

Accountability for Uyghur Cultural Genocide under International Law: Call for an Overhaul of the International Treaties Framing the Crime of Genocide



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by **Vincent Lefebvre**

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Introduction

On August 31, 2022, the UN High Commissioner for Human Rights, Michelle Bachelet, released a report, long-awaited by human rights organisations, on the human rights situation in the Xinjiang Uyghur Autonomous Region of the People's Republic of China. It concludes that the human rights violations suffered by the Uyghurs may constitute “*international crimes, in particular crimes against humanity*”¹. Although it does not contain any new disclosures, this report finally provides the UN with an official position, after its credibility has been questioned in recent months due to Michelle Bachelet’s conclusions on her visit to Xinjiang to assess the situation and respect for the human rights, echoing the Chinese government’s propaganda and its inaction. Reporting credible evidence of “*torture and sexual violence*”² against the Uyghur minority as well as other Muslim minorities, the UN calls on the international community to act.

For decades, the Sunni Muslim Uyghur minority in Xinjiang has been targeted for ongoing persecution by the Chinese authorities. Violence have been escalating since early 2014, with the onset of a genocidal policy assuming various forms to eradicate this community's identity from History and beyond. Since China nitrates the abuses committed, and thereby is unwilling to pursue domestic justice, recourse for Uyghurs must be made at the international level, which possesses the tools to prosecute those responsible for crimes of mass atrocity, i.e. the International Criminal Court. Despite the abundant evidence and testimonies provided by survivors, and although many countries have strongly condemned China's actions, going so far as to allege genocide according to some Western States, a significant number of countries are backing China or have refrained from issuing any statement, mainly by fear of economic repealing.

As early as April 2021, following months of research, GROW had alerted on the human rights situation in Xinjiang province. In our view, the atrocities committed against Muslim minorities in Xinjiang are not only crimes against humanity but also genocide taking, at first glance, the form of cultural annihilation of these populations.

To this day, the Chinese government has not been held legally accountable for the genocide of the Uyghur minority. Instead of assessing the degree of political willingness of individual United Nations member States, it is necessary to look at the range of obstacles that constrain the UN's leeway. Whence the failure to hold the Chinese authorities accountable for their actions and to impose legal sanctions for violations of international law? What are the grounds for such legal inaction on behalf of the United Nations? What are the alternative forms of justice available?

While the UN is taking the measure of the crimes committed against Muslim minorities in the region, recognising in its report the commission of alleged crimes against humanity, this article aims to reaffirm and develop the position of our think tank. Through normative-descriptive analysis of the international legal instruments framing the crime of genocide as well as China's international law practices, this paper argues for an overhaul of the international texts governing the crime of genocide. It first provides an

¹ OHCHR. (2022). *Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China*. *ohchr.org*. [online] 31 Aug. p. 3. Available at: <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf> [Accessed 21 Sept. 2022].

² *Ibidem*.

analysis of the alleged substantive nature of the State-imposed extinction of the Uyghurs. It then addresses international law loopholes regarding accountability for cultural genocide. At last, it considers the intrinsic limitations arising from China's practice of international law and questions the tools and alternative forms of justice to deal with China's legal shield.

Uyghurs' state-imposed extinction: A genocide down to its cultural essence

The International system is experiencing more than ever a crisis of legitimacy. Historically, the UN, criticised for being an undemocratic and highly politicised institution, has always enabled Western countries to strengthen their influence on the international scene. In the present case, it is important to keep this element in mind, in order to guarantee total impartiality in the definition of the crimes in progress. Indeed, as mentioned earlier, all the countries accusing China of committing genocide are Western countries, led by the United States, China's political enemy and commercial opponent. It is therefore important to step back from the political statements and make a factual and legal cross-assessment of the situation. Criminal law, whether domestic or international, requires sufficient elements of crimes to establish the existence of crimes of sufficient gravity for the Court to address them, where appropriate within its jurisdiction. The jurisdiction of the International Criminal Court (ICC) is defined in Article 5 of the Rome Statute. Its material jurisdiction is therefore limited to the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Assessing the violence committed against the Uyghur population is an essential but complex task, due to the legal implications of certain categories of crimes, notably genocide. Yet some Western countries have blamed China for committing genocide through statements or motions. Still, as Stef Block, Danish Minister of Foreign Affairs, underlined upon the adoption of such a motion by his country's parliament, the term genocide used to refer to the persecution of the Uyghur minority is not recognised by the UN nor by an international tribunal. The labelling of genocide is therefore a contentious issue. As a matter of law, Article II of the 1948 Genocide Convention defines the crime of genocide as followed:

