

Cultural Genocide and Key International Instruments: Framing the Indigenous Experience

Shamiran Mako*

PhD Candidate, Department of Politics and International Relations, University of Edinburgh,
Edinburgh, UK

Abstract

Since its introduction by Raphael Lemkin during the Second World War, cultural genocide has served as a conceptual framework for the non-physical destruction of a group. Following a vigorous debate over the legitimacy of the concept by states fearing prosecution for ethnocidal acts, namely Australia, the United States, Sweden and Canada, cultural genocide/ethnocide was abrogated from the 1948 Genocide Convention. This pivotal move has shifted the frame of analysis and has sparked a contentious debate about the distinguishing elements of the physical destruction of a people and their cultural dissipation. The achievements of the indigenous peoples' movement throughout the 1980s reignited the debate surrounding cultural genocide within the international arena. This article is both a survey of cultural genocide of indigenous populations of North America, South America and Australia, as well as the role of indigenous social movements within the international arena. It analyzes the development of cultural genocide within international law by Raphael Lemkin, its subsequent debate by the United Nations' Ad Hoc Committee on Genocide, its omission from the Genocide Convention, and its reintroduction by indigenous peoples' mobilization to the international arena. The Declaration on the Rights of Indigenous Peoples, the Indigenous Peoples Rights Act (Philippines), the International Covenant on Economic, Social, and Cultural Rights, the various findings of the International Criminal Tribunal for the former Yugoslavia relating to cultural genocide, the conference findings of the Organization for Security and Co-operation in Europe relating to minorities, along with Lemkin's original reference to the term will be used as frameworks for illuminating the extent and gravity of such crimes.

Keywords

cultural genocide; ethnocide; indigenous peoples; Raphael Lemkin; colonialism; indigenous mobilization

1. Introduction

Since its introduction by Raphael Lemkin, the concept of cultural genocide has often been invoked as a conceptual framework for the non-physical destruction of a group. Following a vigorous debate over the legitimacy of the concept by

*) The author would like to thank Professor Hannibal Travis of Florida International University and Professor Sargon Donabed of Roger Williams University for their helpful comments, as well as the anonymous reviewers for their insightful suggestions.

member States, cultural genocide/ethnocide was abrogated from the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG). This pivotal move sparked a contentious debate *vis-à-vis* that which constituted the destruction of a group; that is, whether the primary focus had to be on the physical destruction of a group as such or whether the cultural dissipation of a group was to be considered equally egregious.

The internationalization of the indigenous peoples' movement, particularly as it applied to indigenous peoples in settler-societies, throughout the 1980s reignited the debate surrounding cultural genocide within the international arena. The inclusion of cultural genocide in the Draft Declaration on the Rights of Indigenous Populations became a hotly debated issue during the annual meetings (throughout the 1990s up to its adoption in 2006) of the Working Group on Indigenous Populations.

Indigenous peoples and organizations saw the inclusion of a cultural genocide clause in the draft Declaration as a critical framework for assessing indigenous cultural degeneration as a result of past and ongoing government policies.¹ Contrarily, certain States sought its exclusion and reckoned it an ambiguous clause lacking in clarity and scope since it was not accepted in international law.² However, the non-physical destruction facet of genocide, which Lemkin emphasized as part of his original usage of the term, is a fundamental factor for assessing the cultural destruction of a group because it exposes other categories of group destruction that are often overshadowed by the limited definition of the Genocide Convention. Also, it is a crucial framework for analyzing indigenous cultural degradation. Recent regional efforts in Europe, Latin America, North America, and Asia, along with international precedents (such as the International Criminal Tribunal for the former Yugoslavia (ICTY) findings in the *Vidoje Blagojević and Dragan Jokic* case), have produced nuanced measures for the incorporation of cultural genocide within the international arena when addressing issues of cultural destruction *vis-à-vis* indigenous peoples.

2. Cultural Genocide,³ Colonialism and the State

The indigenous experience in settler societies has been vital in defining cultural genocide in reference to the non-physical destruction of a group. In many ways,

¹) UNHCHR, 2002, 18.

²) United Nations High Commissioner for Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, U.N. Doc. E/CN.4/2002/98, 18.

³) Ever since Lemkin's original usage of the term ethnocide, many definitions have been created in an attempt to pinpoint exactly what such a phenomenon consists of in the real world. For example, in 1981, the UNESCO-sponsored meeting of experts on ethno-development contended in the *Declaration of San Jose* that "ethnocide means that an ethnic group is denied the right to enjoy,

colonialism was the impetus for legitimizing the destruction of all aspect of native life, as noted by Davis and Zannis:

The intention to replace independence with dependence, an integral factor for all colonial systems, is proof of intent to destroy. Colonialism controls through the deliberate and systematic destruction of racial, political and cultural groups. Genocide is the means by which colonialism creates, sustains and extends its control to enrich itself.⁴

An integral component of colonial policies in settler societies was the need for the expedient integration or assimilation, and in some cases, annihilation of indigenous populations following contact. For colonial administrations, cultural genocide became the most expedient way for tackling indigenous integration without the physical annihilation of aboriginal peoples. As noted by Julian Burger,

In such instances the marginalization of indigenous culture becomes cultural genocide or ethnocide. Ethnocide means that an ethnic group, collectively or individually, is denied its right to enjoy, develop and disseminate its own culture and language. Where indigenous peoples do not face physical destruction, they may nevertheless face disintegration as a distinct ethnic group through the destruction of their specific cultural characteristics.⁵

Within North America, the American-Indian experience is one rooted in both physical and cultural dissipation. This becomes evident upon a closer examination of the way in which law and colonialism were instruments of genocide, both in the physical and cultural forms.

