



*Routledge Studies in Genocide and Crimes against Humanity*

# **CULTURAL GENOCIDE**

## **LAW, POLITICS, AND GLOBAL MANIFESTATIONS**

Edited by  
Jeffrey S. Bachman



**ROUTLEDGE**  


# Cultural Genocide

This book explores concepts of cultural genocide, its definitions, place in international law, the systems and methods that contribute to its manifestations, and its occurrences.

Through a systematic approach and comprehensive analysis, international and interdisciplinary contributors from the fields of genocide studies, legal studies, criminology, sociology, archaeology, human rights, colonial studies, and anthropology examine the legal, structural, and political issues associated with cultural genocide. This includes a series of geographically representative case studies from the USA, Brazil, Australia, West Papua, Iraq, Palestine, Iran, and Canada.

This volume is unique in its interdisciplinarity, regional coverage, and the various methods of cultural genocide represented, and will be of interest to scholars of genocide studies, cultural studies and human rights, international law, international relations, indigenous studies, anthropology, and history.

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### **Cultural Genocide**

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*Edited by Jeffrey S. Bachman*

# **Cultural Genocide**

Law, Politics, and Global Manifestations

**Edited by Jeffrey S. Bachman**

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# Contents

<i>Notes on contributors</i>	vii
<i>Acknowledgments</i>	ix
<b>Introduction: bringing cultural genocide into the mainstream</b>	<b>1</b>
JEFFREY S. BACHMAN	
<b>PART I</b>	
<b>Cultural genocide in international law</b>	<b>19</b>
<b>1 Raphaël Lemkin: culture and cultural genocide</b>	<b>21</b>
DOUGLAS IRVIN-ERICKSON	
<b>2 An historical perspective: the exclusion of cultural genocide from the genocide convention</b>	<b>45</b>
JEFFREY S. BACHMAN	
<b>3 A modern perspective: the current status of cultural genocide under international law</b>	<b>62</b>
DAVID NERSESSIAN	
<b>PART II</b>	
<b>Global manifestations of cultural genocide</b>	<b>93</b>
<b>Section one: settler colonialism, forced assimilation, and indigenous genocide</b>	<b>95</b>
<b>4 Destroying Indigenous cultures in the United States</b>	<b>97</b>
LAUREN CARASIK AND JEFFREY S. BACHMAN	

<b>5</b>	<b>Genocide and settler colonialism: how a Lemkinian concept of genocide informs our understanding of the ongoing situation of the Guarani Kaiowá in Mato Grosso do Sul, Brazil</b>	118
	GENNA NACCACHE	
<b>6</b>	<b>A political economy of genocide in Australia: the architecture of dispossession then and now</b>	140
	MARTIN CROOK AND DAMIEN SHORT	
<b>7</b>	<b>Colonialism and cold genocide: the case of West Papua</b>	179
	KJELL ANDERSON	
	<b>Section two: cultural destruction</b>	205
<b>8</b>	<b>Heritage wars: a cultural genocide in Iraq</b>	207
	HELEN MALKO	
<b>9</b>	<b>A century of cultural genocide in Palestine</b>	227
	DAUD ABDULLAH	
<b>10</b>	<b>The Baha’i community of Iran: cultural genocide and resilience</b>	246
	MOOJAN MOMEN	
	<b>Section three: justice and restitution</b>	267
<b>11</b>	<b>Ontological redress: the natural and the material in transformative justice for “cultural” genocide</b>	269
	ANDREW WOOLFORD	
	<i>Index</i>	285



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# Introduction

## Bringing cultural genocide into the mainstream

*Jeffrey S. Bachman*

Years ago, I was discussing with a colleague my recent participation in Central Michigan University's Human Rights, Literature, the Arts, and Social Sciences International Conference. I told her my topic was cultural genocide. Before I had a chance to inform her of my position, she made her own quite clear: there is no such thing as "cultural genocide," implying that genocide was synonymous with killing members of a protected group. For a variety of reasons, I chose not to reveal my position. Well, with the publication of this volume, I suppose the cat is out of the bag.

At the conference, I presented a paper arguing that the colonial powers intentionally worked to ensure that cultural genocide would be excluded from the methods prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Additionally, I argued that the United Kingdom worked, with the support of the US and France, to insert what the Soviet Union referred to as the "colonial clause," which allowed colonial administrators of foreign territories to leave these territories outside the scope of the Genocide Convention's protection. While technically sound, this effort and resulting provision (Article XII) violated the object and purpose of the Genocide Convention – the *universal* eradication of the crime of genocide.

The reason the colonial powers so aggressively opposed the inclusion of cultural genocide was "to limit their obligations under international law" and to avoid implicating themselves in the crime of genocide.<sup>1</sup> In their opposition to the inclusion of cultural genocide, the colonial powers took a position that stood in direct conflict with Raphael Lemkin's own. Cultural genocide was a key element in Lemkin's concept of genocide, something that began to develop from as early as 1933 and was included in the first two formal drafts of the Genocide Convention – the Secretariat Draft (1947) and Ad hoc Committee Draft (1948). Yet, as I discuss in more detail in Chapter 2, cultural genocide was successfully removed from the language of the text, with the US playing a leading role.<sup>2</sup>

The exclusion of cultural genocide from the Genocide Convention has influenced more than just the place of cultural genocide in international law; it also seems to have had significant influence over the field of genocide studies. On the one hand, this is understandable. The legal definition is the one, at least in theory, that members of the international community recognize and consent to.

Therefore, if one of our goals as genocide scholars is to promote a greater commitment from the international community to the prevention of genocide, then it makes sense for us to employ the legal definition in our research. On the other hand, the legal definition of genocide was shaped by an overtly political process.<sup>3</sup> Hence, limiting ourselves to the legal definition places political restraints on an activity (academic research) that should not be limited on such a basis.<sup>4</sup>

Nonetheless, many of the same arguments advanced by negotiating parties who opposed the inclusion of cultural genocide in the Genocide Convention have been employed by scholars. This is true despite the existence of a large body of literature that highlights the treaty's deficiencies and forwards alternative concepts and definitions of genocide. It is as if the political determinations that influenced the positions of at least some of the Genocide Convention's negotiating parties successfully normalized and mainstreamed a concept of genocide that excludes cultural genocide to the point at which it has become hegemonic in law *and* genocide studies.<sup>5</sup>

In *Genocide: A Comprehensive Introduction*, Adam Jones offers twenty-five scholarly definitions of genocide, spanning from 1959 to 2014.<sup>6</sup> Among these definitions, only two include cultural genocide. Yehuda Bauer included in his definition of genocide the "elimination of national (racial, ethnic) culture and religious life with the intent of 'denationalization'."<sup>7</sup> Bauer distinguishes "genocide" from "holocaust," defining holocaust as the "planned physical annihilation, for ideological or pseudo-religious reasons, of all the members of a national, ethnic, or racial group."<sup>8</sup> In this regard, Bauer's definition of genocide shares similarities with Lemkin's concept of genocide in that it includes techniques other than those that are used to murder members of a protected group. Bauer instead uses a different term, "holocaust," to describe what most genocide scholars do as genocide – the physical destruction of a group by mass killing. Meanwhile, Christopher Powell and Julia Peristerakis "understand genocide as a multidimensional process that works through the destruction of the social institutions that maintain collective identity as well as through the physical destruction of human individuals."<sup>9</sup> Though it is not clear whether they would include as genocide the former without the latter, Powell and Peristerakis do include an element of cultural genocide.

Scott Straus conducted a similar survey of scholarly definitions with comparable results. Straus includes fourteen definitions, one of which was Lemkin's, and a number of which were also included by Jones.<sup>10</sup> Among the fourteen definitions, only Lemkin's includes cultural genocide as a method of genocide in and of itself. Robert Melson's definition is somewhat ambiguous. According to Melson, genocide is "a public policy mainly carried out by the state whose intent is the destruction in whole or in part of a social collectivity or category, usually a communal group, class, or a political faction."<sup>11</sup> Greater clarity can be found in Melson's article on the paradigms of genocide. In differentiating "total genocide" from "partial genocide," Melson writes, "Total genocide implies extermination and/or massive death of such an order that a group ceases to continue as a distinct culture. Partial genocide stops at extermination and the annihilation of

culture.”<sup>12</sup> Thus, though Melson includes cultural genocide, he does so within a concept of “partial genocide,” and only when it is accompanied by killing members of the targeted group.

Combined, Jones and Straus review thirty-two non-repeating scholarly definitions of genocide. Among the nearly three dozen definitions, only Lemkin, who, it bears repeating, coined the term “genocide,” and Bauer recognize cultural genocide as a stand-alone method of genocide. Though, in their use of “as well as” to connect destruction of institutions that maintain collective identity and physical destruction, it is possible that Powell and Peristerakis, too, recognize cultural genocide as a distinctly genocidal act. Notably, the Bauer definition in Jones is from 1984. Straus also includes a definition of genocide by Bauer from 1999. In this more recent definition, Bauer defines genocide as “a purposeful attempt to eliminate an ethnicity or a nation, accompanied by the murder of large numbers of the targeted group.”<sup>13</sup> Further, according to Bauer, “When no murder is involved, but oppression, political, cultural or other, accompanied by physical persecutions but not by mass murder, one cannot talk about genocide but one has to use other terms.”<sup>14</sup> Clearly, in the definition from 1999, Bauer requires that large numbers of people need to be murdered for an act to constitute genocide.

Why is it that so many genocide scholars have rejected one of the core elements of Lemkin’s concept of genocide?<sup>15</sup> As the survey of scholarly definitions of genocide indicates, the majority of scholars believe that the concept of genocide ought to be limited to acts that threaten the physical survival of the targeted group.<sup>16</sup> Within this group exists subgroups of scholars that, like those mentioned above, see cultural destruction as something that may accompany the genocidal act of physical annihilation, and those who see cultural destruction as evidence of genocidal intent, but not genocidal in itself.<sup>17</sup> The above approaches to the concept of genocide must exclude cultural genocide, even when its perpetrators aim to eliminate those elements of a group’s culture that together form the foundation of its members’ collective identity.

Opponents of the idea of cultural genocide also vary in terms of how strongly they express their opposition. For example, Irving Horowitz is contemptuous in his dismissal of the concept of cultural genocide. He proclaims there to be “a need to avoid degrading this whole tragic theme by spreading its meaning to include cultural deprivation or the punishment of select individuals, even if they symbolically represent whole populations.”<sup>18</sup> Furthermore, Horowitz argues, “actual genocides involve real deaths” as opposed to “symbolic” death.<sup>19</sup> Others take a more pragmatic approach. For example, Israel Charny is concerned by the lack of recognition of physical genocides and, therefore, uses alternative labels for cultural genocide, such as “ethnocide” and “linguicide,” to avoid situations in which “destruction of a culture’s continuity is labeled as committing genocide while others in which millions of people are actually murdered are not.”<sup>20</sup> Similarly, Kurt Jonassohn and Frank Chalk recognize the “many cases in history in which the collective memory, identity, or culture of a group was destroyed without the killing of its members,” but label these cases “ethnocide.”<sup>21</sup>

Though a minority in the field of genocide studies, there is a growing number of scholars who have placed greater emphasis on cultural genocide and seek its recognition.<sup>22</sup> These scholars tend to argue that cultural genocide, like physical genocide, is a method that can achieve similar ends as physical genocide by way of different means. For example, Robert van Krieken states that “it may be ill-advised to stand too stubbornly on the conceptual purity of a ‘correct’ definition of genocide” that distinguishes physical genocide from cultural genocide.<sup>23</sup> Van Krieken asserts that such a distinction fails to “deal with the question of what continuity there, nevertheless, remains, what they continue to have in common with each other, what general ‘spirit’ they share, and what might be done in response to that continuity.”<sup>24</sup>

Central to the survival of a group’s collective cultural identity are the group’s social institutions, relations and practices, and characteristics. Therefore, maintaining and strengthening cultural institutions is imperative for the survival of cultural identity.<sup>25</sup> Such institutions contribute to the preservation of social relations and practices. As Damien Short states, social formations are composed of “a fluid network of consensual practical social relations which form a comprehensive culture.”<sup>26</sup> Therefore, culture as identity can be damaged, and potentially eliminated, by the deliberate disruption of these practices and relations. Policies that undermine cultural institutions, relations, and practices also undermine the preservation of the distinct characteristics of the group. In this regard, indigenous communities have been and continue to be especially at risk of cultural genocide. As Julian Burger notes, “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.”<sup>27</sup>

David Nersessian writes that a concept of genocide limited to physical and biological manifestations allows a group to be “kept physically and biologically intact even as its collective identity suffers in a fundamental and irremediable manner. Put another way, the present understanding of genocide preserves the body of the group but allows its very soul to be destroyed.”<sup>28</sup> Similarly, George Tinker states that cultural genocide “involves the destruction of those cultural structures of existence that give people a sense of holistic and communal integrity.”<sup>29</sup> Because cultural genocide involves the prohibition, disruption, and destruction of cultural institutions, relations, practices, and characteristics – the cultural structures of existence that form the soul of the group – genocide must be understood to be a holistic concept and a process-oriented crime that amounts to more than an end result.<sup>30</sup>

Though there is some risk of letting the concept of cultural genocide become unmoored, slipping into the abstract, I chose not to seek to impose a single definition of cultural genocide on contributors to this volume. It was determined that it would be better to leave space for contributors to bring their own interpretations of cultural genocide to their research. Though each contributor does not start from a predetermined unified definition, it is clear from their contributions that they share a common idea about cultural genocide’s core concept. I believe Damien Short best expresses this core concept in his definition: cultural genocide refers to



“a method of genocide which destroys a social group through the destruction of their culture.”<sup>31</sup> Lawrence Davidson offers a similar core concept, with the addition of an explicit intent requirement and a power dynamic. He defines cultural genocide as the “purposeful destructive targeting of out-group cultures so as to destroy or weaken them in the process of conquest or domination.”<sup>32</sup> Working from a core concept that establishes a unified foundation allows cultural genocide research to consider all the various ways the survival of a social group’s cultural identity can be threatened without being bound by the ways that have already been identified, or being prohibited from identifying new ones.

## **Significance and controversies**

When I first approached Routledge and Adam Jones, series editor for Routledge Studies in Genocide and Crimes against Humanity, I did so with confidence that this book could make a unique contribution to the field of genocide studies by helping fill a void in the literature in a way that has not yet been achieved. With the book finished, I still believe this to be the case. At the time of publication, *Cultural Genocide: Law, Politics, and Global Manifestations* is only the third book dedicated entirely to the study of cultural genocide, and it is the first edited volume. It is also, then, the first book on cultural genocide that brings together a diversity of voices, approaches, and disciplines. This claim is in no way meant to discount the important contributions made by Elisa Novic and Lawrence Davidson, whose work we are indebted to, but rather to emphasize the significant contributions this book and its contributors are making to the field.<sup>33</sup>

## ***Contributions to the study of Lemkin and international law***

Though this book does not offer quite the depth found in Novic’s study of cultural genocide in international law, it does address three significant questions: (1) How did cultural genocide fit into Raphael Lemkin’s concept of genocide? (2) Having been included in the first two formal drafts of the Genocide Convention, through what process was cultural genocide excluded from the adopted text of the treaty? (3) What is the current status of cultural genocide under international law? Answering these questions is the focus of the first part of this book – Cultural genocide in international law.

In Chapter 1, Douglas Irvin-Erickson challenges genocide scholars and those in other fields who have begun to turn to Lemkin’s ideas to re-evaluate our understanding of Lemkin’s concepts of culture, nations, and national groups. Irvin-Erickson asserts, Lemkin was clear, over and over again, that culture was not the same as a human group, and therefore the destruction of culture could not be genocide.<sup>34</sup> Moreover, as Irvin-Erickson points out, Lemkin believed cultural change could be beneficial because such changes “inspired creativity, beauty, and countless other human goods ... at the individual and group levels.”<sup>35</sup> Ultimately, writes Irvin-Erickson, the key distinction between cultural destruction and genocide is Lemkin’s belief that culture and nations were two different con-

cepts. Destroying culture was not genocide; destroying nations was.<sup>36</sup> As will be seen in subsequent chapters, Irvin-Erickson and other scholars of Lemkin and cultural genocide are engaged in an ongoing debate about the implications of cultural destruction and oppression, not only in a material sense, but also on the survival of groups as such.

My own contribution in Chapter 2 discusses the processes by which acts that constitute cultural genocide were removed from those prohibited under the Genocide Convention, after having been included in the first two formal drafts of the treaty. It includes the results of an analysis of the Genocide Convention's preparatory works, including a discussion of the positions held by pertinent parties that participated in the drafting of the treaty. The positions of these negotiating parties are also placed within their proper historical context. As noted earlier, I argue that the US and other colonial powers worked aggressively to ensure that the acts constituting cultural genocide were excluded from the adopted text of the treaty, even as they maintained policies at home and in territories under their control that included elements of these very same acts. In this regard, the Genocide Convention is both a legal text and a political project.

At the end of Chapter 2, I assert, "With an increased focus on indigenous rights and efforts to decolonize genocide studies, the idea that cultural destruction is a technique of genocide has become increasingly accepted. It is now time for the law to catch up."<sup>37</sup> In Chapter 3, David Nersessian shows that, while progress has been made, international law continues to fail to "recognize the human group's inherent right to its own unique cultural existence and heritage."<sup>38</sup> He does so by analyzing the current state of cultural genocide under international law, identifying where elements of cultural genocide reside under different international legal regimes. These include international human rights law, specialized treaties, and international humanitarian law. Nersessian considers cultural genocide in a broad sense – not only as an emerging legal concept, but also in the wider setting, including the consideration of cultural genocide by international criminal tribunals as an evidentiary means of demonstrating intent to destroy a protected group "as such" in cases of physical or biological genocide. With some cultural protections in place, Nersessian concludes, "Half a loaf is better than none."<sup>39</sup> However, he adds, "The fact that criminals can be prosecuted for *some* of their crimes should not end the discussion about whether the law also should redress another aspect of the harm caused that is not presently covered."<sup>40</sup> Indeed, Nersessian calls on the international community to revisit the need for an international instrument that deals specifically with the prevention of the cultural destruction of human groups as such.

### ***Contributions to the study of particular cases and methods of cultural genocide***

In his book, Davidson advances a unified theory of cultural genocide, which he then applies to four historical cases: treatment of Native Americans by North

America's settlers, attacks on the culture of Eastern European Jews in Russian-controlled territories prior to the Jewish Holocaust, Israeli attacks on Palestinian culture, and China's attempts to assimilate the people of Tibet.<sup>41</sup> As a collection, this book cannot offer the same consistency in approach that Davidson was able to. However, as a collaborative effort, the contributors to this volume offer great diversity and breadth in their approaches, as well as broad regional representation in the cases studied. Contributors include emerging and senior scholars with expertise in genocide studies, legal studies, sociology, human rights, colonial studies, anthropology, and criminology. Their scholarly approaches to the study of cultural genocide are interdisciplinarily legal, political, sociological, archaeological, anthropological, and criminological. In Part II of this book – Global manifestations of cultural genocide – contributors offer readers eight distinct cases of cultural genocide. These cases are further divided into three sections: settler colonialism, forced assimilation, and indigenous genocide; cultural destruction; and justice and restitution. As readers will see, these eight chapters span the globe and the different techniques states have employed and continue to employ that threaten the survival of groups. In doing so, the cases presented in the second part of this volume advance the discussion of cultural genocide conceptually and in terms of its real-world application to the treatment of groups of peoples.

The first section on settler colonialism, forced assimilation, and indigenous genocide includes four chapters. In Chapter 4, Lauren Carasik and I evaluate US policies, which were characterized as “more humane,” that aimed to eradicate Native cultures by “killing the Indian to save the man.” Among the most destructive were residential schools that sought to “civilize” indigenous groups by separating children from their families and communities. The schools inflicted a devastating intergenerational legacy that endures today, with native communities facing high rates of suicide, substance abuse, domestic violence, and other social ills. Importantly, Carasik and Bachman emphasize a point that they are not alone in making in this volume. The incomplete physical and cultural genocide of Native Americans and their cultures is not owing to a lack of effort, but due to Native perseverance and resistance. The resiliency of indigenous groups, other groups represented in this volume, and those not included but equally worthy of our attention cannot be overstated.

In Chapter 5, Genna Naccache reviews the impact of demand for Brazil's soya and sugarcane on the Brazilian landscape. She argues that the landscape has suffered severe adverse changes, which have had a devastating impact on the rights of the Guarani Kaiowá, including their forced displacement leaving them confined to small parcels of land or roadsides that inhibit their practice of cultural rituals as hunter-gatherers. Naccache uses a Lemkinian concept of genocide through which she concludes that Brazil is responsible for an ongoing genocide that involves what Claudia Card refers to as the “social death” of the group by prioritizing agribusiness over the human and cultural rights of the Guarani Kaiowá. Naccache concludes by situating the treatment of the Guarani Kaiowá in the broader historical context of European expansionism, writing “Genocidal

strategies have produced genocidal results – the decimation of almost the entire indigenous Amazon.”<sup>42</sup>

In Chapter 6, Martin Crook and Damien Short focus on contemporary culturally destructive policies in Australia, and the colonial structures that produce them. Though physical genocide and forced transfer of children have ceased in Australia, Short and Crook argue that genocide is an ongoing process with the failure to truly decolonize. In doing so, they continue to advance their novel research on capitalism and the ecocide-genocide nexus. As they put it, the genocide-ecocide nexus stems from the settler colonial land grabs and settler capitalism to the

cultural destruction of the homelands movement, or the rise of the capitalist driven process of extreme energy and CSG [coal seam gas] production; at every juncture and turning point, the continuities, breaks and departures in the relations of genocide must be understood in articulation with the imperatives of capital accumulation and the global chains of capitalist production and trade.<sup>43</sup>

Kjell Anderson puts forward his concept of “slow-motion” cold genocides in Chapter 7. Examining the case of West Papua, Anderson argues that Papuans have been the victims of low-intensity genocide, rooted in their supposed inferiority. In cold genocides, the destruction of a group occurs over generations. Physical destruction might not be a direct intention of the perpetrator, but may still be the eventual result over a long period of time, caused by policies that undermine the foundations of group existence by systematically oppressing the group or by willfully reckless policies. Anderson argues,

West Papuan indigenous peoples have had their identity, autonomy, and physical security undermined through the neo-colonial policies of the Indonesian state. This systematic campaign appears to be genocidal in that it aims at the disappearance of the (West) Papuan group, as an autonomous political and ethnic identity.<sup>44</sup>

The use of “appears” is purposeful here, as Anderson engages with scholars who believe the term “genocide” only applies to cases in which a substantial number of group members have been killed. He asserts that genocide does not necessarily involve high-intensity episodes of killing, but can also involve gradual destruction, repression, and limited killing.

The second section of cases focuses on cultural destruction, with studies of Iraq, Palestine, and Iran. In Chapter 8, Helen Malko addresses the so-called Islamic State’s deliberate destruction of cultural heritage in Iraq. Malko explains that these attacks on human history exemplify why cultural genocide is such a serious crime. Significantly, Malko illustrates how Iraq’s cultural heritage is not only of global, but also local importance. She argues that “its destruction has a direct cultural and psychological impact on the people of Mosul and Iraq.”<sup>45</sup> Just

as Lemkin was concerned with the future loss for all of humanity of cultural contributions from peoples affected by genocide, the loss of existing contributions may result in irredeemable harm. Malko argues that Islamic State attacks aim to erase the collective memory and shared identity and history of the people of Iraq and, therefore, constitutes cultural genocide.

In Chapter 9, Daud Abdullah provides evidence of Israel's cultural genocide against the Palestinian people in Palestine, Israel, and beyond. Abdullah chronicles Israel's theft, destruction, and appropriation of Palestinian history in the form of intellectual, architectural, and artistic contributions. When combined with other elements of physical and structural violence perpetrated against Palestinians, Abdullah makes a case for Israel being responsible for a "synchronized attack" on different aspects of life in Palestine.

In Chapter 10, Moojan Momen discusses the history of ill-treatment of the Baha'i religious minority in Iran, and the intensification of the oppression that occurred following the Islamic Revolution of 1979. Moojan describes how the potential for physical genocide in Iran evolved into a planned campaign of cultural genocide, one that has involved the destruction of Baha'i holy places, execution of the religion's elected leaders, forced relocation, economic strangulation, educational deprivation, arbitrary and illegal arrests and harassment, and a continuous campaign of black propaganda in the media. Similar to Abdullah's analysis, Momen demonstrates how the persecution of the Baha'i extends beyond any one method of genocide, arguably encompassing all three, constituting a synchronized attack on Baha'i existence.

The volume concludes with a section on justice and restitution. Though this section is comprised of only one chapter, Andrew Woolford ably brings the volume to a close by raising and addressing significant questions regarding the potential limits of the concept of cultural genocide, as well as those about what constitutes proper redress for the lived experiences of indigenous peoples under North American settler colonialism and who gets to determine this. Woolford argues that harms from forced assimilation through Canadian residential schools extend beyond the cultural and, therefore, cannot be divorced from their material dimensions. Hence, restorative justice must also address the material and the natural, in addition to the cultural harm.

In case after case, persecution of particular groups and attacks on their shared cultural identity and heritage had and continue to have consequences for the affected peoples that extend beyond the immediate harm. Cultural genocide affects group cohesion, identity, memory, and way of life. The cases in this book illustrate the ways such ill-treatment and attacks threaten the very existence of the groups as such. Moreover, the persecution of the groups and the attacks on their cultural heritage have often been part and parcel to a broader, as Lemkin put it, "synchronized attack on different aspects of life."

In its interdisciplinarity, *Cultural Genocide: Law, Politics, and Global Manifestations* has the potential to bring significant progress to the field of genocide studies. In his preface to the edited collection *New Directions in Genocide Research*, Adam Jones highlights the evolution of genocide studies.<sup>46</sup> With this

evolution, genocide research has grown to include comparative studies and critical studies, including research on gendercide, ecocide, politicide, structural violence as genocidal, and, of course, cultural genocide. Not so much a warning as statement of fact, Jones writes that the “all hands on deck” approach to the study of genocide has left “the field in a constant state of evolution, exploration – and confusion.”

There are also times when all hands on deck can bring greater clarity to an issue through their individual and collective contributions. Together, the contributions to this volume are part of a growing wave in genocide studies of scholars who incorporate cultural genocide in their definitions of genocide. Though this may sow confusion to those on the outside looking in, it is my hope that the chapters in this volume will continue to strengthen the case for why cultural genocide should be a generally accepted method of genocide in the field of genocide studies. With such acceptance will come greater clarity.

My hope does not come without some consternation. I am concerned that a volume on cultural genocide has the potential to simultaneously raise its visibility and make the case for its inclusion in the concept of genocide, while also reinforcing the idea that it does not belong. In their research on cultural genocide, scholars are compelled to write of “cultural” genocide, not simply “genocide.” The problem is not the placement of “cultural” in front of “genocide.” Rather, the problem is how this is interpreted. Though the contributors to this volume and others might use “cultural” as a descriptor, there are others who will inevitably see it as a qualifier. This is evident in the fact that, whether as qualifiers or descriptors, we do not do the same when discussing the other methods of genocide. As Andrew Woolford and Jeff Benvenuto ask,

And why is it that we so often feel required to place the qualifier “cultural” before the word “genocide”? Although Lemkin distinguished between cultural, biological, physical and other patterns of genocide, we seldom find it necessary to specify when we speak of physical or biological genocide. So what value is there in conjoining the “cultural” qualifier to the concept of genocide?<sup>47</sup>

This is a conundrum that scholars face. Are we simultaneously raising the visibility of cultural genocide, contributing to a movement in genocide studies toward recognition, while also reinforcing a hierarchy of genocide? What does the need for a qualifier, or descriptor for that matter, tell those of us who research and invoke cultural genocide, and even those who practice it, when the physical and biological methods of genocide need neither? Does it simply describe the technique by which genocide was committed? Or does it impart that cultural genocide is not genocide at all?<sup>48</sup>

I cannot help but feel as though placing “cultural” in front of “genocide” allows those who limit genocide to mass killing to dictate the terms of the debate. It is as if those who recognize cultural genocide as genocide are insurgents seeking to topple an existing regime, rather than equal contributors to the

study of a phenomenon first recognized as such by Lemkin, an individual who believed that the method of cultural genocide, as incorporated in the Secretariat Draft of the Genocide Convention, “represented the full breadth of his thinking on national cultural autonomy”<sup>49</sup> and, in Lemkin’s words, was “the most important part of the Convention.”<sup>50</sup>

There are, of course, differences between cultural, biological, and physical genocide, even as the lines that separate them are blurred. We mustn’t reject these differences or pretend that they do not exist for cultural genocide to be treated with the same gravity and sense of urgency that biological and physical genocide produce. Differences do not produce hierarchies; it is how differences are interpreted and who has the power to enforce their interpretation that does. Differences neither make the methods of cultural, biological, and physical genocide incomparable, nor one method worthier of the title of “genocide” than the other(s).

The use of qualifiers and descriptors to describe acts that fall outside the scope of the legal definition of genocide and remain controversial in the field of genocide studies does more than create and sustain a hierarchy of genocide; it also contributes to the problem of “hidden genocides.”<sup>51</sup> The same can be said for the use of alternative labels, such as “ethnocide” and “politicide.” Those cases that do not conform to the limited conception of genocide that continues to dominate genocide studies remain at the periphery of the field. Qualifiers and hidden genocides, then, become mutually reinforcing. Hidden genocides must be qualified, and qualified cases remain hidden. See, for example, Indonesia’s genocide against communists in 1965 and 1966. Other than the Jewish Holocaust and, perhaps, the Tutsi Genocide in Rwanda, there might not be a clearer case of genocide, and a physical one at that, than the slaughter of hundreds of thousands of people in Indonesia in a little more than six months. Nonetheless, because the victims were members of a political group which, like cultural genocide, were omitted from the final text of the Genocide Convention, and perhaps because the victims were communists, the Indonesian genocide remains largely hidden and/or labeled “politicide.”<sup>52</sup>

Patrick Wolfe makes a compelling case for the abandonment of the term “cultural genocide,” to be replaced by “genocide” standing on its own. Wolfe asserts that the term cultural genocide “confuses definition with degree.”<sup>53</sup> He continues,

Moreover, though this objection holds in its own right (or so I think), the practical hazards that can ensue once an abstract concept like “cultural genocide” falls into the wrong hands are legion. In particular, in an elementary category error, “either/or” can be substituted for “both/and,” from which genocide emerges as either biological (read “the real thing”) or cultural – and thus, it follows, not real.<sup>54</sup>

Moreover, as Woolford explains, there are acts of genocide that may fall simultaneously within multiple methodological categories, such as the destruction of a group’s food source being both cultural and biological.<sup>55</sup>



Perhaps it is time for the field of genocide studies to return to a more Lemkinian concept of genocide, one that recognizes the cultural, biological, and physical as techniques and methods of genocide. Genocide then is a process that is pursued via these techniques and methods, often with the three overlapping. With this recognition, qualifiers, descriptors, and alternative labels would no longer be of use. Instead, the nuances about what form a genocide took, and what techniques and methods were employed, would be saved for the analysis of a particular case. Ideally, this would eliminate the propensity for genocide studies to create hierarchies of genocide that both elevate some forms of genocide above others and, in worse cases, hide some methods of genocide and their associated cases altogether. This approach recognizes both difference (cultural, biological, physical) and sameness (genocide).

### **Concluding note**

It is my hope that this volume will contribute to the ongoing shift in genocide studies away from a limiting concept of genocide that defines genocide only as direct violence perpetrated against the collective physical integrity of the members of the targeted group. A starting point would be to recognize the violence that is cultural genocide. Cultural genocide shares a relationship with physical violence and may be manifested in different forms of indirect violence and structural violence. Forced assimilation, economic dislocation, environmental injustices and the adverse effects on peoples of climate change, and attacks on cultural rights and heritages are all forms of violence. With recognition of this fact, we can begin to see the ways in which both cultural genocide and physical genocide are methods that can achieve similar outcomes through different means. In this regard, the centrality of genocide as a process, rather than as an end result, will be restored.