“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; [physical genocide]*
- (b) Causing serious bodily or mental harm to members of the group; [physical genocide]*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [physical genocide]*
- (d) Imposing measures intended to prevent births within the group; [biological genocide]*
- (e) Forcibly transferring children of the group to another group. [biological genocide]”³*

According to this internationally agreed definition, two major elements must be observed simultaneously to label an act of persecution as a crime of genocide. On the one hand, there is the *mens rea*, that refers to oneself intent to destroy a particular group and on the other hand, the *actus reus*, which corresponds to the commission of one of the above listed prohibited acts against members of the so-called group. The

³ United Nations General Assembly. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*. (into force 12 Jan. 1951). A/RES/3/260. 9 Dec. United Nations, Treaty Series, vol. 78, p.277, art. II. Available at: <https://www.refworld.org/docid/3ae6b3aco.html> [Accessed 21 Sept. 2022].

establishment of the mental element is crucial insofar as it affects the characterization of the crime. In the present case, determining whether there is an individual, collective or State intent to annihilate the Uyghur people in part or in whole is necessary to specify the nature of the persecution of which they are the target and to conclude whether it constitutes a crime of genocide or rather a crime against humanity. However, it is an element that cannot be easily established; firstly because China is an opaque State that stifles free information and secondly because the authorities deny the allegations against them, justifying their policy towards the Uyghurs on the grounds of the fight against poverty and Islamic separatism.

As a consequence, explicit articulations of intent are relatively rare. However, as the jurisprudence of the International Criminal Court in the *Al Bashir case* suggests, evidence of explicit genocidal intent is not required to establish *mens rea*.

In this regard, the International Criminal Tribunal for the former Yugoslavia (ICTY) has ruled that the genocidal intent must often be inferred based on “all of the evidence, taken together”⁴ and that inference must be “the only reasonable conclusion available on the evidence,”⁵ as recalled by its judgment in *Tolimir case*. The ICTY lists relevant factors allowing for the assessment of the genocidal intent, ranging from the general context to the precise nature of the acts committed, including any daily discriminatory measures.

In the present case, although explicit statements of intent are almost non-existent, a significant amount of evidence obtained or relayed through victims' testimonies, reports from NGOs or research institutes or leaked Chinese official documents point to an intention by the Chinese authorities to commit genocide against the Muslim minority. Notably, leaked official documents reveal that the alleged genocidal acts are the result of carefully planned Chinese actions, with guilt traced to the top of China's leadership and Party. According to the ICTY in *Tolimir case*, the existence of such a plan clearly indicates an intent to commit genocide against the concerned people. Other Chinese government documents, obtained in May 2022, state that since 2014, between 900,000 and 1.8 million Uyghurs have been arbitrarily interned in camps whose guards are authorised to kill anyone who tries to escape.

While the Chinese government's repressive policy is consistent with an intent to destroy an ethnic group, particular attention must be paid to the nature of the violence committed against the Uyghurs, i.e the *actus reus*. Article II of the Genocide Convention lists five acts from (a) to (e) which committed independently of one another with the intent to destroy a group amount to a genocide.

As a matter of fact, for decades, Uyghurs have been victims of a policy of marginalisation by the Chinese government, which has gradually turned into a dual repressive policy of assimilation into the dominant Han culture and internment in camps for the most community-minded. This policy of Hannification takes several forms: mass surveillance and detention in ‘vocational education and training centres’, placement and indoctrination of Uyghur minors in families of the Han ethnic majority (e), sterilization of women and birth control (d) and destruction of Uyghur culture in all its past, present and future manifestations. The aim is to gradually limit their freedoms until their culture, including their religion and language, is totally eradicated, which the Chinese authorities justify by the fight against separatism.

⁴ ICTY Judgement (Chamber II). 12 Dec. 2012. Case No: IT-05-88/2-T. PROSECUTOR v. ZDRAVKO TOLIMIR. Par. 34.

⁵ Staki} Appeal Judgement, par. 219; Čelebići Appeal Judgement, par. 458; Gotovina et al. Trial Judgement, par. 303; Popovi} et al. Trial Judgement, par. 12 ; Tolimir Trial Judgement, par 34.