In Georgia, the 1789 statute legalized the indiscriminate slaughter of Creek Indians by declaring them beyond the protection of the State.⁶ Beyond physical extermination, the State implemented policies of acculturation by enacting

develop and transmit its own culture and its own language, whether collectively or individually” (see W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2000) p. 189) As for Chalk and Jonassohn, they assert that *ethnocide* is used “for those cases in which a group disappears without mass killing. The suppression of a culture, a language, a religion, and so on is a phenomenon that is analytically different from the physical extermination of a group” (F. Chalk and C. Jonassohn, *The History and Sociology of Genocide* (Yale University Press, New Haven, CT, 1990) p. 23). Niezen contends that ethnocide or cultural genocide “occurs more often where the state has a firm grip over a subject people but is still striving to secure its national identity. It is usually manifested in policies or programs of ‘assimilation’ aimed at eliminating stark cultural differences and rival claims to sovereignty that arise from first occupation of a territory. Its goal is the elimination of knowledge of, and attachments to, distinct and inconvenient ways of life” (R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley and Los Angeles, 2003) p. 55).

⁴ R. Davis and M. Zannis, *The Genocide Machine in Canada* (Black Rose Books, Montreal, 1973) p. 30.

⁵ J. Burger, *Report from the Frontier: The State of the World’s Indigenous Peoples* (Zed Books Ltd., London, 1987) p. 31.

⁶ R. Strickland, ‘Genocide-at-Law: An Historic and Contemporary View of the Native American Experience, 34 *University of Kansas Law Review* (1985/1986) pp. 713–756, at p. 720.

laws that restricted land entitlements to Indians who had renounced tribal citizenship.⁷

In Canada, the Indian Act of 1876 enabled the federal government to mandate all aspects of Indian life and cultural practices, including the management of reserves, elections of chiefs and councils, taxation, and enfranchisement which were all administered by the Indian agent appointed by the federal government.⁸ Enfranchisement was crucial for the assimilation process as an “enfranchised Indian ceased, in law, to be an Indian”.⁹ Moreover, Indian agents and church leaders dictated and managed the assimilation process by prohibiting aboriginal cultural practices exemplified by the prohibition of the potlatch in BC and the Sun Dance in the Prairies in 1884.¹⁰ Furthermore, residential schools systems were an integral part of the “civilization” process of colonial settlers and an instrument for the institutionalization of cultural genocide. As noted by Castellano, Archibald, and Degané:

Aggressive civilization to accomplish colonial goals was thought to be futile in the case of adults. Residential schooling was the policy of choice to reshape the identity and consciousness of First Nations, Inuit, and Métis children. The persistence of colonial notions of superiority is evidenced in the fact that residential schooling that punished the expression of Aboriginal languages, spirituality, and life ways and attempted to instill a Euro-Canadian identity in Aboriginal children, continued from 1831 into the 1970s.¹¹

Thus, the Canadian government engaged in the methodical transformation of aboriginal cultural and ethnic identities by incorporating such policies within the legal and institutional structures of the State.

Similarly, Australia’s child removal policy was purposive of eliminating and altering aboriginal cultural attachments, without physically annihilating them.¹² The Aboriginal Act of 1897 enabled State Protectors to remove any Aboriginal or half-caste, Aboriginal adult or child and relocate them in other parts of the country.¹³ As with Canada, Australia’s child removal policy was part and parcel of the civilizing project, which was inherently ethnocidal in character. As Van Krieken notes,

⁷ *Ibid.*

⁸ A. Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (University of British Columbia Press, Vancouver, 1995) pp. 77–78.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ M. Castellano, L. Archibald and M. Degané, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*. Ottawa, ON: Aboriginal Healing Foundation, Ottawa, ON, 2008) pp. 1–2.

¹² For a comprehensive discussion on the genocide of aboriginals in Australia see D. A. Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, New York, NY, 2004).

¹³ R. Manne, ‘Aboriginal Child Removal and the Question of Genocide, 1900–1940’, in Moses, *ibid.*, pp. 217–243, at p. 221.

[t]he relationship between European and Indigenous Australian children has broader significance because the removal of Aboriginal children was centrally a ‘civilizing project,’ despite the fact that the subsequent critique of that practice is also undertaken in the name of ‘civilization’. Civilization was the foundation for citizenship in the modern nation-state.¹⁴

This policy enabled Australian governments to systematically and legally alter aboriginal identities by dispossessing generations of aboriginal children of their cultural and ethnic attachments.

