

Combatting Impunity for Cultural Destruction

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By: Alexa Banister-Thompson

Introduction

Genocide has been called the “crime of all crimes”(see here). It stands at the apex of international criminal law (see here). In its broadest sense, genocide is the attempt to destroy, in whole or in part, a national, ethnical, racial or religious group (see here). While there are various elements to genocide, this article is concerned with destruction. Specifically, whether cultural destruction fits within the Genocide Convention (the “Convention”).

During negotiations for the Convention, one of the most highly contested provisions was Draft Article 3 regarding cultural genocide. With a vote of 25-16 amongst the Member States, Draft Article 3 was

excluded from the Final Draft of the Convention (see here). The *Rome Statute* and the respective treaties establishing the *ad hoc* tribunals replicated the Convention (see Rome Statute; see ICTR Statute; see ICTY Statute). As such, cultural genocide, as a stand-alone provision, has been consistently excluded. Despite this exclusion, the inclusion of Article 2(e), the forcible transfer of children with an intent to destroy a group, is an anomaly in the definition as this act does not immediately lead to the physical or biological destruction of a group.

This is a timely discussion, as just over a year ago, the National Inquiry into the Missing and Murdered Indigenous Women and Girls (MMIWG) released their Final Report (see Final Report Part 1, see Final Report 2, see Supplementary Report) and this Journal had a commentary on the Final Report (see here). The central finding described by the media and the public was that the past and ongoing atrocities committed against the Indigenous peoples of Canada amounted to cultural genocide. The legal correctness of using the term 'genocide' was subject to some critique (see here). There are problems with the notion of non-retroactivity, the lack of a clear time frame, and the conflation of the abhorrent acts of the 20th century with the ongoing mistreatment of the Indigenous peoples (see here). Leaving these issues aside, I will focus on how the Final Report is useful in showing how cultural destruction impacts the viability of a group to continue. Thus, if the destruction of culture impedes the ability of a group to continue its existence, this could amount to genocide in the future.

Why Was Cultural Genocide Excluded From The Convention and Has There Been a Change?

There are four explanations for the exclusion of cultural genocide from the Convention. First, the Convention was drafted through a Western worldview, which is the overarching factor that permeates the impact of the following three observations. Second, the Convention was negotiated by many colonizer states who may have been unwilling to codify a crime that mirrored their colonial past. Third, Member States feared a broad definition would expand the abuses prohibited by the Convention and dissuade other states from signing (see here). Fourth, the majority of Member States envisioned cultural genocide as a human rights problem, rather than an international criminal law issue (see here).

The era of decolonization, combined with acts of reconciliation, have provided a broader understanding of the importance of cultural values within groups. Additionally, cultural destruction goes further than human rights violations: it penetrates the criminal sphere and should be punished accordingly. Thus, the time has come to recognize how the destruction of culture detrimentally impacts the viability of a group's continuance.

What is "Destruction"?

There is no binding international law that confines the act and intent of genocide to physical and biological destruction (see here at 21). According to Article 21(2) of the *Rome Statute*, courts may apply previous decisions, but the common law principle of *stare decisis* is not applicable to international law. Therefore, the fact that previous decisions have not recognized cultural destruction

does not preclude its application to future cases.

Additionally, Article 32 of the *Vienna Convention on the Law of Treaties* states the *travaux préparatoires* (the "*travaux*") may be consulted and taken into consideration when interpreting treaties. While drafting the Convention, the negotiating parties unanimously wanted to prohibit physical and biological destruction, but ultimately, cultural genocide as a stand-alone provision was excluded (see here). However, this distinction was never codified in the Convention. The drafters left the door open for interpretation.

The jurisprudence is conflicting on whether cultural destruction fits within the definition of the Convention. In *Prosecutor v Akayesu,* the Trial Chamber of the International Criminal Tribunal for Rwanda held that destruction within the Convention "does not necessarily mean that harm is permanent and irremediable". Additionally, national courts have also confirmed this proposition. The Federal Constitutional Court of Germany has stated, "the intent to destroy the group...extends beyond physical and biological extermination" (see here at para 579).

In contrast, in *Prosecutor v Krstic? (Krstic?)* the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that international law confines genocidal acts to physical and biological destruction. While the ruling was upheld on appeal, Justice Shahabuddeen provided a partially dissenting opinion, stating "the intent to destroy the group [was satisfied]… by the intent to cause the *non-physical destruction of the group* in whole or in part" (see here at para 54). Finally, the International Law Commission described genocide as "the material destruction of a group either by physical or by biological means".