They are already forbidden to possess a Quran, to wear the veil or to use the Uyghur language in the region's universities. Meetings are banned, books are burnt, and mosques have been closed and destroyed, such as Keriya, a UNESCO World Heritage site⁶. All these acts of violence are directed towards the eradication of the community, its culture, and its heritage. However, due to the opacity of the Chinese regime, it is difficult to say whether this violence goes beyond the attack on their lifestyle. Although multiple testimonies recount killings (a), rapes, disappearance, and torture (c) of Uyghurs, it is difficult to know whether these attacks are systematic, and many experts believe a widespread physical extermination of the ethnic minority would be unlikely⁷.

Still, the International Criminal Tribunal for Rwanda (ICTR) elaborated upon the category of genocide "causing serious bodily or mental harm" (b) in *Prosecutor v. Akayesu*, finding that it encompasses both mental and physical torture and "can be caused by the enslavement, starvation, deportation and persecution [...] and by [the victims'] detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture."⁸ It appears today, based on the information available that much of what the ICTY is describing here is consistent with China's treatment of the Uyghurs⁹. Moreover, it is important to recall that the crime of genocide is a crime of intent and not a crime of result. As the name of the Convention on the Prevention and Punishment of the Crime of Genocide indicates, the purpose of the text is to provide prior protection to populations threatened by any plan of annihilation underway or about to be carried out. Therefore, although all the evidence suggests that China is intentionally committing genocide against the Uyghur minority, why has there been no criminal action taken against those responsible?

The report of the UN High Commissioner for Human Rights on the situation of human rights in the Xinjiang region, although remaining a step forward for the Uyghur cause, does not make use of the word genocide. The UN remains cautious, as it hopes to maintain open communication channels with Beijing in order to obtain guarantees of China's compliance with human rights. Yet, it seems that the Organisation has not completely ruled out these qualifications when, although insisting on crimes against humanity, it refers to the commission of "international crimes"¹⁰ against these populations, among which is the crime of genocide. The UN is now required to make use of this report in order to open an investigation into the crimes committed by the Chinese government, despite the legal obstacles that we will discuss in the third part, while not ruling out any qualification of crimes prior to this investigation. This is all the more important as the UN must regain its credibility when it comes to promoting human

⁶ DIOUF, F., DUFERMONT, T., GIRARD, I., LEFEBVRE, V., SCHMITZ, C. & SEEPERSAD, I. (2021). Uyghurs in the Contemporary International Society: From Awareness to Action. *Generation for Rights Over the World*. [online] Available at : <https://www.growthinktank.org/en/uyghurs-in-the-contemporary-international-society-from-awareness-to-action-2/> [Accessed 22 Sept. 2022].

⁷ *Ibidem*.

⁸ Free translation: ICTR Judgement (Chamber I). 2 Sept. 1998. Case No: ICTR-96-4-T. PROSECUTOR v. JEAN-PAUL AKAYESU. Par. 503.

⁹ VAN SCHAACK, B. (2021). Genocide against the Uyghurs: Legal Grounds for the United States' Bipartisan Genocide Determination. *Just Security*.

¹⁰ OHCHR. (2022). *Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*. *ohchr.org*. [online] 31 Aug. p. 3. Available at: <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf> [Accessed 21 Sept. 2022].

rights, especially among NGOs. In the present case, this means translating its political declarations into action in order to stop the crimes underway and to allow the victims to seek reparation.

Similarly, few governments have officially and publicly labelled these atrocities as genocide, which in the light of what has just been demonstrated seems to suggest a downplaying of the intent, gravity and scale of the atrocities committed by the Chinese authorities against the Uyghur minority. Such denial can be attributed *inter alia* to the global rise in Islamophobia since 9/11, to communitarian conflicts within Islam itself between Sunnis and Shiites, or even to the economic interests of certain States. Nevertheless, an intrinsic explanation exists and is directly linked to the conception and recognition of the genocide by the individual member States of the international community. In fact, for comparatively historical reasons, there is a tendency to narrow this genocide down to ethnocide, i.e. the intentional elimination of the tangible and intangible cultural heritage of a people or nation for political, military, religious, ideological, economic, ethnic or racial reasons, since the persecutions, as described above, target Uyghur culture. While it is clear that a people cannot survive the extinction of its culture, the concept of cultural genocide is neither formalised in international criminal law, nor can it be regarded as having reached the status of customary international law as State practice needs to be sufficiently widespread and representative, as well as consistent¹¹.

