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# Cultural Genocide – Culturecide: An Unfinished or Rejected Project of International Law?

**Key words:** cultural genocide, Raphael Lemkin, indigenous peoples, human rights, culturecide

**Abstract:** The article analyses the evolution of the definition of ‘cultural genocide’ from the debates of the 1948 Genocide Convention to the 2007 U.N. Declaration on the Rights of Indigenous Peoples. It presents how Raphael Lemkin originally envisioned this notion. It discusses examples of culturecidal practices and possible developments of this concept in the future.

## Introduction

*New conceptions require new terms. By ‘genocide’ we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote **an old practice**<sup>1</sup> in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide, etc. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be **disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals** belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity but as members of the national group.<sup>2</sup>*

This passage opens the most important chapter of the ground breaking work written by Raphael Lemkin and published in the United States in 1944: *Axis Rule*

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1 Unless otherwise noted, all highlights in the text by H. Schreiber.

2 R. Lemkin, ‘Genocide’, in R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington 1944. This is the most important work by Raphael Lemkin and it had an immense influence on later international law in terms of international criminal law and the criminalisation of the most serious crimes.

in *Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* – the work that has given the world the name for what Winston Churchill referred to as ‘a crime without a name.’<sup>3</sup>

The first aim of this article is to study how Raphael Lemkin originally envisioned the definition of ‘genocide.’ Then, I would like to show how this definition has evolved with regard to cultural and identity-related issues in the debates on the shape of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>4</sup> Finally, I will try to present the contemporary contexts (the U.N. Declaration on the Rights of Indigenous Peoples of 2007 – UNDRIP 2007) in which the term ‘cultural genocide’ – eventually excluded from the official definition of genocide – appears. In the contemporary context, I propose to use the term ‘culturecide’ instead. Where it appears in its original historical context – that is when I present Lemkin’s idea and describe the debate during the drafting of the Convention of 1948 – I shall leave it as ‘cultural genocide.’ The study of the history of this concept in international law is expected to help answer the question posed in the title of this article: whether it is an unfinished project, one which could re-emerge in the future in the framework of international law, or rather a rejected one.

### **At the roots – culture as the key to the concept of genocide in the thought of Raphael Lemkin**

Today, although the ‘crime of crimes’<sup>5</sup> has had a name for more than six decades, the author of this name remains virtually anonymous in his own homeland (except for a narrow group of researchers, including lawyers and sociologists dealing with genocide-related issues<sup>6</sup>). For a long time, his works were essentially

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3 In a radio speech of 24 August 1941. After: J. T. Fussel, ‘A Crime Without a Name’. *Winston Churchill, Raphael Lemkin and the World War II Origins of the Word ‘Genocide’*, available at: <http://www.preventgenocide.org/genocide/crimewithoutaname.htm> (accessed on 10 January 2013).

4 UN Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, ratified by Poland on 18 July 1950. Hereinafter: Convention of 1948.

5 This expression was coined by Lemkin himself and is used in his unpublished autobiography *Totally Unofficial Man*. Edited fragments have been published in S. Totten, S. L. Jacobs (eds.), *Pioneers of Genocide Studies: Confronting Mass Death in the Century of Genocide*, Westport 2002, p. 383. For more on this publication see Footnote 9.

6 Cf. selected recent Polish publications on this subject: L. M. Nijakowski, *Rozkosz zemsty. Socjologia historyczna mobilizacji ludobójczej (Historical Sociology of Genocidal Mobilisation)*, Warszawa 2013; K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc (The Concept of Genocide in*

not translated into Polish<sup>7</sup> and his presence in world literature is marked only by a handful of publications. A well-known researcher of Lemkin's ideas and the concept of genocide, Anthony Dirk Moses, wrote that despite some occasional undertakings, literature on Lemkin 'is still in its infancy.'<sup>8</sup> Ryszard Szawłowski confirms that it is also true for Poland.<sup>9</sup> Another reason for this is probably that his achievements in this field still have not been published, even in the form of post-mortem 'collected works', which is not an uncommon practice.<sup>10</sup> The subject of genocide has become popular as it is considered to be of great importance, and consequently, as it often happens with success, it has come to have many fathers – 'pioneers of genocide studies.'<sup>11</sup> In fact, however, Raphael Lemkin, a Polish lawyer

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*the Context of Judicature of Ad Hoc International Criminal Courts*), Warszawa 2010; D. Drózd, *Zbrodnia ludobójstwa w międzynarodowym prawie karnym (The Crime of Genocide in International Criminal Law)*, Warszawa 2010.

- 7 *Axis Rule in Occupied Europe* was translated and published only recently by Wydawnictwo Scholar: R. Lemkin, *Rządy państw osi w okupowanej Europie*, Warszawa 2013.
- 8 A. D. Moses, 'Raphael Lemkin, culture, and the concept of genocide', in D. Bloxham, A. D. Moses (eds.), *The Oxford Handbook of Genocide Studies*, Oxford–New York 2010, p. 20.
- 9 R. Szawłowski, 'Rafał Lemkin (1900–1959) – polski prawnik twórcą pojęcia ludobójstwo' (Rafał Lemkin (1900–1959) – A Polish Lawyer Who Coined the Term Genocide), in R. Ignatiew, A. Kura (eds.), *Zbrodnie przeszłości. Opracowania i materiały prokuratorów IPN (Crimes of the Past. Compilations and Materials of IPN Prosecutors)*, vol. 2, Warszawa 2008. So far, in Poland, the fatherland of Lemkin, only one book entirely devoted to the broad influence of the thought and concepts of Lemkin has been published: A. Bieńczyk-Missala, S. Dębski (eds.), *Rafał Lemkin. A Hero of Humankind*, Warszawa 2010.
- 10 The entirety of Lemkin's work remains in the form of typescript and notes stored essentially in three institutions: 1) 7 boxes at the Jacob Rader Marcus Center of the American Jewish Archives (AJA), located at the Hebrew Union College in Cincinnati, Ohio. These are materials of 1942–1959, donated to this institution in two parts: by a cousin of Raphael Lemkin, Robert Lemkin, in April 1965, and complemented by the donation of Rabbi David Saperstein of the Union of American Hebrew Congregations in November 1983. The materials are not available online; 2) 12 boxes, donated in 1975 to the American Jewish Historical Society, mainly from 1944–1952 – moved in 2001, when the main seat of the AJHS moved from Massachusetts to New York. The greater share of the collection, including the fragments of the unpublished *The History of Genocide*, which is also cited in this text, is available online on the website of the AJHS; 3) 5 boxes of microfilmed materials from the years 1946–1959, donated by a friend of R. Lemkin, Alexander Gabriel, to the New York Public Library (hereinafter: NYPL), Archives and Manuscripts Division, in 1982. These materials are available online.
- 11 See: S. Totten, S. L. Jacobs (eds.), *Pioneers of Genocide Studies...* In the *Introduction* the authors describe how they started the work on the publication: 'Initially, we started by

of Jewish origin, was the only true pioneer and we owe it to him and his efforts that this crime – today considered the most serious type of crime that can be committed against a national, ethnic, racial or religious group, bearing the largest legal, political and moral weight – appeared in international law and in the awareness of the international community. This does not mean, of course, that the phenomenon itself appeared thanks to Lemkin; he himself describes it as ‘an old practice in its modern development’.