Such a shift is of substantial importance. Scholars who recognize cultural genocide have been trapped in a debate with scholars who reject their ideas rather than engaging in debate with each other. This has acted as an impediment to the advancement of cultural genocide research. Scholars of cultural genocide have been kept busy arguing for its recognition as a method of genocide when, as can be seen in Irvin-Erickson's and Woolford's contributions to this volume, research on cultural genocide would benefit from constructive debate among those who already recognize it as such. Therefore, a shift in genocide studies from the exclusivity of physical genocide to a concept of genocide that incorporates all the methods of group destruction will allow cultural genocide studies to move forward.

### **Notes**

- 1 Quoted in Beth Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *The Yale Law Journal* 106, no. 7 (1997): 2268. For evidence of the colonial powers' deliberate opposition to the inclusion of cultural genocide, see Jeffrey Bachman, *The United States and Genocide: (Re)Defining the Relationship* (London: Routledge, 2018); Jeffrey Bachman, "An Historical

Perspective: The Exclusion of Cultural Genocide from the Genocide Convention,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019); John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008); Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017); Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (New Brunswick, NJ: Rutgers University Press, 2018).

- 2 In Chapter 3 of *The United States and Genocide*, I focus specifically on the role the US played in ensuring cultural genocide was excluded from the Genocide Convention.
- 3 See Bachman, *The United States and Genocide*, 20; Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights, 1997), 409–412.
- 4 One might rightfully ask whether submitting to the political whims of some of the negotiating parties is itself a political act.
- 5 Interestingly, Leora Bilsky and Rachel Klagsburn write,

The inherent tension between law and history is one of the explanations given to the gap between the popular and legal understandings of genocide. The law wishes to designate the crime of genocide to the most serious acts (“crime of crimes”) and, thus, limits genocide to its physical and biological aspects, requires a special intent or a plan directed at the destruction of a group as such and affords protection to limited classes of groups. Historians, by contrast, unlimited by legal considerations, can account for the complexity and various aspects of genocides.

(Leora Bilsky and Rachel Klagsburn, “The Return of Cultural Genocide?” *The European Journal of International Law* 29, no. 2 (2018): 375)

Nonetheless, despite not being limited by legal considerations, at least not entirely, the field of genocide studies continues to be dominated by definitions of genocide that mirror the legal one or that are even narrower.

- 6 See Adam Jones, *Genocide: A Comprehensive Introduction*, 3rd edition (London: Routledge, 2017), 23–27.
- 7 *Ibid.*, 24.
- 8 *Ibid.*
- 9 *Ibid.*, 27.
- 10 See Scott Straus, “Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide,” *Journal of Genocide Research* 3, no. 3 (2001): 350–355.
- 11 *Ibid.*, 355.
- 12 Robert Melson, “Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions,” *The Annals of the American Academy of Political and Social Science* 548 (1996): 157.
- 13 Straus, “Contested Meanings and Conflicting Imperatives,” 352.
- 14 Yehuda Bauer, “Comparison of Genocides,” in *Studies in Comparative Genocide*, eds. Levon Chorbajian and George Shirinian (London: Palgrave Macmillan, 1999), 35.
- 15 Jones writes that “Lemkin was deeply attached to the concept of cultural genocide, and it was his most personally wounding experience, during the drafting of the UN Convention, to see his concept jettisoned.” See Jones, *Genocide*, 40. Meanwhile, Dirk Moses writes that some in the field of genocide studies have consciously or unconsciously misinterpreted Lemkin. He writes,

Either way, the – upon reflection, extraordinary – assumption is that Lemkin did not properly understand genocide, despite the fact that he invented the term and went to great trouble to explain its meaning. Instead, most scholars presume to

instruct Lemkin, retrospectively, about his concept, although they are in fact proposing a different concept, usually mass murder. To that end, even his texts have been bowdlerized to make genocide mean mass killing and/or resemble the Holocaust.

(A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 21)

- 16 See, among others, George J. Andreopoulos, "Introduction: The Calculus of Genocide," in *Genocide: Conceptual and Historical Dimensions*, ed. George J. Andreopoulos (Philadelphia: University of Pennsylvania Press, 1997); Adam Jones, *Genocide*; Barbara Harff, "Recognizing Genocide and Politicide," in *Genocide Watch*, ed. Helen Fein (New Haven, CT: Yale University Press, 1992); Barbara Harff and Ted Gurr, "Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945," *International Studies Quarterly* 32, no. 4 (1988); Pieter N. Drost, *The Crime of State: Genocide* (Leyden: A.W. Sythoff, 1959); Irving L. Horowitz, "Science, Modernity and Authorized Terror," in *Studies in Comparative Genocide*, eds. Levon Chorbajian and George Shirinian (London: Palgrave Macmillan, 1999); Jacques Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (New York: Columbia University Press, 2009); Steve T. Katz, *The Holocaust in Historical Context: Volume 1: The Holocaust and Mass Death before the Modern Age* (Oxford: Oxford University Press, 1994); Daniel Chirot and Clark McCauley, *Why Not Kill Them All? The Logic and Prevention of Mass Political Murder* (Princeton, NJ: Princeton University Press, 2010).
- 17 For a discussion of cultural destruction and genocidal intent, see Jones, *Genocide*, 42; see also John Quigley, *The Genocide Convention: An International Law Analysis* (Burlington, VT: Ashgate, 2006), 105; Martin Shaw, *What Is Genocide?* (Malden, MA: Polity Press, 2007), 106.
- 18 Horowitz, "Science, Modernity and Authorized Terror," 25.
- 19 *Ibid.*
- 20 Israel W. Charny, "Toward a Generic Definition of Genocide," in *Genocide: Conceptual and Historical Dimensions*, ed. George J. Andreopoulos (Philadelphia, PA: University of Pennsylvania Press, 1997), 84.
- 21 Kurt Jonassohn, "What is Genocide?" in *Genocide Watch*, ed. Helen Fein (New Haven, CT: Yale University Press, 1992), 21.
- 22 Jones, *Genocide*, 42.
- 23 Robert van Krieken, "Cultural Genocide Reconsidered," *Australian Indigenous Law Review* 12 (2008): 77.
- 24 Robert van Krieken, "Cultural Genocide in Australia," in *The Historiography of Genocide*, ed. Dan Stone (New York: Palgrave Macmillan, 2008), 147.
- 25 See Lindsey Kingston, "The Destruction of Identity: Cultural Genocide and Indigenous Peoples," *Journal of Human Rights* 14, no. 1 (2015): 63–83.
- 26 Damien Short, "Cultural Genocide and Indigenous Peoples: A Sociological Approach," *The International Journal of Human Rights* 14, no. 6 (2010): 842.
- 27 Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (New York: Zed Books, 1987), 31.
- 28 David Nersessian, "Cultural Genocide," in *Genocide: A Reader*, ed. Jens Meierhenrich (Oxford: Oxford University Press, 2014), 81.
- 29 George E. Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis: Fortress Press, 1993), 6.
- 30 See Bilsky and Klagsburn, "The Return of Cultural Genocide," 376–379; Thomas Butcher, "A 'Synchronized Attack': On Raphael Lemkin's Holistic Conception of Genocide," *Journal of Genocide Research* 15, no. 3 (2013): 253–271. Relatedly, in a settler-colonial context, Ruth Amir writes that "the colonial takeover is a process

- rather than an event.” See Ruth Amir, “Cultural Genocide in Canada? It Did Happen Here,” *Aboriginal Policy Studies* 7, no. 1 (2018): 106.
- 31 Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016), 3.
  - 32 Lawrence Davison, *Cultural Genocide* (New Brunswick: Rutgers University Press, 2012), 1.
  - 33 Novic’s book is the first fully comprehensive legal analysis of cultural genocide and its place in international law. See Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016). Davidson’s book is essentially divided into two parts. The first part offers an overview of cultural genocide’s theoretical foundations, while the second part provides four case studies.
  - 34 Douglas Irvin-Erickson, “Raphaël Lemkin: Culture and Cultural Genocide,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).
  - 35 *Ibid.*, p. 23.
  - 36 *Ibid.*
  - 37 Jeffrey Bachman, “An Historical Perspective: The Exclusion of Cultural Genocide from the Genocide Convention,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 57.
  - 38 David Nersessian, “A Modern Perspective: The Current Status of Cultural Genocide Under International Law,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 76.
  - 39 *Ibid.*
  - 40 *Ibid.*
  - 41 See Davison, *Cultural Genocide*, Chapters 2–5.
  - 42 Genna Naccache, “Genocide and Settler Colonialism: How a Lemkinian Concept of Genocide Informs Our Understanding of the Ongoing Situation of the Guarani Kaiowá in Mato Grosso do Sul, Brazil,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 121.
  - 43 Martin Crook and Damien Short, “A Political Economy of Genocide in Australia: The Architecture of Dispossession Then and Now,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 166.
  - 44 Kjell Anderson, “Colonialism and Cold Genocide: The Case of West Papua,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 179.
  - 45 Helen Malko, “Heritage Wars: A Cultural Genocide in Iraq,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019), p. 208.
  - 46 Adam Jones, “Editor’s Preface: The Present and Future of Genocide Studies,” in *New Directions in Genocide Research*, ed. Adam Jones (London: Routledge, 2012), xxi.
  - 47 Andrew Woolford and Jeff Benvenuto, “Canada and Colonial Genocide,” in *Canada and Colonial Genocide*, eds. Andrew Woolford and Jeff Benvenuto (London: Routledge, 2017), 6.
  - 48 In *Redefining Genocide*, Short makes a similar point. He contends that cultural genocide is a method of genocide and, therefore, *is* genocide. Thus, a descriptor is not necessary. See Short, *Redefining Genocide*, 36.
  - 49 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 183.
  - 50 Raphael Lemkin quoted in A. Dirk Moses, “Raphael Lemkin, Culture, and the Concept of Genocide,” 37.
  - 51 For more on hidden genocides, see contributions to Alexander Hinton, Thomas La Pointe, and Douglas Irvin-Erickson, eds. *Hidden Genocides: Power, Knowledge, Memory* (New Brunswick, NJ: Rutgers University Press, 2014).
  - 52 In their introduction to *Hidden Genocides*, Hinton, La Pointe, and Irvin-Erickson provide a table that categorizes cases of genocide based on their position in the field

of genocide studies. Categories include prototype, triad, twentieth-century core, second circle, periphery, and forgotten. The genocide in Indonesia is included in the periphery category. See Hinton *et al.*, *Hidden Genocides*, 6. Also see Chapter 4 in Bachman, *The United States and Genocide*, for more on the genocide in Indonesia and the role of the US.

53 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 398.

54 Ibid.

55 See Andrew Woolford, "Ontological Redress: The Natural and the Material in Transformative Justice for 'Cultural' Genocide," in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).

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**Part I**

**Cultural genocide in  
international law**



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# 1 Raphaël Lemkin

## Culture and cultural genocide<sup>1</sup>

*Douglas Irvin-Erickson*

Much has been written about Raphaël Lemkin,<sup>2</sup> one of the foundational figures in genocide studies.<sup>3</sup> Indeed, Lemkin's theories of persecution and mass violence are increasingly influential outside the subfield of genocide studies.<sup>4</sup> As this volume would suggest, a particularly important aspect of Lemkin's work relates to the notion of cultural genocide. On one level, it is fitting that scholars studying cultural genocide would turn to Lemkin. Lemkin, after all, coined the word "genocide," which first appeared in print in 1944, and inspired the movement at the United Nations in the late 1940s to outlaw genocide, which culminated in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Lemkin also wrote extensively about culture, genocide, and cultural genocide, and his work to outlaw genocide was inspired by a belief that cultural diversity enriched the human experience and should be protected.

Despite Lemkin's well-known interest in cultural destruction, what Lemkin meant by "cultural genocide" is less well-known, and Lemkin's views on the "death" of a culture are complex, nuanced and, at first-glance, counterintuitive. Oftentimes scholars will read Lemkin's writings and substitute their own definitions of "culture," "nations," and "genocide" in their interpretations of Lemkin's work. Of course, it is the prerogative of individuals to interpret a text in the way they see fit, but those who seek to understand Lemkin's writings should begin with accepting that Lemkin's definitions of these concepts are very different than the commonly held definitions of these words we have today. What is more, Lemkin's ideas on what "genocide," "culture," and "nations" were changed through time.<sup>5</sup>

Lemkin never used the phrase "cultural genocide" to refer to a type of genocide, except for a few years after 1946 when, during the second draft of the UN Genocide Convention, the US delegation split the concept of genocide into two concepts of physical genocide and cultural genocide. In my previous work, I have described at length the processes by which "genocide" was redefined during the drafting process of the UN Genocide Convention between 1946 and 1948.<sup>6</sup> As I have explained elsewhere, the US delegation's attempt to split the concept of genocide into two different concepts – cultural genocide and physical genocide – was an elaborate ploy to remove from the definition of genocide aspects of Lemkin's ideas that the US delegation found objectionable. Indeed,

the US delegation, along with the Soviet Union and the UK, did not want to enshrine a treaty into international law that criminalized the destruction of human groups as sociological entities. Lemkin began using this term “cultural genocide,” but always in the sense that attacking a culture was a way of committing genocide, and not a different type of genocide. But, as I have argued previously, the fact that Lemkin began using the term “cultural genocide” lent legitimacy to the notion that there was such a thing as two kinds of genocide, the physical and the non-physical. What is more, in the horse-trading of articles and definitions as the UN member states negotiated the treaty against genocide, Lemkin acquiesced. He stopped advocating for his wholistic conception of genocide and allowed what the US called “cultural genocide” to be removed from the treaty, so that he could preserve, in return, a consensus amongst a majority of the delegations drafting the convention that the treaty include provisions for referring the prosecution of genocide to a competent international tribunal (what is now Article VI of the final version of the Genocide Convention).<sup>7</sup>

Regardless of the minutiae of this history of the legal definition of genocide, Martin Shaw has shown convincingly that it is oxymoronic to refer to “cultural genocide” if the concept of genocide is already defined in reference to destroying a cultural group. Shaw, furthermore, presents an exceptional disquisition on the limitations of Lemkin’s theorizing on culture and the destruction of culture.<sup>8</sup> This chapter, instead, will attempt to parse Lemkin’s notions of cultural genocide, focusing on what Lemkin thought culture was. Indeed, I hope to make clear in this chapter that most definitions of “cultural genocide” that emerged in the writings of later theorists and scholars have very little in common with Lemkin’s notion of “cultural genocide,” precisely because the colloquial definitions of “culture” in current English-language usages have very little to do with the definitions of culture that emerged in the Anthropology of the 1930s, 1940s, and 1950s, which Lemkin used to define culture.

Crucial to this chapter, finally, is the point that Lemkin believed destroying a culture did not always result in the destruction of a human group and, therefore, attempts to destroy a culture were not always genocidal, and did not always result in genocide. For Lemkin, culture was not the primary object of protection under the UN Genocide Convention; national groups were. What takes many genocide scholars by surprise is that Lemkin’s definition of nations was so broad that it could include groups as small as “those who play at cards” or groups as large as Jews, Armenians, and Poles. Lemkin’s goal was to outlaw a broad range of attempts to destroy a broad range of human groups, and where cultural destruction intersected with attempts to destroy a particular group, then and only then would an act of cultural destruction be genocidal.

### **The concept of culture in “cultural genocide”**

The history of the concept of culture – not just Lemkin’s definition of culture, but the whole social history of the concept – is marked by several hundred years of definitional stability, with a sudden pattern of drastic changes in what this

word has been taken to signify in the past 100 years. The history of the concept of culture in the nineteenth and twentieth centuries is the subject of many dissertations, books, and learned essays. A cursory overview is sufficient to illustrate the points I wish to make. This overview is crucial because one's notion of what constitutes cultural genocide is dependent upon one's definition of culture. Definitions of culture employed by those who study "cultural genocide" tend to employ only two possible definitions of culture – the two usages that are most common in everyday colloquial English. This is important because Lemkin's definition of culture, in contrast, was taken directly from his reading of his contemporaries Bronisław Malinowski and Ruth Benedict.

To supply one's own definition of culture in interpreting Lemkin's writings on culture, therefore, is to fundamentally misread and misinterpret Lemkin's ideas.<sup>9</sup> As a result, there are many aspects of Lemkin's thinking that can seem counterintuitive at first. For instance, Lemkin believed that it was a fundamentally positive thing for "world civilization" to have cultures that changed, coming into and going out of existence. Lemkin's goal in outlawing genocide was not to prevent social groups from coming and going out of existence, but rather to prevent the intentional destruction of social groups because the intentional act of destruction caused devastating harm. Lemkin was clear, however, that no group had a prior right to exist, and that the disintegration of a given group (and, by extension, its culture) was not necessarily a bad thing. By outlawing genocide, Lemkin sought to protect a world where national-cultural diversity would be allowed to thrive. This necessarily implied that the destruction and creation of social groups was desirable, because he believed that the interactions of groups are what caused groups to change, and that this change was the engine of human progress and human creativity. It was the interaction of nations, and the changing of national groups, that inspired creativity, beauty, ingenuity, and countless other human goods, he believed, at the individual and group levels.

A. Dirk Moses was the first to notice this aspect of Lemkin's thinking. Moses' important work positions Lemkin, especially Lemkin's late works, squarely in the camp of Malinowski. While Lemkin's conception of cultural genocide is worked out in reference to Malinowski's theories of cultural functionalism, Lemkin dedicates more space in his unpublished manuscripts to writing about Benedict. The two theories of culture (the Malinowski-functionalism school and the Boas-Benedict historical particularism school) are often presented as being at odds with each other; yet they both recognized two things that became hallmarks of the discipline of Anthropology in the middle of the twentieth century and appear in Lemkin's thought, but are absent from the colloquial understandings of culture in current usage. First, they noted that a given culture was not the same thing as a human group as a sociological entity; and, second, that changes in a culture were necessary for ensuring the continuation of human societies, because these changes allowed people and groups to adapt to new situations and new challenges. Culture, therefore, was not something that existed as a reified whole, primordially or trans-historically. Lemkin, while never working out the contradictions between Malinowski and Benedict's theories of culture in his own

theory of genocide, employed these two definitions of culture as his own. From these axioms, Lemkin did not view the destruction of culture as genocide; rather genocide was the destruction of a national group. As a result, definitions of cultural genocide built around definitions of culture outside of Malinowski and Benedict's terms have very little to do with Lemkin's notion of cultural genocide.

The first colloquial usage of "culture" that is pertinent to our discussion is, according to the Oxford English Dictionary, the usage that refers to "the arts of the mind" and "other manifestations of human intellectual achievement regarded collectively" dates to the late seventeenth century. A recent article in *The European Journal of International Law* is indicative of this approach to cultural genocide that uses this definition of culture, analyzing the organized restitution of heirless Jewish property such as books, archives, and works of art as a specific response to cultural genocide.<sup>10</sup> This usage of "culture" originated as an elliptical use of the sixteenth-century usage: "development of the mind, faculties, manners" or "improvement by education and training." Who does not remember Thomas Hobbes writing in *Leviathan*, "The education of Children [is called] a Culture of their mindes"? This usage marked a contrast with a parallel sixteenth-century usage of "culture" that referred to the training and improvement of the human body. And, again, who does not remember Hobbes, in his translation of Thucydides' *Peloponnesian War*, marveling at the Lacedaemonian soldiers' bodies "Amongst whom ... especially in the culture of their bodies, the nobility observed the most equality with the commons"? These understandings of the word "culture" – to train the body and to train the mind – trace to three fifteenth-century usages that signified the preparation of fields for the growing of plants and crops, and the raising of farm animals. Indeed, in its Anglo-Norman and Middle French forms, the English word "culture" was etymologically related to the word "cultivate." Cultivate was the verb form of the noun, "culture." While those who use the phrase "cultural genocide" in English probably do not intend to signify the destruction of plants and farm land that people have "cultivated," it is safe to say that a significant amount of the colloquial usages of "cultural genocide" probably do signify acts aimed at destroying "the arts of the mind" and "other manifestations of human intellectual achievement regarded collectively," such as music, architecture, the sciences, the arts and literature, libraries, books and paintings and such. When culture is understood as a collective intellectual achievement – curated, created, and collectively *cultivated* – the location of culture is placed into the past and the future, as something a group achieves, makes, or maintains beyond the scope of any individual life or any individual's life works. But, in this sense, culture is also taken, somewhat paradoxically, to be located in the material artifacts and creations of a group: in a painting, in a library, in a book, in the architecture of a religious site. This was not Lemkin's definition of culture. As I shall discuss below, Lemkin believed the destruction of these collective achievements such as libraries, books, and music could be a means for committing genocide, but the destruction of these things was not necessarily genocide or genocidal.

A second usage of “culture” employed by scholars of cultural genocide is a more familiar contemporary definition, which emerged in the nineteenth century. According to the Oxford English Dictionary, this usage of “culture” is a count noun meaning “the distinctive ideas, customs, social behaviors, products, or way of life of a particular nation, society, people, or period” and, hence, “a society or group characterized by such customs.” This usage of “culture” came into existence as a reaction against the concept of civilization in Enlightenment philosophy to describe a given group’s religion, economy, politics, morals, and technology. In the German counter-Enlightenment philosophy, culture was coined to stand in opposition to civilization as such, signifying national movements in the arts and common tastes. Towards the end of the century, the first definitions of culture in Anthropology combined the two concepts of culture and civilization, to define culture as socially taught knowledge, beliefs, arts, morals, customs, and habits. Indeed, this is perhaps the most common definition of culture, where “a culture” signifies a body of thoughts and habits, but can also stand in for the group, reducing the group to this body of thoughts and habits, so that civilizational advances are reduced to culture, and culture explains civilizational advances; thus, when this usage is employed in “cultural genocide,” destroying a culture is tantamount to destroying the civilization, and vice-versa, and the destruction of either constitutes the destruction of the group.

We see this understanding of culture at work in a wide range of scholarship on cultural genocide, with authors who define cultural genocide as “the purposeful weakening and ultimate destruction of cultural values and practices of feared out-groups;”<sup>11</sup> and

the effective destruction of a people by systematically or systemically (intentionally or unintentionally in order to achieve other goals) destroying, eroding, or undermining the integrity of the culture and system of values that defines a people and gives them life.<sup>12</sup>

Authors who turn to these definitions do so because it allows them to reject the first usage of culture outlined above – as human intellectual achievement regarded collectively. Scholars of cultural genocide who employ this second usage of “culture” do so because the first usage is often taken as elitist, privileging “high culture” such as literature or art, and because this first definition would refute the possibility of cultural adaptation. For this second set of scholars, the “culture” in cultural genocide “refers to the wider institutions that are central to group identity” including “language, religious practices and objects, traditional practices and ways, and forms of expression.”<sup>13</sup> This usage brings us closer to Lemkin’s usage but, even still, Lemkin would not define such acts of destruction as genocide.

While the two usages of culture outlined above have remained constant in common usage, definitions of culture in Anthropology continued to change considerably. It is difficult to imagine many of the disciplinary definitions of culture that Anthropology has put forward in the last fifty years being used in a



definition of “cultural genocide.” What would be destroyed if “cultural genocide” employed Claude Lévi-Strauss’ definition of culture? A system of underlying structures of opposition common to all human societies? How could you destroy something intrinsic to the human condition? What if we employed Vic Turner or Clifford Geertz’s definitions of culture? Would cultural genocide be the destruction of independent systems of meaning deciphered by interpreting key symbols and rituals, or the destruction of webs of significance that changed the way people interacted? Definitions of cultural genocide that use these definitions of culture would border on the nonsensical, since Turner and Geertz constructed definitions of culture in which no individual or society ever belonged to any one culture but, at the same time, no individual could ever exist outside of culture. Indeed, theorists of “cultural genocide” are often putting their finger on the destruction of something that is different than what cultural anthropologists usually define as culture.

Before Lévi-Strauss, Turner, and Geertz created the frame for much of Anthropology’s theories of culture in the mid twentieth century, Franz Boas in the early part of the century saw culture as an integrated whole shaped by historical processes, not as something that was biologically, environmentally, naturally, or socially predetermined. This approach cleared the way for the founding of modern Anthropology to create definitions of culture that were different than the two common understandings of culture outlined above. Early twentieth-century anthropologists, writing before and after the two world wars, and during the early years of decolonization, were the contemporaries upon whom Lemkin built his understanding of culture. Following Boas, one of Lemkin’s heroes, Ruth Benedict, in her seminal book *Patterns of Culture*, placed learned behavior at the center of the human experience, drawing a sharp contrast with the idea that behavior was racially or biological determined. Benedict also charted a path toward viewing culture as a kind of human laboratory, so that the world’s cultural diversity provided a “vast network of historical contact” in which “we may study the diversity of human institutions” which “provide ready to our hand the necessary information concerning the possible great variations in human adjustments, and a critical examination of them is essential for any understanding of cultural processes.”<sup>14</sup> These sentiments echo throughout Lemkin’s writings.

Rather than cataloguing the scholars who employ a colloquial definition of culture when they interpret Lemkin’s writings on “culture,” or those who appropriate ideas about Lemkin’s notions of cultural genocide that circulate in received scholarship in genocide studies, it is far more productive to outline some examples of scholars who have considered the breath of Lemkin’s thinking through a careful examination of his theoretical writings. In one of the first scholarly treatments of Lemkin’s idea of cultural genocide, aside from Moses’ essay cited above, Barry Sautman correctly observed that Lemkin did not believe that cultural assimilation, or the loss of a cultural group, was a bad thing that had to be avoided at all costs.<sup>15</sup> As such, Sautman dismisses much of Lemkin’s work, and proceeds to chart a new path toward understanding “cultural genocide.” Indeed, Lemkin did not believe that any group had a prior right to exist, and he

believed that dynamic changes in group identities were beneficial to the human condition. Lemkin distinguished assimilation through moderate coercion, and voluntary assimilation, from acts of genocide. He considered, for example, the forced transfer of children from one group to another to be genocide, but not the construction of incentives that encouraged children to take on new forms of group membership and shift identities.<sup>16</sup> As Dominik Schaller has argued, Lemkin's views here are problematic when weighed against contemporary sentiments, especially when Lemkin framed the cultural changes brought about by colonialism as beneficial to non-European peoples, whose cultures he had a tendency to portray as lacking agency and being somewhat helpless in the face of the social and material challenges posed by a modernizing world.<sup>17</sup>

### **Lemkin: genocide as the destruction of nations**

Before considering Lemkin's ideas on cultural genocide further, it is necessary to remind readers of Lemkin's definition of genocide.

The word "genocide" first appeared in print in Lemkin's 1944 magnum opus, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*.<sup>18</sup> Lemkin derived "genocide" from the Greek word *genos* (race, family, tribe) and the Latin root *cide* (to kill). In a footnote, he added that genocide could equally be termed "ethnocide," with the Greek *ethno* meaning "nation." "By 'genocide' we mean the destruction of a nation or an ethnic group," Lemkin wrote.<sup>19</sup> Lemkin likened the word "genocide" to other words, such as tyrannicide, homicide, and infanticide. Genocide signified the attempt to destroy a national, racial, or religious group, but "it did not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation."<sup>20</sup> Instead, genocide was a social process of destroying nations that was not necessarily quick nor violent. For Lemkin, genocide signified "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."<sup>21</sup> The objective of such a plan, Lemkin added, was the

disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.<sup>22</sup>

The key detail here is that the destruction of culture, in Lemkin's thinking, is one of many ways in which genocide can be committed.

As a new word, "genocide" would also be free of the connotations carried by similar existing words, Lemkin felt, such as the German word *Völkermord*, meaning "nation-murder." *Völkermord* appeared in turn-of-the-century reports about the German colonial war against the Herero and Nama peoples, and it was used by public and private German and Habsburg sources to describe the Ottoman campaign against Armenians.<sup>23</sup> Lemkin was fluent in German and had

used the term, but decided against the word – perhaps because the root *Volk* was too close to the German Romantics’ use of *Volk* to describe an organic nation, a concept that Lemkin believed was an important structuring aspect of the Nazi genocide.<sup>24</sup> Similarly, *nationicides* was first used by François-Noël Babeuf in his 1794 book, *Du Système de dépopulation ou la vie et les crimes de Carrier*, to describe and condemn the conduct of Jean-Baptiste Carrier in the War of the Vendée, when troops sent from Paris started a project of depopulation to destroy the “nations” living in the territory.<sup>25</sup> The English word “denationalization” was commonly used too. But, as Lemkin explained, “denationalization” denoted the deprivation of citizenship or the removal of national groups from geographical territories, not the destruction of a national pattern as a sociological entity, nor the attempt to replace a given national pattern with national patterns of the oppressor.<sup>26</sup> “Genocide” would be the neologism Lemkin had been searching for, “coined by the author to denote an old practice in its modern development,” in order to mobilize efforts around the world to denounce the practice and remove it from the repertoire of human actions.<sup>27</sup>

While lecturing at Yale University after his work at the UN, Lemkin told his law students that he settled on the term “genocide” because the Greek and Sanskrit connotations of the root word *genos* signified a human group that was constituted through a shared way of thinking, not objective relations. The concept of the *genos* Lemkin said, “was originally conceived as an enlarged family unit having the conscience of a common ancestor – first real, later imagined.”<sup>28</sup> Martin Shaw has pointed out that, while Lemkin knew that human groups were mental constructions and did not have a reified form outside of their social constructions, his mistake was that he viewed all human groups, sociologically, as a kind of extended kinship or family unit.<sup>29</sup> Shaw’s interpretation, in my view, is largely correct. Theorists who employ Lemkin’s concepts of culture and cultural genocide should be well aware that Lemkin’s theory of the *genos* was deeply flawed by today’s social science standards, and that his overall notion of culture relies upon conceptions of culture that have been discredited by social scientists and historians.<sup>30</sup> However, simply because Lemkin’s understanding of culture and human societies is no longer accepted by social scientists does not mean Lemkin’s thinking on genocide and the destructions of nations should be thrown out. It is in this imagined connection between people, Lemkin presciently observed, where “the forces of cohesion and solidarity were born.” The same forces for group cohesion, Lemkin taught his students at Yale, could also serve as “the nursery of group pride and group hate” that is “sometimes subconscious, sometimes conscious, but always dangerous, because it creates a pragmatism that justifies cold destruction of the other group when it appears necessary or useful.”<sup>31</sup> This meant two things for Lemkin. First, he believed all social groups, including races and religions, were aspects of human consciousness that did not have trans-historical permanence. Second, he believed that genocide, as an attempt to destroy groups as such, was the product of “anthropological and sociological patterns” that could be changed.<sup>32</sup>

Lemkin also believed genocide was a colonial practice, and he said so explicitly.<sup>33</sup> Genocide had two phases, he wrote: “One, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”<sup>34</sup> “Directed against the national group as an entity,” he wrote, “the actions involved” in committing genocide “are directed against individuals, not in their individual capacity, but as members of the national group.” Lemkin thus interpreted the genocide perpetrated by Nazi Germany as a colonial project of transforming the demographics of Germany and the newly conquered regions of occupied Europe. “In line with this policy of imposing the German national pattern, particularly in the incorporated territories, the occupant has organized a system of colonization of these areas,” Lemkin wrote.<sup>35</sup> As a consequence of this German colonization of the occupied territories, Lemkin concluded, “participation in economic life is thus dependent upon one’s being German or being devoted to the cause of Germanism. Consequently, promoting a national ideology other than German is made difficult and dangerous.”<sup>36</sup>

Lemkin believed that twentieth-century nationalist movements were not the first to inspire genocide, and he sought a definition of genocide that would capture what genocide was as a type of conflict. For much of history before the rise of the nation-state, Lemkin wrote, the “fury or calculated hatred” of genocide was directed “against specific groups which did not fit into the pattern of the state [or] religious community or even in the social pattern” of the oppressors, he continued. The human groups most frequently the victims of genocide were “religious, racial, national and ethnical” and “political” groups, he wrote. But genocide victims could also be other families of mind “selected for destruction according to the criterion of their affiliation with a group which is considered extraneous and dangerous for various reasons.” These other groups did not have to be racial or religious groups. Lemkin even included under the rubric of nations sociological groups such as “those who play cards, or those who engage in unlawful trade practices or in breaking up unions.”<sup>37</sup> Genocide, Lemkin reasoned, could be conducted against criminals because states often criminalized certain types of subjectivities and identities. Lemkin derived this point from his study of the penal codes of fascist regimes, where the state conceptualized national-cultural diversity as a crime against the nation and the state. The principle, Lemkin felt, was evident in the Soviet penal codes that criminalized national identities and tried to transform the Soviet population into a nation of “new Soviet men.” It was also evident in the Nazi citizenship laws and race law that defined Jews as enemies of the state – criminals – and set about the task of removing Judaism from Germany and then the world, Lemkin wrote. In similar fashion, religious groups could seek to remove other religions from the world, and so forth. Genocide, for Lemkin, was not a fixed concept, in terms of what kinds of social groups committed it; what kinds of social groups it was committed against; or even how it was committed. Any attempt to destroy a nation, as a family of mind, was genocide. If genocide was the destruction of nations and national patterns, what was a nation according to Lemkin?