As with the US, Canada, and Australia, *indigenismo* policies of Latin American governments toward their Indians populations were also embedded in the legal structure of the State. Mexico’s Reform Laws issued in 1856 modernized the agricultural sector by breaking up lands belonging to the Church as well as indigenous communal land holdings which forced Indians into the national labour market and diluted their traditional and cultural *modus vivendi*.¹⁵ Although successive governments abolished the Land Reforms laws, they nonetheless instilled policies of cultural genocide by forcing indigenous communities into the national education system and economy, which drastically altered their traditional ways of life.¹⁶

In Brazil, various government developmental programs led to an encroachment on protected indigenous hinterland in the 1960s.¹⁷ The government promoted an “emancipation” policy in the 1970s, one parallel to Canada’s “enfranchisement” policy, which pressured educated Indians to formally relinquish their Indian heritage.¹⁸ The policy, although not formally adopted as Canada’s Indian Act, resulted in the destruction of indigenous cultural survival and identity. Similarly, vast development projects and gold mining in the 1980s exposed the Yanomami peoples of the Brazilian Amazon to disease, starvation and missionaries, all of which drastically altered the culture and traditional livelihoods of this small indigenous community.¹⁹

With respect to laws governing indigenous communities, the classification of Indians according to the Brazilian Civil Code is dependent on the extent to which such primitive cultures or legally incapacitated persons are civilized or “acculturated.” Only upon their adaptation into the “civilization of the country” do they relinquish their “incapacitated” status.²⁰ Although the Brazilian Indian Statute

¹⁴ R. Van Krieken, ‘The Stolen Generations’ and Cultural Genocide’. 6:3 *Childhood* (1999) pp. 297–311, at p. 300.

¹⁵ D. Maybury-Lewis, *Indigenous Peoples, Ethnic Groups, and the State*, 2nd edition (Allyn and Bacon, Needham Heights, MA, 2002) p. 16.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 22.

¹⁸ *Ibid.*, p. 23.

¹⁹ *Ibid.*, p. 25.

²⁰ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Brazil, Chapter VI: Human Rights of the Indigenous Peoples in Brazil*, IACHR Doc.29 rev.1, Washington, DC, 1997, para. 11, available at <www.cidh.org/countryrep/Brazil-eng/chapter%206%20.htm>.

contains provisions for the protection of indigenous communities and their traditional values it, nonetheless, categorizes indigenous persons into one of three categories – “isolated”, “undergoing the process of integration” and “integrated” – with the latter category requiring their incorporation into the national community.²¹ As part of the colonial civilization process, the Indian Statute and the Brazilian Civil Code have had severe consequences on the cultural survival of Brazil’s indigenous communities as the lines of integration and assimilation overlap.

3. Lemkin, Colonialism and Cultural Genocide

The policies of colonial powers in settler States epitomized cultural genocide as newly emerging States sought to consolidate newly conquered territories by asserting their dominance over native populations. Raphael Lemkin acknowledged the role of colonization as an instrumental process of his neologism, genocide:

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 of the area by the oppressor’s own nationals.²²

Although Lemkin’s analysis juxtaposed colonial policies with genocide, the adopted version of the Genocide Convention of 1948 differed from Lemkin’s original definition. For Lemkin, culture was an intrinsic component of individual and group well-being in human societies; thus, threats or violations to a group’s culture would ultimately result in the group’s disintegration, assimilation, and physical destruction.²³ However, his emphasis on the inclusion of cultural genocide as part of the genocide convention was contested by States fearing prosecution for their treatment of minorities and those that did not equate cultural genocide as a defining element of genocide.²⁴ Nevertheless, cultural genocide was instrumental in shaping Lemkin’s analysis of the treatment of aboriginals in settler societies.

Lemkin’s unpublished works and personal manuscripts point to the inherent link between genocide, both physical and cultural, *vis-à-vis* colonial powers in

²¹ *Ibid.*, paras. 12–13.

²² R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation Analysis of Government Proposals for Redress* (Howard Fertig, Inc, New York, 1973) p. 79.

²³ D.A. Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghahn Books, New York, 2008) p. 12.

²⁴ Schabas, *supra* note 3, pp. 183–184.

settler societies.²⁵ In reference to colonialism in the United States, Lemkin suggested that colonial enslavement of American Indians was cultural genocide and constituted an “effective and thorough method of destroying a culture, and of de-socializing human beings”.²⁶ It is imperative to note, Lemkin (1948/49) distinguished between “cultural change and cultural genocide”.²⁷ Lemkin perceived the former as a slow and gradual process of adaptation to new situations, while he saw the latter resulting from absolute and violent change that required “the pre-meditated goal of those committing cultural genocide” and believed that the latter only occurs when there are “surgical operations on cultures and deliberate assassination of civilizations”.²⁸

When the concept of cultural genocide is juxtaposed with the colonial policies of settler societies, it becomes clear that the systematic policies of the latter were intended to eliminate the cultural existence of aboriginal populations. These findings point to the fact that the colonial process was inherently ethnocidal in nature and that Lemkin was cognizant of the experiences of native populations in settler societies in his development of the concept of cultural genocide as a paradigm for the non-physical destruction of a group. However, Lemkin’s drive for the inclusion of cultural genocide within international customary law during the drafting process of the Genocide Convention would prove challenging.

4. Cultural Genocide and International Law

Raphael Lemkin’s analysis of genocide in *Axis Rule in Occupied Europe* brought to the fore an exhaustive approach to the understanding of genocide and its role within international law. Parallel to the institutionalization of genocide as an international crime against humanity were the distinct notions of cultural versus biological destruction of a group. Lemkin’s analysis enumerated several dimensions of genocide not limited to the physical and biological destruction of a people, but rather encompassed a wide spectrum of non-physical destruction such as political, social, cultural, economic, religious, moral, as well as biological and physical.²⁹ In broader terms, genocide was a systematic plan to destroy the group by various means and over a spectrum of time:

The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, their national feelings and their religion. It may

²⁵ Moses, *supra* note 23, pp. 90–91.

²⁶ Unpublished works cited in *ibid.*, p. 94.

²⁷ Lemkin *ibid.*

²⁸ Unpublished works, cited in Moses, *supra* note 23, p. 94.