The cultural aspect was at the centre of the concept of genocide created by Raphael Lemkin<sup>12</sup>. Despite being distinguished as a separate category, it is also present in the other aspects of genocide: political, social, religious, economic, and moral. However, it also shared the fate of most of these aspects by being excluded from the final definition that appeared in the 1948 Genocide Convention (only the religious aspect made it in).

Meanwhile, in his most important work (and the only one published) *Axis Rule in Occupied Europe* Lemkin elaborated on his vision of genocide as follows:

Genocide has two phases: one, **destruction of the national pattern of the oppressed group**; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, **after removal of the population and the colonization by the oppressor’s own nationals**.<sup>13</sup>

It is important to note that this description does not include what is nowadays considered obvious and crucial in the discussion on genocide: physical extermination of the population. Instead, it speaks of national patterns, which refer us directly to the notion of culture. Lemkin distinguishes eight ‘techniques of genocide in various fields’, which were made into characteristics of groups subject to genocide during the work on the Convention of 1948: political, social, cultural, economic, biological, physical, religious and moral.

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noting those individuals who wrote the earliest and most significant works on genocide theory, and among those individuals were Lemkin, Charny, Kuper, Fein, Horowitz, and Cohn.’ Lemkin is among the 35 authors eventually considered ‘pioneers’, but it was only he whose unremitting work and involvement in the issue of punishing genocide brought about its criminalisation (the authors eventually admit this in the introduction to a fragment of his autobiography).

- 12 Already in 1933 Lemkin addressed International Conference for the Unification of the Criminal Law held in Madrid, with the report presenting his definitions of ‘acts of vandalism’ and ‘acts of barbarity’, which later evolved into cultural genocide concept.
- 13 Cf. Footnote 2. Unless otherwise noted, all other quotations are from Chapter 9 of *Axis Rule...*

## Political

In line with this policy of imposing the German national pattern, particularly in the incorporated territories, the occupant has organized a **system of colonization of these areas**. In western Poland, especially, this has been done on a large scale. The Polish population have been removed from their homes in order to make place for German settlers who were brought in from the Baltic States, the central and eastern districts of Poland, Bessarabia, and from the Reich itself. The properties and homes of the Poles are being allocated to German settlers; and to induce them to reside in these areas the settlers receive many privileges, especially in the way of tax exemptions.

The issue of colonisation and territorial occupation was extremely important to Lemkin and he was very familiar with it, since he was interested in the history of the colonisation of Hispanic America. He studied the writings of the most famous defender of Indians Bartolomé de Las Casas, as well as of Francisco de Vitoria. The former was even Lemkin's hero: 'his name has lived on through the centuries as one of the most admirable and courageous crusaders for humanity the world has ever known'.<sup>14</sup> Lemkin's knowledge and in-depth studies of the colonisation period surely influenced the concept of genocide, the fundamental elements of which were territorial conquest and occupation in the form of colonisation.<sup>15</sup> The title of his book, *Axis Rule in Occupied Europe*, also points to the issue of territorial occupation as being crucial to his concept of genocide. An inseparable element of this concept was the change of the demographic structure, although not necessarily through mass killings but also, for example, through deportation of the native population and the settling of new people from the oppressor nation, which Lemkin explicitly

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14 R. Lemkin, 'Spain Colonial Genocide', AJHS, P-154, box 8, folder 12. After: A. D. Moses, 'Raphael Lemkin, culture...', p. 26.

15 At the same time, we should take notice of – as historians studying the age of colonisation and the knowledge about its true face in the Europe of that time do – that Lemkin's views in this respect did not completely stray from the views common in his time. He was not an opponent of colonisation as such but he condemned its brutal form. In peaceful colonisation he saw the chance for improving civilisational progress of indigenous peoples. He was indignant at the Belgian genocide practices in Congo, which were a hot topic in Europe owing to E. Morel and R. Casement, he condemned genocide committed by Germans on the Herero in 1904–1908 but he also believed that King Leopold II of Belgium had the good will to stop the massacres and make the natives happy. In this sense, notwithstanding his undeniable greatness, Lemkin was also a child of his century. Cf.: D. J. Schaller, 'Raphael Lemkin's view on European colonial rule in Africa: between condemnation and admiration', *Journal of Genocide Research*, vol. 7, no. 4, 2005, pp. 531–538.

called ‘colonisation.’ It is not a coincidence that this term appears in this context; it is obvious that it was used on purpose, given the studies conducted by Lemkin, also while working on *The History of Genocide*. Genocide is a ‘technique’ of occupation and comes down to colonisation and conquest, which has been, since World War II, ‘an old practice in its modern development’ in Europe:

The enemy nation within the control of Germany must be destroyed, disintegrated, or weakened in different degrees for decades to come. Thus the German people in the post-war period will be in a position to deal with other European peoples from the vantage point of biological superiority. Because the imposition of this policy of genocide is more destructive for a people than injuries suffered in the actual fighting, the German people will be stronger than the subjugated peoples after the war even if the German army is defeated. **In this respect genocide is a new technique of occupation aimed at winning the peace even though the war itself is lost.**

The other techniques of genocide also essentially refer to the notion of culture and its intangible, spiritual values, enshrined however to the specific, elite social group – intelligentsia.

## Social

The social structure of a nation being vital to its **national development**, the occupant also endeavours to bring about such changes as may weaken the **national, spiritual resources**. The focal point of this attack has been the intelligentsia because this group largely provides the national leadership and organizes resistance against Nazification.

It is important that Lemkin presents a very particular vision of culture, manifested exactly in passages such as this one. For him, culture is first of all what we would call high culture, the product of intelligence, the depository of ‘national, spiritual resources.’ This is further confirmed by another fragment of Lemkin’s works:

All our cultural heritage is a product of the contribution of all nations. We can best understand this when we realize how impoverished our culture would be if the people doomed by Germany such as the Jews had not been permitted to create the Bible or give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give the world a Copernicus, a Chopin, a Curie; the Greeks a Plato and a Socrates, the English a Shakespeare, the Russians a Tolstoy and a Shostakovich, the Americans an Emerson and a Jefferson, the Frenchmen a Renan and a Rodin.<sup>16</sup>

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16 ‘Memorandum from Raphael Lemkin to R. Kempner’, 5 VI 1946, United States Holocaust Memorial Museum, R. Kempner Papers (RS 71.001); quoted after: A. D. Moses, ‘Raphael Lemkin, culture...’, p. 29.

The same is confirmed by the description of the cultural techniques of genocide presented in *Axis Rule...* as it points almost exclusively to high culture, manifested in cultural activity, literary works or monuments:

## Cultural

In the incorporated areas the local population is **forbidden to use its own language** in schools and in printing. [...] Moreover, in the Polish areas Polish youths **were excluded from the benefit of liberal arts studies** and were channelled predominantly into the trade schools. The occupant apparently believes that the study of the liberal arts may develop independent national Polish thinking, and therefore he tends to prepare Polish youths for the role of skilled labour, to be employed in German industries.

