. 13, 24 April 1961, at 160 (English translation available at www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-013-02.html). See also critique by Arendt, *supra* note 68, at 19–20.

[80] Schabas, *supra* note 26, at 80–81. However, universal jurisdiction was rejected, and it was left to member states to 'enact necessary legislation for the prevention and punishment of this crime'. This 'was considered regressive, given that the London Charter and other post-war declarations expressly overrode domestic laws'. Vrdoljak, *supra* note 9, at 29.

[81] Stiller, *supra* note 25, at 122–123.

[82] Charter of the International Military Tribunal 1945, 82 UNTS 279.

as part of a colonial rule, as genocide. This has helped demarcate the boundaries between the laws of war and colonial expansion, which Lemkin tried to overcome in his book. Why then did cultural genocide not enter the Convention? The history of the drafting process is well documented, and we will not elaborate it here again. We will only highlight the stages when culture played a significant role and the dynamic it created among delegates.

United Nations General Assembly (UNGA) Resolution 96(1) called on states to draft a convention to prevent genocide. It stated in the preamble that:

> [g]enocide is 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; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the Unites Nations.[83]

We see here a comparison between the murder of an individual and the destruction of a group; the group is therefore the focal point of this prohibition, not only from an intrinsic point of view of the group but also as concerning the whole of humanity, in order to protect diversity and human plurality. Although the reference to the protection from cultural genocide is not clear cut here, the ensuing draft by the UNGA Secretariat nevertheless included a specific provision prohibiting cultural genocide. This draft was prepared with the help of three experts in international law – Henri Donnedieu de Vabres, Vespasian Pella and Lemkin – and included the eight techniques of genocide detected by Lemkin, grouped under three categories – physical (causing death), biological (preventing births) and cultural (destroying a group's specific characteristics).[84] Significantly, of the three experts, only Lemkin supported the inclusion of cultural genocide, whereas the other two 'held that cultural genocide … amounted to reconstituting the former protection of minorities'.[85]

A later draft, prepared by an ad hoc committee on genocide (of the UN Economic and Social Council), devoted a separate article to cultural genocide.[86] This was a tactical move as the drafters believed that it would be easier to progress with a separate article.[87] The separate article protected only the material products of the culture, such as libraries, museums, schools and monuments as well as the group's language. This change meant that cultural genocide was no longer perceived as an integral part of genocide – as one technique among others – but, rather, as protecting the cultural products of a group and, thus, somehow less serious than physical or biological

[83] GA Res. 96(1), 11 December 1946.

[84] Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947, Art. I, para. 2, ss 1, 2 and 3. Cultural genocide was explained in the draft as consisting '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' (at 26).

[85] *Ibid.*, at 27.

[86] *Report of the Committee and Draft Convention Drawn up by the Committee* (*Report of the Committee*), UN Doc. E/794, 24 May 1948, Art. III, at 17.

[87] See Moses, *supra* note 27, about Lemkin's reluctance towards this move. See also J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (2015), at 88.

genocide.[88] In effect, this signalled a retreat from the holistic approach advocated by Lemkin to one that resembles the more limited humanitarian law tradition. Ultimately, this change enabled states to claim that the correct place for such protection is under human rights instruments and not under a convention for the prevention of genocide. In the end, the provision prohibiting cultural genocide was deleted altogether from the final version of the Convention.

The discussion held by the Sixth Committee on 25 October 1948 reveals the chasm between supporters and objectors to the inclusion of cultural genocide in the Convention.[89] The former believed that a group can be destroyed by destroying its cultural foundations,[90] or that cultural genocide is always a part of physical genocide and at times its precursor, and that, therefore, excluding cultural genocide can thwart efforts to prevent physical genocide.[91] The Pakistani delegate also expressed an even more fundamental view; not only were physical and cultural genocide intrinsically linked, but cultural genocide was the aim, whereas physical genocide was the means.[92] The objectors, on the other hand, thought that the right place for cultural genocide was in instruments that protected minorities, such as the protection of freedom of expression in national constitutions and civil codes or by the protection afforded to language, religion and culture under the Universal Declaration of Human Rights.[93]

Although the arguments in the debate revolved around legal considerations, the subtext of the discussion reveals that the real fear was expressed by states with minorities or by colonial powers that feared international interference in what they saw as internal matters.[94] They were worried that the Genocide Convention would bring in the backdoor the discarded minorities' protection regime and that it would create an international review power on the manner in which states treat their minorities.[95] This is apparent in the concerns expressed by states with national minorities or indigenous peoples that their assimilationist policies would be regarded as 'cultural

[88] See also Hon, 'Bringing Cultural Genocide in the Backdoor: Victim Participation at the ICC', 43 *Seton Hall Law Review* (2013) 359, at 366.