²⁹ Lemkin, *supra* note 22, pp. 82–89.

be accomplished by wiping out all basis of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilized as a last resort.³⁰

When analyzing his position in the aforementioned unpublished works, it becomes clear that the intention to destroy the cultural and social existence of a group through forced integration or assimilation was an integral element and a defining characteristic of Lemkin's conception of cultural genocide. Thus, for Lemkin, the inclusion of a clause on cultural genocide in the drafting process of the Genocide Convention in the 1940s was a crucial element for proscribing the non-physical destruction of a group, and was a key issue for the newly established Ad Hoc Committee on Genocide by the Economic and Social Council in 1948, particularly relating to the establishing the various forms of genocide.³¹

Relatedly, the initial drafts of the UNGC contained two categorical references to the constituting elements of genocide under Articles II and III: namely, acts of physical or biological genocide and cultural genocide. Thus, cultural genocide was incorporated in the initial drafting stages of the Genocide Convention by the Ad Hoc Committee's meeting during the second and third sessions of the Commission on Human Rights, between December 1947 to May 1948. The resulting Draft Declaration 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 national or racial origin or religious belief such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups.³²

Be that as it may, geopolitical and national interests of member countries played a central role in determining the inclusion or exclusion of a cultural genocide clause.³³ The debate surrounding the inclusion or exclusion of a cultural genocide

³⁰ R. Lemkin, 'Genocide-a Modern Crime', 4 *Free World* (1945) pp. 39–43, para. 5, available at <www.preventgenocide.org/lemkin/freeworld1945.htm>.

³¹ United Nations Economic and Social Council, *Ad Hoc Committee on Genocide*, UN Doc. E/AC.25/2, 1948.

³² United Nations Economic and Social Council, *Draft Convention on Prevention and Punishment of the Crime of Genocide*, UN Doc. E/AC.25/12, 1948.

³³ For a comprehensive discussion, see L. Kuper, *Genocide: its Political use in the Twentieth Century* (Yale University Press New Haven, CT, 1981) pp. 30–31 and Schabas, *supra* note 3, pp. 179–189.

clause in the final version of the Genocide Convention became, as succinctly noted by the representative of the United Kingdom, “one of the thorniest aspects of the problem”.³⁴ Thus, the promulgation of a clause that included cultural genocide in the initial draft of the Genocide Convention resulted in profound disagreement from various member States.³⁵ However, the communist countries led by the USSR and the Eastern Bloc fervently advocated the inclusion of the clause based on their experience during Hitler’s reign that led to the prohibition and destruction of language schools, museums, cultural symbols and institutions.³⁶ Schabas argues that Australia, the United States, Canada, Sweden, France, Peru, India, and the United Kingdom, in fact, demonstrated their dissatisfaction with the inclusion of a cultural genocide clause stemming from their ongoing and past treatment of minorities, indigenous groups and immigrants.³⁷ Ultimately, as a result of the latter States’ dissent, cultural destruction, or cultural genocide, was deliberately abrogated from the 1948 Convention.³⁸

³⁴ United Nations Economic and Social Council, *Commission on Human Rights, Third Session*, UN Doc. E/CN.4/SR.76, 1948.

³⁵ For example, the United States’ objection was twofold: one, cultural genocide was not related to genocide in the physical sense of the term and that acts resulting in cultural genocide did not “shock the conscience of mankind”; two, the protection and preservation of a cultural group should fall within the domain of human rights. The Swedish delegation asserted that the cultural protection of minorities should be addressed by general international legal principles rather than through the Genocide Convention. More importantly, it raised serious concerns that Sweden might be accused of cultural genocide due to the country’s education policy toward minorities as well as the government’s forced conversion of the Lapps to Christianity. The Brazilian delegation’s reasoning for the omission of a cultural genocide clause within the Genocide Convention was directly related to the country’s policies toward the assimilation of “local cultures” and that a State “might be justified in its endeavour to achieve by legal means a certain degree of homogeneity and culture within its boundaries”. The Canadian delegation adamantly opposed the inclusion of cultural genocide, noting that the people of Canada were deeply attached to their dual cultural backgrounds comprising of Anglo-Saxon and French elements, and would “strongly oppose” any effort at minimizing the influence of these two cultures in Canada. Iran opposed the inclusion of cultural genocide noting that there was a great difference between the physical extermination of a group and cultural survival and called into question whether barbaric or backward cultures deserved protection from assimilation resulting from the civilization policies of a State. Similarly, the representative of New Zealand also opposed the inclusion of a cultural genocide clause, arguing that it interfered with the Trusteeship Council’s efforts at civilizing the indigenous inhabitants of the Tanganyika regions and that the tribal structure was “an obstacle to the political and social advancement of the indigenous inhabitants ... Thus, the Council was opposed to the maintenance of a distinctive cultural trait of the local population. It would be detrimental to the prestige of the United Nations to include in a convention provisions which were so confused that they might be invoked against its own organs.” The ensuing discussion regarding Article III of the Draft Genocide Convention is available in UN Doc. A/C.6/SR.83.

³⁶ J. Morsink, ‘Cultural Genocide, the Universal Declaration, and Minority Rights’, 21:4 *Human Rights Quarterly* (1999) pp. 1009–1060, at p. 1029.

³⁷ Schabas, *supra* note 3, pp. 183–184.

³⁸ *Ibid.*, p. 186.