In order to prevent the expression of the national spirit through artistic media, a **rigid control of all cultural activities has been introduced**. All persons engaged in painting, drawing, sculpture, music, literature, and the theatre are required to obtain a license for the continuation of their activities. Control in these fields is exercised through German authorities. [...] especially in Poland, were **national monuments destroyed and libraries, archives, museums, and galleries of art carried away**. In 1939 the Germans burned the great library of the Jewish Theological Seminary at Lublin, Poland. This was reported by the Germans as follows:

‘For us it was a matter of special pride to destroy the Talmudic Academy which was known as the greatest in Poland. ... We threw out of the building the great Talmudic library, and carted it to market. There we set fire to the books. The fire lasted for twenty hours. The Jews of Lublin were assembled around and cried bitterly. Their cried almost silenced us. Then we summoned the military band and the joyful shouts of the soldiers silenced the sound of the Jewish cries.’

Universities, museums, libraries, galleries of art mentioned by Lemkin in this passage belong to a vision of culture, which is created, encoded and made available only to the society’s elites.

However, the central significance of culture for the techniques of genocide transpires also in other areas. Destruction of culture is the first step towards the destruction of a nation as a whole, even though the methods applied can manifest themselves in the spheres of economy, religion or morality, by preventing people from sustaining their culture and fulfilling other (spiritual, religious, intellectual, etc.) than very basic needs or ‘basic instincts’ (food, shelter, simple survival):

## Economic

The destruction of the foundations of the economic existence of a national group necessarily brings about a crippling of its development, even a retrogression. **The lowering of**

**the standards of living creates difficulties in fulfilling cultural-spiritual requirements.** Furthermore, a daily fight literally for bread and for physical survival may **handicap thinking in both general and national terms.**

## Religious

In Luxemburg, where the population is predominantly Catholic and religion plays an important role in national life, especially in the field of education, **the occupant has tried to disrupt these national and religious influences.** Children over fourteen years of age were permitted by legislation to renounce their religious affiliations, for the occupant was eager to enroll such children exclusively in pro-Nazi youth organizations. [...] Likewise in Poland, **through the systematic pillage and destruction of church property and persecution of the clergy, the German occupying authorities have sought to destroy the religious leadership of the Polish nation.**

## Moral

In order to weaken the spiritual resistance of the national group, the occupant attempts to create an atmosphere of moral debasement within this group. According to this plan, **the mental energy of the group should be concentrated upon base instincts and should be diverted from moral and national thinking.** It is important for the realisation of such a plan that the desire for cheap individual pleasure be substituted for the desire for collective feelings and ideals based upon a higher morality.

Except for the physical and biological aspects of genocide, in all the others it is the culture that is usually attacked, as the carrier of identity and cohesion of the group concerned, of its 'national thinking', language, religion, values, and morality. However, out of the eight techniques of genocide listed by Lemkin, it is exactly these two – the physical and the biological – that have dominated our present-day understanding of this concept and had shaped the debate on the final definition of genocide in the Convention of 1948.

Another interesting source on the basis of which we can reconstruct Lemkin's views on the concept of genocide, is a fragment of his notes titled *The Concept of Genocide in Anthropology*.<sup>17</sup> In the section 'The Significance of Cultural Genocide', Lemkin writes:

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17 I would like to sincerely thank Dirk Moses for providing me with a scan of this document, which is stored in NYPL archives and is inaccessible online. R. Lemkin, 'The Concept of Genocide in Anthropology', NYPL, box 2, folder 2. This fragment was written in the period 1946–1959.



In our definition of genocide we have included cultural genocide. The question might arise whether we are justified in including the attack upon a culture per se in the definition of a concept which is primarily concerned with the destruction of a social group. [...] If the culture of a group is violently undermined, the group itself disintegrates and its members must either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganisation and, perhaps, physical destruction. [...] **According to this view it is clear that the destruction of cultural symbols is genocide** because it implies the destruction of their function and thus **menaces the existence of the social group which exists by virtue of its common culture.**<sup>18</sup>

Lemkin owes this approach to the notion of culture to the influence of another great Pole whose works he studied – Bronisław Malinowski, who was making a staggering career in Anglo-Saxon science at that time.<sup>19</sup> His innovative (for those times) method of participant observation, which required staying among the studied group for a long time, as well as the conclusions concerning the need for a functional and comprehensive treatment of all manifestations of culture are both reflected in Lemkin's text, which occasionally even directly quotes Malinowski.<sup>20</sup>

While elaborating on the notion of cultural genocide, Lemkin clearly differentiated it from cultural changes taking place in normal circumstances, in particular including cultural diffusion, to which he dedicated a separate section of his text.

Cultural genocide is a more or less abrupt process, that is **it must not be confused with the gradual changes a culture may undergo.** Such gradual changes occur by means of the continuous and slow adaptation of the culture to new situations. The new situations arise from physical changes, creative energies within the culture and the impact of outside influences. Without them the culture becomes static [...].<sup>21</sup>

Consequently, what constitutes the difference between diffusion and cultural genocide is the manner and time in which these processes take place. In Lemkin's thought diffusion is essentially a long-term and rather spontaneous process of adopting foreign cultural elements, whereas cultural genocide does not necessarily need to imply the presence of new elements in the given culture. It can, however, mean the weakening of the group so that it is ultimately helpless when faced with the physical extermination that awaits it.

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18 R. Lemkin, *The Concept of Genocide...*, p. 2.

19 This concerns primarily the work *A Scientific Theory of Culture*, published post-mortem in 1944.

20 R. Lemkin, *The Concept of Genocide...*

21 *Ibid.*, p. 3.

Where cultural genocide appears to be merely a step towards physical extermination, there will certainly be no difficulty in distinguishing it from diffusion<sup>22</sup>

This fragment very clearly shows the broad concept of genocide, entailing the destruction of culture, as an introduction to or a stage preceding a **possible** physical elimination of the group. As a matter of fact, this fragment is not the only one that confirms this vision – the initial paragraph of Chapter 9 of *Axis Rule...*, quoted at the beginning of this article, seems to confirm it too.<sup>23</sup> The analysis of the ‘techniques’ of genocide characterized by Lemkin himself allows us to conclude that cultural aspects (referred to as spiritual, religious, national requirements, resources or identity) have always been in the centre of Lemkin’s vision of the nature of genocide.

### Cultural genocide in the debate on the Convention of 1948

Lemkin played a significant role in the creation of 1948 Convention, although he acted as a ‘totally unofficial man’<sup>24</sup>. On 11 December 1946 – with the unanimous adoption of Resolution no. 96/I by the UN General Assembly, proposed by Lemkin – the two-year work on the Convention officially started. The first words of the Resolution, penned by Raphael Lemkin himself, read as follows:

Genocide 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 United Nations.

William Schabas points out that this first sentence of the Resolution has in fact possibly affected the future understanding of genocide: as compared to homicide but one conducted on a massive scale on a group, which placed the

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22 *Ibid.*, p. 4.

23 Lemkin’s approach to the notion of culture is also shown in the broad studies he conducted in preparation for *The History of Genocide*, which might have been his other *opus magnum*. Yet, although the draft of the book was presented several times to a number of publishers, it has never been published. It presents genocide in the historical context: from the Antiquity, through the Middle Ages, to the contemporary age, and many passages thereof show what great importance Lemkin ascribed to cultural genocide.