These varying opinions of high level domestic and international courts and commissions give credence to the view that genocide might not constitute solely physical or biological destruction. While the more authoritative jurisprudence contemplates physical destruction, there is sufficient jurisprudence to permit the inclusion of cultural genocide in international criminal law.

Article 2(e): An Argument that Genocide includes Cultural Destruction

There is little jurisprudence on Article 2(e) of the Convention, which may be explained, in part, by the difficulty of linking the forcible transfer of children to physical or biological destruction of a group. "Forcible" has been expanded to include the threat of force or coercion (including violence, duress, detention, psychological oppression or abuse of power) (see ICC Elements of a Crime). How then might the courts reconcile a threat posed by the forced transfer of children with the physical or biological destruction of a group?

The jurisprudence does not provide a convincing explanation for the inclusion of Article 2(e) in the Convention. Discussions around Article 2(e) have assessed the impact on the future viability of a group (see ILC) or have even stated that Article 2(e) fits within biological destruction because it can have "consequences for the group's capacity to renew itself, and hence to ensure its long-term survival" (see Croatia v. Serbia at para 136). To follow this reasoning, the intention of forcibly

transferring children would have to be to destroy the group's ability to reproduce.

However, it does not follow that simply transferring children from one group to another amounts to the intent to eliminate the group's reproductive capacities because it would still be biologically possible for them to reproduce albeit in a different location. Instead, Article 2(e) is an exception to the general rule of physical and biological destruction (see here).

Including forcible transfers of a group's children with the intent to destroy the group leaves the door open for an expansive interpretation of the law to include cultural destruction as this act does not require the intention to immediately physically or biologically destroy the group. In order to narrow the definition of 'genocide' to preclude cultural destruction of a group, the Convention would have to explicitly state that destruction is confined to physical or biological. Alternatively, it would have to prohibit genocidal acts which reflect the intention of only physical and biological destruction, which Article 2(e) does not. As the drafters of the Convention failed to do this, there is room for an interpretation that views cultural destruction as sufficient to establish the "to destroy" component of genocide.

Cultural Destruction Impacts the Future Viability of the Group

Failing to protect a group's culture effectively denies their right to exist. This is consistent with Lemkin's original conception of genocide, which prompted the creation of the Convention. Consistency requires the international community to recognize the integral role that culture plays, and how the destruction of a group's culture impedes its ability to continue as a group. Evaluating the mistreatment of Indigenous peoples within Canada demonstrates how cultural destruction, as discussed above, inherently attacks the viability of a group to continue as one.

Case Study: Canada's Indigenous Peoples

The Final Report on the MMIWG provides insight into the historical and continuous plight of the Indigenous peoples of Canada (see Final Report 1, see Final Report 2). Despite various reports, truth commissions, and calls to action, the international community has done very little to protect the Indigenous peoples of Canada. Although various reprehensible acts were committed against the Indigenous peoples of Canada, the focus here is on the crimes aimed specifically at the Indigenous peoples' culture that demonstrate the inability of a group to carry on as a group following the destruction of their culture.

An Overview of the Atrocities of the Indigenous Peoples of Canada

At the beginning of colonization, Indigenous peoples were removed from their traditional lands and relegated to designated Indian reserves (see here). The use and spiritual nature of the Indigenous peoples' land is an integral part of their culture (see here). Intensified control of Indigenous peoples came with the enactment of the *Indian Act*. Federal officials forbade Indigenous peoples from speaking their language and practicing their religion (see here). Additionally, Federal officials

introduced residential schools to forcibly remove children from their “savage” way of life. Sir John A. MacDonald stated the objective of the residential schools was to “take the Indian out of the child... Indianness was not to be tolerated; rather it must be eliminated” (see here). The late Prime Minister’s words could not have been clearer: the objective was to destroy their culture.

The Atrocities on the Indigenous Peoples Mirror Elements of Article 2(e)

The alleged crimes listed above depict a grim history of Canada, however, they do not necessarily meet the threshold of biological or physical destruction of a group. Instead, they mirror elements of Article 2(e) as the viability of the Indigenous culture was threatened through their children, even though actual destruction did not occur. However, similar to the Court in *Kristi?*, cultural destruction, the seizing of traditional lands, and the removal of “the Indian” in children can be used as evidence of the intention to eliminate the culture of Indigenous peoples within Canada.