[89] Third Session of the General Assembly, Sixth Committee, Eighty-Third Session, UN Doc. A/C.6/SR, 25 October 1948, at 193–207.

[90] Such as the delegate of Czechoslovakia. *Ibid.*, at 205–206.

[91] Such as the delegate of Belorussia (*ibid.*, at 201–202), Ecuador (at 203–204) and the Soviet Union (at 204–205).

[92] *Ibid.*, at 193.

[93] Such as the delegates of Sweden and Brazil. *Ibid.*, at 197–198. Universal Declaration of Human Rights (UDHR), GA Res. 217, 10 December 1948.

[94] The USA's stand on this issue is a case in point. The USA opposed the inclusion of a cultural genocide provision already at the initial stage of the Ad Hoc Committee's proposal and strongly endorsed the view that cultural protection should be achieved under the protection of minorities. See *Report of the Committee*, *supra* note 86, at 18. However, this did not happen under the UDHR as well. Eventually, Mrs Roosevelt, in her hat as the US delegate to the UDHR drafting sessions, denied that the USA had minorities at all and, then, as the chairwoman, stated that 'provisions relating to rights of minorities had no place in a declaration of human rights'. Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights', 21 *Human Rights Quarterly* (1999) 1009, at 1024.

[95] Vrdoljak, supra note 25, ch. 6, at 170.

genocide'.[96] Ultimately, the emphasis on the group's protection at the centre of cultural genocide ran against the current of protecting the rights of the individual in the Universal Declaration of Human Rights and in the IMT's judgment, which prioritized crimes against humanity over genocide.[97]

The final definition of genocide in the Genocide Convention abandoned the division into techniques or types of genocide and opted instead for a list of five prohibitions, including the one of '[f]orcibly transferring children of the group to another group' (Article 2, paragraph e), which is regarded by experts as the only remnant of cultural genocide.[98] This concession, Ana Vrdoljak argues, undermines the insight that the destruction of collective identity is the fundamental driving force of genocidal activities aimed at destroying the group as such.[99]

5 Restitution Struggles of the 1940s: The Hidden History of Cultural Genocide

The first drafts of the Genocide Convention that were prepared by the Secretariat included a provision that required state parties to provide reparations to victims of genocide (Article 13).[100] This requirement eventually fell,[101] but we wish to reflect on its significance for understanding cultural genocide. The last version of Article 13 (draft of 26 June 1947) reads:

> When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.

In its comments, the UN Secretariat acknowledged that this provision diverges from the principle of individual guilt, by holding the population of a country as a whole

[96] See, e.g., comment made by the Swedish delegate regarding the conversion of Lapps to Christianity in the Third Session of the General Assembly, *supra* note 89, at 197. For a revisionist history that traces the origins of modern genocide to practices of homogenization by nation-states, see M. Levene, *Genocide in the Age of the Nation-State*, 2 vols (2005).

[97] For an elaboration on the two conflicting approaches to counter mass atrocities that were promoted by Lauterpacht (rights of the individual) and by Lemkin (protection of the group), see Sands, *supra* note 14.

[98] See Schabas, *supra* note 26, at 201–202.

[99] Vrdoljak, *supra* note 25, at 166.

[100] See First Draft of the Genocide Convention, UN Doc. A/AC.10/42, 6 June 1947, Art. XIII, reprinted in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (2008), at 119–120; Second Draft of the Genocide Convention, UN Doc. A/AC.10/42/Rev.1, 12 June 1947, Art. XIII, at 128); Draft Convention on the Crime of Genocide, *supra* note 84, Art. XIII.