Here, Lemkin borrowed heavily from the Austro-Hungarian Marxist and Social Democratic theorists and political figures, Karl Renner and Otto Bauer. Indeed, he told Renner as much in his personal correspondences.<sup>38</sup> Bauer had argued that modern nations were “communities of character” that developed out of “communities of fate.”<sup>39</sup> For Bauer, Renner’s longtime co-author and close political colleague, nations were not derived territorially, as liberal nationalism professed, nor were they the closed off and organic entities that conservatives (and German Romantic theorists) believed them to be. For Bauer, national consciousness was “by no means synonymous with the love of one’s own nation or the will for the political unity of the nation.” Instead, “national consciousness is to be understood as the simple recognition of membership in the nation.”<sup>40</sup> This also meant that the content of national identity was always changing because both nationality and nations as social groups were products of the consciousness of individuals.<sup>41</sup> Thus for Bauer, nations were neither trans-historical nor primordial entities but constantly changing as individuals themselves changed and as new “communities of fate” formed and developed into new “communities of character.” Consequently, national identity was not a zero-sum game, and national identities were not mutually exclusive. Lemkin would borrow these ideas explicitly in his late, unpublished writings on genocide and quietly announced this position in a footnote in *Axis Rule*.<sup>42</sup>

“Nations are families of mind,” Lemkin wrote.<sup>43</sup> Moses has written that Lemkin believed that “nations comprise various dimensions: political, social, cultural, linguistic, religious, economic and physical/biological.”<sup>44</sup> While this is true, a nation, according to Lemkin, was above all a collection of individuals who thought of themselves as belonging to the same group, with the help of shared languages, arts, mythologies, folklores, collective histories, traditions, religions and even shared ancestry or a shared geographical location. Languages, lineages, pseudo-scientific theories of biology, religions, and geography – these only created the boundaries of national groups when people believed that these things mattered. Importantly, this principle meant that a given individual could belong to more than one nation at the same time since the criteria for establishing nations were not mutually exclusive. Individuals could enter into and out of certain “families of mind” throughout their lives or could express one identity at one time and another at another time, or multiple national identities at once. Within this conception, no individual could ever be fully representative of a nation; nor could any individual be reduced to a nation.

It was for this reason that Lemkin considered many different kinds of groups to be “nations,” believed that nations were constituted by people’s recognition that they were part of a nation, argued that nations were always changing their national character and that this dynamism enriched the lives of individuals, and felt that each individual could hold many different national identities throughout his or her life – oftentimes holding several at once. For Lemkin, genocide was, above all else, an attempt to deny this dynamism in human societies, to wall-off the boundaries of social groups, and to produce static forms of social identity that served the interests of narrow groups within a conflict, such as political or

religious elites, but that would ultimately stifle human creativity, beauty, ingenuity, and the forms of social interaction necessary for promoting social change.

Lemkin's definition of genocide was simple. Genocide was the destruction of nations, which entailed the destruction of the national patterns of the oppressed group and the imposition of the national patterns of the oppressor. For Lemkin, genocide was not necessarily an act of mass murder, though mass murder could be genocide if the act was committed with the intention of destroying a nation. Instead, if genocide was the destruction of nations and national patterns, then genocide for Lemkin was very much the destruction of "families of mind" as well as the destruction of social processes by which "communities of character" formed from "communities of fate," to apply Bauer's terminology. For Lemkin, the destruction of cultural symbols, artifacts, and institutions was not genocide, by itself, unless it "menaces the existence of the social group which exists by virtue of its common culture."<sup>45</sup> In such a formulation, therefore, the outlawing of particular customs and rituals, attempts to abolish a language, or the destruction of social institutions or cultural institutions become genocidal for Lemkin when the acts are committed with the intention of preventing the replication of a group's social identity.

If Lemkin defined genocide as the destruction of nations (as families of mind) – and believed that genocide involved the destruction or removal of the national pattern of the oppressed and the imposition of the national pattern of an oppressor – then we can understand why Lemkin would be so concerned with acts that destroyed the bonds of social solidarity that made group life, and the social reproduction of groups, possible. This is precisely why Lemkin believed that in many cases, the destruction of libraries and the banning of folk traditions and religious customs could be acts of genocide, while large-scale acts of mass killing and massacres might not qualify as genocidal.

Lemkin was not trying to coin the word "genocide" to signify a particular type of violence.<sup>46</sup> Rather, he was trying to create a new juridical and conceptual category of "different actions" that, "taken separately," constitute other crimes but, when taken together, constitute a type of atrocity that threatened the existence of social collectivities and threatened a peaceful and cosmopolitan social order of the world.<sup>47</sup> As a consequence, Shaw writes, in contrast to subsequent theorists who narrowed genocide to a specific crime, Lemkin saw genocide as including not only organized violence but also a wide range spectrum of forms of persecution.<sup>48</sup> Genocide, in Lemkin's thought, was a social and political process of attempting to destroy human groups, not an act of mass killing. But he defined human groups as mental constructions, families of mind, nations created through a historical process. It followed, therefore, that genocide was the destruction of *social processes* not social things. Remember, also, that he defined nations themselves as processes, not objective wholes.

As Lemkin explained in his unpublished manuscript, *Introduction to the Study of Genocide*, "like all social phenomena, [genocide] represents a complex synthesis of a diversity of factors; but its nature is primarily sociological, since it means the destruction of certain social groups by other social groups or the individual representatives."<sup>49</sup> Any analysis must, therefore, recognize that



genocide is a gradual process and may begin with political disenfranchisement, economic displacement, cultural undermining and control, the destruction of leadership, the break-up of families and the prevention of propagation. Each of these methods is a more or less effective means of destroying a group. Actual physical destruction is the last and most effective phase of genocide.<sup>50</sup>

It bears repeating again, for emphasis, that Lemkin did not believe the destruction of cultural symbols, artifacts, and institutions was genocide, unless these acts of destruction “menaces the existence of the social group which exists by virtue of its common culture.”<sup>51</sup> Here was Lemkin’s notion of genocide as a process that destroyed a process, not an act that destroyed a thing.

### **Lemkin on group destruction in *Axis Rule in Occupied Europe***

To position Lemkin as a key theorist in the study of mass violence, identity-group violence, cultural violence, and community destruction, it is necessary to examine his 1944 magnum opus, *Axis Rule in Occupied Europe*. Lemkin begins the book by presenting chapters titled simply, “Administration,” “Police,” “Law,” “Courts,” “Property,” “Finance,” “Labour,” “Legal Status of the Jews,” and, ninth, “Genocide.” The book documents how the Nazi Party ruled Germany, and directed the Axis occupation, before presenting Lemkin’s thesis that genocide was the guiding principle of that occupation. The short, five-page eighth chapter on the legal status of the Jews introduces the chapter on genocide by showing how the Nazi Jewish laws structured the actions of bureaucracies and individuals at almost every level of the Axis governments. The ninth chapter demonstrates that the legal status of the Jews, beginning in the early 1930s, set in motion a social and political process that was both institutional and normative, shaping expectations of how Jews should be treated socially, legally, and politically. Thus, a banker, a store owner, a judge, and a police officer would all be compelled to treat Jews in a certain way according to their individual duties and social roles, ensuring a process of social reification in which Jews become the imagined “other” that Nazi policies took them to be in the first place. Moreover, the chapter also demonstrates that the Jewish laws directed the governments and societies in occupied Europe toward a systematic suppression of people who were understood to be Jewish. When taken individually, none of these separate actions compelled by the law – whether they were the actions of a functionary doing his or her job or a racist – constituted a genocidal scheme to dismantle an entire Jewish nation. It was only when they were taken together, on the whole, that they constituted genocide.<sup>52</sup> In the eighth chapter on the legal status of the Jews, the concept of genocide is, therefore, fully implicit even though Lemkin does not mention the word “genocide.” But it is also clear that Lemkin saw genocide as a systematic plan of persecution, aimed at destroying groups as sociological entities.



The ninth chapter on genocide sets the groundwork for the rest of the book, which contains an exhaustive analysis of the genocide as it was conducted in each of the occupied territories. The third part of *Axis Rule* includes nearly 400 pages of translations of statutes, directives, and decrees that Lemkin began collecting in Stockholm in late 1941. From his analysis of Axis laws, Lemkin demonstrated that the various occupying administrations were engaged in a systematic attack on enemy “elements of nationhood” in every Axis administration across Europe. Though systematic, the genocide was not conducted uniformly throughout Europe. Instead, Lemkin identified eight distinct “techniques of genocide” being employed across Germany and the occupied territories. He introduced these techniques in his chapter on genocide before analyzing the laws of occupation. These techniques were: political, social, cultural, economic, biological, physical (including racial discrimination in feeding, endangering of health primarily in ghettos, and mass killings), religion, and moral. Lemkin did not intend these eight techniques to be a typology for all genocides. Where he outlines techniques such as “economic” or “biological” or “cultural” genocides, for instance, Lemkin is not outlining a particular type of genocide or a means of committing genocide that could apply to all cases across history. Instead, in *Axis Rule*, Lemkin simply attempts to outline the way the Axis genocide was being conducted, and the specific ways the Nazi program of genocide was structured across Europe, in accordance with the particular contours of Nazi ideologies and interests.

The first technique of the Axis genocide, Lemkin believed, was politics. Politically, Lemkin argued, the German occupiers prepared for genocide by destroying the local institutions of self-government in the incorporated areas, which would have been capable of resisting Nazi orders. The German occupation subsequently replaced the political institutions with “German patterns of administration” that could be effective institutional conduits for implementing German policies. The regime ruled through the “usurpation of sovereignty,” which was achieved by hollowing out local institutions likely to resist Nazi orders, shattering existing legal orders, and then instituting new juridical orders channeled through those most likely to be loyal in each region. As Lemkin later explained in a manuscript he authored in the 1950s but never published, “the Nazis never broke a law if they could help it. They changed instead the law to fit the new situation – or rather the new crime.”<sup>53</sup>

The second technique of the Axis genocide was social. Indeed, Lemkin saw political and social techniques of genocide as interrelated, and believed that removing the “local law and local courts” and replacing them with “German law and courts” was the first step to destroying the “vital” social structures of the nation. The focal point of the laws of occupation and the Nazi decrees quickly became “the intelligentsia, because this group largely provides national leadership and organizes resistance against Nazification,” Lemkin wrote.<sup>54</sup> Lemkin also included laws banning Polish youth from studying the liberal arts because “the study of liberal arts may develop independent national Polish thinking,”<sup>55</sup> the closure of private schools across occupied Europe to promote a

unified National Socialist education, and the banning of perceived anti-German textbooks.<sup>56</sup>

Cultural genocide, Lemkin's third category, was closely intertwined with social techniques. By cultural genocide, Lemkin did not mean that the destruction of culture was genocide, but rather that genocide against a group could be committed through cultural techniques. Across the incorporated territories, he observed, "the local population is forbidden to use its own language in schools and printing."<sup>57</sup> There were decrees ordering teachers in grammar school to be replaced by German teachers to "assure the upbringing of youth in the spirit of National Socialism."<sup>58</sup> It was even illegal to dance in public buildings in Poland, except for dance performances officially approved as sufficiently German.<sup>59</sup> In fact, in every occupied territory, people who "engaged in painting, drawing, sculpture, music, literature, and the theater are required to obtain a license" from the local office of the Reich Chamber of Culture "to prevent the expression of the national spirit through artistic media."<sup>60</sup> In Poland, the authorities in charge of cultural activities organized the destruction of national monuments and destroyed libraries, archives, and museums, carrying away what they desired and burning the rest.<sup>61</sup>

Fourth, the genocide was being committed through economics, from liquefying financial cooperatives, to confiscating property, to manipulating financial systems to undermine the elemental base of human existence. Fifth, genocide was being committed biologically, he wrote. Because the German ideology thought of nations in idioms of race and biological superiority, there was very clearly a biological element to the Nazi German genocide, Lemkin believed. The Nazi regime sought to lower birthrates of people whose bloodline was undesirable, while promoting the reproduction of those who were biologically more favorable. Sixth, physical genocide, Lemkin wrote, signified the "physical debilitation and even annihilation" of national groups. The physical attack on nations was conducted through racial discrimination in feeding, measures intended to endanger the health of groups, and mass killings. This technique of mass killing, Lemkin wrote, "was employed mainly against Poles, Russians, and Jews, as well as against leading personalities" who represented the intelligentsias of enemy nations. The Jews, Lemkin wrote, were liquidated by disease, hunger, and executions inside the ghettos, on transport trains, and in labor and death camps.

The seventh technique was religious, Lemkin wrote, as the German occupation attempted to change the religious patterns of the occupied territories. The eighth technique of the Nazi German genocide, Lemkin wrote, was the closely related category of morality. Moral genocide, he argued, included acts intended to "weaken the spiritual resistance of the national group." This could include forced drug use or the practice of inflating food prices to prevent people from affording basic nutrition, while artificially keeping alcohol prices low to encourage people to drink instead of eat.<sup>62</sup>

By themselves, none of these eight techniques would constitute genocide. Nor did Lemkin intend these ideas to signify typologies of genocide. Nor were these techniques the only way to commit genocide. Rather, Lemkin's analysis of the

laws of the Axis occupation of Europe revealed that the legal order in the occupied territories was oriented toward destroying enemy nations using these eight techniques. In other words, Lemkin's goal in *Axis Rule* was to define genocide as a general, broad category of conflict, and then outline the ways in which this particular genocide was being committed by the Nazis. "Cultural genocide" in Lemkin's terminology in *Axis Rule*, therefore, was not a type of genocide – but rather one of many techniques of committing genocide that included mass killings and concentration camps, but also forms of political, social, and economic destruction, and more.

### Culture and genocide

Lemkin scholars have argued that Lemkin's idea of genocide is dangerous because it is derived from a "Herderian ontology" of groupism that is explicitly anti-liberal.<sup>63</sup> Herder, of course, was the German Romantic theorist who first developed the notion of culture that gave rise, historically, to the bedrocks of Anthropology, including cultural relativism, and a deep sense of compassion for the suffering caused by colonial attempts to destroy culture in the name of civilization. Romantic nationalism might have generated an appreciation for cultural diversity, Lemkin pointed out, but it did so by glorifying cultures as primordial entities that transcended history, to which all individuals could be reduced. This notion of culture was grounded in a form of nationalism, he continued, that sought to glorify the trans-historical and primordial German nation above and beyond the forms of oppressive European governments. Lemkin believed this Romantic notion of culture, which underpinned German nationalism, would later be used by anti-semitic and militarist thinkers such as Ernst Moritz Arndt, Heinrich von Treitschke, and Friedrich Ludwig, the philologist and theologian who felt the German nation was humiliated by the Napoleonic victories and started a nationalist gymnastic movement to unify and strengthen the young men of the country.<sup>64</sup> Troubled by this ideology that presents the individual, the community, the nation, and the state as objective and organic wholes bound by language, blood, and territory, Lemkin saw Romantic nationalism as highly exclusionary, consolidating the idea of the nation – the *Volk* – into the service of an intolerant nation state.

Fichte, the prominent follower of Herder, was especially problematic for Lemkin. In Fichte's conception, the nation expressed an organic "will" that provided social cohesion by enforcing a strict vision of relativity that shaped individuals' tastes, beliefs, values, morals, and actions. Fichte's theory of the union of the state, nation, and morality – where the highest principles of morality and right were attained by people living together in a physically and spiritually self-reproducing society that manifested its will in the state – was the starting point from which the ancient practice of genocide took its modern form, Lemkin wrote.<sup>65</sup> Fichte and Herder, Lemkin wrote, invented the idea of a singular German *Volk* that was present throughout history in order to advocate uniting "German" peoples, such as the Danes, Poles, Prussians, Austrians, Bavarians, and so forth, into a single empire and nation-state.

To argue that Lemkin conceptualized human groups, and culture, in organic or Herderian-Romantic terms is to ignore Lemkin's own thoughts on the matter. Lemkin could not have been more clear that he rejected a definition of culture that was derived from a German Romantic world view, and even believed that this notion of culture was an important factor in shaping the Holocaust. Lemkin argued explicitly that the "Herderian Romantic approach" which valorized organic cultures and believed human groups were organic and trans-historical entities might have inspired emancipatory nationalist movements in the revolutions of 1848, but "it became culturally atavistic in the nineteenth century and politically aggressive in the late nineteenth and the first half of the twentieth centuries," when it "coupled with the strive for power, aggrandizement, internal anxieties, and disrespect for minorities [to] create a climate ... for the perpetration of genocide."<sup>66</sup>

With an understanding of nations derived from the national cultural autonomy theorists – not organic or romantic nationalists – Lemkin rejected atavistic theories of the nation and was resolute in his opposition to a relativistic form of nationhood. When Lemkin told the *Christian Century* in a 1956 interview that he did not consider himself to be only Polish or Jewish because he did "not belong exclusively to one race or one religion," he was rejecting this organic nationalist worldview without completely giving up his communitarian sentiments.<sup>67</sup> Lemkin, as Moses put it, did not structure identity like a zero-sum game, and never "believed that being a Polish patriot and advocate for all cultures entailed renouncing his Jewish heritage or cultural rooting."<sup>68</sup> Likewise, he held that standard of identity for all of humanity, where individuals could hold as their own many identities at once – could belong to many families of mind at once – and could not be reduced to any particular one.

What makes Lemkin's thinking difficult to parse is that he did not believe nations were organic and primordial entities with a concrete existence defined by blood, language, geography, or some other objective criteria; rather, he believed that nations were aspects of consciousness that took on a social reality as a "family of mind" between individuals. By contrast, culture, in Lemkin's definition of the concept, was a functional, structural force that provided for the basic needs of a human group, and helped bind the social group together as a group. After the war, Lemkin explained his ideas on cultural destruction and genocide by citing anthropologists James Frazer and Bronisław Malinowski's theories of cultural functionalism, the theory that culture was necessary for maintaining the physical well-being of people because it integrated social institutions and coordinated practices, beliefs, and actions to allow people to pursue and sustain their biological needs.<sup>69</sup> Lemkin wrote after the war in his unpublished manuscript *Introduction to the Study of Genocide* that all human beings "have so-called derived needs which are just as necessary to their existence as the basic physiological needs." These derived needs "find their expression in social institutions," Lemkin wrote, citing Frazer. He concluded, "If the culture of a group is violently undermined, the group itself disintegrates and its members either become absorbed into other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction."<sup>70</sup>

If nations were “families of mind” according to Lemkin’s definition of the concept, then it was culture that integrated nations. Culture, in Lemkin’s definition, was a functional, structural force that integrated individuals into social groups. As Shaw has explained, Lemkin recognized that nations did not actually have concrete linkages that united them through history; rather, he believed it was the social construction of these linkages that mattered. In Lemkin’s thought, there were certain aspects of culture – common rituals, music, arts, practices, and shared beliefs – that integrated individuals into national groups and allowed them to form the “family of mind” (and, remember, indeed, that Lemkin’s definition of nation had such a low bar that almost any imaginable social group, such as “card players,” would have qualified as a nation so long as individuals of that group believed they were a group). The destruction of culture was therefore closely associated with the destruction of nations, in Lemkin’s thought, because the destruction of culture could undermine the ability of a nation to exist. However, Shaw observes, Lemkin’s definition of culture “cannot bear the weight of representing the essence of what is attacked in the whole range of genocides,” which means that Lemkin could not have considered the mode of genocide to be mainly cultural.<sup>71</sup> Lemkin spelled out his position when he wrote that the “destruction of cultural symbols is genocide” only when “it implies the destruction of their function” and subsequently “menaces the existence of the social group which exists by virtue of its common culture.”<sup>72</sup> Thus we see at work Lemkin’s belief that the destruction of culture, according to his definition of culture, is not genocide; genocide was the destruction of the family of mind.

Lemkin explained his ideas further by turning to the anthropologist Ruth Benedict, who became one of his main academic sources in his manuscript *Introduction to the Study of Genocide*. In *Patterns of Culture*, Benedict created a framework for understanding how individuals were shaped by culture and how individuals shaped culture.<sup>73</sup> Although Benedict built on existing theories of cultural functionalism that have been dispelled in contemporary Anthropology – and although she believed that individuals’ subjectivities were almost completely shaped by their cultural groups, which has also been refuted in the discipline – she argued that culture was not a fixed object and therefore could not be dealt with typologically. Rather, the critic had to look to an area “beyond cultural relativity” to see how cultures were constantly changing, adjusting to challenges, or adapting to meet the demands of crisis.<sup>74</sup> The text is crucial for understanding Lemkin’s writings on the difference between cultural change and genocide. “Gradual changes occur by means of the continuous and slow adaptation of the culture to new situations,” Lemkin wrote, echoing Benedict.<sup>75</sup> No culture can exist without changing, he added, but the process of gradual change also ensures that a given culture may slowly disintegrate over time. As culture changed, so too did nations change. Genocide, in contrast to cultural change, was an attempt to destroy a nation. Thus the act of genocide, in Lemkin’s thought, was an act that was intended to protect the inviolability of an imagined organic national group by destroying other forms of national consciousness, and thereby prevent cultural change from taking place. The end result of genocide, Lemkin wrote, was a static and unchanging world civilization.

Lemkin's internationalism and cosmopolitanism were intertwined. His vision of human rights was predicated on the state's responsibility to protect all who lived in the state, not just its citizens – where the liberal rule of law stood to guarantee the ability of individuals to exercise their ethnic traditions, religious beliefs, and identities. Lemkin's theory was ecumenical, as well. He believed the Genocide Convention represented something larger than a promise of tolerance and good governance: the promise for all people to live in a world where they could enjoy the experience of difference. The acceptance of others with different traditions and identities was the source from which all other demands for human rights were derived in the first place. In Lemkin's thought, the Genocide Convention was part of a larger effort: "first we make existence safe," and "then we work to improve it."<sup>76</sup> The freedom of speech, the freedom to vote, the freedom to worship, he argued, were meaningless in a world that sought to stamp out national-cultural diversity and obliterate people's ability to freely exercise their subjectivity.

Turning back to Ruth Benedict's writings on the importance of cultural values changing in relation to challenges faced by a society or individuals, Lemkin cited *Patterns of Culture* to argue that "cultural relativity can be a doctrine of hope rather than despair" when it fosters a universal respect for national-cultural diversity, an understanding that cultures and national identities are always changing, and that this dynamism is a fundamental human good.<sup>77</sup> "In our present endeavors at unifying the world for peace," Lemkin continued,

this doctrine [of cultural relativity] has a two-fold significance. It means that we must respect every culture for its own sake. It also means that we must probe beyond specific cultural differences in our search for a unified conception of human values and human rights. We know that this can be done.<sup>78</sup>

Here is the heart of what Moses calls Lemkin's "ecumenical cosmopolitanism."<sup>79</sup> In his description of his research project for *Introduction to the Study of Genocide*, Lemkin explained that the "philosophy of the Genocide Convention is based on the formula of the human cosmos" that recognized a need to outlaw the destruction of nations "not only by reason of human compassion but also to prevent draining the spiritual resources of mankind."<sup>80</sup> "World culture is like a subtle concerto" that "is nourished and gets life from the tone of every instrument," Lemkin explained.<sup>81</sup>

Lemkin saw this diversity as the wellspring of human creativity and the great animator of a dynamic world.<sup>82</sup> The interaction between nations, as culture-bearing groups, is what prevents world culture from becoming "static," Lemkin wrote. Lemkin did not join with Herder and Fichte to celebrate cultures as the sources of all creativity and the human good. Rather, the engine of all human creativity was the possibility of living in a plural world animated by diversity, to allow for the free exercise of subjectivity, and to allow individuals to experience different subjective positions. Such national-cultural diversity, Lemkin believed,



is what generated new kinds of thought, tastes, aesthetics, and beliefs and enriched the lives of individuals.<sup>83</sup> The struggle against genocide, he wrote, began when “it was felt that a brutally imposed, national or racial pattern by one nation or race over the entire world would be an end of civilization.”<sup>84</sup> For Lemkin, the struggle against genocide was a struggle to create a world where the “subtle concerto” of a peaceful, accepting, and diverse world civilization could finally take hold.

## Notes

- 1 Acknowledgment: This chapter is adapted from lectures delivered at Harvard University, the University of Buenos Aires, and Florida International University. Portions of this chapter appeared earlier in Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017). Thank you to the University of Pennsylvania Press for permission to reproduce portions of the book in this chapter, which I have cited as needed.
- 2 John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008); William Korey, *An Epitaph for Raphael Lemkin* (New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001); Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013). Samantha Power, “*A Problem from Hell*”: *America and the Age of Genocide* (New York: Basic Books, 2002); Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*; and Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (New York: Knopf, 2016). David Crowe is writing a much-anticipated biography of Lemkin.
- 3 Agnieszka Biencyzk-Missala and Slawomir Debski, eds., *Rafał Lemkin: A Hero of Humankind* (Warsaw: Polish Institute of International Affairs, 2010); and Dominik Shaller and Jürgen Zimmerer, eds., *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence* (New York: Routledge, 2009). See two special issues on Lemkin in *Journal of Genocide Research* 15, no. 3 (2013), and 7, no. 4 (2005). Several important early journal articles and chapter include Steven L. Jacobs, “Genesis of the Concept of Genocide According to Its Author from the Original Sources,” *Human Rights Review* 3, no. 2 (2002): 98–103; A. Dirk Moses, “Raphael Lemkin, Culture, and the Concept of Genocide,” in *Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 19–41; and Steven Schnur, “Unofficial Man: The Rise and Fall of Raphael Lemkin,” *Reform Judaism* (1982): 9–11 and 45. And see introductions to: Steven L. Jacobs, ed., *Raphael Lemkin’s Thoughts on Nazi Genocide: Not Guilty?* (Lewiston, NY: Edwin Mellen Press, 1992); Steven L. Jacobs, ed., *Lemkin on Genocide* (Lanham, MD: Lexington Books, 2012); and, Frieze, ed., *Totally Unofficial: The Autobiography of Raphael Lemkin*. A special issue of *Genocide Studies and Prevention* dedicated to Raphaël Lemkin, edited by Benjamin Meiches and Jeff Benvenuto, is forthcoming.
- 4 Alexander Laban Hinton, “Critical Genocide Studies,” *Genocide Studies and Prevention* 7, no. 1 (2012): 4–15.
- 5 The subject that has been studied extensively. For instance, see Moses, “Raphael Lemkin, Culture, and the Concept of Genocide”; Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*; Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*; Martin Shaw, *What is Genocide?* 2nd edition (London: Polity, 2015); Martin Crook, Damien Short, and Nigel South, “Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments,” *Theoretical Criminology* 22, no. 3 (2018): 298–317.



- 6 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, Chapter 6.
- 7 Ibid.
- 8 Shaw, *What is Genocide?*, 25–35.
- 9 For an excellent review, see Moses, “Raphael Lemkin, Culture, and the Concept of Genocide.” Cf. Ruth Amir, “Law Meets Literature: Raphael Lemkin and Genocide Studies,” *Pólemos: Journal of Law, Literature and Culture* 12, no. 2 (2018): 429–447.
- 10 Leora Bilsky and Rachel Klagsbrun, “The Return of Cultural Genocide?” *The European Journal of International Law* 29, no. 2 (2018): 373–396.
- 11 Lawrence Davidson, *Cultural Genocide* (New Brunswick, NJ: Rutgers University Press, 2012), 18–19.
- 12 George Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis: Fortress Press, 1993), 6.
- 13 See Lindsey Kingston, “The Destruction of Identity: Cultural Genocide and Indigenous Peoples,” *Journal of Human Rights* 14, no. 1 (2015): 63–83, 65.
- 14 Ruth Benedict, *Patterns of Culture* (Boston: Mariner Books, 1934), 17.
- 15 Barry Sautman, “Cultural Genocide in International Contexts,” in *Cultural Genocide and Asian State Peripheries*, ed. Barry Sautman (London: Springer, 2006), 5.
- 16 Ruth Amir, “Killing Them Softly: Forcible Transfers of Indigenous Children,” *Genocide Studies and Prevention: An International Journal* 9, no. 2 (2015): 41–60, 52.
- 17 Dominik J. Schaller, “Raphael Lemkin’s Views of European Colonial Rule in Africa: Between Condemnation and Admiration,” in *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, eds. Dominik J. Schaller and Jürgen Zimmerer (New York: Routledge, 2013), 87–94, 92.
- 18 Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Carnegie Endowment for International Peace, 1944).
- 19 Lemkin, *Axis Rule*, 79.
- 20 Ibid.
- 21 Ibid.
- 22 Ibid.
- 23 Henry R. Huttenbach, “From the Editor: Lemkin Redux: In Quest of a Word,” *Journal of Genocide Research* 7, no. 4 (2005): 443–445.
- 24 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 6. But see, Claudia Kraft, “Völkermord als Delictum Iuris Gentium: Raphaël Lemkin’s Vorarbeiten für eine Genozidkonvention,” *Simon Dubnow Institute Yearbook* 4 (2005): 79–98.
- 25 Carmelo Domenico Leotta, *Il genocidio nel diritto penale internazionale: dagli scritti di Raphael Lemkin allo Statuto di Roma* (Torino: G. Giappichelli Editore, 2013), 72–76.
- 26 Lemkin, *Axis Rule*, 79–80.
- 27 Ibid., 79.
- 28 Lemkin, *Totally Unofficial*, 181–182.
- 29 Shaw, *What is Genocide?*, 21.
- 30 Ibid., 24.
- 31 Lemkin, *Totally Unofficial*, 181–182.
- 32 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 9.
- 33 Lemkin, *Axis Rule*, 79.
- 34 Ibid., 79. See generally A. Dirk Moses, ed., *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (London: Berghahn Books, 2008).
- 35 Lemkin, *Axis Rule*, 83.
- 36 Ibid., 86.
- 37 Raphaël Lemkin, “The Nature of Genocide,” n.d., Raphaël Lemkin Collection, P-154, American Jewish Historical Society, New York, United States [hereafter AJHS], box 2, folder 2, p. 14.