Moreover, the right of the Indigenous peoples to self-determination was clearly encroached on by the forgoing measures as they were unable to transmit cultural values and teachings across generations. This, in part, was due to the children being forced to the residential schools, as well as the use of the *Indian Act* to restrict every facet of their culture.

Some people may argue that the Canadian government’s act of inhibiting the ability of Indigenous peoples to exercise self-determination does not rise to the level of genocide. This statement would be true if the government had only infringed their right to self-determination. However, genocide is the most extreme denial of self-determination and necessitates answering a higher crime. Therefore, it is relevant to the discussion as Canada has gone further through its actions, “which ultimately aims to lead to the cultural demise of unique, pristine heritage which is socially, culturally and anthropologically irreplaceable” (see here, see here).

One argument against including cultural destruction in the crime of genocide is that these alleged crimes are more accurately depicted as crimes against humanity, rather than genocide. However, there are three major concerns with this criticism. First, crimes against humanity are inherently aimed at reprehensible actions against individuals, rather than the elimination of groups. To be a “target” in a crime against humanity, the victim need only be part of a civilian population. However, for Indigenous peoples, their involvement in a group is inherent in their identity (see here). By only prosecuting these crimes as crimes against humanity, the international community would be ignoring the gravity of targeting a group’s culture. Second, while genocide has no scale requirement, crimes against humanity require a “widespread or systematic attack” (see here). If the only recourse for victims of cultural genocide was through a crimes against humanity investigation, the crimes might not meet this threshold, and the acts might go unpunished. This analysis would require value judgments that potentially degrade the victims’ experience. Third, while genocide “focuses on the group nature of the victims…crimes against humanity [are] engaged by the group nature of the perpetrators” (see here). This change of focus reduces the significance of cultural destruction of a group.

Overall, the abhorrent actions committed on the Indigenous peoples need to be addressed, and this is most effectively done through the crime of genocide.

The Future of Cultural Genocide

Genocide serves a dual function of responsibility: both individual criminality and state responsibility. Individuals can be prosecuted either by a State or by the International Criminal Court (ICC). In contrast, states can face repercussions through Articles on the Responsibility of States for Internationally Wrongful Acts.

Overall, it is unlikely that Canada or individual perpetrators would face punishment for the actions against the Indigenous peoples because of the principle of non-retroactivity. Under Article 11 of the *Rome Statute*, the ICC only has jurisdiction over crimes committed after the ICC was established in 1998. Additionally, Canada's Crimes Against Humanity and War Crimes Act (codifying genocide as an offence in Canada) came into effect in 2000. Thus, no individuals can be prosecuted for such crimes committed prior to the enactment of the legislation.

As critics of the Final Report discuss, only a court can make a legal determination on genocide (see here). Thus, while the Final Report lacks judicial impact, it is useful insofar as it may facilitate conversation on lowering the very high threshold of physical and biological destruction to prove genocide to include cultural destruction of a group. Additionally, by acknowledging the prohibition of cultural destruction as an element of genocide in a future analysis of the treatment of Indigenous people (rather than applying the law retroactively), states may be more accepting of this aspect of the prohibition of genocide, as they could not be penalized for actions or omissions from the past that would amount to cultural genocide. The case study above is an example of why the path forward needs to apply a more robust interpretation of 'destruction' so that such atrocities no longer go unpunished.

Conclusion

Cultural genocide is controversial. The drafters of the Convention exercised their choice to exclude cultural genocide from the definition due to its controversial nature and the perceived repercussions of an overbroad definition. However, through the inclusion of Article 2(e) in the Convention, the drafters did not completely foreclose an interpretation that might include cultural destruction in the crime of genocide. The inclusion of this provision has resulted in ongoing disagreement amongst the international community as to whether cultural genocide is part of international law.

The allegation of genocide in the Final Report of the MMIWG remains technically contentious. However, the bottom-line message is important: despite the ability of a group to survive physically and biologically, culture is a quintessential part of it, and without it, the group might have effectively been destroyed. It is essential for the international community to expand the narrow lens of genocide to combat impunity.

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About the author

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