International law early lacune to account for cultural genocide

There have been two major opportunities in the contemporary history of international law to recognise cultural genocide as an international crime; the first in 1948 during negotiations on the definition of genocide in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the second in 2007 during talks on the United Nations Declaration on the Right of Indigenous Peoples (UNDRIP).¹²

Historically, the earliest definition of the term genocide was given by the Polish lawyer Raphael Lemkin. In 1943, in his book 'Axis Rule in Occupied Europe', he coined and defined the concept of genocide as being "political, social, cultural, economic, biological, physical, religious and moral in nature".¹³ Lemkin provides a conception of genocide that goes beyond the attack on physical integrity and extends to all violence aimed at annihilating aspects of the identity of the targeted group and regulating its daily life, such as the prohibition of learning and practicing the local language and the prohibition of religious practice. In his view, it cannot be otherwise as 'the very essence of genocide is a systematic attack on the culture of a group'.¹⁴ Culture, which is plural, creates difference, and it is exactly against this singularity of identity that the atrocities constituting genocide are directed. This vision of genocide including its

¹¹ United Nations General Assembly. (2018). *Draft conclusions on identification of customary international law*. International Law Commission 70th Sess. Conclu. 8(1). Available at: <https://docenti.unimc.it/andrea.caligiuri/teaching/2021/24045/files/documents/draft-conclusions-on-identification-of-customary-international-law-2018> [Accessed 21 Sept. 2022].

¹² NOVIC, E. (2016). *The Concept of Cultural Genocide: An International Law Perspective*. Oxford University Press.

¹³ *Ibidem*.

¹⁴ BILSKY, L. & KLAGSBRUN R. (2018). The Return of Cultural Genocide? *European Journal of International Law* 29: 373–96.

cultural dimension was adopted by the United Nations General Assembly in 1946 in its Resolution 96(1)¹⁵ and which Lemkin expected to be formalised following the negotiations of the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948.

Nevertheless, while the early stages of the drafting process of Article II of this convention incorporated a comprehensive definition of genocide as being also of a cultural nature, the political process of negotiating the terms of the treaty gradually removed this dimension, with some States judging that “*the gap between mass murder and the closure of libraries was just too large*”¹⁶, to the benefit of their accession to the convention. This was mainly the case of countries such as France, the US, the UK and Canada, which used to (still) mistreat minorities including migrants and indigenous peoples. Others, such as Poland for example who even though concerned about the acts of cultural annihilation claimed that cultural genocide should be distinguished from “the physical extermination of the group”¹⁷ and framed within “a convention aimed at the protection of minority rights”¹⁸. As a consequence, an *ad hoc* committee was set up to discuss in a more efficient way the various matters of disagreement, including *inter alia* the issue of cultural genocide. This committee was composed of Lebanon, Poland, the Soviet Union, Venezuela, China, France and the US.

The highly polarised debates about whether or not to include cultural genocide in the drafting of Article II led to the compromise of isolating this provision in an Article III so as to facilitate its deletion or possible reservation upon ratification of the treaty. Said Article III, could be read as follows:

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

1. Prohibiting the use of 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.”¹⁹

With regard to the acts mentioned, Article III as formulated would have allowed China's atrocities against the Uyghurs in Xinjiang to be qualified in law as amounting to a genocide in its cultural meaning. Nevertheless, despite the focus on it, it was eventually decided to “remove cultural genocide from the Genocide Convention”.²⁰ Article III was suppressed and following the Greek delegate’s proposal, the

¹⁵ United Nations General Assembly. (1946). *The Crime of Genocide*. A/RES/96. 11 Dec. 55th PM. Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/47/PDF/NRO03347.pdf?OpenElement> [Accessed 21 Sept. 2022].

¹⁶ HON, K. (2013). Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC. *Senton Hall Law Review* 43: 1–54.

¹⁷ ECOSOC. (1948). *Ad Hoc Committee on Genocide: Summary Record of the Third Meeting*. E/AC.25/SR.3. 13 Apr. p. 728. Available at: <https://digitallibrary.un.org/record/601784/usage> [Accessed 21 Sept. 2022].

¹⁸ ECOSOC. (1948). *Ad Hoc Committee on Genocide: Summary Record of the Third Meeting*. E/AC.25/SR.3. 13 Apr. p. 701. Available at: <https://digitallibrary.un.org/record/601784/usage> [Accessed 21 Sept. 2022].