- 38 See Karl Renner, "State and Nation," *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (New York: Routledge, 2005), 15–48, especially at 30 and 39. Compare this to Lemkin's correspondences with Renner. Raphael Lemkin to Karl Renner, March 29, 1950, Raphael Lemkin Papers, American Jewish Association, Cincinnati, Ohio, United States, box 1, folder 15.
- 39 Otto Bauer, *The Question of Nationalities and Social Democracy*, trans. Joseph O'Donnell, ed. Ephraim J. Nimni (Minneapolis: University of Minnesota Press, 2000), 7.
- 40 Bauer, *Question of Nationalities and Social Democracy*, 120.
- 41 *Ibid.*, 21.
- 42 Lemkin, *Axis Rule*, 91 note 5.
- 43 Raphael Lemkin, "Genocide," Raphael Lemkin Papers, New York Public Library, New York, United States [hereafter NYPL], reel 4, box 3, folder 1–2, p. 1.
- 44 A. Dirk Moses, "The Holocaust and Genocide," in *The Historiography of the Holocaust*, ed. Dan Stone (Houndmills: Palgrave Macmillan, 2004), 539.
- 45 Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, 144; Correspondence from Raphaël Lemkin to Thomas Mahoney, December 28, 1948, box 2, folder 2, Raphaël Lemkin Collection, P-154, AJHS, Boston and New York.
- 46 Shaw, *What Is Genocide?*
- 47 *Ibid.*
- 48 *Ibid.*, 36.
- 49 Raphaël Lemkin, "The Concept of Genocide in Sociology," in Raphaël Lemkin, *Introduction to the Study of Genocide*, n.d., NYPL, reel 3, box 2, folders 1–4.
- 50 Raphael Lemkin, "Concept of Genocide in Sociology."
- 51 Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, 144; Correspondence from Raphaël Lemkin to Thomas Mahoney, December 28, 1948, box 2, folder 2, Raphaël Lemkin Collection, P-154, American Jewish Historical Society, Boston and New York.
- 52 Bartolomé Clavero, *Genocide or Ethnocide, 1933–2007: How to Make, Unmake and Remake Law with Words* (Milan: Giuffrè Editore, 2008), 32.
- 53 Jacobs, *Raphael Lemkin's Thoughts on Nazi Genocide*, 187.
- 54 Lemkin, *Axis Rule*, 83.
- 55 *Ibid.*, 84.
- 56 *Ibid.*, 385–391. See "Orders in Regard to Private Schools, December 6, 1940"; "Elementary School System in Lorraine, February 14, 1941"; and "Use of Certain French Textbooks, August 10, 1940."
- 57 Lemkin, *Axis Rule*, "Order Concerning the Use of the German Language in Luxemburg, August 6, 1940," 440.
- 58 Lemkin, *Axis Rule*, "Order Concerning Compulsory Schooling in Lorraine, February 14, 1941," 386.
- 59 Lemkin, *Axis Rule*, "Order Concerning Prohibition of Dancing in the Government General, April 9, 1941," 555.
- 60 Lemkin, *Axis Rule*, 84 and "Duty of Registration for All Persons Engaged in Creating or Transmitting Cultural Values in Luxemburg," 442.
- 61 Lemkin, *Axis Rule*, "Order Concerning the Preservation of Works of Art in the Occupied Territory of France, July 15, 1940," 390.
- 62 Lemkin, *Axis Rule*, 90.
- 63 See Daniel Marc Segesser and Myriam Gessler, "Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)," *Journal of Genocide Research* 7, no. 4 (2005): 453–468; Thomas M. Butcher, "A 'Synchronized Attack': On Raphael Lemkin's Holistic Conception of Genocide," *Journal of Genocide Research* 15, no. 3 (2013): 253–271. On this debate, see A. Dirk Moses, "Moving the Genocide Debate beyond the History Wars," *Australian Journal of Politics and History* 54, no. 2 (2008): 248–270, 267. Seyla Benhabib has defended Lemkin against

- charges that he advocated a relativist nationalism of vulnerable peoples: Seyla Benhabib, *Dignity in Adversity: Human Rights in Trouble* (Cambridge: Polity Press, 2011), 51, 220 note 24.
- 64 Raphaël Lemkin, "Introduction: The New Word and the New Idea," NYPL, n.d., reel 3, box 2, folder 2, p. 8.
- 65 Ibid.
- 66 Raphaël Lemkin, "Collective Frustrations as a Prelude to Genocide," NYPL, n.d., reel 3, box 2, folder 4.
- 67 Robert Merrill Bartlett, "By the Way: Pioneer vs. an Ancient Crime," *Christian Century* (July 16, 1956).
- 68 Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," 24.
- 69 Ibid., 25–26.
- 70 Raphaël Lemkin, "The Significance of Cultural Genocide," NYPL, n.d., reel 3, box 2, folder 3.
- 71 Shaw, *What is Genocide?*, 25.
- 72 Raphaël Lemkin, "The Concept of Genocide in Anthropology," NYPL, n.d., reel 3, box 2, folder 3.
- 73 See, Virginia Heyer Young, *Ruth Benedict: Beyond Relativity, Beyond Pattern* (Lincoln: University of Nebraska Press, 2005), 2.
- 74 Margaret Mead, *Ruth Benedict* (New York: Columbia University Press, 1974).
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- 76 Herbert Yahraes, "He Gave a Name to the World's Most Horrible Crime," *Collier's* (March 3, 1951): 28–29, 56.
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- 79 Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," 24–25.
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## 2 An historical perspective

### The exclusion of cultural genocide from the genocide convention

*Jeffrey S. Bachman*

#### **Introduction**

Prior to its adoption at the General Assembly and subsequent entry into force, the text of the United Nations Genocide Convention (UNGC) evolved through a drafting and negotiation process that determined the final provisions of the treaty. Throughout this process, debate over whether cultural genocide (for the purpose of this chapter, “cultural genocide” refers specifically to a particular technique of genocide) ought to be included in the treaty was highly contentious. This chapter provides an overview of the UNGC’s drafting process, the means by which cultural genocide was excluded from the final text, how the “colonial clause” was added, and historical context to show how colonial powers were aggressively seeking the exclusion of cultural genocide.

#### **Overview of the drafting process**

In 1946, Raphael Lemkin began in earnest his campaign to make genocide a crime under international law. The importance of Lemkin’s efforts cannot be overstated. As Elisa Novic explains, in the aftermath of World War II,

Ultimately, it was genocide, rather than crimes against humanity, which received codification. It is hard to explain this fact by any reason other than Lemkin’s involvement; he relied upon the post-war momentum of a new international order to lobby the international community to adopt quickly an international instrument dedicated to genocide.<sup>1</sup>

On November 2, 1946, Cuba, India, and Panama requested that the UN General Assembly include on its agenda the prevention and punishment of genocide. Approximately one month later, on December 11, 1946, the General Assembly adopted Resolution 96(I), which affirmed that genocide “is a crime under international law which the civilized world condemns” and requested that the Economic and Social Council “undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”<sup>2</sup> From this point forward, the



process can be divided into three phases, as it is in the treaty's preparatory works: the development of the Secretariat Draft and the subsequent discussion and comment period; the appointment of an Ad hoc Committee on Genocide and its work on a revised Ad hoc Committee Draft; and discussions of the Ad hoc Committee Draft at the more representative Sixth Committee, where the text of the treaty was prepared for final debate and adoption at the General Assembly.<sup>3</sup>

The UN Division of Human Rights was charged with drawing up an initial working draft of a convention on genocide, which was then discussed and revised by three Secretary-General appointees: Raphael Lemkin, Vespasian Pella, and Henri Donnedieu de Vabres. The three experts developed the first formal draft of the UNGC – the Secretariat Draft.<sup>4</sup> The Secretariat Draft defined genocide as a criminal act committed against a racial, national, linguistic, religious, or political group “with the purpose of destroying it in whole or in part or of preventing its preservation or development.”<sup>5</sup> Article II of the Secretariat Draft identifies the three techniques of genocide as physical genocide, biological genocide, and cultural genocide.<sup>6</sup>

The Secretariat Draft was submitted to the Economic and Social Council in May 1947. The Economic and Social Council appointed the Ad hoc Committee on Genocide to continue drafting the convention. The Ad hoc Committee, consisting of seven members – China, France, Lebanon, Poland, Soviet Union, United States, and Venezuela – voted on its draft of the convention at its twenty-sixth meeting on May 10, 1948. With five votes in favor, one vote against, and one abstention, the Ad hoc Committee sent a revised draft of the treaty back to the Economic and Social Council.<sup>7</sup> In Article II of its draft, the Ad hoc Committee defined genocide as a set of “deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members.”<sup>8</sup> Notably, Article II included only acts that constituted the techniques of physical and biological genocide. Cultural genocide was included separately in Article III.

On August 26, 1948, the Economic and Social Council sent the Ad hoc Committee Draft to the General Assembly, which then referred it to the Sixth Committee.<sup>9</sup> The Sixth Committee produced a new draft of the convention, which was sent back to the General Assembly. On December 9, 1948, the General Assembly unanimously adopted Resolution 260(A)(III), formally known as the Convention on the Prevention and Punishment of the Crime of Genocide. Article II of the final text of the UNGC defines genocide as specific acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Absent from the final enumerated acts of genocide is the technique of cultural genocide.

### **Negotiating cultural genocide out of the UNGC**

Though the final text of the UNGC emphasizes physical genocide, the first two drafts identified acts of cultural destruction and prohibition as severe human



rights violations that, alone, constituted a method of genocide.<sup>10</sup> The Secretariat Draft defined cultural genocide as:

Destroying the specific characteristics of the group by:

- a forcible transfer of children to another human group; or
- b forced and systematic exile of individuals representing the culture of a group; or
- c prohibition of the use of the national language even in private intercourse; or
- d systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- e systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

The Ad hoc Committee Draft retained much of the language found in the Secretariat Draft. It defined cultural genocide as:

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

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

Due to disagreement with his fellow appointees – Pella and Donnedieu de Vabres – Lemkin was forced to devote considerable effort to gain the inclusion of cultural genocide in the Secretariat Draft.<sup>11</sup> Lemkin believed the method of cultural genocide was the “most important part of the Convention.”<sup>12</sup> Prior to working on the Secretariat Draft, Lemkin wrote in 1946, “Cultural considerations speak for international protection of national, religious and racial groups. Our whole cultural heritage is a product of contributions of all nations.”<sup>13</sup> Thus, for Lemkin, both the cultural contributions themselves and the ability of groups to contribute them were central to his conception of genocide.

The three experts disagreed about whether the UNGC ought to prohibit the elements of cultural genocide. De Vabres and Pella argued that cultural genocide represented “an undue extension of the notion of genocide” to the “protection of minorities.”<sup>14</sup> Lemkin, however, argued that a group’s existence is predicated on the preservation of “its spirit and moral unity” and that the destruction of a group’s culture is “as disastrous for civilization as was

physical destruction of nations.”<sup>15</sup> Ultimately, the three experts submitted the Secretariat Draft with all three of Lemkin’s methods of genocide included, allowing the state parties who would negotiate the terms and provisions of the treaty to determine its fate.

That cultural genocide was originally included alongside physical and biological genocide triggered strong opposition from colonial powers,<sup>16</sup> two of which, the US and France, were represented on the Ad hoc Committee. These powers were simultaneously human rights advocates and sensitive to criticism of policies in territories under their administrative control.<sup>17</sup> At the Ad hoc Committee, proponents of the inclusion of cultural genocide asserted that genocide could be committed either through attempts to physically exterminate a group or through the extermination of its culture. Opponents countered that the UNGC should be limited to the most egregious acts and that cultural genocide ought to be addressed by those organs concerned with human rights, protection of minority populations, and discrimination.<sup>18</sup>

As Irvin-Erickson also notes in Chapter 1, the US was a vocal opponent of the inclusion of cultural genocide at the Ad hoc Committee.<sup>19</sup> It sought to include a formal declaration in a Committee report:

The prohibition of the use of language, systematic destruction of books, and destruction and dispersion of documents and objects of historical or artistic value, commonly known in this Convention to those who wish to include it, as ‘cultural genocide’ is a matter which certainly should not be included in this Convention. The act of creating the new international crime of genocide is one of extreme gravity and the United States feels that it should be confined to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject. The acts provided for in these paragraphs are acts which should appropriately be dealt with in connection with the protection of minorities.<sup>20</sup>

Because of the significant influence wielded by the US, the Ad hoc Committee ultimately came to a compromise in order to retain the prohibition of cultural genocide while also retaining the support needed to move the drafting of the convention forward. As requested by the US and France, the Ad hoc Committee separated cultural genocide from physical and biological genocide. This was the source of the inclusion of physical and biological genocide in Article II of the Ad hoc Committee Draft, and cultural genocide in Article III. The request was made by the US, with French support, to “enable Governments to make reservations on a particular point of the Convention.”<sup>21</sup> In other words, the US and France wanted to allow states to adopt the UNGC, while also declaring that they did not recognize the existence of the crime of cultural genocide. With the compromise, the Ad hoc Committee voted six to one in favor of retaining the prohibition of cultural genocide.

Despite the compromise made at its behest, the lone dissenting vote was cast by the US. The US defended its vote, stating,

The decision to make genocide a new international crime was extremely serious, and the United States believed that the crime should be limited to barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide.<sup>22</sup>

Further, the US adopted a similar strategy to that used by the Soviet Union in its efforts to exclude political groups from the UNGC:

Were the Committee to attempt to cover too wide a field in the preparation of a draft convention for example, in attempting to define cultural genocide – however reprehensible that crime might be – it might well run the risk to find some States would refuse to ratify the convention.<sup>23</sup>

Thus, the US lobbed the thinly-veiled threat that it would undermine the adoption of the UNGC if cultural genocide were included.

Upon multiple attempts to engineer its removal, opponents of the inclusion of cultural genocide succeeded at the Sixth Committee, the General Assembly's standing committee and primary forum for the consideration of legal questions. Pakistan argued against its omission, asserting that the purpose of genocide is to destroy

the ideas, the values and the very soul of a ... group, rather than its physical existence. Thus the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not do the same for cultural genocide.<sup>24</sup>

Pakistan also noted that General Assembly Resolution 96(I) recognized that genocide had inflicted "great losses on humanity in the form of cultural and other contributions." Thus, Pakistan argued, the General Assembly had intended that cultures be protected. In response to those who brought up the importance of cultural assimilation, something Lemkin did not oppose,<sup>25</sup> Pakistan noted that assimilation could be used as a "euphemism concealing measures of coercion designed to eliminate certain forms of culture."<sup>26</sup>

Denmark, the Netherlands, France, and the US were vocal opponents of retaining cultural genocide during debate at the Sixth Committee. Denmark argued that the inclusion of cultural genocide would relegate the convention to being "a tool for political propaganda instead of an international legal instrument."<sup>27</sup> Denmark added that equating mass murder and the closing of libraries demonstrated a clear lack of logic and proportionality.<sup>28</sup> The Netherlands argued that cultural genocide was too vague to be pinned down in a clear and concise definition. Further, according to the Netherlands, it was questionable whether "all cultures, even the most barbarous, deserved protection, and whether the assimilation resulting from the civilizing action of a State also constituted genocide."<sup>29</sup> France argued that protection of cultures was a human

rights issue and, therefore, ought to be protected “within the framework of the international declaration on human rights.”<sup>30</sup> Finally, the US argued that the convention should be limited to those acts that “shocked the conscience of mankind.”<sup>31</sup>

The Soviet Union forcefully argued in support of the inclusion of cultural genocide; meanwhile, Belarus openly accused the US and the United Kingdom of cultural genocide, stating that the

North American Indian had almost ceased to exist in the United States. [He went on to say that in] colonial territories too there were no signs that indigenous culture was being developed and encouraged.... Ninety percent of the people living in the British colonies were illiterate, for the development of culture and the colonial yoke were mutually exclusive.<sup>32</sup>

The UK delegate responded, “There had been considerable progress in the colonies toward self-determination. No evidence had been produced that the use of Native tongues was being restricted in any British colony.”<sup>33</sup>

At this point, Ukraine joined the debate. Ukraine stated that

a petition by Natives of Tanganyika (part of present-day Tanzania) complaining that a proposed law affecting their interests and ostensibly supported by them had not even been translated into their Native tongue.... On the whole Natives were prevented from using their language and developing their own culture. It was enough to cite the following figures: on the Gold Coast 90,000 out of a population of 3,500,000 Natives attended schools; in Kenya, the Government spent 500 times as much on each European child as on each African child.<sup>34</sup>

The negotiating parties that opposed the inclusion of cultural genocide succeeded in excluding it at the Sixth Committee by a vote of twenty-five to sixteen, with four abstentions.<sup>35</sup> Explaining the US vote against the inclusion of cultural genocide at the Sixth Committee, Mr. Gross stated,

There were, in fact, grounds for asking whether it was more important to protect the right of a group to express its opinions in the language of its choice, [which is what Article III did,] or to protect its right to free expression of thought, whatever the language. If the object were to protect the culture of a group, then it was primarily freedom of thought and expression for the members of the group which needed protection.<sup>36</sup>

Thus, for the US, protecting the rights of the members of different cultures to speak their ancestral language was not as important as protecting the rights of the individuals within the different cultures to freely express themselves. Essentially, Gross made the claim that without freedom of expression, a group would be voiceless regardless of which language the group speaks. Yet, Gross’s

argument painted the situation as one of either freedom of expression or freedom to communicate in one's cultural language.

During the final debates over the text of the UNGC, proponents and opponents of a prohibition of cultural genocide continued to defend their positions. The Soviet Union's proposal that cultural genocide be reinserted into the language of the treaty was rejected. The Soviet delegate argued that the exclusion of cultural genocide from the treaty "might be utilized by those who wished to carry out discrimination against national, cultural and racial minorities."<sup>37</sup> Pakistan again emphasized that physical genocide was only one means by which the destruction of a people could be achieved, arguing that "forcible and systematic suppression of a national culture" should not be allowed to be consumed within the "euphemistic term of assimilation."<sup>38</sup> The US, meanwhile, also reiterated elements of its previously stated arguments. According to the US, as "barbarous and unpardonable" as destroying churches and libraries might be, such acts are not comparable to physical genocide. Similarly, India opined that it had not been shown that the destruction of "religious edifices, schools or libraries" would result in the annihilation of the group. The UK dismissed the idea of cultural genocide as "essentially a matter of human rights and that the convention on genocide should be confined in the strict sense to the physical extermination of human groups."<sup>39</sup>

### **Inserting the "colonial clause"**

Forced assimilation of members of one group into another, such as by an occupying or colonizing force, was a central element of Lemkin's concept of genocide.<sup>40</sup> When the negotiating parties stripped the text of the UNGC almost entirely of the elements of cultural genocide,<sup>41</sup> they also eliminated most of the links between colonialism and genocide.<sup>42</sup> One question remained, however: would the UNGC apply to territories under the administrative control of another state?

At the Sixth Committee, the UK proposed the addition of Article XII to the UNGC. Article XII states,

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Despite its significance, in the abundant literature on the UNGC, Article XII has failed to garner the attention it deserves.<sup>43</sup> Even within the UNGC's nineteen articles, Article XII is placed among the procedural articles, separated from the more substantive articles by Article X, which certifies the Chinese, English, French, Russian, and Spanish texts as equally authentic, and Article XI, which details the ratification and accession processes.

Article XII gave the colonizing powers the option of extending application of the UNGC to the territories under their control; i.e. application was not

compulsory, but rather voluntary. This led the Soviet Union to refer to Article XII as the “colonial clause.”<sup>44</sup> In support of the colonial clause, the UK asserted,

It had been the custom during the last twenty or thirty years to include an article similar to the one proposed by this delegation in all multilateral treaties. It was only in recent years that any objections had been raised to the practice and those objections were based on purely political motives and designed to create difficulties for the colonial Powers.<sup>45</sup>

The UK argued further in defense of its proposal by stating that it would be constitutionally impossible for it to decide for its territories, especially those territories that were completely self-governing, whether they would accept and be bound by the provisions of the convention without first consulting them. The US supported the proposal, stating that it was “extremely reasonable.”<sup>46</sup>

Essentially, the UK argued that because colonies were not present to represent themselves at the negotiations, they could not be compelled to abide by the terms of the UNGC without first giving their consent. The UK failed to note that the colonial territories, lacking statehood and UN Member State status, could not ratify or accede to the UNGC. Thus, the UK failed to acknowledge that without requiring all territories under the control of the colonial powers be protected by the UNGC, these territories would be left outside of the UNGC’s protection.

Ukraine challenged the UK’s position, arguing that it was of the utmost importance that the treaty apply to all countries and especially non-self-governing territories. According to Ukraine,

[T]he peoples of non-self-governing territories were most likely to become the victims of acts of genocide because they did not possess the highly developed organs of information necessary to inform the whole world immediately of the commission of the crime.<sup>47</sup>

The Soviet Union also challenged the UK, asking it to address two questions: (1) how many of the UK’s territories were self-governing and how many were non-self-governing, and (2) would the UK accept compulsory responsibility for its non-self-governing territories?<sup>48</sup> The UK representative replied that he was not a colonial expert and, therefore, could not respond to the Soviet Union’s first question with precise numbers. The UK’s representative did claim that at least three-quarters of its territories were self-governing. In response to the Soviet Union’s second question, the UK answered that it was technically possible for the UK to extend the application of the UNGC to non-self-governing territories, but the UK “did not choose to adopt this course.”<sup>49</sup>

The UK argued that almost all of the territories under its control maintained some form of local administration and, therefore, it was not up to the UK to commit those territories to the UNGC’s obligations, even though, technically, only it could do so because its colonies lacked the statehood required to be Contracting Parties. The Soviet Union seemed to accept, at least for the sake of

argument, that self-governing territories were primarily responsible for the treatment of their populations. Ukraine argued that non-self-governing territories, however, were especially susceptible to genocide because they lacked advanced forms of communication that would allow victims to inform the international community of their plight. The Soviet Union pressed the UK to answer whether it would extend the UNGC's protection to its non-self-governing territories. The UK answered in the negative with no further explanation.

Unsatisfied, the Soviet Union continued to press the issue. It stated that the treaty was atypical and that in order to avoid furthering the dark days of the colonial legacy, the "Committee should bear in mind that millions must not be allowed to remain outside the scope of the convention and left to the arbitrary action of the colonial Powers."<sup>50</sup> The Soviet Union questioned the sincerity of the UK, arguing that it must be concluded from the UK's position that it believes "that there might be peoples who wished to become victims of genocide."<sup>51</sup> Seemingly with no sense of irony, the UK retorted that the Soviet Union was asking it and the other colonial powers to impose their will on their territories.

Ukraine submitted a proposal to counter that of the UK. Ukraine's proposal would have required that all territories under the control of a colonizer be included as parties to the UNGC. The Ukraine and UK proposals were voted on in that order. Ukraine's proposal was defeated by nineteen votes to ten, with fourteen abstentions. The UK's proposed addition of Article XII was adopted by eighteen votes to nine, with fourteen abstentions.<sup>52</sup> Later, the Soviet Union would submit a reservation to Article XII, stating, "The Union of Soviet Socialist Republics declares that it is not in agreement with Article XII of the Convention and considers that all provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories" (Declarations and reservations).<sup>53</sup> It is clear from the Soviet Union's reservation that it believed Article XII to be inconsistent with the object and purpose of the UNGC.

### **Protecting the interests of the colonial powers**

The UNGC was a political project.<sup>54</sup> The final text of the treaty was the result of political maneuvering, particularly by those state actors that emerged from the ashes of World War II. The US and Soviet Union were especially influential during the proceedings, but so too were the other colonial powers. Conversely, the territories administered by the colonial powers lacked any influence over the proceedings because they lacked statehood, which meant they were unable to participate in the drafting of the UNGC. Thus, as Christopher Powell notes, "The wording of the Convention was shaped by the desire of its framers not to criminalize their own behavior."<sup>55</sup> The result of the negotiations, then, was not a treaty developed from the good faith of the negotiating parties, but rather one that was created in response to the horrors already committed in the first half of the twentieth century, while protecting the interests of the negotiating parties. As Anna Leander and Tanja Aalberts assert, legal expertise and argument cannot be depoliticized; the law is political.<sup>56</sup>



The US, France, and UK sought to express reasonable arguments for their opposition to the inclusion of cultural genocide and/or their support for the colonial clause; however, their positions can be easily refuted. In response to the argument that the elements of cultural genocide lack the severity of the crime of physical genocide, Kristina Hon states, “The underpinnings of society, culture, and communities, however, *are* [emphasis in original] so threatened by prohibitions on books and languages, thereby lowering quality of life and weakening identity.”<sup>57</sup> It was also argued by the colonial powers that the elements of the crime of cultural genocide would be more appropriately dealt with by human rights instruments aimed at protecting minority rights. Hon recognizes the validity of such an argument on its surface, but then notes its failure to “consider that it is not always the majority that oppresses the minority, and that groups of equal strength and population might also wish to eliminate the other’s culture in a fight for dominance and power.”<sup>58</sup> The colonial powers also argued that the inclusion of cultural genocide could interfere with the right of states to implement policies aimed at incorporating and assimilating minority populations. However, the inclusion of cultural genocide would have distinguished between organic and forced assimilation by criminalizing the latter.<sup>59</sup> Nevertheless, limiting genocidal assimilation to mean only that which was demonstrably forced, that is the result of some form of direct coercive act, was still unsatisfactory for many of the negotiating parties, which believed the Secretariat Draft equated closing libraries to mass murder.<sup>60</sup>

The UK also sought to offer legalistic arguments in support of its proposed colonial clause. The UK argued that extending the UNGC to its territories without the consent of the local administrators would violate their sovereignty. While technically valid, the UK’s argument against compulsory application of the convention lacked legitimacy. First, such an argument fails to acknowledge the many ways in which colonization violated the sovereignty of the colonized. Second, the UK’s attempt to depict the use of similar language in previous treaties as the norm failed to acknowledge the growing movement following World War II to end the colonial era. Therefore, the UK’s reference to what had been acceptable in previous decades lacked the “validity” it may have once held. In response to Ukraine and the Soviet Union’s challenges to its proposal, the UK claimed its objections were politically motivated. Presumably, that was certainly at least partially the case. However, Soviet and Ukrainian efforts to “create difficulties for the colonial Powers” did not invalidate their opposition to the colonial clause. Article XII of the UNGC clearly violates the spirit of the treaty. Leaving territories under some form of administrative control outside of the UNGC’s legal protection is incompatible with the object and purpose of the universal prohibition of genocide. It is also clear that Article XII violates the spirit of the United Nations Charter. Article 73 states:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the

inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

The colonial powers had good reason to fear the application of the UNGC to their policies at home (in the case of the US and its treatment of its indigenous peoples) and to those in foreign territories under their control. At the time the provisions of the UNGC were being negotiated, France held seventeen colonies and two UN trusteeships in Africa alone.<sup>61</sup> The UK also maintained seventeen African colonies and kept close ties with the apartheid regime in South Africa.<sup>62</sup> Meanwhile, the US was actively engaged in policies that sought to “kill the Indian, spare the man.”<sup>63</sup> According to Mako,

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.<sup>64</sup>

Julian Burger argues that colonial conquest inevitably leads to cultural genocide through the subjugation of the victims of colonial conquest and the marginalization of their cultures:

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.<sup>65</sup>

According to Jean-Paul Sartre, the only thing that prevented colonial administrators from taking the next step from committing cultural genocide to committing physical genocide was the usefulness of the local populations for “the colonial economy”:

Since victory, easily achieved by overwhelming fire-power, provokes the hatred of the civilian population, and since civilians are potentially rebels and soldiers, the colonial troops maintain their authority by the terror of perpetual massacre, genocidal in character. This is accompanied by cultural genocide, made necessary by colonialism as an economic system of unequal exchange in which the colony sells its raw materials and agricultural products at a reduced price to the colonizing power, and the latter in return sells its manufactured goods to the colony at world market prices. However, the dependence of the settlers on the sub-proletariat of the colonized protects the latter, to a certain extent, against physical genocide.<sup>66</sup>

For Davis and Zannis, genocidal intent is inherent to colonization:

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.<sup>67</sup>

Establishing a colony typically involved the expedient forced assimilation of indigenous populations into the colonizer's culture, usurpation of land, and appropriation or destruction of their cultural heritage. In some cases, it involved the annihilation of members of the indigenous population.<sup>68</sup> Mako writes that cultural genocide was a means to expedite indigenous integration without committing genocide in the physical sense.

Leo Kuper challenges the notion that colonization inevitably leads to cultural genocide. He notes the necessary contrast between borrowing items of culture and transforming institutions, on one hand, and the implementation of deliberate policies aimed at the elimination of a culture, on the other. Kuper recognizes that there have been many examples of cultural genocide in the history of colonization, but argues that it is not a universal feature of colonization.<sup>69</sup> Kuper's conclusion is an important one, because colonial policies varied between colonizers and colonies. However, Kuper's conclusion is also important in relation to the colonial powers' opposition to the inclusion of cultural genocide in the UNGC. For the colonial powers to be opposed to the inclusion of cultural genocide, it was not required that colonization be synonymous with cultural genocide. Nor was it required that the potential for cultural genocide be present in each and every one of the colonial powers' colonies. For it to be in the vested interest of the colonial powers that cultural genocide be omitted from the UNGC, all that was necessary was that their policies in some colonies include elements of the crime of cultural genocide. Therefore, the question is not whether the colonial powers were committing cultural genocide beyond a shadow of a doubt prior to or during the UNGC's negotiations, or subsequent to its entry into force; rather, the issue is whether the colonial powers had reason for concern that they could be implicated in or accused of cultural genocide because of their policies in one or more of the territories under their control. If the colonial powers had reason for such concern, it would have been in their interest to push for cultural genocide's omission.

Even with the successful exclusion of cultural genocide from the UNGC, it was still in the interests of the colonial powers to exclude territories under their control from the treaty's protection. For example, Kuper offers Algeria as a prime example of genocide committed by a colonial ruler against the colonized. Kuper believes that the colonization and decolonization of Algeria are among the bloodiest conflicts in history.<sup>70</sup> Muhammad el-Farra wrote of France's use of force to suppress the legitimate rights of Algerians. As the suppression of cultural rights intensifies, some members of the oppressed population may begin to

organize and consider armed resistance.<sup>71</sup> This, Kuper argues, is inevitable. Therefore, the colonial power must resort to force to maintain its control over the colonized. This is precisely what happened in Algeria, argues el-Farra:

Entire villages are shelled, bombed, or burned; acts of genocide are committed against the inhabitants of towns and villages; an indiscriminate campaign of extermination is now taking place.... These are acts of genocide committed against people whose only crime is their love for liberty and their desire to preserve their own culture.<sup>72</sup>

## Conclusion

The omission of the technique of cultural genocide from the UNGC removed forced assimilation, prohibition of various forms of cultural and group expression, and destruction of a group's cultural heritage, as well as other acts, from the scope of the treaty's protection. This protected the interests of those states who had a history of policies that threatened the cultural survival of members of their populations and/or those living in territories under their control. Furthermore, it permitted such states to continue to employ acts associated with the technique of cultural genocide during the UNGC's drafting process, as well as subsequent to its entry into force. The omission of cultural genocide has also resulted in a contentious debate among genocide scholars. With an increased focus on indigenous rights and efforts to decolonize genocide studies, the idea that cultural destruction is a technique of genocide has become increasingly accepted. It is now time for the law to catch up.

## Notes

- 1 Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016), 23.
- 2 United Nations General Assembly. Resolution 96(I) of 11 December 1946. Accessed May 1, 2016. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>.
- 3 For detailed overviews of this process, see chapter 2 in Novic, *The Concept of Cultural Genocide*; Matthew Lippman, "The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide," *Boston University International Law Journal* 3, no. 1 (1985): 1–65. For a complete record of the UNGC's preparatory works, see Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (The Hague: Martinus Nijhoff Publishing, 2008).
- 4 Lippman, "The Drafting of the 1948 Convention," 5–9.
- 5 Secretariat Draft of the Convention on the Prevention and Punishment of the Crime of Genocide. Accessed May 1, 2016. [www.preventgenocide.org/law/convention/drafts](http://www.preventgenocide.org/law/convention/drafts).
- 6 For a description of the specific acts that make up each of the three techniques of genocide, see Article II of the Secretariat Draft.
- 7 Lippman, "The Drafting of the 1948 Convention," 34.
- 8 Ad hoc Committee Draft of the Convention on the Prevention and Punishment of the Crime of Genocide. Accessed May 1, 2015. [www.preventgenocide.org/law/convention/drafts](http://www.preventgenocide.org/law/convention/drafts).