5. Remedial Attempts: ILO Conventions C107 and C169

Article 2 of the International Labour Organization's (ILOs) Indigenous and Tribal Populations Convention C107, 1957, the first international body of law pertaining to indigenous populations, contended that "governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries".³⁹

The rights and responsibilities accorded to States under Convention C107 regarding aboriginal populations were problematic when perceived within the assimilationist and ethnocidal policies of the colonial State. In hindsight, Convention C107 legitimized the actions of the State toward its indigenous populations, as the lines between civilizing integration and ethnocidal assimilation were often blurred, particularly when taking into account the inherently prejudicial attitude of the colonial State. As a result, Convention C107 became outdated and contradictory to the universal human rights regime instituted by the United Nations.

The drastic change in attitude following decolonization was the major factor *vis-à-vis* the revision of ILO's Convention C107. Moreover, the internationalization of the indigenous peoples' movement throughout the 1970s and 1980s, along with the study conducted by Special Rapporteur José R. Martínez Cobo for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which led to the creation of the Working Group on Indigenous Populations, brought indigenous concerns to the fore. Taking into account the limited language of the initial Convention C107, it became clear that the Convention, in its original form, was not compatible with the new developments and indigenous demands. Ultimately, the Convention was revised and adopted in 1989. Article 2 of the revised Indigenous and Tribal Peoples' Convention C169 stipulates that "governments shall have the responsibility for developing, *with the participation of the peoples concerned*, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity".⁴⁰ This eliminated the language on the integration of indigenous peoples found in the original clause, replacing it with more tolerant notions of multiculturalism.

The discussion of cultural genocide and international law remained more or less dormant prior to the participation of indigenous groups within the UN system. Indeed, it was the mobilization of indigenous peoples throughout the 1980s that impelled the reintroduction of cultural pressed for the promulgation

³⁹) International Labor Organization, C107 Indigenous and Tribal Populations Convention, 1957, para. 18, available at <www.ilo.org/ilolex/english/convdsp1.htm>.

⁴⁰) International Labor Organization, C169 Indigenous and Tribal Peoples Convention, 1990, para. 22, emphasis added, available at <www.ilo.org/ilolex/english/convdsp1.htm>.

of cultural genocide as an integral component of international legal human rights mechanisms.

6. Indigenous Mobilization and Cultural Genocide

A number of indigenous social movements in recent decades have transformed and sharply altered domestic, regional and international policy initiatives and outcomes regarding the crime of genocide and cultural genocide as it relates to indigenous peoples. The push to address human rights as they pertain to indigenous peoples by numerous indigenous groups from North and Latin America culminated in the formation of the Working Group on Indigenous Populations (WGIP) in 1982, and later in the Permanent Forum on Indigenous Issues in 2000. More specifically, the forums facilitated indigenous participation and dialogue regarding indigenous rights violations, factors that were negligible within the UN system prior to 1969.⁴¹ The movements have, in fact, become a catalyst for enunciating and legitimizing indigenous issues in the areas of genocide, human rights, cultural preservation, environmental protection, and social and economic development within the international arena.

Operationally, the UN Working group was a mechanism for enabling indigenous groups to raise concerns to both UN and State representatives; to engage in active dialogue with State representatives; and to introduce and disseminate their concerns to the international arena.⁴² Its agenda-setting initiatives provide an international rubric for the dissemination of indigenous issues pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, along with the institutionalization of international mechanisms for assessing indigenous rights. The 24th session of the WGIP was attended by 33 Member States, with a total of 583 accredited participants, including non-governmental organisations, indigenous delegates and scholars.⁴³ The great number of participants at the Working Group and their vital concern about indigenous issues was the motivation for the creation of an international mechanism for the protection of indigenous human rights. The WGIP was abolished in 2006 and was replaced by the Expert Mechanism on the Rights of Indigenous Peoples, pursuant to Human Rights Council resolution 6/36 of 14 December 2007.

⁴¹ M. Nakata (ed.), *Indigenous Peoples, Racism and the United Nations* (Common Ground Publishing, Altona, Victoria, 2001) p. 15.

⁴² S. James Anaya, *Indigenous Peoples in International Law*, 2nd edition (Oxford University Press, New York, 2004) pp. 221–222.

⁴³ United Nations Human Rights Council, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session*, UN Doc. A/HRC/Sub.1/58/22, 2006, p. 5.

7. Declaration on the Rights of Indigenous Peoples

At its 38th session, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted resolution 1985/22, which authorized the creation of a draft Declaration on the Rights of Indigenous Peoples by the Working Group. Following years of debate, the Sub-Commission adopted the draft Declaration under resolution 1994/45 as submitted by the Working Group, and forwarded the draft for consideration by the Commission for Human Rights. It became the first concerted effort within international law to specifically outline and address the distinctive notion of cultural genocide/ethnocide since its omission from the UNGC. Article 7 of the Draft Declaration guaranteed that

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.⁴⁴

Over the course of the decade that followed, member States deliberated over the language and scope of the draft Declaration. Issues stemming from the inclusion of self-determination, defining indigenous peoples, land rights and cultural genocide clauses continued to resonate throughout the meetings of the Economic and Social Council, and often dominated the debate of the Working Group's meetings.⁴⁵ With respect to cultural genocide or ethnocide, the initial review of the Draft Declaration by the Secretariat noted that although the terms cultural genocide and ethnocide under Article 7 were not part of any international human rights instruments, their inclusion in was justified as reference to the terminology was used during the Meeting on Ethnocide and Ethnodevelopment in Costa Rica

⁴⁴) United Nations High Commissioner for Human Rights, *Draft Declaration on the Rights of Indigenous Peoples*, Geneva: United Nations, 1994, available at <[www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.sub.2.res.1994.45.en?opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.sub.2.res.1994.45.en?opendocument)>.