[101] The US delegate thought the provision to be 'not sufficiently precise to be of value' and found it more appropriate that the issue of reparations be dealt with in a framework of a future criminal tribunal vested with the power to deal with offences under the Convention. See US Comment to UN Doc. E/623, 30 January 1948, Art. XIII, reprinted in Abtahi and Webb, *supra* note 100, at 550–551. The next draft (19 May 1948) did not include a reparations provision. Vrdoljak explains that it was the lack of agreement to include state responsibility for an international crime that inhibited the inclusion of a reparations provision. Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity', 22 *EJIL* (2011) 17, at 41.

responsible for the crime of genocide committed by its government, but it justified this diversion because the nature of the liability was civil and because 'it represents an application of the principle that populations are to a certain extent answerable for crimes committed by their governments which they have condoned, or which they have simply allowed their government to commit'.[102] The comment explains that the redress could also be for 'the group as such', taking the form of 'reconstitution of the moral, artistic and cultural inheritance of the group'. Here, we notice the close link that was initially made between reparations for genocide and the cultural aspects of genocide – when trying to redress the group as such.[103] This link is further illuminated when we turn our attention to the story of the struggle of Jewish organizations to redress the cultural genocide suffered by the Jewish people in the aftermath of World War II. But before we turn to examine the civil track for redressing genocide, we should mention that as the proposed reparation provision did not enter the Convention, we are left with a criminal prohibition on genocide without the complementary redress of reparations, which is what some scholars call a 'reparation gap'.[104]

The story of the rise and fall of cultural genocide in the late 1940s remains incomplete if we confine ourselves to criminal law. When we expand our view to include efforts undertaken by the victims of genocide to complement the criminal course by turning to the private law of restitution, a different picture emerges. Indeed, lately, several scholars have called to explore the role of restitution, including property restoration to individuals, in rehabilitating groups that suffered genocide.[105] After the war, the Poles and Jewish organizations collaborated in efforts to collect evidence as material for the SNT and the Nuremberg trial since both felt they were victims of group persecution. We saw that both groups struggled to introduce genocide as the focus of the trials. However, their ways parted when it came to the issue of restitution since

[102] Draft Convention on the Crime of Genocide, *supra* note 84, at 47. Karl Jaspers provided a philosophical defence of such a view. Political responsibility, in his view, applies to all members of the citizenry regardless of their position and manifests itself in the state's liability to pay reparations. K. Jaspers, *The Question of German Guilt* (2000 [1948]), at 30.

[103] The representative of the WJC that appeared before the Ad Hoc Committee of the UN Economic and Social Council (ECOSOC) supported the idea of reparations for genocide. Ad Hoc Committee on Genocide, Summary Record of the Third Meeting (Ad Hoc Committee), UN Doc. E/AC.25/SR.3, 13 April 1948. The WJC, a globalist Jewish legal defence organization, worked closely with Lemkin on the UN legal campaign. See Loeffler, *supra* note 11, at 347.

[104] Novic, *supra* note 26, at 203–204. The reparation gap was only partly ameliorated by the Rome Statute that allows for reparation (but is limited by the narrow definition of genocide that excludes cultural genocide). Rome Statute, *supra* note 2, Art. 75.

[105] See O'Donnell, 'The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?', 22 *EJIL* (2011) 49, discussing the forgotten role of restitution in remedying the effect of Aryanization and linking it to the field of transitional justice. Vrdoljak, *supra* note 101. Since the late 1990s, we have witnessed a stream of Holocaust restitution class actions against European corporations and a growing body of scholarship by Anglo-American and European legal scholars and historians who have undertaken significant work on the issue of post World War II restitution. This was complimented by international conferences and soft law instruments adopted to address the limitations of international law in this regard. See, M. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003); M.J. Kurtz, *America and the Return of Nazi Contraband: The Recovery of Europe's Cultural Treasures* (2006); L. Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business* (2017).

the Jews saw the Poles as collaborating with the victimizers and as the beneficiaries of their expulsion. [106] There was an early attempt (with the support of the Soviets) to revive the Jewish community in Poland (for example, by establishing Yiddish-speaking institutions). But, as the Jewish victims began to return and demand the restitution of their property (lands and houses) from ordinary Poles who had appropriated them, the worst anti-Jewish violence took place, culminating in the Kielce pogrom in 1946. At this point, Jewish organizations realized that there could be no restoration of Jewish life in Poland.