- 9 John Quigley, *The Genocide Convention: An International Law Analysis* (Burlington, VT: Ashgate, 2006).
- 10 Lindsey Kingston, "The Destruction of Identity: Cultural Genocide and Indigenous Peoples," *Journal of Human Rights* 14, no. 1 (2015): 66.
- 11 Novic, *The Concept of Cultural Genocide*, 24.
- 12 Quoted in A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 37.
- 13 Quoted in Lippman, "The Drafting of the 1948 Convention," 3.
- 14 *Ibid.*, 11.
- 15 *Ibid.*
- 16 Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016), 18.
- 17 *Ibid.*; Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT: Yale University Press, 1982), 31; Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco, CA: City Lights, 1997), 411.
- 18 Lippman, "The Drafting of the 1948 Convention," 31.
- 19 Douglas Irvin-Erickson, "Raphaël Lemkin: Culture and Cultural Genocide," in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).
- 20 Abtahi and Webb, *The Genocide Convention*, 1061.
- 21 William Schabas, *Genocide and International Law: The Crime of Crimes* (New York: Cambridge University Press, 2000), 181.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 Quoted in Lippman, "The Drafting of the 1948 Convention," 44.
- 25 See, among others, Irvin-Erickson, "Raphaël Lemkin: Culture and Cultural Genocide"; Moses, "Raphael Lemkin," 27; Novic, *The Concept of Cultural Genocide*, 21.
- 26 Quoted in Lippman, "The Drafting of the 1948 Convention," 44.
- 27 *Ibid.*, 45.
- 28 *Ibid.*
- 29 *Ibid.*
- 30 Schabas, *Genocide and International Law*, 183.
- 31 Abtahi and Webb, *The Genocide Convention*, 727.
- 32 Johannes Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," *Human Rights Quarterly* 21, no. 4 (1999): 1048.
- 33 *Ibid.*
- 34 *Ibid.*, 1048–1049.
- 35 Abtahi and Webb, *The Genocide Convention*.
- 36 Morsink, "Cultural Genocide," 1039.
- 37 Quoted in Lippman, "The Drafting of the 1948 Convention," 59.
- 38 *Ibid.*
- 39 *Ibid.*
- 40 Quigley, *The Genocide Convention*, 9.
- 41 The inclusion of the forced transfer of children in the final text of the Genocide Convention was not necessarily part of an effort to include at least one element of cultural genocide in the treaty, but rather to "complement the emphasis on the physical/biological consequences of genocidal techniques." See Moses, "Raphael Lemkin," 38.
- 42 Ruth Amir, "Cultural Genocide in Canada? It Did Happen Here," *Aboriginal Policy Studies* 7, no. 1 (2018): 106.
- 43 Where this or related language is discussed in the literature, the debate during negotiations is typically absent. In his seminal work, *Genocide in International Law: The Crime of Crimes*, Schabas includes no mention of Article XII other than its inclusion

- in the reproduction of the Genocide Convention. The same can be said for Quigley's *The Genocide Convention: An International Law Analysis*. Further, in none of his three lengthy analyses of the Genocide Convention does Matthew Lippman mention Article XII (Lippman, "The Drafting of the 1948 Convention"; "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later," *Temple International and Comparative Law Journal* 8 (1994), 1–84; "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later," *Arizona Journal of International and Comparative Law* 15 (1998), 415–514.
- 44 Abtahi and Webb, *The Genocide Convention*, 1816.
- 45 *Ibid.*, 1815.
- 46 *Ibid.*, 1816.
- 47 *Ibid.*
- 48 *Ibid.*
- 49 *Ibid.*, 1817.
- 50 *Ibid.*
- 51 *Ibid.*, 1818.
- 52 *Ibid.*
- 53 Declarations and Reservations to the *Convention on the Prevention and Punishment of the Crime of Genocide*. Available at [www.preventgenocide.org/law/convention/reservations](http://www.preventgenocide.org/law/convention/reservations).
- 54 See Jeffrey Bachman, *The United States and Genocide: (Re)Defining the Relationship* (London: Routledge, 2018), 4–6.
- 55 Christopher Powell, "What Do Genocides Kill? A Relational Conception of Genocide," *Journal of Genocide Research* 9, no. 4 (2007): 532. See also Beth Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *The Yale Law Journal* 106, no. 7 (1997): 2268.
- 56 Anna Leander and Tanja Aalberts, "Introduction: The Co-Constitution of Legal Expertise and International Security," *Leiden Journal of International Law* 26, no. 4 (2013): 783–792.
- 57 Kristina Hon, "Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC," *Seton Hall Law Review* 43, no. 1 (2013), 368.
- 58 *Ibid.*
- 59 *Ibid.*; see also Damien Short, "Cultural Genocide and Indigenous Peoples: A Sociological Approach," *The International Journal of Human Rights* 14, no. 6 (2010): 833–848.
- 60 Moses, "Raphael Lemkin," 38.
- 61 France's African territories included Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Djibouti, Gabon, Guinea, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Togo, and Tunisia. For analysis of relevant French policies in some of its African colonies, see, for example, Remi P. Clignet and Philip J. Foster, "French and British Colonial Education in Africa," *Comparative Education Review*, 8, no. 2 (1964); Alf Andrew Heggoy, "Education in French Algeria: An Essay on Cultural Conflict," *Comparative Education Review* 17, no. 2 (1973); Priscilla Blakemore, "Association and Assimilation in French Educational Policy and Practice: 1903–1939," *Comparative Education*, 29 (1970).
- 62 The United Kingdom's African territories included Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe. For analysis of relevant British policies in some of its African colonies, see, for example, Clignet and Foster, "French and British Colonial Education"; Derwent Whittlesey, "British and French Colonial Technique in West Africa," *Foreign Affairs* (1937); Nuffield Foundation and Colonial Office, *African Education: A Study of Educational Policy and Practice in British Tropical Africa* (Oxford: Oxford University Press, 1953).

- 63 Statement by Captain Richard Henry Pratt, founder of the United States Indian Industrial School in Carlisle, Pennsylvania, when describing the objective of Indian residential schools. Quoted in Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco, CA: City Light Books, 2004), 14.
- 64 Shamiran Mako, "Cultural Genocide and Key International Instruments: Framing the Indigenous Experience," *International Journal on Minority and Group Rights* 19 (2012): 177.
- 65 Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (London: Zed Books, 1987), 31.
- 66 Kuper, *Genocide*, 44.
- 67 Robert Davis and Mark Zannis, *The Genocide Machine in Canada: The Pacification of the North* (Montreal, Quebec: Black Rose Books, 1983), 30.
- 68 Mako, "Cultural Genocide and Key International Instruments," 177.
- 69 Kuper, *Genocide*.
- 70 *Ibid.*, 60–61.
- 71 Muhammad El-Farra, "The Algerian Tragedy," *Africa Today* 3, no. 4 (1956): 7–9.
- 72 *Ibid.*, 7.

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### 3 A modern perspective

## The current status of cultural genocide under international law

*David Nersessian*

#### **Introduction**

While the practice dates to antiquity,<sup>1</sup> the intentional destruction of the cultural heritage, objects, and practices belonging to other human groups remains a significant problem for the international community today. As detailed herein, when perpetrated to destroy the unique cultural attributes of the group itself, attacks on culture qualify as the specific form of destruction known as “cultural genocide.”

Cultural destruction often is a consequence of war. During the ongoing conflicts in Iraq and Syria, for example, “[i]n addition to the tragic loss of human life and the humanitarian crisis, cultural heritage has been intentionally targeted, damaged, trafficked, and destroyed.”<sup>2</sup> Post-conflict environments – especially in failed states like Libya – also are ripe for destruction.<sup>3</sup> But it also occurs during peacetime, often as part of a wider body of discriminatory state policies. Cultural genocide has been employed, for example, as a technique to subdue indigenous populations into the ways of majority rulers. Notable instances include the “Stolen Generations” of Australian Aborigines removed from their tribes between 1925 and 1949<sup>4</sup> and the century-long system of compulsory residential schooling for native children in Canada.<sup>5</sup>

Cultural destruction also can arise during territorial occupations by foreign powers, even if outright hostilities concluded long ago. The Dalai Lama, for example, has accused the Chinese government of committing cultural genocide in Tibet since his exile in 1959.<sup>6</sup> Among other practices, in 1995 the Chinese government took into custody a six-year-old child named Gedhun Choekyi Nyima. Nyima had been identified and designated through Tibetan Buddhist practices as the 11th Panchen Lama, who in turn identifies and selects the 15th Dalai Lama following the death of the current 14th Dalai Lama, Tenzin Gyatso.<sup>7</sup> It is unclear whether succession – and thus the survival of the Tibetan Buddhist religion – is possible in the Panchen Lama’s absence.

This chapter analyzes the current state of cultural genocide under international law. It considers cultural genocide in a broad sense – juxtaposing the original legal concept proposed (and rejected) when the 1948 Genocide Convention<sup>8</sup> was finalized against the ways that international law treats cultural genocide today. The concept will be analyzed and discussed in several settings where

international law is developed and applied, such as international criminal tribunals, human rights bodies, domestic courts, and UN organs. After a brief discussion of historical antecedents, acts of cultural destruction that meet the original definition will be considered through alternative legal lenses – as descriptive and evidentiary matters, as human rights violations, and as other types of international crimes (notably, war crimes and crimes against humanity).

The goal here is not to provide an encyclopedic analysis of the many intersections between modern international law and cases of cultural genocide. Rather, it seeks to provide a small number of *examples* of the different applications of international law in order to compare them to the original conception removed from the Convention. The chapter concludes that considerable gaps remain, such that the international community should continue to work toward an international instrument that addresses the true criminality inherent in cultural genocide.

Three related issues are worth noting briefly but will not be discussed further here. First, although this chapter focuses on international law, many countries have enacted legislation to address cultural issues as an internal matter. Domestic law can help or hurt in this context. On one hand, culturally destructive practices have been facilitated through legal procedures aimed at “civilizing” or “assimilating” alternative populations – such as Australia’s Aboriginal Act of 1897 and Canada’s Indian Act of 1876.<sup>9</sup> On the other hand, domestic law also can help preserve cultural heritage, as with the numerous federal laws and protections aimed at preserving Native American culture in the United States.<sup>10</sup>

Domestic law protects culture abroad as well. Following a federal investigation, for example, the US-based retailer Hobby Lobby was forced to return some 5,500 ancient Iraqi cuneiform tablets, clay bullae, cylinder seals, and other artifacts that it purchased for \$1.6 million from dealers in the United Arab Emirates and Israel because the objects had been looted from Iraqi archaeological sites.<sup>11</sup> While not discussed further here, it is useful to bear in mind that alternative domestic regulations and adjudicatory mechanisms also may apply to a given instance of cultural destruction.

Second, it is worth noting that cultural issues often intersect – many times uneasily – with domestic laws of general application (for example, when the object of theft is a cultural object, in connection with cultural norms around interpersonal conduct or gender relations, in adapting cultural practices to public educational environments, and the like). Courts may find it difficult to adapt and apply these general laws to specific cultural contexts.<sup>12</sup> Cultural issues have arisen, for example, in cases involving criminal charges of kidnapping and rape relating to the Hmong practice of *zij poj niam* (marriage by capture),<sup>13</sup> allegations of prosecutorial misconduct for characterizing a defendant’s murder of estranged family members as “honor killings,”<sup>14</sup> weapons charges and civil rights claims arising out of Sikh males wearing *kirpan* swords in public places<sup>15</sup> or in public schools,<sup>16</sup> determining the appropriate sentencing impact of a defendant’s marriage under Islamic law to his 13-year old sexual assault victim,<sup>17</sup> and a court’s refusal to consider a provocation defense based on a “reasonable Mexican male” standard, as opposed to a “reasonable person”

standard.<sup>18</sup> International courts face similar challenges in accounting for specific cultural characteristics in the cases before them.

Third, regardless of the (domestic or international) context in which law is created, there remains the ongoing requirement of political will to apply and enforce it. This can prove especially challenging in the international setting. Cultural rights and practices do not exist in a social and political vacuum and thus are strongly impacted by larger geopolitical realities.<sup>19</sup> The United States and Israel, for example, plan to withdraw from the primary international body on cultural protection – the United Nations Educational, Scientific, and Cultural Organization (UNESCO) – after accusing it of anti-Israel bias.<sup>20</sup> While *realpolitik* is not discussed further here, such considerations certainly lurk in the background and impact how international law is created, interpreted, and enforced on the international plane.

We now consider the history of cultural genocide in the immediate aftermath of World War II.

### **A brief history of cultural genocide**

The term “genocide” was a neologism created by Polish law professor Raphael Lemkin to describe Nazi race policy in occupied Europe during World War II. It is an amalgam of the Greek *genos* (race or tribe) and the Latin *cide* (killing) – speaking literally to the killing of the tribe.<sup>21</sup> The core concept of genocide is the destruction of the various facets of existence of a protected group.

Lemkin’s original conception in 1944 was quite broad. He identified eight dimensions of genocide: political, social, cultural, economic, biological, physical, religious, and moral – each aimed at destroying a different aspect of a human group’s existence.<sup>22</sup> Murder, rape, and similar harm to group members themselves constituted physical genocide, as did longer-term measures such as death through starvation or overwork.<sup>23</sup> The destruction of the group’s fertility or otherwise impeding its capacity to reproduce constituted biological genocide.<sup>24</sup> Destruction of the group’s social institutions or political leadership could amount to social genocide.<sup>25</sup> Attacks on business and economic leaders may constitute economic genocide (the “destruction of the foundations of economic existence” of a group).<sup>26</sup> Lemkin’s core idea was that a group existed in numerous dimensions, and that genocide was a broad attack on any or all of those aspects of group life. The victim was the *collective itself*, as opposed to its individual members. “Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”<sup>27</sup>

As Lemkin saw it, cultural genocide was the destruction of the group’s unique cultural, linguistic, and religious characteristics. This destruction could manifest against group members as well as group institutions or property. It protected group members as *persons* by covering matters such as the killing or persecution of clergy, academics, or intellectual leaders, abolishing the group’s unique language, and restricting education in the customs of the targeted group. It also

included the destruction of religious institutions and the theft or destruction of religious objects. The crime also occurred when artistic, literary, and cultural activities were restricted or when outlawed and national treasures, libraries, archives, museums, artifacts, and art galleries were destroyed or confiscated.<sup>28</sup>

Lemkin's concept was a direct response to the Holocaust and persecution of Jews in Germany and throughout occupied Europe. Indeed, Nazi zeal had taken cultural genocide to a new level, utilizing even the force of law to help accomplish the destructive aims. As the Israeli court noted during the trial of captured Nazi Adolf Eichmann, the Nuremberg laws themselves were specifically intended "to oust [Jews] from the economic *and cultural life* of the State ..."<sup>29</sup>

After the war, genocide was prosecuted as a violation of domestic criminal law in three early trials. The Polish Supreme National Tribunal adopted Raphael Lemkin's descriptive framework and convicted Amon Goeth (former Commandant of the forced labor camp at Plazow (Cracow), Poland),<sup>30</sup> Rudolf Hoess (former Commandant of the Auschwitz concentration camp),<sup>31</sup> and Arthur Greiser (former Nazi governor of occupied territory in Western Poland)<sup>32</sup> of genocide under Polish law. These trials took place under a special Polish decree enacted after the war to deal with German war criminals.<sup>33</sup> While the primary focus was on acts of physical and biological destruction, the judgments of all three courts (each finding the accused guilty and imposing the death penalty) recognized the defendants' guilt for cultural genocide as well.<sup>34</sup>

The newly formed United Nations also began to take steps to address the crime, explicitly recognizing the cultural losses it creates:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of *cultural and other contributions represented by these human groups*, and is contrary to moral law and to the spirit and aims of the United Nations.<sup>35</sup>

The United Nations sought to codify Lemkin's concept into a new Genocide Convention. The first draft in 1946 thus criminalized – in addition to physical and biological genocide – attacks on the group's culture:

- 3 Destroying the specific characteristics of the group by:
  - a forcible transfer of children to another human group; or
  - b forced and systematic exile of individuals representing the culture of a group; or
  - c prohibition of the use of the national language even in private intercourse; or
  - d systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
  - e systematic destruction of historical or religious monuments or their

diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.<sup>36</sup>

The concept appeared in the second draft of the Convention in a more abbreviated form:

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

- 1 Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
- 2 Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.<sup>37</sup>

As discussed elsewhere in this volume,<sup>38</sup> the third and final draft of the Genocide Convention was negotiated between fifty-seven states<sup>39</sup> against the backdrop of the emergent Cold War between the Western Allies and the Soviet States. It became clear that agreement on a final treaty would be highly difficult to achieve.<sup>40</sup> In addition to disputes over whether certain groups (e.g. political groups) should be protected under the Convention<sup>41</sup> and whether a permanent international tribunal should prosecute offenders,<sup>42</sup> significant disagreement also arose over cultural genocide.

Apart from Cold War politics, many of the Convention's drafters saw cultural genocide as analytically distinct from physical and biological genocide.<sup>43</sup> The Danish representative argued, for example, that it defied both logic and proportion "to include in the same convention both mass murders in gas chambers and the closing of libraries."<sup>44</sup> The drafters reached consensus on a weak form of cultural protection in Article II(e), which prohibits the removal of the protected group's children. This protected human families against the forcible transfer of the group's children to environments where they would be indoctrinated into the customs, language, religion, and values of another group,<sup>45</sup> which could be "tantamount to the destruction of the group, whose future depended on that next generation."<sup>46</sup> But a direct prohibition on cultural genocide per se was removed from the final draft of the Convention, albeit on a divided vote.<sup>47</sup>

Thus, even though cultural genocide often accompanies physical and biological genocide,<sup>48</sup> cultural destruction is not directly covered by the Genocide Convention or treated as a criminal offense in and of itself. Group culture is protected only insofar as is necessary to protect the group from biological genocide. Human institutions (schools, libraries, museums, newspapers, historical monuments, language or religious practices, etc.) are not covered.

Since the Genocide Convention excludes the concept, the question then becomes whether – and how – cultural genocide might be addressed elsewhere under international law. A useful starting point is to consider several treaty regimes developed since World War II that protect and preserve cultural heritage.

### **Modern treaty regimes and international human rights law**

In the decades since the Genocide Convention was finalized, international protection for the cultural existence of human groups has crystallized largely into two primary, albeit limited, treaty regimes. Neither treats cultural genocide as a criminal offense or focuses on the cultural existence of human groups themselves. The first is a series of specialized treaties and related agencies tasked with the preservation of world culture. This effort has focused largely on cultural objects and sites but includes some measures to respect the intangible dimensions of cultural existence as well. The second is broad cultural protections as a subset of international human rights law, in that a number of widely adopted human rights instruments recognize cultural rights, albeit for individuals, not groups themselves. Each category is discussed before delving more deeply into the treatment of cultural genocide as a criminal offense in other international contexts.

#### ***Specialized treaties on cultural protection***

Several international instruments protect different types of cultural property, which can be broadly categorized into movable and non-movable categories. Chief among treaties protecting the former is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>49</sup> This instrument reflects a number of state commitments to both prevent the illicit transfer of cultural property from their territories and to help other states to prevent such transfers.<sup>50</sup> Obligations to return stolen or illegally transferred cultural property appear in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which requires states to impose due diligence requirements and duties of return on purchasers but also to provide compensation for purchasers who act in good faith during the acquisition.<sup>51</sup>

Non-movable cultural artifacts also are protected. In 1972, under the auspices of UNESCO, the UN promulgated the Convention for the Protection of the World Cultural and Natural Heritage,<sup>52</sup> which now has 133 states party.<sup>53</sup> The Convention focuses on geographic locations, categorized either as “cultural heritage” (monuments, groups of buildings, and other sites)<sup>54</sup> or “natural heritage” (geologic formations and natural features)<sup>55</sup> sites. It also creates the World Heritage Committee, which identifies and designates World Heritage listings – recognizing the importance of sites and ostensibly providing them with enhanced international protection.<sup>56</sup> States undertake to conserve both World Heritage sites and other places of natural or cultural significance within their territories.<sup>57</sup>



Presumably, this reflects a minimum commitment not to commit cultural genocide in relation to protected sites (and not to allow non-state actors to commit such acts), although no specific legal consequences arise from a state's failure to uphold these treaty obligations.

Treaties also protect the less tangible dimensions of human groups. These include international efforts to preserve the culture, language, and way of life of indigenous peoples.<sup>58</sup> That said, efforts to face squarely the reality of cultural genocide against indigenous peoples have proved both controversial and limited in scope. The Declaration on the Rights of Indigenous Peoples,<sup>59</sup> for example, is a UN General Assembly resolution, rather than a binding and enforceable international treaty.

The original draft of the Declaration in 1994 provided that "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide...."<sup>60</sup> It recognized explicit duties around prevention and provided victims with remedies for violations.<sup>61</sup> But the original provisions on cultural genocide were watered down in subsequent work on the instrument.<sup>62</sup> Specific declarations relating to ethnocide and cultural genocide were reframed: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."<sup>63</sup> The final Declaration does, however, provide that states should provide "effective mechanisms for prevention of, and redress for" actions that deprive indigenous groups of their unique identity, takings of indigenous land or resources, and population transfers, forced assimilation, or propaganda inciting racial or ethnic discrimination against these groups.<sup>64</sup>

Despite its obvious declaratory and symbolic power, it is important to note the limitations of the Draft Declaration. First, while its broad provisions certainly would apply to cultural genocide, the instrument – quite deliberately – makes no specific reference to it. Its declaratory power in this sense is muted. Moreover, as a General Assembly resolution, it has no legally binding effect under international law.<sup>65</sup> As such, even if conduct falls within its scope, the Declaration itself provides no basis for the assertion of legal rights. At most it could be seen as *reflecting* (as opposed to *creating* or *guaranteeing*) rights that exist elsewhere under customary international law (i.e. rights guaranteed under other provisions of international human rights law).

In summary, these specialized instruments primarily represent commitments by states to respect certain dimensions of cultural life within their borders and to ensure that cultural objects remain where they belong.<sup>66</sup> They facilitate ongoing international cooperation through mechanisms such as the World Heritage Committee, which helps to ensure that cultural protection remains a priority. These treaty regimes play a critical role in the protection of culture around the planet, and their work can and should continue.

That said, the fact remains that these regimes are fundamentally different in character from cultural genocide as originally conceived in the Genocide Convention. Broad agreements to cooperate in protecting culture simply are not the same as an international instrument specifying that cultural genocide is an

international crime that protects the cultural life of a human group, in addition to its physical and biological existence.

### ***Human rights treaties***

Certain rights to cultural life also are protected under a number of international human rights instruments. References to culture appear, for example, in two of the three components of the “international bill of rights” – the Universal Declaration of Human Rights (UDHR)<sup>67</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>68</sup> However, given the large number of different types of human rights addressed in these instruments, rights focused on culture are protected only at a broad level of generality.

The UDHR, for example, provides that “[e]veryone, as a member of society ... is entitled to realization ... of the economic, social and *cultural rights* indispensable for his dignity and the free development of his personality.”<sup>69</sup> This includes “the right freely to participate in the cultural life of the community ...”<sup>70</sup> The ICESCR includes a brief reference to collective rights, in that “[a]ll peoples have the right of self-determination [and] [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and *cultural development*.”<sup>71</sup> At the individual level, participating states must “recognize the right of everyone ... [t]o take part in cultural life.”<sup>72</sup>

Regional protection for cultural rights also exists, albeit on a more limited scale. One important regional human rights instrument – the European Convention on Human Rights – includes no references to culture at all.<sup>73</sup> This may be because the European Cultural Convention instead provides that participating European states “shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe.”<sup>74</sup> Much of this involves cultural development and exchange within European society, however, as opposed to protecting cultural existence per se.<sup>75</sup>

While human rights instruments (and the investigatory and adjudicatory mechanisms that accompany them) are certainly important, it is necessary to accept that they have many significant limitations that constrain their utility for preventing and redressing cultural genocide. First, they depend entirely on the willingness of states to adopt them in the first place and subsequently to uphold their human rights obligations in good faith. It goes without saying that states most likely to commit cultural genocide – or to tolerate its commission by non-state actors within their territories – are least likely to participate in voluntary human rights schemes in the first place.

Second, even when they apply and are upheld in good faith, they impose duties on the states themselves and do not create individual civil or criminal penalties for human rights infringements. Violations create at most a duty for the state to pay compensation and to desist from the infringing behavior. This is a far cry from the original treatment of cultural genocide as an international crime.

Third, the commitments undertaken by states to uphold cultural rights typically are far less robust than those applicable to other types of rights. The prohibition on

international crimes such as genocide, for example, requires criminal penalties and mandatory enforcement.<sup>76</sup> And rights guaranteed under the International Covenant on Civil and Political Rights<sup>77</sup> benefit from state commitments “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,”<sup>78</sup> “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant,”<sup>79</sup> and “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” that is “determined by competent judicial, administrative or legislative authorities.”<sup>80</sup>

In contrast, States party to the ICESCR undertake only

to take steps, individually and through international assistance and co-operation ... to the maximum of its *available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means....<sup>81</sup>

A state’s commitment to deal with cultural genocide will be far less rigorous when anchored in an obligation to work progressively toward a vague goal as resources allow than one grounded in a criminal prohibition or a clear legal duty not to tolerate certain conduct under any circumstances.

Finally, as noted above, such instruments generally focus on the rights of individuals, not collectives. This is a very different approach from the core concept of genocide, where the object of protection is the group itself, rather than its individual members. This makes for an ill fit between offense and response. Indeed, attempts to redress instances of cultural genocide as human rights violations in and of themselves have met with little success.<sup>82</sup> Even when human rights clearly link to the cultural characteristics of human groups, infringements often are approached through the lens of *other* types of rights (e.g. free expression and association, education, religious identity, linguistic freedom, and the like).<sup>83</sup> The principal focus on these other types of rights renders the cultural injuries subsidiary. This in turn dilutes the overall impact of adjudicating the human rights consequences of a specific attack intended to destroy a group’s unique cultural existence “as such.”<sup>84</sup>

This reflects wider structural problems with using the current human rights regime to deal with cultural genocide. As the author wrote previously:

Human rights jurisprudence lacks sufficient flexibility to properly redress cultural genocide, which differs from other infringements upon cultural rights in both scope and substance. The existing scheme redresses the intentional and systematic eradication of a group’s cultural existence (for example, destroying original historical texts or prohibiting all use of a language) with the same mechanisms as it would consider the redaction of an art textbook. But cultural genocide is far more sinister. In such cases, fundamental aspects of a group’s unique cultural existence are attacked with the aim of destroying the group, thereby rendering the group itself (apart from

its members) an equal object and victim of the attack. The existing rubric of human rights law fails to recognize and account for these important differences.<sup>85</sup>

We now turn to a discussion of the ways in which, despite its removal from the Genocide Convention, acts of cultural genocide nevertheless might be treated as international crimes.

### **Modern international criminal law**

As noted above, due to historic *realpolitik*, cultural genocide is not an international crime in and of itself. Because the various international criminal tribunals with jurisdiction over genocide replicate the Convention verbatim,<sup>86</sup> criminal prosecution for genocide thus has focused on the physical and biological dimensions of the offense. Cultural genocide simply is not covered.<sup>87</sup> That said, before discussing how acts of cultural genocide qualify as *other* types of international crimes (namely, war crimes and crimes against humanity), it is important to note two additional ways in which cultural genocide becomes relevant in international criminal jurisprudence.

The first relates to the requisite *mens rea* (mental state) of genocide itself. Genocide is a crime of specific intent, which means that it must be the offender's actual purpose to destroy the protected group.<sup>88</sup> This is a high burden to establish and – barring a confession – requires courts to consider circumstantial evidence relating to the offender's mental state. Instances of cultural genocide have been used as evidence that an offender acted with the intent to destroy a protected group “as such” in cases of physical or biological genocide.<sup>89</sup> Injuries that violate (or which are perceived by offenders to violate) the “very foundation of the group”<sup>90</sup> demonstrate the perpetrator's wider mental state *vis-à-vis* the protected group itself. Cultural destruction in tandem with attacks on group members thus is probative on whether the accused intended to physically or biologically destroy the group in those attacks.<sup>91</sup>

Second, in some circumstances it can be difficult to identify whether a given collective qualifies as a protected racial, national, ethnic, or religious group entitled to protection under the Convention, as well as whether the perpetrator targeted that collective “as such.”<sup>92</sup> There are no universal definitions of the qualities of protected groups, such that each must be defined on a case-by-case basis as it exists within a given society.<sup>93</sup> Acts of cultural genocide, where the perpetrator attacks markers of the group's unique linguistic, social, historical, and cultural existence, thus also can help to establish the contours of the protected group itself.