⁴⁵) See e.g. *Report of the Working Group on the Elaboration of a Draft "United Nations Declaration on the Rights of Indigenous Peoples"*, UN Doc. E/CN.4/1996/84, 1996; *Report of the Working Group on the Draft Declaration on Indigenous Peoples*, UN Doc. E/CN.4/2000/84, 1999; *Report of the Working Group on the Draft Declaration on Indigenous Issues*, UN Doc E/CN.4/2002/98, 2002; *Report of the Working Group Established in Accordance with the Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session*, UN Doc. E/CN.4/2006/79 (2006).

in 1981, sponsored by United Nations Educational, Scientific and Cultural Organization (UNESCO).⁴⁶ However, this position changed as the Working Group proceeded to debate the scope and implications of the Draft Declaration. In the 2003 Report of the Working Group, Chairperson and Rapporteur Luis-Enrique Chávez noted that the references to cultural genocide and ethnocide were unclear to certain States and that the terms were not accepted in international law. It was noted that although the terms were used in the 1991 Declaration of San José, they were not developed by States, and were, as a result, not part of international law. Moreover, member States noted that the language under Article 7 was unclear and expressed uncertainty about the words ethnocide and cultural genocide.⁴⁷ The United States, Norway, New Zealand and Canada submitted proposals calling for the use of alternative language in reference to the terms ethnocide and cultural genocide.⁴⁸

The recommendation for the removal of cultural genocide and ethnocide from Article 7 of the Draft Declaration took place during the 59th session of the Economic and Social Council.⁴⁹ States were unclear over the meaning and scope of the terms, citing ambiguities over the language and its usage. Some argued that since the terms were not developed by States, they did not have weight under international law.⁵⁰ Norway proposed an amendment to cultural genocide and ethnocide by rephrasing the article to “genocide, forced assimilation or destruction of their future”. Canada proposed two alternatives to the draft language: The first alternative read as follows: “Indigenous peoples and individuals shall not be subjected to genocide, forced assimilation or destruction of their culture”; the second alternative read: “States shall not take or permit measures aimed at depriving indigenous individuals or peoples of their cultural values or ethnic identities through their denigration, or their forced assimilation, integration or population transfer”.⁵¹ Following a vigorous debate, cultural genocide/ethnocide, in their direct form, were omitted from the final text of the Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly under Resolution 61/295 in 2007). The Declaration was adopted by 143 States in favour, 4 votes against (Australia, Canada, New Zealand and the United States), with 11 abstentions.

⁴⁶ United Nations High Commissioner for Human Rights, *Discrimination Against Indigenous Peoples: Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1994/2.

⁴⁷ United Nations High Commissioner for Human Rights, *Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN Doc. E/CN.4/2003/92, 2003.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, pp. 24–25.

The omission of a direct reference to cultural genocide in the final Declaration is partially remedied by other provisions calling for the cultural protection of indigenous peoples. Article 7(2) asserts that “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”.⁵² Though the terms cultural genocide and ethnocide have been abrogated from the final version of the Declaration, a case can be made that “any act of genocide” under Article 7(2) is suggestive of genocide in the cultural form, or cultural genocide. Furthermore, Article 8(1) stipulates that “indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”,⁵³ while subsection 2 enumerates the following provisions:

2. States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them [indigenous peoples] 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 [indigenous peoples] 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 [indigenous peoples] 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 [indigenous peoples].

Although implementation and compliance remain critical challenges to international customary law, “soft power” is a critical framework for analyzing international obligation and State compliance with international customary law. Coined by Joseph Nye, soft power “is the ability to get what you want through attraction rather than coercion or payments. It arises from the attractiveness of a country’s culture, political ideals, and policies.”⁵⁴ The enforceability of the Declaration is principally anchored in the use of soft power as a means for setting the political agenda regarding the indigenous human rights regime. Both the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues are the forums for facilitating this engagement.

⁵² United Nations High Commissioner for Human Rights, *Declaration on the Rights of Indigenous Peoples*, available at < www.un.org/esa/socdev/unfii/documents/DRIPS_en.pdf. >

⁵³ *Ibid.*

⁵⁴ J. S. Nye Jr., *Soft Power: the Means to Success in World Politics* (Public Affairs, New York, 2004) p. x.

8. Supplementary International Mechanisms

A number of subsidiary instruments have come to incorporate cultural genocide and indigenous cultural degradation in reference to the non-physical destruction of a group. In broader terms, Articles 22 and 27 of the Universal Declaration of Human Rights and Articles 1, 3 and 15 of the International Covenant on Economic, Social, and Cultural Rights guarantee cultural rights and rights to cultural development. On a regional scale, the European Cultural Convention outlines measures for European cultural protection, preservation and development. As a national instrument, the 1997 Indigenous Peoples Rights Act, enacted by the Senate and the House of Representatives of the Philippines, also includes a number of cultural protection components.