What was the fate of Jewish cultural restitution? The organized restitution struggle of Jews after the war focused on the fate of heirless property. Cultural restitution in international law is based on the territoriality principle – the return of cultural property to the state of origin. The experience of World War II confronted the world with the need to adapt this framework to deal with a state persecuting cultural groups within its own borders. In this setting, Jewish organizations sought to apply private property and restitution laws to cultural genocide, as being complementary to the criminal prohibition and as a means to rehabilitate a group. These efforts were made simultaneously with the struggles to influence the Nuremberg proceedings[107] and the Genocide Convention.[108] A coalition of five Jewish organizations formulated the concept of a 'successor organization' for Jewish heirless property in 1945 and established the Jewish Restitution Successor Organization to deal specifically with the restitution of Jewish property, private and public. This organization financed the activity of another organization, Jewish Cultural Reconstruction, which 'was officially recognized on 15 February 1949 by the United States military government as the agency in charge of collecting and redistributing Jewish cultural property found in the American zone of Germany, centered in Offenbach and later in Wiesbaden'.[109] Together, these organizations tried to cope with a glaring lacuna in international law when genocide results in a large amount of heirless property and, according to the rules of international law, such property should be restituted to the state of origin. The Jewish organizations feared that Jewish heirless property would be returned to the states that participated in the persecution and plunder of the victims. In particular, they thought that it would be a colossal injustice if the German states – the successors of the Third Reich – would become the rightful successors of the property of murdered Jews. They argued that in response to the collective crime of genocide that targeted the Jews as such, '[t]he Jewish people as such, represented by the body of representatives of the

[106] Steinlauf, *supra* note 62, at 46–61.

[107] See Lewis, *supra* note 14.

[108] On 5 February 1948, the WJC filed with the ECOSOC 'memorandum on genocide'. In it were several suggestions pertaining to the advancement of drafting of the Convention. Committee on the Arrangements for Consultation with Non-Governmental Organizations, List of Communications Received from Non-Governmental Organizations Granted Consultative Status, in Categories (b) or (c), UN Doc. E/C.2/78, 6 February 1948. See also participation of the WJC representative in a meeting of the Ad Hoc Committee, *supra* note 103.

[109] D. Herman, 'Hashavat Avedah: A History of Jewish Cultural Reconstruction, Inc.' (2008) PhD dissertation (on file with authors). See also Kurtz, 'Resolving a Dilemma: The Inheritance of Jewish Property', 20(2) *Cardozo Law Review* (1998) 625.

Jewish people shall be granted collective claim to heirless individual property as well as to the destroyed Jewish communities and institutions'.[110] However, no precedent existed in international law to recognize 'the Jewish people' as a legal entity under international law with a right of succession that could overcome the territorial state.[111]

Moreover, unlike the struggles of restitution in the 1990s that focused on concepts of 'private property', the Jewish struggle of the 1940s sought to introduce collectivist thinking, seeing restitution as a countermeasure to genocide.[112] In order to change the law of restitution, a link between cultural genocide and collective restitution had to be made. This task was first undertaken at the level of legal theory in two path-breaking books published in 1944: Siegfried Moses's *Jewish Post-War Claims*[113] and Nehemiah Robinson's *Indemnification and Reparations: Jewish Aspects*.[114] Both books advocated a collectivist approach to the problem of Jewish cultural restitution and reparations.[115] Ultimately, Jewish organizations succeeded in becoming the trustees for heirless cultural property and dispersing it in a way that signalled the renewal of the Jewish culture (by shipping cultural property such as books and religious artefacts to new and renewing communities in Israel and the USA). However, this struggle largely disappeared from historical memory and from the legal landscape that revolves since the 1990s around art restitution based on private property.

This omission is not accidental, as the Allies deeply disagreed about the meaning of restitution and did not want to create a precedent for international law.[116] In the end, cultural restitution was achieved through ad hoc agreements and not by a principled solution or an international treaty. As a result, collective cultural restitution was later perceived as a political/moral issue and not as a legal one. Therefore, international law did not absorb the legacy of this effort of seeing the victim group as a subject in

[110] This position was put forward as early as 1944 by Siegfried Moses in his book *Jewish Post-War Claims* (2001 [1944]), at 78.