### ***War crimes***

It is all but inevitable that objects of cultural significance will be destroyed during an armed conflict. At times, however, such destruction is neither necessary

or accidental, as the International Court of Justice observed in the *Application of the Genocide Convention* case:

The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts .... On 25 August 1992, Bosnia's National Library was bombarded and an estimated 1.5 million volumes were destroyed .... The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.<sup>94</sup>

Most recently, massive cultural destruction has been perpetrated by the terrorist group ISIS to fuel its own radical ideology and twisted vision for a caliphate.<sup>95</sup> This includes the

systematic destruction of artifacts and archaeological sites such as Iraq's ancient Assyrian city of Nimrud, the ancient Assyrian capital of Khorsabad, artifacts in Iraq's Mosul Museum and books and rare manuscripts from the Mosul Library, and the 2000-year-old Temple of Baal Shamin in Palmyra, Syria....<sup>96</sup>

The intentional destruction of objects of cultural and historic significance during armed conflict has long been considered a war crime. Treaties dating to the early twentieth century specify that

[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.<sup>97</sup>

Seizing cultural property and damaging cultural institutions also is forbidden.<sup>98</sup>

After World War II, cultural protection was greatly enhanced through a specialized instrument – the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict – which reflected the belief “that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”<sup>99</sup> The Convention expanded protections during war to include movable cultural property of artistic, historic, or informational character as well as non-movable cultural buildings, monuments, and centers.<sup>100</sup> The Additional Protocols to the Geneva Conventions also addressed cultural protection, reaffirming that it was unlawful in armed conflict “[t]o commit any acts of

hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”<sup>101</sup>

Developments in international humanitarian law following conflicts in Africa and the Balkans in the 1990s were reflected in the Second Protocol to the 1954 Hague Convention, which *inter alia* applies the original Convention’s protections to non-international armed conflicts as well as traditional wars between nations.<sup>102</sup> Mechanisms also exist to designate important physical locations of cultural significance as particularly at risk from armed conflict. UNESCO, through its Committee for the Protection of Cultural Property in the Event of Armed Conflict and World Heritage Committee, has the authority to grant, suspend, or remove “enhanced protection” status for a given site.<sup>103</sup> A “Blue Shield” designation now serves “as the international equivalent of the Red Cross or Red Crescent to mark cultural property to be protected and to signify cultural heritage professionals.”<sup>104</sup>

In order to qualify as a war crime, an attack on culture must occur within the larger context of an “armed conflict.” The actual existence of armed conflict – and the perpetrator’s awareness of it – are critical components of war crimes because they transform what otherwise might constitute ordinary crimes against persons or property into international offenses.<sup>105</sup> Once this wider context is established, however, any number of offenses against either cultural property or the cultural identity of group members qualify, either when perpetrated directly or when committed by subordinates for whom an accused commander is legally responsible.<sup>106</sup>

International humanitarian law continues to provide meaningful protection against cultural destruction, as exemplified by a recent prosecution in the International Criminal Court. Under the ICC Statute, any of the following could constitute war crimes relating to a group’s cultural property or members:

- Unnecessarily and wantonly destroying the property of the adversary;<sup>107</sup>
- Intentionally attacking civilian objects (targets that are not military objectives);<sup>108</sup>
- Intentionally attacking historic monuments or buildings dedicated to religion, education, art, science or charitable purposes;<sup>109</sup>
- Pillage;<sup>110</sup>
- Destroying or seizing property unjustified by military necessity;<sup>111</sup> and
- Outrages upon personal dignity, including humiliating and degrading treatment.<sup>112</sup>

In *Prosecutor v. Al Mahdi*, the accused – a member of the “Ansar Dine” Islamic extremist group, which was linked to Al Qaeda – was charged with war crimes under Article 8(2)(e)(iv) of the Statute for unlawful attacks on historic monuments and similar targets.<sup>113</sup> Following his guilty plea, he was sentenced to nine years’ imprisonment and received a (largely symbolic) restitution order of 2.7 million euro for destroying ten religious buildings, including revered shrines, an ancient mosque, and cemeteries in the Timbuktu region of northern Mali.<sup>114</sup>

In its sentencing decision following Al Mahdi's guilty plea, the ICC explicitly recognized that attacks on objects of religious and cultural significance in Timbuktu<sup>115</sup> were, together with other offenses within the ICC's jurisdiction, among "the most serious crimes of concern to the international community."<sup>116</sup> The *Al Mahdi* tribunal drew expressly upon wider international cultural protection regimes in considering the gravity of the accused's crimes, noting that many of the destroyed cultural sites were in fact world heritage sites.<sup>117</sup> Victims of the destruction of religious and culturally symbolic sites thus were regarded as not only "the [religious] faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community."<sup>118</sup>

### ***Crimes against humanity and persecution***

There also are options to criminally prosecute individuals for acts of cultural destruction that occur outside of the context of armed conflict. Cultural genocide has been considered (and prosecuted as) a crime against humanity – notably the offense known as persecution. This crime protects individuals from serious forms of discrimination grounded in their status as members of certain protected groups. Persecution is "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."<sup>119</sup> The required contextual element that transforms ordinary offenses into crimes against humanity is that the offenses take place within the wider context of "a widespread or systematic attack on a civilian population."<sup>120</sup>

The modern understanding of persecution reflected in the International Criminal Court explicitly includes cultural identity.<sup>121</sup> However, the use of cultural characteristics as a basis for persecution has waxed and waned over the years. Persecution on cultural grounds was not directly included, for example, in the mandate of the Nuremberg tribunals,<sup>122</sup> although some suggest that offenses against cultural existence were implied within the overall conceptual mandate.<sup>123</sup>

Following the initial wave of post-World War II trials and the development of the Genocide Convention and four Geneva Conventions, the 1954 Draft Code of Crimes against the Peace and Security of Mankind defined crimes against humanity to include "persecutions, committed against any civilian population on social, political, racial, religious or *cultural grounds* by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."<sup>124</sup> While the core concept of unlawful discrimination largely tracked the definition of crimes against humanity applied by the Nuremberg Tribunal, the International Law Commission expanded the concept of persecution, noting that it was "necessary to prohibit also inhuman acts on cultural grounds, since such acts are no less detrimental to the peace and security of mankind than those provided for in the said Charter."<sup>125</sup>

Persecution on cultural grounds remained in the subsequent version of the Draft Code promulgated in 1991.<sup>126</sup> However, when it came time to actually implement the concept, the international community declined to do so, omitting it from both the ICTY and ICTR Statutes<sup>127</sup> as well as the next version of the



Draft Code promulgated in 1996.<sup>128</sup> The trend shifted back with the creation of the International Criminal Court in 1998.<sup>129</sup> The concept also appears in subsequent ad hoc international tribunals created for Iraq<sup>130</sup> and Cambodia.<sup>131</sup>

Although no persecution cases relating to cultural destruction have yet been brought in the ICC, a number of cases before the ICTY make clear that cultural attacks can constitute the crime of persecution when they are linked to a group's racial, ethnic, religious, etc. existence.<sup>132</sup> The theft of important property belonging to the group certainly qualifies,<sup>133</sup> as do attacks on civilian members or institutions belonging to the group.<sup>134</sup> It also includes the destruction of important cultural property belonging to the group and physical harm to group members based upon their cultural characteristics.<sup>135</sup> Attacks on markers of cultural identity also can help to establish the "contextual" elements of crimes against humanity in the first place – that the offenses committed formed part of a widespread or systematic attack on a civilian population, i.e. against a particular protected group.<sup>136</sup>

### ***Conclusions on war crimes and crimes against humanity for cultural destruction***

It clearly is a good thing that cultural genocidaires can be criminally prosecuted for *something* that reflects the criminal nature of their conduct. The stakes are quite high, and the UN Security Council has even recognized linkages between cultural destruction and breaches of international peace and security, at least when such acts occur in the context of armed conflict<sup>137</sup> and/or terrorism.<sup>138</sup> Even when it does not threaten the international order in and of itself, cultural destruction makes a bad situation worse and far more difficult to recover from.<sup>139</sup>

That said, the picture nevertheless remains far from complete when it comes to protecting the cultural existence of human groups themselves under international criminal law. The fact remains that genocide, war crimes and crimes against humanity simply are not the same offenses, and offenders can be convicted of all three crimes in relation to the same underlying conduct, depending on context and the perpetrator's wider intentions.<sup>140</sup> War crimes cover criminal acts committed within the wider context of an armed conflict and protect individuals and certain civilian objects (e.g. hospitals, cultural sites) from excessive or unnecessary harm within that context. Crimes against humanity focus on offenses against civilians (not military personnel or military objects) and serious discrimination that forms part of a widespread or systematic attack on a civilian population. Genocide is different: it focuses on protecting human groups from harm, applies in times of war and peace, and is not limited to civilians.<sup>141</sup>

International law recognizes three different offenses because three distinct harms are at issue. The fact that criminal prosecution is available for *something* – while better than letting offenders go unpunished – is not dispositive on whether there should be an additional offense that more precisely describes the nature of the conduct in question and more overtly condemns the injuries caused.

## The path forward

Half a loaf is better than none. The international treaty regime around cultural heritage no doubt has ensured the preservation of important cultural sites and the retention (or return) of many cultural objects to the groups to which they belong. And in some circumstances, the intentional destruction of a group's culture can be punished as another type of crime. This is genuine progress. But it is important to be clear as to what has been accomplished and what has not. It also is necessary to recognize the limitations of the current approach.

The fact that criminals can be prosecuted for *some* of their crimes should not end the discussion about whether the law also should redress another aspect of the harm caused that is not presently covered. The harm caused by cultural genocide is the injury to the unique cultural existence of the group itself, as opposed to infringements upon the individual cultural rights of group members. The failure to protect the collective's cultural existence "as such" has real consequences:

Collective identity is not self-evident but derives from the numerous, interdependent aspects of a group's existence. Lemkin's original conception of genocide expressly recognized that a group could be destroyed by attacking any of these unique aspects. By limiting genocide to its physical and biological manifestations, a group can be kept physically and biologically intact even as its collective identity suffers in a fundamental and irremediable manner. Put another way, the present understanding of genocide preserves the body of the group but allows its very soul to be destroyed.<sup>142</sup>

A society makes a direct and important statement about what it cares about most when it decides to address a given matter through its criminal laws. These have been described as society's "most cherished values"<sup>143</sup> – the small number of things for which it is willing to impose the ultimate legal sanction. In this sense, what was true in 1948 remains true today. The cultural existence of human groups is protected at most as an ancillary right associated with the group's individual members, rather than a right pertaining to the group in and of itself.

International law fails to recognize the human *group's* inherent right to its own unique cultural existence and heritage – beyond its physical and biological survival. This is far from satisfactory. It is time for the international community to revisit the question of creating a specific international instrument to prevent the cultural destruction of human groups "as such."

## Notes

- 1 See, e.g., Jack Martin Balcer, "The Greeks and the Persians: The Processes of Acculturation," *Historia: Zeitschrift für Alte Geschichte* 32, no. 3 (1983): 257–267, 259 (describing "column drums and architectural pieces of the acropolitan temples destroyed by the marauding Persians" during Persian invasions of Greece in the fifth century BCE).

- 2 See, e.g., Irina Bokova, "Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage," *Harvard International Review* 36, no. 4 (2015): 40–45 (describing massive cultural destruction during armed conflicts in Iraq and Syria).
- 3 See, e.g., "Libya's Cultural Heritage 'Being Destroyed and Plundered by Isis,'" *Guardian*. December 15, 2015. [www.theguardian.com/world/2015/dec/15/libya-cultural-heritage-being-destroyed-and-plundered-by-isis](http://www.theguardian.com/world/2015/dec/15/libya-cultural-heritage-being-destroyed-and-plundered-by-isis) (accessed November 17, 2018).
- 4 See *Kruger v. Australia*, 126 A.L.R. 126, 160–161, 174–175, 190, 232 (Austr. High Ct. 1997) (denying claims that removals violated both the Genocide Convention and "a pre-existing rule of international law involving a prohibition upon genocide").
- 5 See "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada," Winnipeg: Truth and Reconciliation Commission of Canada, December 2015: 1, 3, 57, 134. [www.trc.ca/websites/trcinstitution/index.php?p=3](http://www.trc.ca/websites/trcinstitution/index.php?p=3) (accessed November 17, 2018). See also Andrew Woolford, "Ontological Redress: The Natural and the Material in Transformative Justice for 'Cultural' Genocide," in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).
- 6 See David Eimer, "Dalai Lama Condemns China's 'Cultural Genocide' of Tibet," *Telegraph*. March 16, 2008. [www.telegraph.co.uk/news/worldnews/1581875/Dalai-Lama-condemns-Chinas-cultural-genocide-of-Tibet.html](http://www.telegraph.co.uk/news/worldnews/1581875/Dalai-Lama-condemns-Chinas-cultural-genocide-of-Tibet.html) (accessed November 17, 2018).
- 7 See, e.g., "Cultural Genocide and the 11th Panchen Lama," International Campaign for Tibet, June 4, 2013. [www.savetibet.org/cultural-genocide-and-the-11th-panchen-lama](http://www.savetibet.org/cultural-genocide-and-the-11th-panchen-lama) (accessed November 17, 2018).
- 8 See "Convention on the Prevention and Punishment of the Crime of Genocide," 78 U.N.T.S. 277, December 9, 1948 [hereinafter: Genocide Convention].
- 9 See Shamiran Mako, "Cultural Genocide and Key International Instruments: Framing the Indigenous Experience," *International Journal on Minority and Group Rights* 19, no. 2 (2012): 175–194, 178 (describing assimilative practices in US, Canada, Australia, and Latin American countries).
- 10 See, e.g., Marilyn Phelan, "Exhibiting Culture: Museums and Indians: A History and Analysis of Laws Protecting Native American Cultures," *Tulsa Law Review* 45 (Fall 2009): 49–60 (detailing federal laws and related efforts to protect Native American cultural sites and heritage). That noted, the United States hardly should be commended for its past or present treatment of native peoples. See, e.g., *Cobell v. Kempthorne*, 455 F.3d 317, 326 (D.C. Cir. 2006) (removing judge from case brought by Indian Trust beneficiaries against the US Department of the Interior following the judge's scathing decision accusing Interior of massive incompetence and malfeasance in the context of "stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of *cultural genocide* against the Indians....") (emphasis added).
- 11 See Natasha Bach, "Hobby Lobby Bought Thousands of Smuggled Iraqi Artifacts in 2010. Now It's Sending Them Back," *Fortune*, May 2, 2018. <http://fortune.com/2018/05/02/hobby-lobby-artifacts-iraq> (accessed November 17, 2018).
- 12 See generally Alison Dundes Renteln, "Making Room for Culture in the Court," *The Judges' Journal* 49, no. 2 (2010): 7–15.
- 13 See Placido G. Gomez, "The Dilemma of Difference: Race as a Sentencing Factor," *Golden Gate University Law Review* 24 (Spring, 1994): 357, 372 note 82 (discussing practices, charges, and cases).
- 14 See *Ohio v. Ahmed*, 2006 WL 3849862 at \*12 (Ohio Sup. Ct. Dec. 28, 2004) (denying claims on grounds of both *res judicata* and absence of prejudice from remarks).
- 15 See *New York v. Singh*, 516 N.Y.S.2d 412 (N.Y. Civ. Ct. 1987) (holding that ordinance prohibiting the carry of an exposed blade did not violate Sikh priest's right to

- freedom of religion but nevertheless dismissing case as a matter of judicial discretion).
- 16 See *Cheema v. Thompson*, 36 F.3d 1102 (9th Cir. 1994) (unpublished opinion) (preliminary injunction in connection with civil rights challenge to public school's no weapons policy).
  - 17 See *Nebraska v. Al-Hussaini*, 579 N.W.2d 561, 563 (Neb. Ct. App. 1998) (holding that sentence of four–six years imprisonment, rather than probation, was not abuse of discretion despite defendant's unfamiliarity with US law and belief that he had married the child victim).
  - 18 See *Trujillo-Garcia v. Rowland*, 9 F.3d 1553 at \*\*1–2 (9th Cir. 1993) (unpublished opinion) (holding that even if the alternate standard applied, “a reasonable Mexican male would not have been provoked to act out of passion by the insults”).
  - 19 See, e.g., Mark S. Ellis, “The ICC’s Role in Combatting the Destruction of Cultural Heritage,” *Case Western Reserve Journal of International Law* 49 (2017): 23, 55–60 (2017) (discussing political will needed to protect cultural heritage in armed conflict) [hereinafter: Ellis, *The ICC’s Role*].
  - 20 See Colum Lynch, “U.S. to Pull Out of UNESCO, Again,” *Foreign Policy*, October 11, 2017. <https://foreignpolicy.com/2017/10/11/u-s-to-pull-out-of-unesco-again> (accessed November 17, 2018).
  - 21 See Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for International Peace 1944): 79 [hereinafter, Lemkin, *Axis Rule*].
  - 22 Lemkin, *Axis Rule*, 79–90. Lemkin subsequently conceded, however, that the most widely accepted varieties were physical, biological, and cultural genocide. See, e.g., Raphael Lemkin, “Genocide as a Crime under International Law,” *U.N. Bulletin* (1948): 70–71.
  - 23 Lemkin, *Axis Rule*, 87–89.
  - 24 *Ibid.* at 86–87.
  - 25 *Ibid.* at 83.
  - 26 *Ibid.* at 85.
  - 27 *Ibid.* at 79.
  - 28 *Ibid.* at 84–85, 89.
  - 29 See Attorney General of Israel v. Eichmann, 36 *Int’l L. Rep.* 5, ¶56 (Isr. Dist. Ct. 1961) (emphasis added).
  - 30 See Trial of Hauptsturmführer Amon Leopold Goeth, 7 *L. Rep. Trials War Crims.* 1 (Pol. Sup. Nat’l Trib. 1948) [hereinafter: *Goeth*].
  - 31 See Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, 7 *L. Rep. Trials War Crims.* 11, 17 (Pol. Sup. Nat’l Trib. 1948) [hereinafter: *Hoess*].
  - 32 See Trial of Gauleiter Artur Greiser, in 13 *L. Rep. Trials War Crim.* 70, 80–84 (Pol. Sup. Nat’l Trib. 1949) [hereinafter: *Greiser*].
  - 33 See Polish Committee of National Liberation, “Decree Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-Treatment of the Civilian Population and of Prisoners of War,” August 31, 1944, art. 1, *Official Gazette* No. 4, September 13, 1944, 7 *L. Rep. Trials War Crim.* 82 (1948): 84.
  - 34 *Greiser*, 13 *L. Rep. Trials War Crim.* at 79–84, 94 (detailing educational, linguistic, religious, cultural, and scientific destruction in Poland as part of a “totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own”); *Goeth*, 7 *L. Rep. Trials War Crims.* at 2–3 (concluding that “[t]he wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations”); *Hoess*, 7 *L. Rep. Trials War Crims.* at 24 (finding that Nazi goal was to biologically and culturally exterminate conquered nations).
  - 35 See General Assembly Resolution 96(I), “The Crime of Genocide,” A/BUR/50, December 11, 1946 (emphasis added).

- 36 “[First] Draft Convention on the Prevention and Punishment of the Crime of Genocide Prepared by the Secretariat,” U.N. Doc. E/447, June 26, 1947, art. I(II)(3).
- 37 “[Second] Draft Convention Prepared by the Ad hoc Committee of the Economic and Social Council on Genocide, Meeting between April 5, 1948 and May 10, 1948,” U.N. Docs. E/AC.25/SR.1–28, art. III.
- 38 See, generally, Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017), 189–193; Douglas Irvin-Erickson, “Raphaël Lemkin: Culture and Cultural Genocide,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019); Jeffrey Bachman, “An Historical Perspective: The Exclusion of Cultural Genocide from the Genocide Convention,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).
- 39 See U.N. GAOR 6th Comm., 3d Sess., xiv–xix.
- 40 See U.N. GAOR 6th Comm., 3d Sess., 67th–110th and 128th–134th mtgs., U.N. Docs. A/C.6/SR.67–SR.110, A/C.6/SR.128–SR.134 (1948) (*travaux préparatoires* for the Genocide Convention).
- 41 See U.N. GAOR 6th Comm., 3d Sess., 128th mtg. at 663–664, U.N. Doc. A/C.6/SR.128 (1948).
- 42 See Genocide Convention art. VI (recognizing possibility of subsequently created international penal tribunal to try genocide cases). The International Criminal Court currently has jurisdiction over the crime of genocide. See “Rome Statute of the International Criminal Court,” U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, July 17, 1998, art. 6 [hereinafter: ICC Statute].
- 43 See, e.g., U.N. GAOR 6th Comm., 3d Sess., 63rd mtg. at 8, U.N. Doc. A/C.6/SR.63 (Mr. Chaumont, Fr.). But see U.N. GAOR 6th Comm., 3d Sess., 83rd mtg. at 196, U.N. Doc. A/C.6/SR.83 (Mr. Perozo, Venez.) (arguing that a group could be destroyed by an attack on its culture even without the physical destruction of its members).
- 44 *Ibid.*, 83rd mtg. at 198–199 (Mr. Federspiel, Den.).
- 45 See Genocide Convention art. II(e).
- 46 See U.N. GAOR 6th Comm., 3d Sess., 83rd mtg. at 195, U.N. Doc. A/C.6/SR.83 (Venez). The drafters recognized that removing children also was both physically and biologically destructive. *Ibid.*, 82nd mtg., at 186.
- 47 *Ibid.* at 206 (approved 25 to 16, with 4 abstentions and 13 absences). The drafters took no official position on the conceptual viability of cultural genocide and recognized that it might be addressed in a subsequent instrument. See “Genocide, Draft Convention and Report of the Economic and Social Council,” *Report of the Sixth Committee*, U.N. GAOR, 3rd Sess., U.N. Doc. A/760, December 3, 1948, ¶11.
- 48 See, e.g., Greiser, 13 L. Rep. Trials War Crim. at 70 (criminal prosecution for educational, linguistic, religious, cultural, and scientific destruction in Nazi-occupied Poland); Prosecutor v. Karadžić and Mladić, Confirmation of Indictment Pursuant to Rule 61, Case Nos. ICTY-95–5-R61 and ICTY-95–18-R61, ¶¶94–95 (ICTY Trial Chamber July 11, 1996) (cultural destruction in former Yugoslavia) [hereinafter: *Karadžić and Mladić – Rule 61*].
- 49 See “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property,” 823 U.N.T.S. 231, November 14, 1970.
- 50 *Ibid.* at art. 5 (protecting cultural property within their states), art. 7 (preventing the illicit acquisition or transfer of cultural property from abroad), and art. 9 (cooperation between states). For more discussion, see Alice Lopes Fabris, “South-South Cooperation on the Return of Cultural Property: The Case of South America,” *Case Western Reserve Journal of International Law* 49 (2017): 173 [hereinafter: Fabris, *South-South Cooperation*].

- 51 See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1322, June 24, 1995, art. 4.
- 52 See “Convention for the Protection of the World Cultural and Natural Heritage,” United Nation Treaty Series, 1037 U.N.T.S. 151, November 16, 1972 [hereinafter: World Heritage Convention].
- 53 See Status of Treaties Deposited with the Secretary-General, “Convention for the Protection of the World Cultural and Natural Heritage” (listing current states party to the treaty), available at [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=_en) (accessed November 17, 2018).
- 54 See World Heritage Convention, art. 1.
- 55 *Ibid.* at art. 2.
- 56 *Ibid.* at art. 8. A modest World Heritage Fund provides financial assistance for site protection and preservation. *Ibid.* at art. 15.
- 57 *Ibid.* at arts. 4–6.
- 58 See “Convention for the Safeguarding of the Intangible Cultural Heritage,” UNESCO Doc. MISC/2003/CLT/CH/14, October 17, 2003, art. 2(2) (including as “intangible cultural heritage” manifestations such as oral traditions and performing arts, social practices and rituals, and celebrations, beliefs and practices concerning the natural world, and forms of traditional craftsmanship).
- 59 “Declaration on the Rights of Indigenous Peoples,” G.A. Res. 61/295, U.N. Doc. A/RES/61/295, September 13, 2007 [hereinafter: Indigenous Peoples Declaration].
- 60 See “Draft Declaration on the Rights of Indigenous Peoples,” U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, August 26, 1994, art. 7.
- 61 *Ibid.*
- 62 See Commission on Human Rights, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session,” 61st Sess., U.N. Doc. E/CN.4/2006/79, March 22, 2006: 25.
- 63 See Indigenous Peoples Declaration, art. 8(1).
- 64 *Ibid.* at art. 8(2).
- 65 See, e.g., *South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.) (Second Phase)*, [1966] I.C.J. Rep. 6, 50–51, ¶98 (noting that UN General Assembly Resolutions “operate[] on the political not the legal level: it does not make these resolutions binding in law.”).
- 66 See, e.g., Fabris, *South-South Cooperation*, at 180 (noting that the 1970 Convention established general principles on cultural protection that states then were required to reflect in domestic laws).
- 67 See “Universal Declaration of Human Rights,” G.A. Res. 217A(III), U.N. Doc. A/810: 71 [hereinafter: UDHR].
- 68 See “International Covenant on Economic, Social and Cultural Rights,” G.A. Res. 2200A(XXI), U.N. Doc. A/6316, 993 U.N.T.S. 3, December 16, 1966 [hereinafter: ICESCR].
- 69 See UDHR, art. 22 (emphasis added).
- 70 *Ibid.* at art. 27.
- 71 See ICESCR, art. 1(1) (emphasis added). Cultural rights are interpreted within the overall construct of the treaty and intersect with the other rights it guarantees, such as the requirement that cultural rights must be provided equally to both genders. See ICESCR, art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”).
- 72 *Ibid.* at art. 15.
- 73 See “Convention for the Protection of Human Rights and Fundamental Freedoms,” Eur. T.S. No. 5, 213 U.N.T.S. 222, November 4, 1950.
- 74 See “European Cultural Convention,” Eur. T.S. No. 18, December 19, 1954, art. 1.



- 75 *Ibid.* at art. 2 (focusing on promotion and exchanges around the “languages, history and civilization” of the various nations within Europe).
- 76 See, e.g., Genocide Convention, arts. 1, 4–6; ICC Statute, art. 5.
- 77 See “International Covenant on Civil and Political Rights,” G.A. Res. 2200A(XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171, December 16, 1966 [hereinafter: ICCPR].
- 78 *Ibid.* at art. 2(1).
- 79 *Ibid.* at art. 2(2).
- 80 *Ibid.* at art. 2(3)(a), (b).
- 81 See ICESCR, art. 2(1) (emphasis added).
- 82 See, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167–168 (5th Cir. 1999) (determining that cultural genocide was not actionable as a discrete violation of international law for which violations could be pursued under the US Alien Tort Statute). See also *Flores v. Southern Peru Copper Corp.*, 253 F.Supp. 2d 510, 518–520 (S.D.N.Y. 2002) (same).
- 83 See, e.g., Council of Europe, European Court of Human Rights Research Division, “Cultural Rights in the Case-law of the European Court of Human Rights,” Jan. 17, 2017: ¶78 (detailing other types of rights intersecting with culture but noting that the ECHR “has never recognized the right to the protection of cultural and natural heritage as such”). [www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf) (accessed November 17, 2018).
- 84 See Genocide Convention, art. 2.
- 85 See David L. Nersessian, “Rethinking Cultural Genocide under International Law,” *Human Rights Dialogue* 12 (2005): 7–8, 8.
- 86 See, e.g., ICC Statute, art. 6; “Statute of the International Tribunal for the Former Yugoslavia,” U.N. Doc. S/25704, May 25, 1993, art. 4 [hereinafter: ICTY Statute]; “Statute of the International Tribunal for Rwanda,” U.N. Doc. S/RES/955, Annex, November 8, 1994, art. 2 [hereinafter: ICTR Statute] (all reproducing Article 2 of the Genocide Convention).
- 87 See, e.g., *Prosecutor v. Krstić*, Case No. ICTY-98–33-T, ¶580 (ICTY Trial Chamber August 2, 2001), holding that

customary 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.

([Emphasis added] [hereinafter: *Krstić (TC)*])

- 88 See, e.g., *Krstić (TC)*, [2001] ICTY ¶572 (adopting purpose standard for genocidal liability). See also *Prosecutor v. Akayesu*, Case No. ICTR-96–4-T, ¶521 (ICTR Trial Chamber September 2, 1998) (requiring that offenders act “with the clear intent to destroy, in whole or in part, a particular group.”) [hereinafter: *Akayesu (TC)*].
- 89 *Krstić (TC)*, [2001] ICTY ¶¶595–597 (holding that attacks on Muslim libraries and mosques – “cultural and religious property and symbols of the targeted group ... may legitimately be considered as evidence of an intent to physically destroy the group.”).
- 90 *Karadžić and Mladić – Rule 61*, [1996] ICTY ¶94.
- 91 *Krstić (TC)*, [2001] ICTY ¶580, holding 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.

*See also* *Prosecutor v. Krstić*, Appeal Judgment, Case No. IT-98–33-A, ¶53 (ICTY App. Chamber April 19, 2004) (Sep. Op. Shahabuddeen, J.) (cautioning



against recognizing cultural genocide as a separate offense but noting that “the destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such.”).

- 92 See Genocide Convention, art. 2 (defining genocide as a number of prohibited “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”).
- 93 See, e.g., *Akayesu (TC)*, [1998] ICTR ¶¶122, 702 and n. 56 (group definition on a case-by-case basis in light of the group’s social, political and cultural context).
- 94 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Yugo.), Judgment, [2007] I.C.J. Rep. ¶342 (February 26) (internal citations omitted).
- 95 See, e.g., Jessica Mendoza, “Why is ISIS Destroying Ancient Artifacts in Iraq?” *Christian Science Monitor*, February 26, 2015. [www.csmonitor.com/World/Global-News/2015/0226/Why-is-ISIS-destroying-ancient-artifacts-in-Iraq](http://www.csmonitor.com/World/Global-News/2015/0226/Why-is-ISIS-destroying-ancient-artifacts-in-Iraq) (accessed November 17, 2018). For more discussion, see Helen Malko, “Heritage Wars: A Cultural Genocide in Iraq,” in *Cultural Genocide: Law, Politics, and Global Manifestations*, ed. Jeffrey Bachman (London: Routledge, 2019).
- 96 See David Bederman and Chimène Keitner, *International Law Frameworks*, 4th Ed. (St Paul, MN: Foundation Press 2016): 258.
- 97 See, e.g., “Convention (IV) Respecting the Laws and Customs of War on Land” and its “Annex: Regulations Concerning the Laws and Customs of War on Land,” Annex, 36 Stat. 2277, T.S. No. 539, October 18, 1907, art. 27. The cultural significance must be publicly designated, however, before such protection would apply. *Ibid.* (“It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.”).
- 98 *Ibid.* at art. 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

- 99 See “Convention for the Protection of Cultural Property in the Event of Armed Conflict,” 249 U.N.T.S. 240, May 14, 1954, pmbl.
- 100 *Ibid.* at art. 1.
- 101 See “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” 1125 U.N.T.S. 3, December 12, 1977, art. 53(a). Protocol I also outlawed the use of cultural objects to support military efforts or as the object of reprisals. *Ibid.* at art. 53(b), (c). See also “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),” 1125 U.N.T.S. 609, June 8, 1977, art. 16 (Protection of cultural objects and of places of worship):

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property ... it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

- 102 “Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict,” 2253 U.N.T.S. 172, March 26, 1999.
- 103 See, e.g., Committee for the Protection of Cultural Property in the Event of Armed Conflict, 11th Meeting, “Report of the Secretariat on its Activities,” UNESCO, U.N.

- Doc. C54/16/11.COM/4/REV, December 8–9, 2016: 3–4 (considering state requests for additional protection for sites located in Bosnia and Herzegovina, Cambodia, Georgia, Mali, and Nigeria), available at <http://unesdoc.unesco.org/images/0024/002466/246667E.pdf> (accessed November 17, 2018).
- 104 See Patty Gerstenblith, “Beyond the 1954 Hague Convention,” in Robert Albro and Bill Ivey, *Awareness in the Military: Developments and Implications for Future Humanitarian Cooperation* (Palgrave Macmillan 2014): 83, 87.
- 105 See, e.g., International Criminal Court, “Elements of Crimes,” art. 8(2)(b)(ii), Elements 4–5 (war crime of attacking civilian objects) (mandating that the attack in question “took place in the context of and was associated with an international armed conflict” and that the accused be aware of this larger context at the time of acting). [www.icc-cpi.int/resource/library/official-journal/elements-of-crimes.aspx](http://www.icc-cpi.int/resource/library/official-journal/elements-of-crimes.aspx) (accessed November 17, 2018) [hereinafter: ICC Elements of Crimes]. See also Prosecutor v. Kordić and Čerkez, Case No. IT-95–14/2-A, ¶1037 (ICTY App. Chamber December 17, 2004) (discussing required nexus between accused’s crimes and armed conflict under ICTY Statute) [hereinafter: *Kordić and Čerkez (AC)*].
- 106 See, e.g., Prosecutor v. Strugar, Appeal Judgment, Case No. IT-01–42-A, ¶¶277–280 (ICTY App. Chamber July 17, 2008) (holding superior liable for willful damage of cultural property by subordinates) [hereinafter: *Strugar (AC)*]. For detailed analysis of a number of ICTY war crimes cases relating to cultural destruction, see Ellis, *The ICC’s Role*, 44–52.
- 107 See ICC Statute, art. 8(2)(a).
- 108 Ibid. at art. 8(2)(b)(ii). See also *Strugar (AC)*, [2008] ICTY ¶329 (noting that while “cultural property is certainly civilian in nature, not every civilian object can qualify as cultural property.”).
- 109 See ICC Statute, arts. 8(2)(b)(ix), 8(2)(e)(iv). See also Prosecutor v. Strugar, Trial Judgment, Case No. IT-01–42-T, ¶312 (ICTY Trial Chamber January 31, 2005), holding that
- an act will fulfil the elements of the crime of destruction or wilful damage of cultural property ... if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.
- 110 See ICC Statute, arts. 8(2)(b)(xvi), 8(2)(e)(v).
- 111 Ibid. at arts. 8(2)(b)(xiii), 8(2)(c)(ii), 8(2)(e)(xii).
- 112 Ibid. at art. 8(2)(b)(xxi).
- 113 Ibid. at art. 8(2)(e)(iv) (prohibition on “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”).
- 114 See Prosecutor v. Al Mahdi, Case No. ICC-01/12–01/15, Judgment and Sentence (Int’l Crim. Ct. Trial Chamber September 27, 2016) [hereinafter: *Al Mahdi (TC)*]. The merits of the restitution order were upheld on appeal. See Prosecutor v. Al Mahdi, Case No. ICC-01/12–01/15-A, Public Redacted Judgment on the Appeal of the Victims against the “Reparations Order” p. 4 ¶1 (Int’l Crim. Ct. App. Chamber March 8, 2018).
- 115 See, e.g., Timbuktu, UNESCO World Heritage Centre, available at <http://whc.unesco.org/en/list/119> (describing the cultural significance of Timbuktu) (accessed November 17, 2018).
- 116 See *Al Mahdi (TC)*, [2016] ICC ¶72. For a debate over the merits of the Al Mahdi decision, compare Milena Sterio, “Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case,” *Case Western*

*Reserve Journal of International Law* 49 (2017): 63 (arguing that the case established an important precedent and enhanced the institutional legitimacy of the ICC) with William Schabas, “Al Mahdi Has Been Convicted of a Crime He Did Not Commit,” *Case Western Reserve Journal of International Law* 49 (2017): 75 (arguing that the offense to which the defendant pleaded guilty was not actually committed because a necessary element – an armed “attack” within the meaning of international humanitarian law – had not occurred in the vicinity at the time the monuments were destroyed).