Of crucial importance are the findings of the International Criminal Tribunal for the former Yugoslavia in the case *Radislav Krstić*. While citing earlier developments regarding genocide, such as the 1992 decision of the UN General Assembly labelling ethnic cleansing as a form of genocide, the Trial Chamber asserted that:

[c]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.⁵⁵

Moreover, the Appeals Chamber, while reiterating that under the UNGC the destruction of culture standing alone does not qualify as genocide, nonetheless cautiously warns that “the destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.”⁵⁶

The Trial Chamber’s decision to consider the circumstances surrounding the material destruction of Bosnian Muslims as an integral component of the intent

⁵⁵ United Nations International Criminal Tribunal for the former Yugoslavia Judgement, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, 2001, The Hague: United Nations, para. 480, available at <www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e-3.htm#IIIIG2bi>.

⁵⁶ United Nations International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, 2001, The Hague: United Nations, p. 203, available at <www.icty.org/x/cases/krstic/tjug/en/krs-tj01080e.pdf>.

to destroy the group substantiates Lemkin's emphasis on the cultural and non-physical destruction of genocide. Similarly, the judgment in the *Vidoje Blagojević and Dragan Jokić* case came to a similar conclusion in its findings regarding cultural genocide, noting: "The Trial Chamber ... finds that such destruction should not simply be equated with killing. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group."⁵⁷ The findings of these ICTY judgments are crucial for two reasons. First, both findings attribute an importance to cultural destruction but acknowledge the inherent limitations of the UNCG in addressing cultural genocide as part and parcel of genocide. Second, both findings set an international precedent for taking into consideration the fact that cultural destruction, or cultural genocide, is a measurable component of the intent to destroy a group, and that such acts can inevitably lead to the physical destruction of the group itself. The cases also demonstrate the complexities in defining and prosecuting the non-physical destruction of a group.

Nevertheless, the absence of cultural genocide within the international legal regime confines its scope and applicability as a component of genocide, further confounding the enormity of non-physical destruction of a group – an experience all too familiar for indigenous peoples. It does not, however, negate its significance when analyzing the non-physical and cultural destruction element to genocide, as corroborated by the ICTY's findings in the aforementioned cases.

9. Critical Challenges and Limitations

Threats to indigenous cultural survival have dominated the discourse on indigenism. Indigenous peoples continue to encounter existential threats to their physical and cultural survival. The movement for the inclusion of cultural genocide in the Draft Declaration on the Rights of Indigenous Peoples was a pre-emptive effort by indigenous groups worldwide to prevent any future policies aimed at subduing indigenous cultural groups or livelihoods, as had been done by colonial powers in settler societies through marginalization and assimilation policies. If governments of settler societies had employed any preventative measures by incorporating cultural genocide or ethnocide within international customary law, they would have helped to avoid indigenous "loss of traditional social cohesion".⁵⁸ However, the omission of cultural genocide from the existing indigenous human

⁵⁷) United Nations International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. JP/PI.S./928e, 2005, The Hague: United Nations., 2005, available at <www.icty.org/x/cases/blagojevic_jokic/tjug/en/050117_Blagojevi_Joki_summary_en.pdf>.

⁵⁸) Burger, *supra* note 5, p. 30.

rights regime is a roadblock in the effort to institute mechanisms for indigenous survival. It also poses grave challenges for identifying and addressing the non-physical destruction of indigenous peoples, which ultimately hinders the development of a cohesive preventative strategy on the domestic and regional front. Such preventative strategies would serve to minimize the loss of, and damage to indigenous cultural heritage. The final report of 24th session of the Working Group on Indigenous Populations highlighted ongoing indigenous cultural degradation stemming from the lack of adequate measures by States to protect indigenous lands, languages, traditional ways of life, cultural properties, and sacred sites. Concerns were also raised regarding population transfers resulting in demographic manipulation of otherwise indigenous lands.⁵⁹

Another setback is the state-centred nature of the UN system and its subsidiary bodies, which poses a perpetual impediment to the formal adoption of a prohibition on and remedy for cultural genocide. As noted earlier, it was the geopolitical as well as the national interests of certain States that led to the exclusion of cultural genocide from the UNGC and the subsequent Draft Declaration on the Rights of Indigenous Populations. As such, issues regarding indigenous cultural dissipation and assimilation continue to dominate the dialogue of the international forums. Unfortunately, though, there is a lack of commitment for the protection of indigenous rights beyond the existing rhetoric of the international community.⁶⁰ The domestic interests of certain States have once again eclipsed any prospect for the inclusion of cultural genocide within international customary law as evidenced by the governments that voted against the Declaration, namely the United States, New Zealand and Canada. Such obstacles posed critical challenges to the implementation of a human rights regime for their indigenous populations that is congruous to the provisions outlined in the single most pertinent instrument of customary law on indigenous rights, the Declaration on the Rights of Indigenous Populations. In recent years, Australia, one of the four countries that had initially voted against the Declaration, adopted the Declaration in 2009.⁶¹ Similarly, Canada, New Zealand and the United States have subsequently adopted the Declaration.

Nonetheless, the lack of development and formal adoption of cultural genocide within the international policy-making arena means the concept remains on the periphery and outside of the ongoing dialogue on indigenous peoples and international criminal law, which has curtailed any effort for the reintroduction

⁵⁹ United Nations High Commissioner for Human Rights, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session*, UN Doc. A/HRC/Sub.1/58/22*, 2006, p. 7.

⁶⁰ R. Hitchcock and T. M. Twedt, 'Physical and Cultural Genocide of Indigenous Peoples', in S. Totten and W. S. Parsons (eds.), *Century of Genocide: Critical Essays and Eyewitness Accounts* (Routledge, New York, 2009) pp. 344–384, at p. 363.