[111] The Treaty of Sèvres following World War I ordered the return of heirless property to the community and not the state under the minorities protection clauses (Art. 144). Vrdoljak mentions that the arbitral commission established to deal with these claims did not deal with cultural property and that this provision did not survive in the Treaty of Lausanne, which replaced the Treaty of Sèvres. Vrdoljak *supra* note 101, at 22. Treaty of Peace between the Allied and Associated Powers and Turkey, signed at Sèvres, 10 August 1920 (not ratified); Treaty of Peace with Turkey, 24 July 1923, 28 LNTS 12.

[112] Starting in the 1990s, Jewish organizations concentrated their efforts in restituting art works to individuals. Dealing sometimes with high profile works, this struggle caught most of the international legal attention and obscured the former struggle of collective restitution to the Jewish people of libraries, archives and works of art. See in this regard Thérèse O'Donnell's excellent article, *supra* note 105.

[113] Moses, *supra* note 110.

[114] N. Robinson, *Indemnification and Reparations: Jewish Aspects* (1944).

[115] See N. Sznaider, *Jewish Memory and the Cosmopolitan Order: Hannah Arendt and the Jewish Condition* (2011), at 42–43.

[116] See M.J. Kurtz, *American Cultural Restitution Policy in Germany during the Occupation, 1945–1949* (1984); Kurtz, *supra* note 105.

international law, which is an omission that is still evident in state control over indigenous struggles for the recognition of cultural genocide and reparations.[117]

We see this oversight also in the treatment of Salo Baron's testimony in the *Eichmann* trial. As mentioned earlier, his testimony has been largely forgotten, and when one reads Baron's description of his and 'Dr. Arendt's' work on cultural restitution, without being familiar with the post-war efforts of Jewish Cultural Reconstruction, the organization that he founded and directed, his account seems out of context and does not connect with the great salvage efforts of Jewish culture after the war.[118] However, in the late 1940s, it was Baron's organization that was responsible for persuading a shift in the American restitution policy. Specifically, Baron's organization argued that:

> In view of the wholesale destruction of Jewish life and property by the Nazis, reconstruction of Jewish cultural institutions cannot possibly mean mechanical restoration in their original form or, in all cases, to their previous locations. The commission intends … to devise if necessary some new forms better accommodated to the emergent patterns of postwar Europe. Ultimately it may also seek to help redistribute the Jewish cultural treasures in accordance with the new needs created by the new situation of world Jewry.[119]

In this paragraph, we can see how Baron masterfully combines the crime of cultural genocide with an understanding of culture as dynamic and changing, as being able to renew itself in the wake of genocidal attacks. This dynamic understanding of culture highlights an important difference between the criminal law track and the civil law track. Baron's views on cultural genocide that were rejected in the *Eichmann* trial as undermining the whole basis of the Israeli prosecution, were made, in the context of the struggle for restitution, the cornerstone of an ambitious programme of cultural reconstruction outside Europe. Moreover, the Jewish organizations that failed to receive recognition for representing the Jewish people in the Nuremberg trials were successful in the context of the struggle for restitution to be recognized as a subject of international law, actively shaping its future by taking hold of its cultural heritage.[120]

6 Conclusion

In this article, we explored the transformations in the concept of cultural genocide in the period of its inception during the 1940s. We wanted to point to the creative potential of the law and how it was initially used to understand the novelty of genocide as a crime targeting a group. We showed that both at Nuremberg and during the

[117] K. Engle criticizes the human rights law turn that protection of indigenous peoples took over the right to collective self-determination and other collective rights. Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights', 22 *EJIL* (2011) 141. Most of the progress in the field of indigenous rights is made through civil litigation. See Mayo Moran, 'The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools', 64 *University of Toronto Law Journal* (2014) 529.

[118] See Baron's testimony, Nizkor Project, *supra* note 78, referring to a list of Jewish 'cultural treasures' compiled by Arendt under his direction.