- 117 See *Prosecutor v. Al Mahdi*, ICC-01/12–01/15, Confirmation of Charges, ¶¶34, 36 (Int’l Crim. Ct. Pretrial Chamber March 24, 2016) (“At the time of the destruction, all cemeteries in Timbuktu, including the Buildings/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO”).
- 118 See *Al Mahdi (TC)*, [2016] ICC ¶80.
- 119 See ICC Statute, art. 7(2)(g).
- 120 See, e.g., ICC Elements of Crimes, Persecution, art. 7(1)(h) (requiring deprivation of fundamental rights committed “as part of a widespread or systematic attack directed against a civilian population” of which the perpetrator was aware).
- 121 *Ibid.* at art. 7(1)(h), covering  
 [p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.
- 122 See “Charter of the International Military Tribunal,” 59 Stat. 1546, 82 U.N.T.S. 284, August 8, 1945, art. 6(c) (covering “persecutions on political, racial or religious grounds”) [hereinafter: Nuremberg Charter] and “Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity,” *Official Gazette of the Control Council for Germany* (1945–1948), December 20, 1945: 50 (facilitating additional trials of major Nazi war criminals and covering “persecutions on political, racial or religious grounds”) [hereinafter: C.C.10 Statute].
- 123 See *Krstić (TC)*, [2001] ICTY ¶575  
 There is consensus that the crime of persecution provided for by the Statute of the Nuremberg Tribunal was not limited to the physical destruction of the group but covered all acts designed to destroy the social and/or cultural bases of a group.
- 124 See “Draft Code of Crimes against the Peace and Security of Mankind,” *Report of the International Law Commission to the General Assembly*, Vol. II, Y.B. Int’l L. Comm. 150 (1954), U.N. Doc. A/CN.4/SERA/1954d, April 30, 1954, art. 2(11) (emphasis added).
- 125 See “Draft Code of Crimes against the Peace and Security of Mankind,” *Report of the International Law Commission to the General Assembly*, Vol. II, Y.B. Int’l L. Comm. 136 (1951), U.N. Doc. A/CN.4/SER.A/1951/Add.1, April 6, 1951 (interim drafting commentary relating to crime of persecution).
- 126 See “Draft Code of Crimes against the Peace and Security of Mankind,” *Report of the International Law Commission on the Work of its Forty-third Session, 29 April–19 July 1991*, Official Records of the General Assembly, Forty-sixth Session, Supp. No. 1, U.N. Doc. A/46/10, July 19, 1991: 94, art. 21 (covering “persecution on social, political, racial, religious or cultural grounds”).
- 127 See ICTY Statute, art. 5(h) (covering “persecutions on political, racial and religious grounds”), ICTR Statute art. 3(h) (same).

- 128 See “Draft Code of Crimes against the Peace and Security of Mankind,” *Report of the International Law Commission on the Work of its Forty-eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, July 26, 1996: 17, art. 18(e) (covering “persecution on political, racial, religious or ethnic grounds”).
- 129 See ICC Statute, art. 7(1)(h).
- 130 See “Statute of the Iraqi Special Tribunal,” 43 I.L.M. 231, December 10, 2003, art. 12(8), covering
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal.
- 131 See “Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea,” 2329 U.N.T.S. 117, June 6, 2003, art. 9 (covering “crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court,” which includes persecution on cultural grounds).
- 132 For details on several ICTY cases in which cultural destruction was prosecuted as a crime against humanity, see Ellis, *The ICC’s Role*, 52–55.
- 133 See, e.g., Prosecutor v. Naletilić and Martinović, Case No. IT-98–34-T, ¶701 (ICTY Trial Chamber March 31, 2003) (holding that acts of plunder carried out on a discriminatory basis against the property of a specific group could constitute persecution).
- 134 See, e.g., *Kordić and Čerkez (AC)*, [2004] ICTY ¶¶104–105, 108 (holding that attacks on civilians or civilian objects may constitute persecution as a crime against humanity, including attacks on property). Many of the attacks in this case focused on the “destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent[.]” See Prosecutor v. Kordić and Čerkez, Case No. IT-95–14/2, ¶207 (ICTY Trial Chamber February 26, 2001).
- 135 See, e.g., Prosecutor v. Blaškić, Appeal Judgment, Case No. ICTY-95–14-A, ¶149 (ICTY App. Chamber July 29, 2004) (holding that “the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the [ICTY] Statute.”). See also Prosecutor v. Stakić, Case No. IT-97–24-T, ¶768 (ICTY Trial Chamber July 31, 2003) (holding that “acts of ‘destruction of, or wilful damage to, religious and cultural buildings’, even if not listed in Article 5 of the Statute, may amount to persecutions”) and ¶813 (crimes against humanity were established when destruction of buildings was “committed by the direct perpetrators with the discriminatory purpose to destroy such non-Serb religious buildings.”)
- 136 See, e.g., Prosecutor v. Blaškić, Judgment, Case No. ICTY-95–14-T, ¶425 (ICTY Trial Chamber Mar. 3, 2000) (holding that Serbian “methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolizing their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population.”).
- 137 See United Nations Security Council, *The Middle East*, S.C. Res. 2139, U.N. Doc. S/RES/2139, February 22, 2014: pmb1. (“Calling on all parties to immediately end all violence which has led to human suffering in Syria, save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites”) and United Nations Security Council, “The Situation between Iraq and Kuwait,” S.C. Res. 1483, U.N. Doc. S/RES/1483, May 22, 2003: ¶7 (requiring states “to take all necessary measures” to prevent the transfer and facilitate the return of cultural artifacts looted from Iraqi museums, libraries, and other cultural institutions during and immediately after the second Gulf War).

- 138 See United Nations Security Council, “Threats to International Peace and Security Caused by Terrorist Acts,” S.C. Res. 2249, U.N. Doc. S/RES/2249, November 20, 2015: pmb. (noting that ISIS constitutes “a global and unprecedented threat to international peace and security” *inter alia* due to “its eradication of cultural heritage and trafficking of cultural property” in addition to “its violent extremist ideology, its terrorist acts, [and] its continued gross systematic and widespread attacks directed against civilians”) and United Nations Security Council, “Threats to International Peace and Security Caused by Terrorist Acts,” S.C. Res. 2199, U.N. Doc. S/RES/2199, February 21, 2015: ¶¶15–17 (condemning “the destruction of cultural heritage in Iraq and Syria”, noting that profits from the illicit trade in cultural artifacts was funding terrorism, and requiring states to take “all appropriate steps” to stop such transfers and to facilitate the return of stolen cultural property “to the Iraqi and Syrian people”).
- 139 See United Nations Security Council, “Maintenance of International Peace and Security,” S.C. Res. 2347, U.N. Doc. S/RES/2347, March 24, 2017

Emphasizing that the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts, notably by terrorist groups, and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States.

And

Noting with grave concern the involvement of non-state actors, notably terrorist groups, in the destruction of cultural heritage and the trafficking in cultural property and related offences.

- 140 See, e.g., Prosecutor v Delalić, Appeal Judgment, Case No ICTY-96–21-A (ICTY App. Chamber February 20, 2001) ¶412, holding that out of fairness to defendants,

multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

([Hereinafter: *Celebici (AC)*])

- 141 For a detailed analysis of these distinctions in the context of physical and biological genocide, see David L. Nersessian, “Comparative Approaches to Punishing Hate – The Intersection of Genocide and Crimes against Humanity,” *Stanford Journal of International Law* 43 (2007): 221.
- 142 Nersessian, *Rethinking Cultural Genocide*, at 8. See also *Al Mahdi (TC)*, [2015] ICC ¶80 (describing cultural destruction in Timbuktu as “a war activity aimed at *breaking the soul* of the people of Timbuktu”) (emphasis added).
- 143 See Lawrence, Frederick M., *Punishing Hate* (Cambridge, MA: Harvard University Press, 1999): 169 (discussing social expression of values in criminal law). See also *Celebici (AC)*, [2001] ICTY ¶17 (Hunt, J. and Bennouna, J. dissenting) (arguing that societal values are expressed in both the substantive elements of criminal offenses themselves as well as the grouping of crimes into different types and degrees of seriousness).

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## **Part II**

# **Global manifestations of cultural genocide**



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**Section one**

**SETTLER COLONIALISM,  
FORCED ASSIMILATION, AND  
INDIGENOUS GENOCIDE**





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## 4 Destroying Indigenous cultures in the United States

*Lauren Carasik and Jeffrey S. Bachman*

### Introduction

In colonial North America, the settlers' need for land to advance capitalist expansion inevitably put them on a collision course with the land's original inhabitants. In the ensuing process of westward expansion, brutal efforts to control and annihilate native populations included outright massacres, removal from territories, and concentration on reservations.<sup>1</sup> Those were followed by policies characterized as more humane, aimed at eradicating the culture instead, by "killing the Indian to save the man." Among the most assimilationist policies were residential schools that sought to "civilize" Indigenous groups by separating children from their families, communities, and the culture that bound them together and instead inculcating them with Christian values.<sup>2</sup> The design and impact of these policies must be viewed in the context of the unfolding, slow-moving effects of settler colonialism, and with it an insatiable drive to dispossess Native Americans of their land, which resulted in genocidal outcomes.<sup>3</sup>

For many children,<sup>4</sup> the schools were deeply traumatic, inflicting a devastating intergenerational legacy that endures today.<sup>5</sup> As Theodore Fontaine argues, "the consequences experienced by Indian residential school survivors and their descendants are a complex tangle of political, social, cultural, economic, mental, physical, emotional, and spiritual harms."<sup>6</sup> North American Indigenous communities continue to face high rates of suicide, substance abuse, domestic violence, and other social ills. In recognizing this toll, however, it is important not to overshadow the resilience and resistance of communities that have continuously worked to preserve and protect their cultural legacies against efforts to eradicate and then forcibly assimilate them.<sup>7</sup>

Much of the discourse on genocide assumes a narrow legal definition, shaped irrevocably by the "seminal atrocity" of the Jewish Holocaust, associated with the unparalleled evil of Nazi Germany. The lens of settler colonial genocide, and its destructive cultural impact for Indigenous communities, refocuses some of this inquiry on societal culpability and the beneficiaries of a process of capitalist expansion. The emerging discourse, situated at the intersection of critical genocide and settler colonialism studies, employs a longitudinal analytical process that sits at the periphery of mainstream inquiry. Analysis of the culturally

destructive legacy of settler colonialism raises the vexing question of how to classify the settler colonial processes in a way that reflects and honors the experience of Indigenous communities and engages scholars and activists to participate in critical discourse, pushing the boundaries set by their predecessors.<sup>8</sup>

Efforts to broaden the discourse are being driven largely by Indigenous peoples to describe the destructive impact of settler colonialism on their land and lives. As Jones notes, “Unsurprisingly, it is aboriginal and indigenous peoples, and their supporters in activist circles and academia, who have placed the greatest emphasis on cultural genocide in issuing appeals for recognition and restitution.”<sup>9</sup> It is a contested, but critical task, that must be undertaken. Woolford argues that

a sophisticated understanding of patterns of destruction wrought by settler colonialism offers a more promising path for redressing genocidal Indigenous-settler relations in a decolonizing manner, since we must understand the complexity of these patterns before we can transform them.<sup>10</sup>

### **Defining cultural genocide**

Borrowing from Damien Short, we define cultural genocide as any attempt to destroy a group as such by eliminating the group’s culture.<sup>11</sup> Acts that constitute cultural genocide include criminalization or de facto prohibition of a group’s language, religious practices, customs, and traditions; destruction of cultural heritage sites, artifacts, artwork, historical records, and books; and indoctrination and forced assimilation of a group’s children into another group. A cultural group’s survival as a unique entity is predicated on the continued existence of its culture. Cultural groups have unique histories, heritages, historical contributions, practices, languages, and values. Destruction of a culture and the coerced assimilation of the members of one culture into another could effectively destroy the group without employing means for its immediate physical destruction. As David Nersessian puts it, prohibiting only a group’s physical destruction “preserves the body of the group but allows its very soul to be destroyed.”<sup>12</sup>

Settler colonialism differs from colonialism in that the goal is not merely to extract resources, appropriate land and exploit labor, but instead to supplant the existing culture and assert dominance through processes of displacement, dispossession, and the usurpation of sovereignty. As Patrick Wolfe puts it, “settler colonialism is first and foremost a territorial project, whose priority is replacing natives on their land rather than extracting an economic surplus from mixing their labor with it.”<sup>13</sup> Through this process, Wolfe continues, the “eliminary strategies all reflect the centrality of land, which is not merely a component of settler society but its basic precondition.”<sup>14</sup> As such, settler colonialism is an enduring structure, not an historical phenomenon.<sup>15</sup> With that understanding, Alissa Macoun and Elizabeth Strakosch caution us not to “construct existing political relationships as inevitable and unchanging.”<sup>16</sup>

In order to add nuance to the discussion, some scholars have opted to use different language to describe the process, such as “indigenocide,” defined by Raymond Evans and Bill Thorpe as “an interdependent, three-way onslaught upon lives, land and culture.”<sup>17</sup> However, alternative terms, such as this, have been met with objections because they imply that the harms they represent are less egregious than genocide. The use of “cultural” as a qualifier is also condemned by some observers since, “Insisting on the centrality of physical destruction to the concept of genocide dismisses the very real destructive potential of cultural violence.”<sup>18</sup> Others are cautious with the use of the term “cultural genocide” since it suggests success in annihilating culture and obscures Indigenous communities’ resilience and resistance, requiring the tricky balance of recognizing destructive processes done in service of capitalist expansion while being “careful to avoid portraying indigenous peoples as passive victims of an absolute power.”<sup>19</sup> As Julian Noisecat writes, Native Americans communities have resisted the onslaught of forces that threaten their survival:

[D]espite all the forces brought crashing down upon indigenous people, we are still here. They came for our land. They came for our resources. They came for our children. They came to destroy us, our communities, our territories, our families, our bodies, our languages, our cultures, our knowledge, our love. But yet we remain.<sup>20</sup>

And finally, as Woolford observes, “An argument against including ‘cultural’ genocide within the definition of genocide has been that the concept would become so broad as to be meaningless.”<sup>21</sup>

Compounding the analytical complexity is that genocide is not a neatly confined construct: it is an international crime, but also more expansively found in public international law, international human rights law, international humanitarian law, and international cultural heritage law.<sup>22</sup> Despite this, the dominant discourse centers on a narrow analysis of whether conduct fits within legally binding definition of the Genocide Convention, which is focused on the prevention and prosecution of concrete acts, and not neatly amenable to a framework on ongoing colonization. Perspectives illuminating the shortcomings of that compromise and the exclusion of voices of the affected demands a more critical discourse. As Payam Akhavan eloquently argues, the importance cannot be overstated:

For survivors ... cultural genocide is above all a song of bereavement, a metaphor for mourning, rebuilding a shattered self-conception through the power of words. It is for us to hear those words, heal those wounds, and to reclaim our shattered humanity.<sup>23</sup>

The term “genocide” emerged to prominence in the aftermath of the Jewish Holocaust and World War II thanks to Raphael Lemkin’s decision to create the term as a signifier of the unique harm perpetrated by genocide, and his tireless

effort to codify the prohibition of genocide in international law. Though Lemkin succeeded in his effort, culminating with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), it is important to unpack the politics of who defined the Convention's parameters and continue to dominate the discourse. Cultural genocide was a key element of Lemkin's conception of the crime of genocide. Thanks, in large part, to Lemkin's role in drafting the Secretariat Draft and his subsequent advocacy, the crime of cultural genocide was included in the first two formal drafts of the Genocide Convention. However, during the treaty's negotiations, states that opposed the inclusion of cultural genocide, the US chief among them, won a vote that resulted in its removal. As Akhavan argues, "the experiences, priorities and views of non-European peoples subjected to 'civilizing missions' were either totally absent or otherwise represented by a small minority."<sup>24</sup>

The US was not alone in its intransigence to including cultural genocide in the convention. Other settler colonial societies – Canada, Australia and New Zealand – also resisted definitions that would force a reckoning about the brutality of their nations' founding circumstances. The objections were more than purely theoretical. Significantly, prior to, during, and subsequent to the treaty's adoption and entry into force, the US enforced policies that contained elements of cultural genocide. Seemingly, with this in mind, the US warned the Ad hoc Committee to avoid attempting to cover too wide a conceptual field in its preparation of its draft of the convention by, for example, including cultural genocide, because doing so could risk support for the treaty.<sup>25</sup>

According to Nersessian, "Collective identity is not self-evident but derives from the numerous, inter-dependent aspects of a group's existence."<sup>26</sup> The US rejected this understanding in aggressively opposing the inclusion of cultural genocide, even threatening to undermine the treaty's viability if it were included. In doing so, the US not only failed to recognize the essential role culture plays in group identity; it openly dismissed it. In supporting its position, the US argued that cultural genocide lacks the severity of the crime of physical genocide. But according to Kristina Hon, "The underpinnings of society, culture and communities ... *are* ... threatened by prohibitions on books and languages, thereby lowering the quality of life and weakening identity."<sup>27</sup> As Robert Davis and Mark Zannis opine,

A culture's destruction is not a trifling matter. A healthy culture is all-encompassing of human lives, even to the point of determining time and space orientation. If a people suddenly lose their "prime symbol," the basis of culture, their lives lose meaning. They become disoriented, with no hope. As social disorganization often follows such loss, they are often unable to ensure their own survival.<sup>28</sup>

Genocide is a crime against groups, not individuals, and it is this distinction that elevates its importance as a prohibited act. The idea of criminal intent is traditionally understood as relevant to the mental state of the individual planners and

perpetrators, but such a narrow lens ignores the larger “collective sociohistorical processes through which intentions take shape.”<sup>29</sup> Lemkin himself called treatment of Native Americans as “cultural genocide par excellence ... the most effective and thorough method of destroying a culture, and of de-socializing human beings.”<sup>30</sup> Lemkin drew a distinction between cultural change and cultural genocide, with the former involving a slow process of assimilation, while the latter reflects the “premeditated goal of those committing cultural genocide.”<sup>31</sup> Irrespective of intent, however, if the commission of genocide is apparent and the government does not act to stop it, genocidal intent can be inferred.<sup>32</sup>

Cultural genocide is a multidimensional process. To succeed, perpetrators of cultural genocide must attack the very foundation of the targeted group’s shared identity – its culture. Thus, as noted above, cultural genocide includes acts that range from the destruction of books to the forced assimilation of a group’s children into another group. Any one act is not likely to achieve the purpose of eliminating a group as such by erasing the group’s unique cultural existence. However, perpetrators do not need to engage simultaneously in all the acts that constitute cultural genocide in order for the state to be responsible for its commission. Rather, what matters is that any of the prohibited acts are carried out as part of a plan to destroy a group as such through the elimination of its shared cultural identity.

Elimination of native society and replacement with settler institutions does not require extinction.<sup>33</sup> Davis and Zannis state that the intent to commit cultural genocide is inherent in colonization:

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.<sup>34</sup>

This context frames the ultimate exclusion of cultural genocide from the convention. In a postcolonial world, there would have been significantly more former colonies shaping the drafts of the Genocide Convention. According to Matthew Lippman, “The central purpose of the Genocide Convention is to preserve and promote pluralism in order to perpetuate the progress which historically has resulted from the clash of cultures.”<sup>35</sup> A common response to charges of cultural genocide in the context of settler colonialism is the lack of specific intent to destroy the culture, which was instead a byproduct of demands for land. This distinction between result and intent is of little comfort to those affected.<sup>36</sup> As Moses contends, “black-letter interpretations of the convention’s stipulations regarding genocidal intention cannot do justice to the messy reality in which such intentions evolve,”<sup>37</sup> since it presumes the legitimacy of progress for one culture on the back of the suppression of the other.

Historically, the US assault on its Indigenous populations was not limited to practices that constitute cultural genocide. In the initial stages of the genocide,

the US employed a combination of physical and cultural genocide. As Mako notes,

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.... Beyond physical extermination, the State implemented policies of acculturation by enacting laws that restricted land entitlements to Indians who had renounced tribal citizenship.<sup>38</sup>

Examples of physical genocide can be found in the well-known case of the Cherokee and the relatively lesser known case of the Yuki. In 1832, the US Supreme Court ruled in *Worcester v. Georgia* that Georgia law did not apply on Native American lands. Chief Justice John Marshall concluded,

The Cherokee nation is ... a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.<sup>39</sup>

This decision was important because it supported Cherokee claims under the Indian Removal Act, which was signed into law by President Andrew Jackson in 1830, that the US had no right to forcibly remove them from their land. Unfortunately for the Cherokee, President Jackson decided his administration was not bound by such decisions, allegedly declaring: “Marshall has made his law, now let him enforce it.”<sup>40</sup> In total disregard of the law, the US military forced all members of the Cherokee tribe to leave their homes and travel west along what would become known as the Trail of Tears. Members of the tribe were forced to walk around fifteen to twenty miles each day in sub-zero temperatures without proper clothing. An estimated 4,000 Cherokees out of a total population of about 8,000 died during their forced removal.<sup>41</sup>

Clearly, the Cherokee were victimized by a deliberate policy that inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part. California’s Yuki Indians were victims of a more direct physical assault – a “deadly combination of settler-colonial brutality and government complicity.”<sup>42</sup> With the commencement of the “Gold Rush” in 1847, “settlers robbed and murdered Yuki men and enslaved the women, crimes that were condoned and even encouraged by the state government, which helped organize militias that indulged in genocidal slaughter.”<sup>43</sup> In the 1840s, the Yuki maintained a population of around 20,000. Within six years of the settlers’ arrival, the Yuki population was reduced by 85–90 percent. By 1880, only 168 Yuki remained; as John Cox notes, the mass murder of the Yuki represents “one of history’s few near-total genocides.”<sup>44</sup> Direct physical violence of this sort was



part and parcel of settler-state colonialism. To enable an ever-increasing occupation of the land by white settlers, the US had to reduce the Indigenous population both in size and in terms of its ability to resist.<sup>45</sup>

In the late nineteenth century, with the end of the “Indian Wars” and the aggregate North American Indigenous population reduced by approximately 98 percent (from an estimated 15 million in 1500 to 250,000 in 1890), the means of destroying the Indigenous groups as such evolved.<sup>46</sup> The new Indian Industrial School in Carlisle, Pennsylvania described its policy as “kill the Indian, save the man.”<sup>47</sup> In this context, “saving” has multiple meanings. Not only would the lives of Native Americans be saved from death, but Native Americans would also be saved from themselves. This was the source of the US cultural genocide against its Indigenous populations: the view that the white man was civilized and Native Americans were savages.

Those efforts were both brutal and costly. As early as the 1870s, there were those in the US who used their influence to lobby for a more “cost-effective” alternative to physical attacks for dealing with the Native “problem” – the complete elimination of Indigenous cultures through the assimilation of the remaining Native American population.<sup>48</sup> “Since then,” writes James Waller, “the ongoing destruction of American Indians is best characterized as ‘ethnocide’ – that is, the destruction of a culture rather than a people per se.”<sup>49</sup> As Churchill points out, Lemkin coined the term “ethnocide” at the same time that he coined the term “genocide,” not (as it is used today) to describe actions different from genocide, but as a synonym for it.<sup>50</sup>

In 1883, the Court of Indian Offenses was created to monitor the behavior of Native Americans and punish those who committed so-called “Indian offenses.” These included performing the “sun-dance,” the “scalp-dance,” and the “war-dance.” The “usual practices” of medicine men were also designated as offenses.<sup>51</sup> The practice of important cultural traditions was met by withheld rations, heavy fines, forced labor, and jail time.<sup>52</sup> Congress also passed laws forcing Native Americans to abandon their customary means of governance and adopt systems of government, police forces, and judicial systems that emulated American institutions.<sup>53</sup> These forms of government were antithetical to established norms. Communal land dislocation was another key to assimilation policy. The US sought to abolish the Indigenous practice of holding land in common, replacing it with the Anglicized system of individual property ownership with the goal of undermining the cohesiveness of Native American societies in order to advance its own capitalist goals.<sup>54</sup>

All these strategies played significant roles in the effort to eradicate Indigenous cultures. However, education was the “linchpin of assimilationist aspirations” by which Native Americans were to be “civilized.”<sup>55</sup> The “compulsory transfer of native children into boarding schools designed to assimilate them into white society” was the primary method of erasing Indigenous cultural identity while sparing the physical lives of the members of the group.<sup>56</sup> Sending Native American children to boarding schools was clearly part of a long-term strategy aimed at the complete eradication of Native American cultures, one that formally

began in 1879 when the US Congress began appropriating money to build off-reservation boarding schools.<sup>57</sup> That same year, the previously mentioned United States Indian Industrial School opened, the first of its kind. The boarding school program, which lasted nearly a century, was intended to remove aboriginal children from their homes, communities, and cultures from the earliest possible age.<sup>58</sup> An Indigenous person would be held for years in state-sponsored “educational” facilities, systematically deculturated, and simultaneously indoctrinated to see her/his own heritage – and him/herself as well – in terms deemed appropriate by a society that despised both to the point of seeking as a matter of policy their utter eradication.<sup>59</sup>

Eliminating Native American languages was considered central to deculturalization. Thus, when the US insisted on excluding cultural genocide from the Genocide Convention, arguing that it was not as important to protect the right of a group to use its language as it was to protect the right of the group to freely express itself “whatever the language,” the US position was consistent with regulations first issued by the Bureau of Indian Affairs in 1885. In its regulations for boarding schools, the Bureau of Indian Affairs decreed that all schools would maintain an English-only policy. In support of the language restriction, J.D.C. Atkins, Commissioner of Indian Affairs, proclaimed,

This language, which is good enough for a white man and a black man, ought to be good enough for the red man. It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him. The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language.<sup>60</sup>

Supporters of US education policy for Native American youth made their case on a number of different levels. They argued that the older generations of Native Americans could not be “civilized,” as they were too old and set in their ways, and therefore beyond redemption. An agent to the Lakota people stated, “It is a mere waste of time to attempt to teach the average adult Indian the ways of the white man. He can be tamed, and that is about all.”<sup>61</sup> The process of “taming” the average adult Native American included prohibiting participation in spiritual practices often referred to as “heathen ceremonies.” Education advocates believed that by educating Native American children, the US could expedite the process of “cultural evolution.”<sup>62</sup> Thus, not only did the US prey on the most malleable members of the Indigenous groups, but it also targeted the most vulnerable – children.

To these advocates, the goal of “educating” Native American youth was an unadulterated good. As George Tinker asks, “Who can quarrel with education?”<sup>63</sup> After all, writes Tinker, the “Indian residential schools ... were the best attempt of the liberal colonizer to advance the state of Indian peoples in North America. Such is the colonizer’s apologetic for colonization and rationalization of conquest.”<sup>64</sup> The great “benefits” the Native Americans would receive were

widely discussed during a series of annual meetings held at Lake Mohonk, New York. US Commissioner of Education William Torey Harris explained that the attributes of civilization include individualism; ownership of private property; acceptance of Christian doctrine; abandonment of the tribal community; production and consumption of material goods; and belief in the noble accomplishment of man's conquest of nature.<sup>65</sup> While it was believed that all societies could be marked on a continuum denoting their evolution from savagism to civilization, it was also held that the US had attained the zenith of cultural development. Thus, as David Wallace Adams writes,

Under the proper conditions, that is to say under white tutelage, Indians too might one day become as civilized as their white brothers ... From all of this it followed that just as savagism must give way to civilization, so Indian ways must give way to white ways.<sup>66</sup>

Francis Leupp, Commissioner of the Bureau of Indian Affairs from 1904 to 1909, was another believer in the "civilizing" effects of education.<sup>67</sup> As a central element of assimilation policy, Leupp saw education as part of "a mighty pulverizing engine for breaking up the tribal mass."<sup>68</sup>

The schools varied in their stated intent and brutality. As Woolford writes, "Like all grandiose modernist projects of state-building, Indigenous boarding schools were prone to inconsistencies, variable applications, local resistances, and subversions."<sup>69</sup> To avoid being reductive, Woolford calls this the "settler colonial mesh." For some scholars, this variability makes it hard to see clear intent,<sup>70</sup> though as the United Nations has found, intent does not have to be explicit.<sup>71</sup> While some characterized the schools as a "benevolent experiment," Woolford argues that "benevolence and destruction are understood not as pure opposites but as potentially related terms, since perceived acts of benevolence, guided by an absolute moral certainty, can be experienced by the targets of such benevolence as painful and destructive."<sup>72</sup> However, Woolford argues, "benevolence was not the primary motivation behind assimilative schooling, for discourses of benevolence were underwritten by a colonial desire for land, resources, and national consolidation."<sup>73</sup> Irrespective of whether the intent was benign or malevolent, the schools set out to extinguish language and religion, separate children from their cultural moorings, and inculcate the cultural values of the settlers. Some schools had a vocational focus, but shunted children into low-wage training that was not geared toward their prosperity, but rather preparing them to service the economy at its lowest levels.

The methods of effecting the removal of children varied. Sometimes the coercion was blatant,<sup>74</sup> but schools could also manufacture "consent" based on Indigenous parents' sense of pragmatism. There was a desire among some parents to see their children "have a life as advantageous as European settlers had, recognition that their way of life was disappearing, and sensitivity to the fact that American policy had often demonstrated a much more violent alternative to mere schooling."<sup>75</sup> It was a survival technique born of the desire to ensure the security

of children in a climate when settler society was determined to subvert Indigenous culture. By the 1920s, there were seventy-seven schools “whose express purpose was the complete assimilation of Native American children, remolding their conception of life and their attitudes toward the land.”<sup>76</sup> Charles Burke, one of Leupp’s successors at the Bureau of Indian Affairs (1921–1929), stated, “It is not consistent with the general welfare to promote [American Indian national or cultural] characteristics and organization.”<sup>77</sup> At boarding schools, tribal religions were suppressed, use of the native tongue was physically punished, and students were taught to read and write English, as well as act and dress like white children.<sup>78</sup> Upon arriving at a boarding school, Indigenous children were typically “cleansed” of all native cultural characteristics that could be removed. They were forced to relinquish their given names, and to answer only to their new English names. Long hair was cut and traditional dress was banned.<sup>79</sup> Boarding schools also included Christian indoctrination in the curriculum.<sup>80</sup>

One rationale behind the use of boarding schools was the need to “free” Native American children “from the language and habits of their untutored and often savage parents.”<sup>81</sup> Tonya Gonnella Frichner, a former lawyer for the American Indian Law Alliance, aptly summarizes the methods by which boarding schools were used to displace Native American children from their homes, as well as their cultures. Frichner notes,

The schools were usually located far from tribal communities, so children spent either minimal or no time living at home. The children were in many cases forcefully removed from their homes as early as three years of age and sent to these schools.<sup>82</sup>

Native American children were prohibited from maintaining their customs, with the threat of corporal punishment to compel compliance. The faith-based groups that often administered the schools also sought to “indoctrinate the children with non-native religious views.”<sup>83</sup> “In sum,” writes Frichner, “these schools were hostile to native ways of life, and the children who attended them were unable to maintain close cultural ties with their native community, causing harm to the children and the communities.”<sup>84</sup>

The forced removal of Native American children from their families and their ways of life did not end with boarding school education. Some of the schools employed an “outing system” in which Native American children were transferred from the boarding school to the homes of white families, where they were subjected to further indoctrination in the American way of life. According to an Association on American Indian Affairs study, 25–35 percent of Native American children were transferred to foster care or placed with adoptive families. The number of Indigenous children living outside their homes and away from their families was staggering in and of itself, but its extraordinary nature becomes clearer when it is compared to figures for non-Indigenous children. On average, Indigenous children were placed in foster care or adoptive housing at a rate five to seven times that of non-Indigenous children – 25–35 percent for

Indigenous children compared to 5 percent for non-Indigenous. In areas where Indigenous populations were higher, so too was the comparative rate of transfer into foster and adoptive services. In South Dakota, for example, placement of Indigenous children was sixteen times more frequent than for non-Indigenous children.<sup>85</sup> Notably, not all brutality was perpetrated at the hands of the government – sometimes settlers acted with and without the tacit or overt complicity and/or approval of the government.