⁶¹ E. Rogers, 'Aust Adopts UN Indigenous Declaration', *ABC Australia*, April 2009, available at <www.abc.net.au/news/stories/2009/04/03/2534210.htm>.

of a ban on cultural genocide since its exclusion from the final adopted text of the indigenous peoples Declaration in 2007.

10. Prospects for Development

The indigenous peoples' movement over the past two decades has altered domestic and international policies towards the plight and rights of indigenous peoples. A vital component of this movement has been its emphasis on reframing and reintroducing cultural genocide to the international arena. In doing so, it provided an avenue for reassessing its relevance to the diverse facets of human rights violations perpetrated against indigenous peoples. Although cultural genocide was excluded from the final version of the Declaration, indigenous groups have been able to influence policy on a domestic, regional, and international level by engaging in what Niezen eloquently calls “the politics of shaming” in reference to their vocalization within international human rights forums, and their ability to bring their concerns to the fore.⁶² Simultaneously, this social movement has altered the boundaries set by colonial settlers regarding indigenous ways of life, mobilizing otherwise voiceless members of society:

The cultural and linguistic revitalization movements have tapped into a set of cultural resources that have recentered the roles of indigenous women, of elders and of groups who have been marginalized through various colonial practices ... While some communities focused primarily on cultural revitalization, others, either as separate organizations or as small groups of individuals became much more intent on engaging in reorganizing political relations with the state. Challenges have been made by indigenous communities with varying degrees of success both through the courts and through the legislature. The constitutional challenges made by indigenous nations have deeply disturbed the colonial comfort of some states.⁶³

When one takes into consideration “soft power” and customary compliance mechanisms and recommendations found in the structure of the Working Group and the Permanent Forum, it becomes clear that States are obliged to discuss challenges voiced by their indigenous groups, and to bring to the fore changes in domestic policy initiatives *vis-à-vis* indigenous peoples' rights.⁶⁴ Seen in this light, challenges raised by domestic, regional and international indigenous grass-roots movements have reintroduced and reified the discourse on cultural genocide as part and parcel of genocide as it relates to the domestic indigenous experience.

⁶² Niezen, *supra* note 3, p. 182.

⁶³ L. T. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, London, 1999) p. 111.

⁶⁴ Anaya, *supra* note 42, p. 70.

On a regional level, the European Union (EU) has adopted a cohesive agenda that engenders conditions for the political, cultural, economic and social development of its indigenous populations.⁶⁵ Also, the 1995 Framework Convention for the Protection of National Minorities outlines measures and stipulates provisions that ensure the cultural preservation of national minorities within the EU. The Helsinki Final Act of 1975 as well as the follow-up entitled the Concluding Document of the Conference on Security and Co-operation in Europe of 1986 contained specific provisions for the protection of minorities within European States.⁶⁶ In addition, Agreements 32–39 of the OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE delineated various measures for the protection of national minorities.⁶⁷ Also, the Arctic Council is an intergovernmental network of Arctic and Scandinavian governments as well as indigenous groups that seek collaborative efforts on issues regarding Arctic economic, political and social development. Similarly, the development of a Proposed American Declaration on the Rights of Indigenous Peoples by the Inter-American Commission on Human Rights pursuant to the recommendations of the Organization of American States is indicative of a concerted effort to bolster regional dialogue and a program of action on issues relevant to indigenous peoples.⁶⁸

By reinserting cultural genocide within the discourse on the non-physical destruction aspect of genocide, indigenous peoples have influenced international precedents by situating cultural preservation as a focal point of the movement. They have also been quasi successful in altering the language in which cultural genocide is framed in a way that is both germane to the accepted framework of the international community and yet compatible with Lemkin's original usage in reference to the non-physical destruction of a group.

11. Conclusion

The vast mobilization and internationalization of the indigenous peoples' movement played a pivotal role in the proliferation of cultural genocide within the

⁶⁵ *Ibid.*, p. 68.

⁶⁶ Organization for Security and Co-operation in Europe, *Conference on Security and Co-operation in Europe, Final Act, 1975*, available at <www.osce.org/mc/39501>. Federation of American Scientists, *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe held on the basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, Vienna, 1989*, available at <www.fas.org/nukel/control/osce/text/VIENN89E.htm>.

⁶⁷ Organization for Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 1990, pp. 18–20, available at <www.osce.org/odihr/elections/14304>.

⁶⁸ Anaya, *supra* note 42, p. 66.

discourse on universal human rights. The movement has reignited the debate on the non-physical destruction of a group, which has had domestic, regional and international policy implications as governments and international policy makers wrestle with indigenous issues. As a form of resistance, indigenous peoples worldwide have found solace in the ability to voice their discontent through the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues, the two international bodies responsible for addressing indigenous issues and bridging the gap between indigenous communities and member States. Moreover, the precedent-setting ICTY rulings that inscribe cultural destruction as part of genocidal intent provide a circumstantial framework for future findings.

However, one should not lose sight of the fact that the prospect for the adoption of cultural genocide is bleak, so long as certain States remain impervious to its inclusion as part and parcel of genocide. The debates during the drafting decade of the UNCG illustrate the inherent complexities in attempting to fuse the national interests of concerned governments on the one hand, and the interests of indigenous groups, on the other. As a result, the future adoption of cultural genocide as a framework for identifying the non-physical destruction of a group remains ambiguous and highly unlikely as indigenous peoples and member States wrangle over its function within international customary law.