24 This is how Lemkin was described in the introductory article to the Sunday issue of the *New York Times* of 20 October 1957, titled ‘The Crime of Genocide.’ Lemkin later gave the same title to his unpublished – until recently – autobiography (see: R. Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, Donna-Lee Frieze (ed.), Yale University Press, 2013).

focus on the physical dimension.<sup>25</sup> Thus, the following passage about the loss of a group's cultural contribution appears in the context of physical genocide – as its consequence – and does not suggest the possibility that certain actions aimed solely against the culture of the group may have a genocidal aspect.<sup>26</sup> This is the direction taken by the debate on cultural genocide in the main text of the Convention, even though the documents from the preparatory works for the Convention clearly show that Lemkin fought long to have the concept of cultural genocide included. He even wrote in the Memorandum on the Genocide Convention: 'Cultural Genocide is the most important part of the Convention.'<sup>27</sup> Consequently, it is only his determination that allowed cultural genocide to return in the second draft.

In the first draft, prepared by the UN Secretariat in June 1947 (the Secretariat Draft), the proposed definition of genocide was as follows:

Article I: Definitions

- I. [Protected groups] The purpose of this Convention is to prevent destruction of racial, national, **linguistic**, religious or **political** groups of human beings.
- II. [Acts qualified as Genocide] In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.

Such acts consist of:

1. [Physical genocide] Causing the death of members of a group or injuring their health or physical integrity by:
  - (a) group massacres or individual executions; or
  - (b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
  - (c) mutilations and biological experiments imposed for other than curative purposes; or
  - (d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

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25 W. A. Schabas, *Genocide in International Law. The Crime of Crimes*, Cambridge 2000, p. 152.

26 *Ibid.*

27 Quoted after: A. D. Moses, 'Raphael Lemkin, culture...', p. 37.

2. [Biological genocide] Restricting births by:
  - (a) sterilization and/or compulsory abortion; or
  - (b) segregation of the sexes; or
  - (c) obstacles to marriage.
3. [**Cultural genocide**] Destroying the specific characteristics of the group by:
  - (a) **forcible transfer of children to another human group**; or
  - (b) forced and systematic exile of individuals representing the culture of a group; or
  - (c) prohibition of the use of the national language even in private intercourse; or
  - (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
  - (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.<sup>28</sup>

The second draft, still discussed as late as in April 1948 (the *Ad Hoc* Committee Draft), stated as follows:

“Article I: [Genocide: a crime under international law]

Genocide is a crime under international law whether committed in time of peace or in time of war.

Article II: [‘Physical and biological’ genocide]

In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or **political** group, on grounds of the national or racial origin, religious belief, or political opinion of its members:

1. Killing members of the group;
2. Impairing the physical integrity of members of the group;
3. Inflicting on members of the group measures or conditions of life aimed at causing their deaths;
4. Imposing measures intended to prevent births within the group.

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28 UN Secretariat, *Secretariat Draft. First Draft of the Genocide Convention*, V 1947, UN Doc. E/447.

## Article III [‘Cultural’ genocide]

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

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group.
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.<sup>29</sup>

However, also during the *Ad Hoc* Committee debates, the question of leaving or deleting ‘cultural genocide’ has been a matter of great concern<sup>30</sup>. In the final version of the Convention, adopted on 9 December 1948, the scope of the definition contained in Article 2 was considerably limited:

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

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

Why is it that cultural genocide disappeared from the draft of the Convention? A detailed history of the debate on the definition of genocide has been reconstructed from official UN documents by, for example, William Schabas. With regard to the notion of cultural genocide, it should be stressed that it had been a subject of controversy from the very beginning of the debate. What is more, the official main task of some delegations, for example the delegation of Canada, was to make every effort not to allow cultural genocide to make it to the final text of the Convention;

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29 *Ad Hoc Committee Draft, Second Draft of the Genocide Convention Prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC), meeting between April 5, 1948 and May 10, 1948*, UN Doc. E/AC.25/SR.1 to 28.

30 *Report of the Committee and Draft Convention and Draft Convention Drawn Up by the Committee*, E/794, 24 May 1948, p. 17–20.

some countries went as far as to order their delegations to vote against the adoption of the Convention as a whole should their request not be granted.<sup>31</sup>

From the very beginning, the idea of cultural genocide was also opposed by the United States and France (later joined by most other countries, its proponents being only Poland, the USSR, Venezuela, Siam, China, and Lebanon), who stressed that it should be moved to the debate on human rights and the protection of minorities.<sup>32</sup> As a result of this, a proposal was subsequently made to include this idea in the Universal Declaration of Human Rights instead, because it was being developed at the same time as the Convention and adopted only a day after it, on 10 December 1948. However, this proposal has not been realised either.<sup>33</sup> The main argument was that an excessively broad definition would threaten the will to adopt the document and would decrease the largest possible number of countries ready to ratify the Convention. Furthermore, the opinion of the Danish delegate, biased and superficial, essentially coming down to the statement that focusing on mass killings and on the closing of libraries in the same convention proves lack of logic and proportion became widespread.<sup>34</sup>

While some arguments for rejecting cultural genocide seem reasonable, those raised by other countries – especially considering the practices they employed towards the indigenous peoples – already heralded the problems the international community still has with this politically explosive issue even today.<sup>35</sup> Sweden admitted outright to its concerns that the Christianisation of Laplanders could result in future cultural genocide accusations against it. Brazil cautioned that some minorities might use this argument when opposing ‘perfectly normal assimilation’. New Zealand, in turn, pointed out that if the concept of cultural genocide had been indeed included in the Convention, accusations of genocide could have been brought up even against the UN Trusteeship Council, which had stated: ‘the now

31 W. A. Schabas, *Genocide...*, p. 184.

32 *Ibid.*, pp. 180–181.

33 *Ibid.*, pp. 180 and 183. This story is presented in detail in J. Morsink, ‘Cultural Genocide, the Universal Declaration, and Minority Rights’, *Human Rights Quarterly*, vol. 21, no. 4, 1999.

34 Cf.: M. Lippman, ‘The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide’, *Boston University International Law Journal*, no. 3, p. 45, 1985.