¹⁹ ECOSOC. (1947). *Ad Hoc Committee on Genocide: First Draft of the Genocide Convention*. E/447. May. p. 701. Available at: <http://www.preventgenocide.org/law/convention/drafts/> [Accessed 21 Sept. 2022].

²⁰ NOVIC, E. (2016). *The Concept of Cultural Genocide: An International Law Perspective*. Oxford University Press.

provision on “forcible transfer of children” was reincorporated within Article II on physical-biological genocide provision. The language of this convention was used in the drafting of the Rome Statute of the ICC, mirroring verbatim the definition of genocide in its Article 6²¹ and flagging the missed opportunity to criminalise cultural genocide.

More than half a century since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, a second event marked the international community's unwillingness to recognise cultural genocide as a crime. The adoption in 2007 of the United Nations Declaration on the Right of Indigenous People brought about a shift from criminal law to human rights law.²² Indeed, the original text considered the total annihilation of a group's culture as a “*collective and individual right not to be subjected to ethnocide and cultural genocide*”²³. Therefore, it acknowledged a right not to be forcibly dispossessed of one's culture, qualifying such an act as cultural genocide. However, the original provisions on cultural genocide were subsequently toned down in the later work on the instrument.²⁴ The specific statements on ethnocide and cultural genocide were reworded, leaving the adopted Article 8 to read: “*Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture*”²⁵. The Final Declaration does, however, provide that States should establish “effective mechanisms of prevention and redress” for actions that deprive indigenous groups of their unique identity, the taking of indigenous lands or resources, and the transfer of population, forced assimilation or propaganda that incites racial or ethnic discrimination against these groups²⁶, all of which were committed by China against the Uyghurs.

Ultimately, this declaration, although symbolic, fails to make reference to and conceptualise in the body of international law the notion of cultural genocide, particularly since, being a General Assembly Resolution, it has no binding value under international law. At most, it can be considered to capture rights that exist under customary international law. Still, according to the 2004 jurisprudence of the ICTY Appeal Chamber in the *Krstic case*, based on the opinion of the International Law Commission, only the physical and biological annihilation of a human group is, in the context of a genocide, considered as a customary rule of international law²⁷. Indeed, few official political statements, meaning from the

²¹ United Nations General Assembly. (1998). *Rome Statute of the International Criminal Court*. (last amended 2010, into force 1 Jul. 2002). A/CONF.183/9. Rome, 17 Jul. United Nations, Treaty Series, vol. 2187, No. 38544, art. 6. Available at: <https://www.refworld.org/docid/3ae6b3a84.html> [Accessed 21 Sept. 2022].

²² NOVIC, E. (2016). *The Concept of Cultural Genocide: An International Law Perspective*. Oxford University Press.

²³ ECOSOC. (1994). *Technical review of the United Nations draft declaration on the rights of indigenous peoples*. Commission on Human Rights 46th Sess. Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/Sub.2/1994/2/Add.1. 20 Apr. Art. 7. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/125/10/PDF/G9412510.pdf?OpenElement> [Accessed 21 Sept. 2022].

²⁴ ECOSOC. (2006). *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session*. Commission on Human Rights 62nd Sess. E/CN.4/2006/79. 22 Mar. Par. 25. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/Go6/119/46/PDF/Go611946.pdf?OpenElement> [Accessed 21 Sept. 2022].

²⁵ United Nations General Assembly. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*. A/RES/61/295. 2 Oct. 61st Sess. Art. 8(1). Available at: <https://www.refworld.org/docid/471355a82.html> [Accessed 21 Sept. 2022].

²⁶ United Nations General Assembly. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*. A/RES/61/295. 2 Oct. 61st Sess. Art. 8(2). Available at: <https://www.refworld.org/docid/471355a82.html> [Accessed 21 Sept. 2022].

²⁷ ICTY Judgement (Appeal Chamber). 19 Apr. 2004. Case No: IT-98-33-A. PROSECUTOR v. RADISLAV KRSTIC. Par. 25.

governments themselves, denounce a genocide of the Uyghurs in China, thus testifying that the concept of cultural genocide is not yet sufficiently widespread and representative to be qualified as a customary international rule²⁸ that would allow prosecution of the Chinese authorities in spite of conventional law.