[119] Quoted in Kurtz, *supra* note 109, at 630.

[120] See Jockusch, *supra* note 36; Lewis, *supra* note 14.

Genocide Convention deliberations the struggle was an attempt not only to recognize a new crime but also to keep it in strict boundaries so that it would not be used to review the discriminatory policies of democratic states against domestic minorities and indigenous peoples. Since the concept of cultural genocide undermined the clear distinction between authoritarian states and democratic states, there is no wonder that the opposition to its inclusion in both of these occasions was very strong. However, when the victim group managed to conduct domestic criminal trials, there was more room for cultural genocide. Moreover, we pointed to an initial link that was made between genocide and cultural restitution as a way to rehabilitate a group. We saw that the route of private law proved more hospitable to cultural genocide in restitution struggles by the victim groups and, in particular, to claims about the relations between cultural heritage and group survival and renewal. However, the Jewish cultural restitution struggle of the 1940s with its collectivist approach gradually faded from law's recollection.

We opened the article with the judgment of the ICC in the *Al-Mahdi* case. Recently, the ICC has issued its reparations order.[121] The order, even more than the judgment and sentence, reveals the breakthrough that the Court has tried to lead in recognizing the connection between the protection of culture and the protection of groups. Similarly to the approach taken by the Jewish organizations in the 1940s, the order privileges collective reparations over individual compensation, with the understanding that culture cannot be reduced to harm to the individual. However, this heroic attempt is hindered by the built-in tension that we alluded to in this article between the individual victim and the group to which she or he belongs. The Jewish organizations championed a collective reparations approach as a countermeasure to group-based crimes. The ICC, in contrast, had to make do with a prohibition on war crimes (to the exclusion of cultural genocide) and had to infuse the order of collective reparations into an individualistic framework that prioritizes the individual victim. This tension is apparent in the reparations order; the Court acknowledged that the harm in this case was for the most part collective and, therefore, that ordering only individually based compensation would not reflect the actual harm and, moreover, would not deal with the threat that the crimes posed to the community. It therefore devised a hybrid solution whereby persons who suffered direct and exclusive harm were entitled to individual compensation.[122] The larger circles of victims are entitled to collective reparations with various modalities of implementation, such as the rehabilitation of the sites of the protected buildings and the rehabilitation of the community of Timbuktu.[123]

[121] Reparations Order, *Prosecutor v. Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15–236), Trial Chanber VIII, 17 August 2017.

[122] Those 'whose livelihoods exclusively depended upon the Protected Buildings' (*ibid.*, para. 81) and 'whose ancestors' burial sites were damaged in the attack' (para. 89).

[123] In the form of 'community-based educational and awareness-raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a "microcredit system" that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.' *Ibid.*, para. 83.

Yet it seems that the group-based logic undermines the internal logic of the Rome Statute: why should the individual victim make the effort to file an application when it is not certain that he or she will gain any advantage?[124] The Court also struggled to fit the criminal mechanism with the restorative motivation of restitution, particularly as the UN Educational, Scientific and Cultural Organization had already rebuilt the buildings in 2015 and did not ask for compensation.[125] The Court's efforts are symptomatic of a growing awareness of the limits of international law in regard to cultural genocide. Our article joins the insight of international law scholars in recognizing the centrality of the concept of cultural genocide in linking public international law to restitution struggles. It calls one to rethink the individualist framework imposed on current discussions of cultural restitution by returning to the earlier insights that saw it as a countermeasure to cultural genocide and sought to empower the group in the struggle against it.

[124] 'The Chamber considers that the harm caused by Mr Al Mahdi's actions is primarily collective in character. It is much larger and of a different nature than the harm suffered by the 139 applicants grouped together. Aggregating their losses and prioritising their compensation would risk dramatically understating and misrepresenting the economic loss actually suffered.' *Ibid.*, para. 76. Eventually, the Court ordered that the Trust Fund for Victims organize a screening process to make sure all victims eligible for individual reparations (i.e., the two specific groups identified by the Court) get their chance at reparations, as it acknowledged that it is beyond the Court's ability to identify all. *Ibid.*, paras 141–146. Rome Statute, *supra* note 2.

[125] *Ibid.*, paras 63, 65.