35 These problems were so great that the next international act, and what is more, one belonging to soft law – the Declaration on the Rights of Indigenous Peoples – was adopted only after almost 30 years of debates on whether it should be passed at all. For more see: H. Schreiber, ‘Międzynarodowa ochrona kultury i dziedzictwa kulturowego ludów tubylczych’ (International Protection of Culture and Cultural Heritage of Indigenous Peoples), *Stosunki Międzynarodowe – International Relations*, vol. 35, no. 1–2, 2007.

existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants.' South Africa agreed with New Zealand's argumentation and noted the danger posed by Article 3 in a situation if it was applied to 'primitive or backward groups'.<sup>36</sup> From today's perspective, after we have experienced the attempts to settle the accounts of the colonial past, we can say that they were indeed right. Those 'prophetic' forecasts are now returning with increased intensity and are voiced by 'naturally assimilated' groups of 'barbarians'.<sup>37</sup>

Thus, the only shred of evidence left in the Convention of 1948, pointing to the long debate on whether cultural genocide was to be included or not, is the fragment of the definition of genocide in Article 2(e): 'forcibly transferring children of the group to another group'. Schabas remarks that this point 'was added to the Convention almost as an afterthought, with little substantive debate or consideration',<sup>38</sup> which justifies the opinion that it has been included in the main definition of genocide sort of 'by accident'.<sup>39</sup> This point appeared, upon the motion of Greece, only at the final stage of the work on the Convention, already after the decision to exclude cultural genocide from the definition. The delegation of Greece justified its motion by saying that while many states opposed the idea of including cultural genocide in the Convention, they 'did not necessarily oppose "forced transfer"'.<sup>40</sup> Another confirmation is the particularly unanimous opinion on this particular matter of the three experts who were consulted on the advisability of including cultural genocide in the main text (while two spoke against cultural genocide, they all agreed on the inclusion of forced transfer of children).<sup>41</sup> Consequently, while Point (e) remains a reminiscence of cultural genocide, which was eventually excluded, it is in fact considered an element of biological genocide – e.g. by the International Law Commission.<sup>42</sup>

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36 After: W. A. Schabas, *Genocide...*, p. 184.

37 See below: section 'Culturecidal practices – selected forms and examples'.

38 W. A. Schabas, *Genocide...*, p. 175.

39 This is also shown by the result of the vote on this point of the definition: 20 votes 'for', 13 'against' and as many as 13 'abstained' (*ibid.*).

40 *Ibid.*

41 *Ibid.*

42 This point was opposed, for example, by the Polish lawyer Manfred Lachs: 'the word "transfer" could also be applied to the evacuation of children from a theatre of war' (*ibid.*). Platon Morozov, in turn, said that 'no one had been able to quote any historical case of the destruction of a group through the transfer of children' (*ibid.*). As a matter of fact, the latter argument was never very apt, even in the debate on the Convention. The concerns and opposition of states employing the practice of forced transfer of children from indigenous peoples in Canada, Australia or New Zealand in the context

It should be emphasised, however, that forced transfer of children from one group to another has not only a biological aspect – by physically depriving a group of the chances for survival (when, for example, further births within the group are prevented or when parents are murdered) – but also a cultural one – in the form of forced assimilation to the customs, values and language used by the dominant group.<sup>43</sup> Although this issue concerns especially children from indigenous peoples living in colonised regions, we should remember that a plan of forced transfer of children was also implemented by Nazi Germany on Polish territories, as part of the Master Plan East (*Generalplan Ost*). On the basis of numerous sources, it is estimated that, in total, approximately 200,000 children were removed from Poland; they were deemed ‘racially valuable’ and worth of being submitted to Germanisation, frequently after their parents had been murdered. After the war, only approximately 30,000 of these children have been recovered.<sup>44</sup>

### **Culturecide in the U.N. Declaration on the Rights of Indigenous Peoples (art. 7–9)**

Although the concept of cultural genocide was excluded from the legal definition of genocide in 1948, it very often appears in contemporary debates on the role of culture in the preservation of identity of groups and, consequently, their survival. In order to avoid confusion with the definition of genocide established in the Convention of 1948 (which emphasises the physical aspects of destroying a group for national, ethnic, racial, or religious reasons), in the context of the ongoing political debate I propose using the term ‘culturecide’, which directly points to the possibility of ‘killing a culture’, without the necessity to physically exterminate its depositaries. The principal connotation of the term ‘cultural genocide’ suggests that members of a group are killed due to cultural reasons. However, while such physical extermination may accompany culturecide, it does not necessarily have

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of the interpretation of cultural genocide only confirm the opposite. For more on this, see further parts of this article.

- 43 D. Nersessian, ‘Rethinking Cultural Genocide Under International Law’, *Human Rights Dialogue*, Spring 2005.
- 44 Cf.: R. Z. Hrabar, *Hitlerowski rabunek dzieci polskich. Urowadzanie i germanizowanie dzieci polskich w latach 1939–1945 (Forced Transfer of Polish Children by Nazis. Abduction and Germanisation of Polish Children 1939–1945)*, Katowice 1960; R. Z. Hrabar, *Na rozkaz i bez rozkazu. Sto i jeden wybranych dowodów hitlerowskiego ludobójstwa na dzieciach (Upon Orders and Without Orders. 101 Selected Proofs of Nazi Genocide Against Children)*, Katowice 1968. The same issue was analysed in the RuSHA Trial (*United States of America v. Greifelt et al.*).



to be the goal – as proven by historical examples. On the contrary, preserving the lives of a ‘lower race’ to use them as slaves or quasi-slaves can actually be in the interest of the dominant group, which will, at the same time, try to eliminate all manifestations of cultural identity of the subdued group as they represent its self-awareness and ties existing within the group. In other words, a group deprived of its own culture, its integrating element, is easier to subdue, degrade and force into a subservient role to the ruling group (not necessarily dominant in numbers). While agreeing to the rejection of Lemkin’s broad definition of genocide in the international legislative act such as the Convention of 1948, we cannot ignore the dramatic cases of struggling with culturecidal practices or their consequences, which last at least a lifetime of the people who experienced them.

The physical survival of a group does not guarantee its existence if its members cannot develop their own culture. Consequently, this notion in its original form of cultural genocide once again tried to ‘enter’ the legal language and appeared in the draft Declaration on the Rights of Indigenous Peoples of 1994.<sup>45</sup>

Article 7 of this draft<sup>46</sup> illustrates the interdependence of the right to life and the right to maintain one’s own culture. The concept of cultural genocide is presented as equal to ethnocide:

Indigenous peoples have the collective and individual right not to be subjected to **ethnocide and cultural genocide**, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.<sup>47</sup>

In the final version of the Declaration, adopted by a resolution of the UN General Assembly on 13 September 2007, Article 7 took the following wording:

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45 It appeared, however, during these five decades under other names in other legal acts – see: ‘Conclusion.’

46 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/145/56/PDF/G9414556.pdf?OpenElement>, p. 107.

47 UN Doc. E/CN.4/Sub.2/1994/56.

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected **to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.**<sup>48</sup>

It should be stressed that the final version of the Declaration no longer includes notions of ethnocide and cultural genocide. The list of practices is the same but the terms that gave rise to concerns and objections of some states were abandoned. Ethnocide and cultural genocide were replaced with forced assimilation and destruction of culture. In the end, the definitions appear in unchanged form (except for their names) in Article 8, which begins as follows:

1. Indigenous peoples and individuals have the right not to be subjected to **forced assimilation or destruction of their culture.**
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
  - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
  - (d) Any form of forced assimilation or integration;
  - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Additionally, the following passage was added to the Preamble of the Declaration:

[...] all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The possible actions presented in Article 8 refer to complex and diverse behaviours, not necessarily related to the official state policy that can lead to the destruction of cultural identity and the resulting destruction of a group as such. This destruction takes place through de-ethnicisation, deculturalisation and disintegration

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48 UN Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted at the 107th plenary meeting of the UN General Assembly on 13 September 2007.