And yet back in 1966, the international community acknowledged the importance of culture for all, with particular emphasis on the protection of minority cultures, in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976. It recognises that in “*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 practice their own religion, or to use their own language*”²⁹. This article is the main provision of international law regarding the protection of minority rights, alongside with the provisions of the UNDRIP. It admits the primordial role of culture in the functioning of daily life and survival of a group. While the significance of culture and its heritage is universally agreed upon by the UN as an inalienable right, the exclusion of the cultural dimension from the definition of genocide has created a legal gap in the international criminal law tools available to hold accountable those responsible for the “international destruction of a nation's culture and identity-cultural genocide”.³⁰ This gap is a manifestation of what some have called ‘bureaucratic gaze’³¹. The proliferation of global human rights treaties in the post-WWII context in response to wartime atrocities has had the pernicious effect of orienting the focus of States on rules, laws, and regulations at the expense of the macro historical context within which mass atrocities occur. Therefore, the decades of repression suffered by the Uyghur people are not enough to trigger a legal reaction from the international community, because the atrocities they are subjected to are not recognised as taking the guise of genocide under the terms of Article II, while in fact they at least testify to an intent to commit a biological genocide. But if the violence were to amount to physical genocide, would it not be too late to act?

As reactions, condemnations, and sanctions, mostly diplomatic and economic, from the international community multiplied, can this modern Uyghur genocide pave the way for the recognition of cultural genocide as an international crime? Still, should the concept of cultural genocide be codified in international criminal law instruments, there are further obstacles to Chinese officials’ prosecution. Regardless of the nature of the genocide, the Chinese State’ practice of international law has shielded it from any legal conviction for genocide, especially when it is taking place on its sovereign territory.

²⁸ JOHANSSON, T. (2019) Cultural Genocide in International Law: An assessment. *Örebro Universitet*.

²⁹ United Nations General Assembly. (1966). *International Covenant on Civil and Political Rights*. (into force 23 Mar. 1976). A/RES/21/2200. 16 Dec. United Nations, Treaty Series, vol. 999, p. 171, art 27. Available at: <https://www.refworld.org/docid/3ae6b3aao.html> [Accessed 21 Sept. 2022].

³⁰ HON, K. (2013). Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC. *Senton Hall Law Review* 43: 1–54.

³¹ The concept of ‘bureaucratic gaze’ refers to a tendency for governing bodies to overemphasise rules, laws and regulations to the extent that they fail to take into account the broader context and environment in which mass atrocities occur or have occurred.

China's quasi-immunity before international law

Although the concept of cultural genocide could be codified in international law in the near future, there are many other impediments to any process of holding China accountable for its policies towards the Uyghur minority. Legally speaking, holding Chinese officials accountable for a crime of genocide, whatever its nature, is a long and complex process considering China's powerful international status and legal practice.

First, China has refused to ratify many international human rights treaties or has made reservations on certain articles. In particular, China has made reservations to Article 20³² of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and did not wish to ratify the optional protocol to this treaty. As a result, China has no legal obligation to accept on its territory, "regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment"³³ which would allow to corroborate the facts available today. Since 2020 and the first calls from the international community for China to open its territory to an independent fact-finding mission, China has always refused categorically in line with its legal practice. The Chinese authorities' practice of censorship makes it very difficult to obtain unmanipulated evidence that would assess the state of the human rights situation in Xinjiang and convince the Prosecutor of the International Criminal Court that there are sufficient grounds to believe that an international crime is being committed in the region.

Besides, China is not a party to the Rome Statute, which does not allow the ICC Prosecutor to investigate the atrocities committed against the Uyghurs. Nevertheless, since genocide is a norm of *ius cogens* with *erga omnes* value³⁴, there is a mechanism to prosecute States that did not ratify the Rome Statute and whose citizens could therefore not be prosecuted by the ICC. This mechanism would allow for the prosecution of prominent Chinese officials involved in the ethnic Uyghur genocide by referral from the UN Security Council. The problem with this option is China's position on the international stage. As a permanent member of the UNSC, China can veto any decision of the Council and is likely to oppose any such decision that would conflict with its interests.³⁵ Therefore, similarly to the negotiations surrounding the Genocide Convention, the inability to bring Chinese officials before the ICC is a consequence of the political game in the international arena. Moreover, as China never declared the Court's jurisdiction over alleged crimes committed on its territory and covered by the Rome Statute, the Prosecutor cannot initiate

³² United Nations General Assembly. (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. (into force 26 Jun. 1987). A/RES/39/46. 10 Dec. United Nations, Treaty Series, vol. 1465, p. 85, art 20. Available at: <https://www.refworld.org/docid/3ae6b3a94.html> [Accessed 21 Sept. 2022].