of the social structure<sup>49</sup> According to Aleksander Posern-Zieliński, the practical actions leading to ethnocide usually take three primary forms, regarding: 1) the cultural aspect in the strict sense (planned elimination of indigenous values and imposition the values of the dominant culture, interruption of the intergenerational transmission of traditions, discrediting authorities); 2) the territorial aspect (translocation, territorial marginalisation, ecological degradation of land); 3) the socioeconomic aspect (social marginalisation due to the group's dependence on the economic system of the dominant society, combined with the phenomena of social pathology).<sup>50</sup>

This definition is in agreement with Raphael Lemkin's vision. In the first footnote to Chapter 9, in which he comments on the introduction of the word genocide, he writes:

Another term could be used for the same idea, namely, *ethnocide*, consisting of the Greek word 'ethnos' – nation – and the Latin word 'cide'.<sup>51</sup>

Usually, these actions (de-ethnicisation, deculturalisation and disintegration of the social structure) are accompanied by depopulation planned and aimed at eradication of cultural identity, which bears the hallmarks of classic genocide. However, the fundamental issue here is acting with intent to physically destroy and kill, which undermines the recognition of the practices used against indigenous peoples as genocide as they were primarily focused on forced and brutal – but 'only' assimilation. The best-known and best documented examples concern the Aborigine tribes of Australia, the Inuits of Canada, the Native American tribes of the United States, and the Sami people of Norway, but these are not the only ones. The fact that the intent to destroy these groups is almost impossible to prove (despite the perfectly documented practices fulfilling the requirements of Point (e) of the definition laid down in the Convention of 1948: 'forcibly transferring children of the group to another group', including the fiasco to use the argument of intentional acting in the famous Australian report *Bringing Them Home*<sup>52</sup>) is the

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49 Cf.: A. Posern-Zieliński, 'Etnocydy' (Ethnocide), in Z. Staszczak (ed.), *Słownik etnologiczny – terminy ogólne* (*Ethnological Dictionary – General Terms*), Warszawa-Poznań 1987, p. 87.

50 *Ibid.*, p. 88.

51 Cf.: Footnote 2.

52 Cf.: R. Van Krieken, 'Cultural Genocide Reconsidered', *Australian Indigenous Law Review*, vol. 12, 2008, special edition, pp. 76–81. R. Gaita, 'Genocide: the Holocaust and the Aborigines', *Quadrant*, vol. 4, 1997, pp. 17–22.

reason why, nowadays, these peoples are much more eager to invoke the notion of culturecide – which constitutes a ‘weaker version’ of genocide.

### Culturecidal practices – selected forms and examples

A well-known example of culturecidal practices<sup>53</sup> was the case of forcibly taking children away from Aborigine mothers under the pretext of creating opportunities for development, which was to hide the true intention of depriving them of their native culture (‘biological absorption’, practiced until 1970). These children were called the ‘Stolen Generation’,<sup>54</sup> and even though the Aborigine culture has not been completely destroyed, almost 200 years of culturecidal practices (going far beyond the aforementioned policy of forced assimilation of children) led to depopulation and far-reaching disintegration of Aborigine tribes. In 1988, when Australia celebrated ‘200 Years of Australia’ (counted from the beginnings of British settlement in 1788), Aborigines spoke of 200 years of slavery.<sup>55</sup> It was only on 13 February 2008 that a historic gesture was made – the new Prime Minister Kevin Rudd said what hundreds of thousands of Aborigines have been waiting to hear for so long: ‘we say sorry’.<sup>56</sup>

A similar gesture was made half a year later in June, in Canada, where the government was using very similar practices – it had forcibly removed children from Inuit families (their number is estimated at more than 100,000) and placed

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53 The film *Rabbit-Proof Fence*, directed by Philip Noyce and made popular in 2002, told the story of these events.

54 According to estimates of the Australian Bureau of Statistics (ABS) of 1994, 1 in 10 Aborigine children were forcibly transferred this way. However, this issue became a topic of public interest only in 1992, after the judgement in the case concerning the land of the Melanesian Mabo (public address of Prime Minister Keating, in which he apologised for the ignorance and prejudice which had led to children being taken away from their families). In 1995, the Attorney-General of Australia started the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which was concluded in 1997 with the report *Bringing Them Home – Report of the National Inquiry*.

55 26 January, officially the ‘Australia Day’, is called ‘Invasion Day’, ‘Day of Mourning’ or ‘Survival Day’ by the Aborigines. After: *Australia Day – Invasion Day*, available at: <http://www.creativespirits.info/aboriginalculture/history/australia-day-invasion-day#toc1> (accessed on 10 May 2013).

56 For more see: H. Schreiber, ‘Pojednanie międzykulturowe w Australii?’ (Intercultural Reconciliation in Australia?), available at: [http://www.stosunkimiedzynarodowe.info/artykuł,65,Pojednanie\\_miedzykulturowe\\_w\\_Australii.html](http://www.stosunkimiedzynarodowe.info/artykuł,65,Pojednanie_miedzykulturowe_w_Australii.html) (accessed on 12 January 2013).

them in special residential schools managed by the Protestant Church, where the children had been subjected to forced acculturation (referred to as resocialisation of children of Native American descent) for almost 200 years (from around 1800 until 1980).<sup>57</sup> On 23 May 2005, an agreement was reached concerning the payment of compensations for the victims of this system and the Indian Residential Schools Truth and Reconciliation Commission was established to monitor the actions and document the events in this respect. It was finally approved by the government on 10 May 2006. The Commission was based on similar commissions already functioning in Africa (Sierra Leone, South Africa).

The experience related to such practices resulted in adding the following passage to the Preamble of the Declaration:

Recognising [...] the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.

A different example (in the institutional sense) of solving the tensions between the state and the native people is Norway. In 1997, at an official opening of the *Sámediggi* (the parliament of the Sami people), King Harald V said:

The state of Norway was founded on the territory of two peoples – the Sámi people and the Norwegians. Sámi history is closely intertwined with Norwegian history. Today, we express our regret on behalf of the state for the **injustice committed against the Sámi people through its harsh policy of Norwegianization**.<sup>58</sup>

Norway's policy towards the Sami (who also inhabit some areas of Finland, Sweden and Russia) has been gradually changing since the 1950s.<sup>59</sup> It was also in

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57 J. J. Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice', *University of Toronto Law Journal*, vol. 52, no. 3, 2002. Native American children were sexually abused in schools on a mass scale, and due to the lack of adequate funding for the schools they were also subjected to forced hard physical labour. There was also virtually no true education in these schools, as it mainly came down to depriving the children of their native language, culture, customs, and spirituality. In some of these schools the mortality rate of children was as high as 50 percent; cf.: <http://www.cbc.ca/news/politics/story/2013/04/26/truth-and-reconciliation-saganash-paul-martin.html> (accessed on 26 April 2013).

58 Quotation after: the official website of the Embassy of Norway in Poland: [http://www.amb-norwegia.pl/AboutN\\_orway/policy/Ludno/population/sami/policy/](http://www.amb-norwegia.pl/AboutN_orway/policy/Ludno/population/sami/policy/) (accessed on 10 March 2013).

59 In 1956, the Minister of Culture and Church Affairs established a commission to deal with the problems of the Sami. A report issued by the commission in 1959 proposed a new political line which completely departed from the policy of Norwegianisation and

Norway that education had once been used to systemically eliminate the Sami culture. In 1974 the Sami Development Fund was established, and two years later the Reindeer Husbandry Agreement was adopted. In the 1980s, the Sami Rights Committee and the Sami Culture Committee were established. This resulted in the adoption of an act establishing the Sámediggi and an act regulating the legal status of the Sami. The first elections to the Sámediggi were held together with the elections to the Norwegian parliament in September 1989 and the first session was officially opened by King Olaf on 7 October 1989.

In 2000, the Norwegian parliament established a fund for the Sami that is managed by the Sámediggi. The money from the fund is used for actions aimed at supporting the development of the language, culture and lifestyle of the Sami and is meant as a collective compensation for the damage and injustice suffered by the Sami due to Norway's actions.

We could say that the establishment of mechanisms to deal with the past in all the countries in which the indigenous peoples are finally starting to participate in the public debate is simply a necessity. The motto 'never again' has become central to the settlement of the dramatic past not only in the countries which are rising from military dictatorships (Latin America) or communist regimes (East-Central Europe) but also in those which saw a fundamental change in the perception of the rights of people (minorities or indigenous peoples) which used to live on the margins of the official social life.

The concept of the right to the truth emerged as a new component of human rights, based upon the existing norms, such as the requirement to ensure freedom of speech and the civil right to seek information, the requirement to make information available and to convene proceedings in cases concerning the violation of human rights.<sup>60</sup> In the light of this right, apology and compensation for culturecidal practices committed against indigenous peoples in the past are a prerequisite for the implementation of the idea of 'cultural justice' and the foundation of the process of cultural reconciliation. One of the means of ensuring

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assimilation practiced at that time. On the basis of recommendations in 1962–1963 the Ministry presented a report to the Storting which became the foundation for the first comprehensive parliamentary debate on the principles which were to underlie the Norway's policy towards the Sami people. After: <http://www.amb-norwegia.pl/facts/sami/sami/sami.htm> (accessed on 20 January 2007).

60 G. Skąpska, 'Law, rights and democracy after totalitarianism', in A. Soeteman (ed.), *Pluralism and Law*, Dordrecht–Boston 2001, p. 155 ff; see also: J. E. Mendez, *An Emerging Right to Truth: Latin America Experiences*, Oñati 1999.

restorative justice for the victims of culturecidal practices can be the truth and reconciliation commissions.<sup>61</sup>

## Culture and cultural life fifty years after Lemkin

In the part of the chapter of *Axis Rule...* devoted to genocide, titled 'Recommendations for the Future', Lemkin formulated important objectives which allow us to narrow down his vision of culture:

The world represents only so much culture and intellectual vigour as are created by its component national groups. [...] The destruction of a nation, therefore, results in the loss of its future contributions to the world. [...] Among the basic features which have marked progress in civilization are the **respect for and appreciation of the national characteristics and qualities contributed to world culture by the different nations** – characteristics and qualities which, as illustrated in the contributions made by nations weak in defence and poor in economic resources, are not to be measured in terms of national power and wealth.<sup>62</sup>

Lemkin's devotion to the idea of cultural diversity and his vision of multicultural states, respecting the minorities living within their borders, was deeply rooted in his identity of a patriotic Pole and a Jew by descent. Anthony Dirk Moses sums it up very aptly:

Lemkin's was an ecumenical cosmopolitanism. Being a Polish patriot and advocate for all cultures never entailed renouncing his Jewish heritage or cultural rooting. His Jewish identity was not structured like a zero sum game. He always mentioned the genocidal persecution of the Jews by the Nazis in the same breath as the mass murder of Polish Christians, Roma, and other victims. Central was his attachment to the notion of 'spiritual nationality', a concept that most likely can be traced to Jewish sources as well as to Herder.<sup>63</sup>

Although cultural genocide is not a separate category recognised by international law, its partial inclusion in the definition of genocide in Point (e) of the

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61 Such a commission was also established in Australia by the parliament act of 1991 (the Council for Aboriginal Reconciliation). Its mandate was not limited to the issues of the Stolen Generation; it concerned the entire process of reconciliation between the indigenous peoples of Australia and the white settlers. Its mandate expired in 2000 with the presentation of the Australian Declaration Towards Reconciliation and the Roadmap for Reconciliation to the government and with the establishment of the non-governmental organisation Reconciliation Australia in its stead (<http://www.reconciliation.org.au/>).

62 Cf.: Footnote 2.

63 A. D. Moses, 'Raphael Lemkin, culture...', p. 24.

Convention of 1948 is an important proof that at least some of its forms are considered unacceptable. The same concerns the U.N. Declaration on the Rights of Indigenous Peoples, which while including the description of culturecidal practices in points (a)–(e) of Article 8, despite eventually not referring to them with the collective term culturecide or ethnocide, points to the fact that culturecide is actually criminalised in this form under the category of forceful assimilation and destruction of culture.

Although the other binding instruments in the area of human rights seemingly do not address culturecide and focus on fundamental rights, such as the right to life, the right to a fair trial or the prohibition of torture, there is also Article 27 of the International Covenant on Civil and Political Rights, which since 1966 has been setting the standard of state responsibilities in the field of guaranteeing the right to cultural life, and Article 15 of the International Covenant on Economic, Social and Cultural Rights, of 1966:

Article 27 ICCPR

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities **shall not be denied the right**, in community with the other members of their group, **to enjoy their own culture**, to profess and practise their own religion, or to use their own language.

Article 15 ICESCR

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) **To take part in cultural life;**
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall **include those necessary for the conservation, the development and the diffusion of science and culture.**
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and **co-operation in the scientific and cultural fields.**

In preparing to draw up its General Comment to Article 15, on the basis of Rule 65 of the Rules of Procedure, the Committee on Economic, Social and Cultural Rights (henceforth: CESCR) held two debates – one in 1992 and another in 2008



– dedicated solely to the issue of the right to take part in cultural life with the participation of representatives of international non-governmental and governmental organisations as well as academic institutions. Already in 1992 it was decided that the concept of ‘cultural life’ should be given a much broader meaning, taking into account both the individual and the collective aspect and reflecting the understanding of culture as ‘a way of being and feeling, in short, the community’s way of life and thought’<sup>64</sup>. In 2008, the CESCR ordered 17 background papers<sup>65</sup> for the debate on the contemporary understanding of the right to take part in cultural life. It must be stressed that the initial understanding of the notion of ‘cultural life’ by the drafters of the Covenant – as reflected by the *travaux préparatoires*<sup>66</sup> – was restricted to the participation of the masses in the sphere of cultural practice created by an elite, that is in ‘high’ culture. Nowadays, both the national reports and the guidelines of the Committee itself address such ‘new’ notions (compared to the international reality of the 1960s and 1970s) as multiculturalism, cultural identity or cultural pluralism. Many states now refer to the promotion of intercultural dialogue, cultural education, and the protection of the culture of minorities and indigenous peoples, including the protection of minority languages<sup>67</sup>. The need to adopt a broad, anthropological definition of culture, reflecting actual practice, is considered essential in all the positions submitted to the CESCR.