³³ United Nations General Assembly. (2003). *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. (into force 22 Jun. 2006). A/RES/57/199. 9 Jan. art 1. Available at: <https://www.refworld.org/docid/3de6490b9.html> [Accessed 21 Sept. 2022].

³⁴ The locution *ius cogens* comes from the Latin 'binding law' and refers to principles of rights that are deemed to be universal and superior, to form the basis of peremptory norms of general international law. A norm of *ius cogens* is said to have *erga omnes* value, when the prohibition of its violation is binding on all States.

³⁵ O'BRIEN, M. (2015). Classifying Cultural and Physical Destruction: Are Modern Historical and Current Human Rights Violations in China: Violations of Criminal Law? *Criminal Law Forum* 26: 533–63.

investigations *proprio motu*³⁶, as was the case recently in the context of the Russian full-scale invasion of Ukraine on February 24th, 2022. In this context, Ukraine, which is not a member of the Court, had previously and twice recognised its jurisdiction, one of which for an indeterminate period of time in order to cover the crimes that would be committed on the whole territory of Ukraine after 20 February 2014³⁷.

Nonetheless, the ICC's recent rulings in the investigation of crimes against the Rohingya people open up a potential legal avenue. The Court considered whether it had jurisdiction to investigate alleged crimes against the Rohingya in Myanmar. Myanmar is not a State Party to the Rome Statute, but the Court considered that since many Rohingyas have fled to Bangladesh, which is a State Party, at least some of the alleged crimes may have taken place on Bangladeshi territory. This led the Court, in 2018, to issue a general judgment declaring that it has jurisdiction over crimes committed in the territory of a non-State Party to the Statute of the Court “*if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.*”³⁸

In this regard, in 2020, two groups of exiled Uyghurs filed a complaint against China before the ICC. The complainants not only asked the Court to open an investigation into abuses committed on Chinese territory, but also into the forced repatriation of thousands of Uyghurs through illegal arrests in other countries, using Chinese embassies, or deportations, including to Cambodia and Tajikistan. But in December 2020, the ICC's then Chief Prosecutor, Fatou Bensouda, said that the abuses described “*were committed solely by Chinese nationals on the territory of China*”³⁹ and that she could not therefore pursue the investigation. She also pledged to keep the case open for further evidence to be submitted, but two years and a subsequent change of prosecutor, the situation remains unchanged. There is very little chance that this avenue of remedy will succeed, as China remains very careful and low-key in its communication and actions.

A further avenue might provide an opportunity to address impunity where international criminal justice and national jurisdictions are lacking, particularly in the case of States not party to the Rome Statute. After more than 10 years of talks, the International Legal Commission adopted on June 3rd, 2022, the first reading on the draft articles on the Immunity of State Officials from foreign criminal jurisdiction. Once adopted, this text should allow the use of universal jurisdiction of States, regardless of the status of the perpetrators of crimes as stated by its Article 7:

“1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.”

³⁶ On their own initiative, without being seized.

³⁷ Office of the ICC Prosecutor. (2022). *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.”* 28 Feb. Par. 3. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> [Accessed 21 Sept. 2022].

³⁸ ICC (Pre-trial Chamber I). 6 Sept. 2018. Case No: ICC-RoC46(3)-01/18. REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT, Par. 64.

³⁹ Office of the ICC Prosecutor. (2020). *Report on Preliminary Examination Activities 2020.* 14 Dec. Par. 73. Available at: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [Accessed 21 Sept. 2022].

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.⁴⁰

Nevertheless, although offering a potential alternative to international justice, universal jurisdiction of States presents some disadvantages, notably the inability to ensure that defendants will stand trial before the foreign criminal court, by virtue of State sovereignty, resulting in numerous trials *in absentia* and non-enforcement of sentences⁴¹. In the present case, the use of universal jurisdiction to prosecute Chinese officials would imply that States recognise the Uyghur genocide under the terms of the Genocide Convention, but also that they find elements directly linking the crimes perpetrated to the Chinese government's 'Big Fishes'⁴². Moreover, given the scale of the abuses, it is no longer time for bargaining but for action. This text offers hope for the fight against impunity, but it is not about to be adopted, much less entered into force and implemented.

Ultimately, only the political interplay, through a reform of the legal instruments of accountability, will decide whether China's cultural genocide of the Uyghurs will lead to prosecution before the ICC⁴³ or any other foreign jurisdiction. Otherwise, it is likely that the violence will continue until the disappearance of Uyghur culture and can never be prosecuted due to the principle of *nullum crimen sine lege*, according to which no legal action can be taken for an act that was not criminalized.⁴⁴

Conclusion

In conclusion, the current international legal framework fails to hold China accountable for the genocide of the Uyghur minority. The few political statements, which are more symbolic than action-oriented, downplay the ongoing atrocities as merely a desire to destroy Uyghur culture. The lack of cultural annihilation in the internationally agreed definition of genocide reveals an inconsistency in the international legal framework regarding the protection of minorities. Offsetting this gap in the availability of international criminal prosecution tools would hardly help the Uyghurs, due to the shelter China has forged through its status and practice of international law.

Yet cultural genocide poses a real threat to minorities and its codification in international treaties would deter or convict States like China that tend to disregard their international legal obligations. While the

⁴⁰ Free translation: United Nations General Assembly. (2022). *Immunity of State officials from foreign criminal jurisdiction*. International Law Commission 73rd Sess. A/CN.4/L.969. Geneva, 18 Apr.–3 June. and 4 Jul.–5 Aug. Art. 7. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/353/99/PDF/G2235399.pdf?OpenElement> [Accessed 21 Sept. 2022].

⁴¹ A trial in absentia and a sentence in absentia refer to a judicial decision pronounced by a judge at the end of a trial, in the absence of the person on trial.

⁴² O'BRIEN, M. (2012). Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the ICC: the Big Fish/Small Fish Debate and the Gravity Threshold. *Journal of International Criminal Justice*, vol. 10, n°3, p. 525-545.

⁴³ O'BRIEN, M. (2015). Classifying Cultural and Physical Destruction: Are Modern Historical and Current Human Rights Violations in China: Violations of Criminal Law? *Criminal Law Forum* 26: 533–63.

⁴⁴ FINNEGAN, C. (2020). The Uyghur Minority in China: A Case Study of Cultural Genocide, Minority Rights and the Insufficiency of the International Legal Framework in Preventing State Imposed Extinction. *MDPI Journal*.

jurisprudence of the International Criminal Court and international ad-hoc tribunals demonstrates an emerging awareness of the limits of international criminal law, a symptom of its manifold dysfunctions remains.

As shown by the early removal of cultural genocide from international treaties, the strong politicisation by States of the law-making process and its mobilisation has strong implications for the effective conduct of justice at the global level. It appears that Law hides the historically more complex and protean nature of genocide, which should not be reduced to its legal definition unless the mistakes of the past are to be repeated. The normative understanding of international relations is to be balanced. International criminal law is the only instrument to hold a State accountable for such crimes, but simultaneously it is the outcome of political bargaining processes. Herein lies the complex issue of human rights protection, which by epitomising the foreign policy guidelines of liberal democracies has irrevocably become a political issue.

Recommendations

In addition to the reiteration of its recommendations contained in the report *Uyghurs in the Contemporary International Society: From Awareness to Action*⁴⁵ of April 2021, GROW :

- Calls on the UN to make use of this report to launch a full investigation into international crimes committed by the Chinese government, and to not rule out any qualification prior to a transparent investigation ;
- Calls on the UN General Assembly (UNGA) to address the shortcomings of international criminal law and its tools regarding accountability for international crimes ;
- In particular, calls on the UNGA to review the primary codification of the concept of genocide in international law to incorporate a cultural dimension, as intended by Raphael Lemkin, when he first coined the notion in 1943 ;
- Reiterates the UN's call on all States to act collectively and take the necessary measures to compel China to respect human rights indiscriminately at home and abroad.

⁴⁵ DIOUF, F., DUFERMONT, T., GIRARD, I., LEFEBVRE, V., SCHMITZ, C. & SEEPERSAD, I. (2021). *Uyghurs in the Contemporary International Society: From Awareness to Action*. *Generation for Rights Over the World*. [online] Available at : <https://www.growthinktank.org/en/uyghurs-in-the-contemporary-international-society-from-awareness-to-action-2/> [Accessed 22 Sept. 2022].

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