In various forms, the protection of the right to live in one’s own culture under the notion of the right to take part in cultural life is also included in the provisions of other instruments of international law, specially human rights, for example the International Convention on the Elimination of All Forms of Racial Discrimination (Article 1), the Framework Convention for the Protection of National Minorities (Article 5), the European Charter for Regional or Minority Languages, as well as in several declarations, such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by

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64 S. R. Konaté, *Implementation of Cultural Rights. Analytical Study of Article 15 of the ICESCR*, 1992, E/C.12.1992/WP.4.

65 Committee on Economic, Social and Cultural Rights, *Background Papers*, 2008, E/C.12/40/3 ff.

66 *Annotation of the Text of the Draft International Covenants on Human Rights*, 1955, UN Doc. A/2929.

67 Y. Donders, *Cultural Life in the Context of Human Rights. Background Paper*, 2008, E/C.12/40/13, p. 5.

the UN General Assembly in 1992. Furthermore, it also appears in the judgements of international criminal courts.<sup>68</sup>

In this new line of interpreting 'cultural life' culture comprises all aspects of life, and in that way is in accordance with the Lemkins' definition of culture and his vision of its crucial role for sustaining also other aspects of life: social, political, moral, biological, physical, religious or economic.

## Conclusions and final considerations

Many grave human rights violations, as mentioned in the examples of Aboriginal tribes, Sami or Inuits, imply a real danger of cultural genocide. The World Commission on Culture and Development noted on this threat for indigenous peoples:

Quite frequently, ... their disappearance as identifiable communities is not simply a regrettable by-product of development but results from a stated or implicit policy. This process has been called cultural genocide or ethnocide. ... **Cultural genocide is the process whereby a culturally distinct people loses its identity** as its lands and resource base is eroded, and as the use of its language and social and political institutions, as well as its traditions, art forms, religious practices and cultural values is restricted. This may be the result of systematic government policy; but even when due to the impersonal forces of economic development, it is still ethnocidal in its effects.<sup>69</sup>

This situation points out to the fact that the distinction between biological and cultural aspects is still by no means clear. The word 'culturecide' might allow us to better grasp the disputed understanding of what it means to 'destroy' a human group: whether it is necessary to physically kill them, or whether they can be 'killed' in more subtle and apparently 'civilised' ways.<sup>70</sup> Lately, this concept appeared again, describing the wanton destruction of cultural heritage sites as visible evidence of cultural identity and diversity in Mali, Syria and Iraq, raising great international concerns and inspiring actions to prevent these atrocities, including first UN Security Council Resolution devoted exclusively to unlawful destruction of cultural

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68 Cf. e.g. the separate opinion of judge Mohamad Shahabuddeen in 2004 in the Krstić case (Case No. IT-98-33-T), tried before the International Criminal Tribunal for the former Yugoslavia; see also: Prosecutor v. Blaškić, Appeals Chamber, Case IT-95-14-T (2004) (Judgment); Prosecutor v. Jakić, Case IT-01-42/I-S, Trial Chamber, 51 (2004) (Judgment).

69 *Our Creative Diversity, Report of the World Commission on Culture and Development*, UNESCO Publishing, Paris 1996, pp. 69–70.

70 R. Krieken, 'Rethinking cultural genocide: Aboriginal child removal and settler-colonial state formation', *Oceania*, vol. 75, Issue 2, December 2004, pp. 125–151.

heritage in the context of armed conflicts and terrorist attacks (Resolution 2347, adopted on 24 March 2017) and following this Resolution Joint Declaration of the Ministers of Culture of G7, expressing ‘deep concern about the destruction of cultural heritage sites, as such actions obliterate irreplaceable patrimony, extinguish the identity of targeted communities and erase any evidence of past diversity or religious pluralism’<sup>71</sup>. In this context a new term has been used by the Director General of UNESCO Irina Bokova: ‘cultural cleansing’<sup>72</sup>

*The modus operandi* consists of an extremely coherent and violent attempt to «cleanse» the society from any form of diversity, as well as and from all its places and vectors of cultural practice and free thinking. This includes deliberate attacks on places of worship and memory, as well as the killing of journalists and teachers, and the revision of education curricula to foster hatred against the other.<sup>73</sup>

Therefore, the concept of banning cultural genocide in international law has not really been ‘rejected’; it is in fact ‘silently present’. Its presence in international law is silent because it is hidden under different names (e.g. forced assimilation or forcible transfer of children)<sup>74</sup> and fragmented in diverse international law instruments: human rights law, international humanitarian law, international criminal law and international cultural heritage law<sup>75</sup>.

Although it seems quite unlikely for the very notion of ‘cultural genocide’ to be included in the catalogue of international crimes, in the political and international sphere it definitely manifests itself quite ‘loudly’. It is directly articulated by the

71 The First G7 Ministerial Meeting on Culture, *Joint Declaration of the Ministers of Culture of G7 on the Occasion of the Meeting “Culture as an Instrument for Dialogue Among Peoples”*, Florence, 30 March 2017.

72 <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin>, accessed on June 2016.

73 *The Protection of Heritage and Cultural Diversity: A Humanitarian and Security Imperative in the Conflicts of the 21st century. Background note to the International Conference “Heritage and Cultural Diversity at Risk in Iraq and Syria”*, UNESCO Headquarters, Paris, 3 December 2014, p. 6.

74 As a result of which some researchers speak of a solely rhetorical power of the argument of cultural genocide (cf.: A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge 2007, p. 114; and: A. D. Moses, ‘Raphael Lemkin, culture...’, p. 39). According to Moses, unfortunately today everything that does not meet the requirements of the conventional narrow definition of genocide ‘falls beneath the radar of international public opinion’ (*ibid.*, p. 41).

75 Y. Donders, ‘Old Cultures Never Die? Cultural Genocide in International Law’, in I. Boerefijnnetal (ed.), *Human Rights: Pre-Conflict, In Conflict, and Post-Conflict*, Intersentia 2012.

descendants of culturally uprooted indigenous peoples. Culturecide thus has a central place in the debate on settling the accounts of the colonial past in the territories of former colonial empires. This ‘unfinished’ project of international law, started by Raphael Lemkin in 1940s, is finding its continuation in the modern public debate and political argumentation today, going far beyond the colonial discourse. It will surely not disappear from international relations, and its continued presence in the legal and political discourse for more than 70 years can also mean that it will be given a proper separate form and name in international law in the future. Paul Martin, former Prime Minister of Canada (2003–2006), said at a hearing before the Canadian Truth and Reconciliation Commission in April 2013: ‘Let us understand that what happened at the residential schools was **the use of education for cultural genocide**, and that the fact of the matter is — yes it was. Call a spade a spade.’<sup>76</sup> Calling these kinds of practices simply “destruction of culture”, “loss of cultural heritage” or “forced assimilation” in the context of dramatic suffering of thousands of people seems no longer enough today: not in the political sense, and neither in the moral or legal one.

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76 CBC News, ‘Paul Martin Accuses Residential Schools of “Cultural Genocide”’, available at: <http://www.cbc.ca/news/politics/story/2013/04/26/truth-and-reconciliation-saganash-paul-martin.html> (accessed on 26 April 2013). One of the witnesses at these hearings, Romeo Saganash, who had been removed from his family of the Cree people, said: ‘I can never be normal. And none, none of those kids who were sent to residential schools can claim to be normal today. It’s impossible’ (*ibid.*).