To this day, the US government has offered only limited recognition of the destructive acts committed by the state and by others on its behalf, while also failing entirely to accept meaningful responsibility. In 1928, the Meriam Report concluded that “[T]he destruction of Indian governments, the liquidation of tribal property and hostility to Indian culture has been a mistake.... [Boarding schools are] overcrowded, the sanitation inadequate, the children undernourished, overworked and severely disciplined, the staff unaccredited and poorly paid.” John Collier, who served as Commissioner of Indian Affairs, said “the administration of Indian affairs [was] a national disgrace.... A policy designed to rob Indians of their property, destroy their culture and eventually exterminate them.”<sup>86</sup> He implemented some short-lived reforms that largely dissipated after World War II,<sup>87</sup> and Indigenous communities continue to decry the destructive forces that continue to dispossess and marginalize them. More recently, President Barack Obama signed a resolution in 2009 that apologized for the nation’s treatment of Native Americans.<sup>88</sup> However, the resolution, which received little public attention, explicitly stated that it did not authorize legal claims.<sup>89</sup>

The issue of reparations has not received any meaningful consideration, nor has the US demonstrated any willingness to reckon with its brutal past by establishing a transitional justice mechanism, not even one that protects the “interests” of the US, let alone one that considers the interests and demands of Native Americans themselves. Whether the harms caused by the residential schools are legally redressable is subject to debate. Andrea Curcio argues that they are, at least on behalf of individual litigants.<sup>90</sup> Others are far less sanguine about the prospects of successful litigation or any means of redress, especially in a systemic fashion. Given the incalculable and enduring harm settler colonialism has inflicted, justice should not be foreclosed for those harmed by the process in general, and the residential schools specifically.

The genocide of Native Americans and Native cultures was ultimately incomplete, not owing to a lack of effort, but due to the perseverance and resilience of Native communities. To ensure that it would not face an accounting, the US ensured the omission of cultural genocide from the Genocide Convention and did not ratify the convention for forty years in part to evade accountability for its treatment of Native Americans.

## **Conclusion**

Although boarding schools are largely shuttered, Native American communities continue to face threats to the sovereignty and self-determination that are critical

to their cultural survival, as processes of settler colonialism continue apace. The Indigenous-led Water Protector movement at the Standing Rock Sioux reservation that developed in response to the Dakota Access Pipeline is emblematic of that struggle. The peaceful resistance galvanized thousands of Native Americans and their allies to protect their tribal lands and the impending ecological destruction that accompanies the unbridled extraction and use of fossil fuels. The pipeline, originally slated to run near Bismarck, North Dakota, was re-routed to within a mile of the Standing Rock Sioux Reservation, in part due to concerns about threats to the water supply of the predominantly white municipality. As Kyle Whyte observes, “Colonial exploitation of indigenous lands through these industries has already inflicted immediate harms on indigenous peoples, from water and air pollution to destruction of sacred sites.”<sup>91</sup> And, as Whyte writes, “It is precisely this social process of settler colonialism that explains why it is no accident that ETP [the company building the pipeline] sought to build a key segment [of] DAPL through tribally significant land and water.”<sup>92</sup>

Adopting a transactional narrative of history that eclipses its destructive impact, President Donald Trump has boasted that “our ancestors ... tamed a continent.”<sup>93</sup> That disregard for the ravages of history bodes ill for the struggle for decolonization under his administration. Resistance under Trump will take on a renewed urgency, amid signals that his administration will move to privatize tribal lands. As Julian Noisecat argues,

The plan would upend over a century of federal Indian policy by converting sovereign Indian land, which is often regulated and held in trust by the federal government, into private property. If the plan is implemented as part of Trump’s oil and infrastructure agenda, it would bring more fracking rigs, pipelines, and protests to America’s colonial frontier on Indian Country’s doorstep.... The indigenous movement will be fighting a battle on two fronts: not only against pipelines but also against a full-frontal assault on indigenous rights and sovereignty.<sup>94</sup>

Reckoning with the past requires us to challenge dominant voices that have shaped the discourse in ways that fail to recognize slower moving processes of cultural destruction unleashed by settler colonialism that forms the foundation upon which settlers have built current society.<sup>95</sup> Though the terrain is contested and complicated, the analysis is critical to undertake because the settler societies have failed to acknowledge, much less reconcile, with the harms wrought. A meaningful process of truth and reconciliation in the US could start to reshape the warped and self-serving narrative of brave explorers and entrepreneurs who found a vast open and uninhabited (by people, not “savages”) landscape, which they alone made productive, because settlers’ dominant perspectives reflexively favor a view that obscures the destruction imposed by their arrival and expansionist aspirations. As framed by Benvenuto, Woolford, and Hinton in their introduction to *Colonial Genocide in Indigenous North America*, “The enduring beliefs in American exceptionalism and Manifest



Destiny, both powerful themes in the collective identity of the United States, are formidable barriers that prevent any serious reckoning with the past and present, especially in terms of genocide.”<sup>96</sup> As Woolford argues, “we must look closely at our own societies, born from a genocidal impulse, and built upon destructive processes that can only be redressed though a long-term commitment to transforming ourselves and our nations.”<sup>97</sup> That imperative has led to a “polarizing struggle between a typically Indigenous-led narrative associated with a systematic and ongoing legacy of genocide and other historians who believe there are limits to the applicability of the term ‘genocide’ and settler colonial genocide (in Canada).”<sup>98</sup> In so doing, the discourse itself must be decolonized to avoid “re-inscribing power dynamics,”<sup>99</sup> since, as Bonita Lawrence writes, “a crucial part of the silencing of indigenous voices is the demand that indigenous scholars attempting to write about their histories conform to academic discourses that have already staked a claim to expertise about [their] past.”<sup>100</sup> Only then can we engage in, as Short calls it,

“emancipatory cultural politics,” whereby understandings of specific cultural processes that are embedded in wider structural social power relationships should be used to bolster specific endeavors for social change and/or to assist specific marginalized peoples, populations or groups in resisting threats to their survival.<sup>101</sup>

## Notes

- 1 William Bradford, “‘With a Very Great Blame on Our Hearts’: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice,” *American Indian Law Review* 27, no. 1 (2002): 41–42.
- 2 As Tonya Frichner posits, “these schools were hostile to native ways of life, and the children who attended them were unable to maintain close cultural ties with their native community, causing harm to the children and the communities.” Tonya Gonnella Frichner, “The Indian Child Welfare Act: A National Law Controlling the Welfare of Indigenous Children,” *United Nations Department of Economic and Social Affairs*. Accessed May 21, 2016. [www.un.org/esa/socdev/unpfii/documents/The%20Indian%20Child%20Welfare%20Act.v3.pdf](http://www.un.org/esa/socdev/unpfii/documents/The%20Indian%20Child%20Welfare%20Act.v3.pdf).
- 3 Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 388.
- 4 As Andrea Curcio notes, “Although some children had a relatively positive, or at least a mixed good and bad boarding school experience, thousands of other children over many generations suffered severe physical and emotional harm as a result of these schools.” Andrea A. Curcio, “Civil Claims for Uncivilized Acts: Filing Suit against the Government for American Indian Boarding School Abuses,” *Hastings Race and Poverty Law Journal* 4 (2006): 45.
- 5 In discussing the role of the Bureau of Indian Affairs, Kevin Gover concluded in September 2000:

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually.... The



trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country [today].... So many of the maladies suffered today in Indian Country result from the failures of this agency.

(Kevin Gover, "Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs," *American Indian Law Review* 25, no. 1 (2000/2001): 162)

- 6 Theodore Fontaine, "Forward," in *Colonial Genocide in Indigenous North America*, eds. Andrew Woolford, Jeff Benvenuto, and Alexander Laban Hinton (Durham: Duke University Press, 2014), vii.
- 7 For an important discussion of "damage-centered" research, and how it "reinforces and reinscribes a one-dimensional notion of these people as depleted, ruined, and hopeless," see Eve Tuck, "Suspending Damage: A Letter to Communities," *Harvard Educational Review* 79, no. 3 (2009): 409.
- 8 As Wolfe observes, not all settler colonial processes were genocidal: "In some settler-colonial sites ... native society was able to accommodate – though hardly unscathed – the invaders and the transformative socioeconomic system that they introduced." Wolfe, "Settler Colonialism and the Elimination of the Native," 387.
- 9 Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd edition (London: Routledge, 2010), 30.
- 10 Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Lincoln: University of Nebraska Press, 2015), 12.
- 11 Short defines cultural genocide as "a method of genocide which destroys a social group through the destruction of their culture." In Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016), 3.
- 12 David Nersessian, "Cultural Genocide," in *Genocide: A Reader*, ed. Jens Meierhenrich (Oxford: Oxford University Press, 2014), 81.
- 13 Patrick Wolfe, "Structure and Event: Settler Colonialism, Time, and the Question of Genocide," in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (Oxford: Berghahn, 2008), 103.
- 14 *Ibid.*
- 15 Wolfe, "Settler Colonialism and the Elimination of the Native," 388.
- 16 Alissa Macoun and Elizabeth Strakosch, "The Ethical Demands of Settler Colonial Theory," *Settler Colonial Studies* 3, no. 4 (2013): 427.
- 17 Woolford, *This Benevolent Experiment*, 27.
- 18 Jeffrey Bachman, *The United States and Genocide: (Re)Defining the Relationship* (London: Routledge, 2018), 30. See also Jeffrey Bachman, "Introduction," in *Cultural Genocide*, ed. Jeffrey Bachman (London: Routledge, 2019).
- 19 Woolford, *This Benevolent Experiment*, 11.
- 20 Julian Brave Noisecat, "Standing Rock and the Struggle Ahead," *Jacobin Magazine*, February 14, 2017. Accessed May 15, 2018. [www.jacobinmag.com/2017/02/standing-rock-donald-trump-dakota-access](http://www.jacobinmag.com/2017/02/standing-rock-donald-trump-dakota-access).
- 21 Woolford, *This Benevolent Experiment*, 290.
- 22 Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016), 11.
- 23 Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?," *McGill Law Journal* 61, no. 4 (2016): 270.
- 24 *Ibid.*, 265.
- 25 *Ibid.*
- 26 Nersessian, "Cultural Genocide," 81.
- 27 Kristina Hon, "Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC," *Seton Hall Law Review* 43, no. 4 (2013): 368.

- 28 Robert Davis and Mark Zannis, *The Genocide Machine in Canada: The Pacification of the North* (Montreal: Black Rose Books, 1983), 20.
- 29 Woolford, *This Benevolent Experiment*, 35.
- 30 John Decker, "Are Settler Colonies Inherently Colonial? Re-Reading Lemkin," in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (Oxford: Berghahn, 2008), 94.
- 31 *Ibid.*, 96.
- 32 Roger Smith quoted in A. Dirk Moses, "Genocide and Settler Society in Australian History," in *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, ed. A. Dirk Moses (Oxford: Berghahn, 2004), 28.
- 33 Wolfe, "Structure and Event," 130.
- 34 Davis and Zannis, *The Genocide Machine in Canada*, 30. Jean-Paul Sartre similarly argues that colonization "cannot take place without systematically liquidating all the characteristics of the native society" in *On Genocide* (Boston, MA: Beacon Press, 1968), 63.
- 35 Matthew Lippman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later," *Temple International and Comparative Law Journal* 8, no. 1 (1994): 74.
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- 40 Rennard Strickland, "The Eagle's Empire: Sovereignty, Survival, and Self-Governance in Native American Law and Constitutionalism," in *Studying Native America: Problems and Prospects*, ed. Russell Thornton (Madison: University of Wisconsin Press, 1998), 258.
- 41 Grant Foreman, *The Five Civilized Tribes* (Norman, OK: University of Oklahoma Press, 1934), 282.
- 42 John Cox, *To Kill a People: Genocide in the Twentieth Century* (Oxford: Oxford University Press, 2016), 17. See also Benjamin Madley's *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (New Haven: Yale University Press, 2016) for an incredibly well-researched comprehensive study.
- 43 Cox, *To Kill a People*, 17.
- 44 *Ibid.*
- 45 George E. Tinker, "Tracing a Contour of Colonialism: American Indians and the Trajectory of Educational Imperialism," in *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco, CA: City Light Books, 2004), xiv.
- 46 Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco, CA: City Lights Books, 1997), 245.
- 47 Quoted in Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco, CA: City Light Books, 2004), 14.
- 48 *Ibid.*
- 49 James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (Oxford: Oxford University Press, 2007), 28.
- 50 Churchill, *Kill the Indian, Save the Man*, 7.

- 51 United States Department of the Interior, "Rule Governing the Court of Indian Offenses," March 30, 1883.
- 52 *Ibid.*
- 53 Sharon O'Brien, "Federal Indian Policies and the International Protection of Human Rights," in *American Indian Policy in the Twentieth Century*, ed. Vine Deloria, Jr. (Norman: University of Oklahoma Press, 1985), 43.
- 54 Churchill, *Kill the Indian, Save the Man*, 12.
- 55 *Ibid.*, 13.
- 56 Cox, *To Kill a People*, 28.
- 57 Lindsay Glauner, "The Need for Accountability and Reparations: 1830–1976: The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans," *DePaul Law Review* 51, no. 9 (2002): 940–941.
- 58 Notably, the forced transfer of children from one group to another is prohibited under Article II of the Genocide Convention. Yet, this provision escapes application of the Genocide Convention primarily because it does not conform to the concept of genocide that tends to dominate both the legal and scholarly understanding of what genocide is – the direct physical destruction of a group by killing its members. As Dirk Moses asserts, the inclusion of forced transfer of children in the final text of the Genocide Convention was not necessarily part of an effort to include at least one element of cultural genocide in the treaty, but rather to "complement the emphasis on the physical/biological consequences of genocidal techniques." See A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 38.
- 59 Ward Churchill, *Kill the Indian, Save the Man*, 13.
- 60 J.D.C. Atkins, "Barbarous Dialects Should Be Blotted Out," in *Language Loyalties: A Source Book on the Official English Controversy*, ed. James Crawford (Chicago, IL: University of Chicago Press, 1992), 51.
- 61 Quoted in David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience 1875–1928* (Lawrence, KS: University of Kansas Press, 1995), 18.
- 62 Adams, *Education for Extinction*, 19.
- 63 Tinker, "Tracing a Contour of Colonialism," xiii.
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- 65 Adams, *Education for Extinction*, 15.
- 66 *Ibid.*, 13.
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- 68 United States Department of the Interior, *Thirty-Second Annual Report of the Board of Indian Commissioners to the Secretary of the Interior 1900* (Washington, DC: Government Printing Office, 1901), 29.
- 69 Woolford, *This Benevolent Experiment*, 8.
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- 77 Quoted in Churchill, *A Little Matter of Genocide*, 245.
- 78 Hernandez-Chavez, "Language Policy in the United States," 145.
- 79 Glauner, "The Need for Accountability and Reparations," 941–942; Churchill, *Kill the Indian, Save the Man*, 19.
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- 91 Kyle Whyte, "Why the Native American Pipeline Resistance in North Dakota is about Climate Justice," *The Conversation*, September 16, 2016. Accessed May 15, 2018. <http://theconversation.com/why-the-native-american-pipeline-resistance-in-north-dakota-is-about-climate-justice-64714>.
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- 94 Noisecat, "Standing Rock and the Struggle Ahead."
- 95 Wolf, "Settler Colonialism and the Elimination of the Native," 338. See also Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press, 2015). Dunbar-Ortiz, whose mother is believed to be part-Native American, deconstructs the foundation myths, replacing them with settler colonialism and genocide experienced by peoples indigenous to the United States.
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## 5 Genocide and settler colonialism

### How a Lemkinian concept of genocide informs our understanding of the ongoing situation of the Guarani Kaiowá in Mato Grosso do Sul, Brazil

*Genna Naccache*

#### **Introduction**

“A shout resounds throughout Brazil – the cry of indigenous peoples.”<sup>1</sup> Countless indigenous nations are under threat of extinction in the world today. Many are being decimated at an alarming rate due to unrestrained resource exploitation and expropriation of their ancestral land, leading them into a cultural void. Along with the Brazilian Amazon indigenous peoples, the surrounding environment is also dying. One of the main reasons for this conundrum is the relentless deforestation of the Amazon, driven by the country’s influential agribusiness, led by the anti-indigenous ruralists in the government.

Deforestation and indigenous conflicts are particularly severe in Mato Grosso do Sul. There, rich and powerful ranchers have plundered indigenous ancestral lands, with state acquiescence, to increase agricultural output. The relentless increase in the production of biofuels from sugar cane and soya to export to China’s furious demand, and cattle farming have all led to a severe depletion of the soil. Given the importance of trees in absorbing greenhouse gases, deforestation also leads to increased amounts of emissions entering the atmosphere. Deforestation, thus, undermines human rights and all forest life. For this reason, the Brazilian State must reach a commitment towards its indigenous peoples and the environment in order to mitigate further losses.

This research argues that a Lemkinian concept of cultural genocide has been an ongoing process experienced by the Brazilian indigenous peoples for centuries. This is a result of settler colonialism’s imposition of their cultural models onto Brazil’s indigenous peoples.

#### **Settler colonial genocide of indigenous peoples in Brazil**

The term [“genocide”] does not necessarily signify mass killings although it may mean that. More often it refers to a coordinated plan aimed at destruction of the essential foundations of the life of national groups so that these

groups wither and die like plants that have suffered a blight.... It may be accomplished by wiping out all basis of personal security, liberty, health and dignity.<sup>2</sup>

(Raphael Lemkin)

According to Patrick Wolfe, “The question of genocide is never far from discussions of settler colonialism.”<sup>3</sup> Wolfe recognises that for indigenous peoples, their land represents life and is equally necessary for life. Thus, “Contests for land can be – indeed, often are – contests for life.”<sup>4</sup> However, “this is not to say that settler colonialism is simply a form of genocide”.<sup>5</sup> Subsequently, in some cases, native societies are able to adapt, “though hardly unscathed”, despite imposed changes interfering with their socio-cultural practices, which inevitably follow.<sup>6</sup>

When the Portuguese arrived in Brazil, they intended to exploit the resources of the new territories and start new profitable trades. Their exploits and the subsequent decimation of the indigenous peoples is explored in what follows. Neves and Ribeiro corroborate that the leading cause of native mortality was infectious diseases brought by the Portuguese settlers.<sup>7</sup> Ribeiro adds that without defences they started to die in great numbers. “This is how civilisation imposes itself, first, as an epidemic of mortal pests. Later, by the decimation through wars of extermination and enslavement.”<sup>8</sup> However, Ribeiro adds that these were only the initial steps towards the “calvary of indescribable sufferings” experienced during the “extermination processes of genocide and ethnocide”.<sup>9</sup>

According to Cunha, the mass disappearance of millions of Brazilian indigenous nations became known by scholars as “The Encounter”.<sup>10</sup> This referred to “the encounter” between the old civilisations and the new world, responsible for “this slaughter never seen before”. This slaughter, for Cunha, was “the result of two driving engines: greed and ambition, which are cultural ways of the expansion of what has been conventionally called capitalism”.<sup>11</sup> Some indigenous peoples managed to escape into the forest, “horrified with the destiny offered through living with the whites”.<sup>12</sup> But, Cunha explains, the diseases were not the main reason for “America’s demographic catastrophe”.<sup>13</sup> Rather, it was from the destruction of the basis of indigenous peoples’ social life, and life in captivity, that millions of Indians “decided to die”.<sup>14</sup> Evidence shows “they died of sadness as they could not live in a future which negated the past, a time when they lived a dignified life as real people”.<sup>15</sup> This strikes a chord with Lemkin’s conception of cultural genocide. According to Short, “Lemkin defined genocide in terms of the violation of a nation’s right to its collective existence.”<sup>16</sup> When this right is undermined, the “essential foundations of the group” become compromised.<sup>17</sup>

A ground-breaking article was published by the *Sunday Times* in 1969, based on a report of the atrocities committed against indigenous peoples in the Amazon forest. In this article, Norman Lewis speaks of how the “Europeans were overwhelmed by the magnificence of the Indians’ manners.”<sup>18</sup> However, these peoples “were to be sacrificed to a process that was beyond the control of those admiring visitors”.<sup>19</sup> Bishop Bartolomeo de Las Casas, an eye-witness to the

process of colonisation in Brazil, described the atrocities committed by the conquistadores to what “must have been the greatest of all wars of extermination”.<sup>20</sup> Twelve million were killed, Las Casas says, most of them in frightful ways.<sup>21</sup>

However, astonishingly, there are some, such as the English archaeologist Lane-Fox Pitt Rivers, who believed “there should be no reason for members of a superior race to regret the gradual extinction of an inferior race if only the future enrichment and welfare of the world is considered”.<sup>22</sup> Similarly, the Israeli historian Benny Morris defends “ethnic cleansing and genocide as integral to the formation of (some) nation states and march of human progress”<sup>23</sup> and proclaimed in a 2004 interview that “even the great American democracy could not have been created without the annihilation of the Indians”.<sup>24</sup> In light of this, it is possible to grasp the arbitrary aspect of colonialism and the entitlement to destroy culturally distinct groups seen by settlers as inferior and not worthy of dignity.

### **Generous natives meet the Portuguese settlers**

Upon their arrival in Brazil, the Portuguese “found an indigenous population of approximately six million”.<sup>25</sup> This number is no longer valid. After being “persecuted, attacked, indoctrinated, disrespected and massacred ... many have been exterminated”.<sup>26</sup> The first encounter “between the Portuguese and Brazilian natives occurred immediately” after they “caught sight of men walking on the beaches”.<sup>27</sup> Later, the Brazilian native people watched the first religious mass on an empty beach and at the end of the service “many of them stood up and blew a horn or trumpet and began to leap and dance”.<sup>28</sup> A large cross was later built, and as they helped carry the cross, they kissed it and knelt before it in the manner of the sailors.<sup>29</sup> Caminha, the expedition chronicler, wrote, “They seem to be such innocent people that, if we could understand their speech and they ours, they would immediately become Christians.”<sup>30</sup>

Later, in the years following Cabral’s arrival, the Portuguese sent fleets to explore the Brazilian coast and found the “only commercial attraction in Brazil – and the origin of its name – was the magnificent great tree known as brazil-wood”.<sup>31</sup> Not long after, European sails soon became a “familiar sight” in the bays and creeks of the Brazilian coastline.<sup>32</sup> To begin with, the trees “were close to the sea and river estuaries, and the Indian were content to barter the cut logs for trade goods”.<sup>33</sup> The tradesmen depended on the help the Indians provided in exchange for “some clothing of little value”.<sup>34</sup> The *Bertoa*, among other ships, brought back parrots, jaguar skins, pet animals, as well as thirty-five Indian slaves, a common practice among Europeans. European philosophers started “to draw comparisons between the Indian generosity and the European greed”.<sup>35</sup> Indigenous peoples received the reputation of “noble savages”, described as “noble and generous ... with no motive other than to emulate virtue”.<sup>36</sup> Nevertheless, according to Hemming, any earthly paradise that may have existed there was systematically shattered by the settlers.<sup>37</sup>

## **False freedom**

In the 1540s, the Jesuits had a monopoly over indigenous matters and took advantage of their free labour to increase their wealth.<sup>38</sup> But this wealth was in sharp contrast with all other Portuguese colonists, who experienced failure and subsequent poverty, defeated by challenges posed by the Amazon. Subsequently, a battle emerged for the monopoly of power over indigenous labour. Impoverished Portuguese settlers intended to “enslave tribespeople or to employ mission Indians for derisory wages”.<sup>39</sup> They accused missionaries of monopoly over “native labour to enrich their own mission plantations”<sup>40</sup> and false promises of freedom were made by the Portuguese Crown, which “was as much a blow at the Jesuits as an act of disinterested humanity”.<sup>41</sup>

When the Portuguese established “permanent settlements on the Amazon” during the 1620s, the river “banks were densely peopled with a succession of prosperous tribes”.<sup>42</sup> Their dependence on indigenous labour “soon wrought devastation on its inhabitants”.<sup>43</sup> They sent armed expeditions up the rivers to capture slaves, slaughtering the ones who resisted, while the Jesuits lured indigenous peoples “downriver with presents and promises of worldly comfort and spiritual magic”.<sup>44</sup> By mid-eighteenth century, there had been a decimation of almost the entire indigenous Amazon. The cause for this “demographic catastrophe” was due to “cultural shock, a demoralisation that caused social disintegration and a collapse of the birth rate; deaths from battles, massacres and sheer overwork; but the biggest killer by far was disease”.<sup>45</sup> This process continued into the next century under the Brazilian State, which failed to address the legacy of harm and instead perpetuated atrocities.

## **The Figueiredo report**

It was not until about eighty years after the founding of the Brazilian State that any action was taken. Brazilian Attorney General Jader Figueiredo launched a Report in 1968, which exposed the genocide and decimation of the Amazon indigenous peoples perpetrated by the Indian Protection Service (SPI), from the end of the 1940s to the end of the 1960s. A governmental organ itself, the SPI was seen as paternally solicitous towards the Amazon indigenous population, appointed to protect them at all costs. However, the SPI was responsible for the most horrific genocidal acts which would lead many of the indigenous peoples into full extinction.

Norman Lewis travelled to Brazil to investigate these atrocities for his 1969 article for the *Sunday Times*. He explains, “The tragedy of the Indian in the USA in the last century was being repeated, but it was being compressed into a shorter time.”<sup>46</sup> Although the atrocities were only catalogued in part, they were of indescribable magnitude. Despite some degree of monitoring during the SPI’s term, “there was a blind spot” where duplicity and lack of social responsibility were present among the SPI’s officers during their missions in the hidden depths of the Amazon forest. Without explanation, the Amazon indigenous peoples were

found to be on the verge of extinction. This led the Brazilian Government to investigate the mass disappearances. In March, 1967, the Figueiredo Report (FR) was published exposing the truth that “the tribes had been virtually exterminated, not despite of all the efforts of the Indian Protection Service, but with its connivance – often its ardent cooperation”.<sup>47</sup> According to the NGO Conselho Indigenista Missionário (CIMI), the Figueiredo Report presented ground-breaking evidence pointing to the genocide of the Brazilian indigenous peoples in that concise period of time (1946–1968).<sup>48</sup>

According to the Figueiredo Report, “The Indian, the reason for the SPI existence, became victims of true scoundrels, which imposed on them a slavery regime and negated them the minimum conditions of life compatible with a human person’s dignity.”<sup>49</sup> Floggings, regardless of age or sex, were part of their daily routine by the SPI, and were often applied in such an excessive way that they caused disabilities or death. However, according to the report, the “trunk” (*tronco*) was the most used of all punishments, which “consisted in the crushing of the victims’ ankle”.<sup>50</sup> The losses were overwhelming: of the “19,000 Mundurucus believed to have existed in the 1930s, only 1,200 were left. The strength of the Guaranis had been reduced from 5,000 to 300. There were 400 Carajás left out of 4,000”.<sup>51</sup>

As translated into English by this author, some of the more telling excerpts from the Figueiredo Report include the following from the section “Substantial are the Crimes”:

- The Indigenous Protection Service denied the extent of persecution until its dissolution. Here are recalled the numerous massacres, many of which were denounced with outrage without, however, any interest from the authorities. The episode of extinction of the tribe located in Itabuna, in Bahia, which confirms that the accusations were truthful, is extremely grave. The complaint was that the unfortunate indigenous people had been infected with the smallpox virus so that their lands could be distributed among the government authorities.
- Most recently, the Cinta Largas, in Mato Grosso, had been exterminated from the air with sticks of dynamite, and strychnine added to sugar, while the bushmen hunt them with “pi-ri-pi-pi” (machinegun) shots and split the survivors in half, while still alive, with machete, from the pubis/to the head!!! The criminals remain unpunished, to the extent that the President of this Commission saw one of the perpetrators of this heinous crime peacefully selling ice-lollies to children in one corner of Cuiabá, without being bothered by Mato Grosso’s justice system.
- Lack of assistance, however, is the most efficient way to carry out murder. Hunger, disease, and ill treatments are destroying these courageous and powerful peoples. The current life conditions of the Pacáas Novos are miserable, while the proud Xavantes are a shadow of what they used to be before their pacification.
- The Commission saw scenes of hunger, misery, malnutrition, diseases, external and internal parasite infestation; such scenes were enough to outrage the most insensitive individual.

- The little that was visible of the consequences of the SPI's actions was enough to cause horror and shock.
- It was not possible to photograph all that was seen. We did not understand the dialect "caingang", guarani, tupi, aruak, etc. A word, a gesture, and simple actions in the presence of an indigenous "captain", or the memories of the atrocious torture inflicted upon the Indians for accusations made in the past, was sufficient to silence even the most eager. We managed to obtain very little help from the frightened Indians.
- The Kadiueus (former Guaiacurus), owners of the rich lands given to them by Senhor D. Pedro II in exchange for their decisive help to the Brazilian troops in that region during the war with Paraguay, find themselves driven away from their dominions, their cattle sold and their women prostituted.... The forests are cut down, the cattle are sold, the land is leased, the mineral resources are exploited. All this is carried out as though in a genuine orgy.<sup>52</sup>

### **The Truth Commission**

These issues were revisited in a 2015 Report of a Truth Commission established to address harms done during the 1964 Military Dictatorship. The Commission (volume 2, 2015) fully acknowledges violations against the indigenous peoples in Brazil from 1946 to 1988, explaining that although many cases were documented, these only represent a very small fraction of crimes carried out against indigenous nations in Brazil. Moreover, it affirms that "through these cases it is only possible to entertain the real extent of the crimes, to evaluate how much is still not known, and the need to continue investigations".<sup>53</sup> Therefore, these violations were neither occasional nor isolated, but instead they transpired as a result of the "State's structural politics, from its direct actions as well as by its omissions."<sup>54</sup> According to the Truth Commission, indigenous politics have always been permeated by government omission and violence. Therefore, "In the wake of the National Integration Programme, great private interests are directly favoured by the government, at the cost of indigenous rights."<sup>55</sup> "Some severe violations of indigenous rights were acknowledge by the tribunals and the state's responsibility was established."<sup>56</sup> As a result, "some Brazilian authorities recognised the genocide of indigenous peoples".<sup>57</sup>

The Commission writes about the land policy and indigenous land dispossession, affirming these are systematic plans by the State to undermine indigenous rights. While their villages are burned down, the Guarani Kaiowá were thrown into trucks and "forcibly relocated into the small reserves demarcated by the SPI". In this confined area, extended families start to experience serious internal conflicts. According to the Commission and literature, this "confinement was a method used to release indigenous land for colonization".<sup>58</sup> Upon arrival at these reserves, they found themselves under the authority of what the Commission calls "station chiefs" "who exerted abusive power", repressed their freedom of movement, imposing detention in illegal cells, punishment, and even torture in the trunk.<sup>59</sup> Indigenous cultural practices were suppressed in pursuit of the SPI's



ultimate goal – the acculturation of the Guarani Kaiowá. Moreover, under the orders of the military generals Costa Cavalcanti, Home Secretary, and Bandeira de Melo, president of FUNAI (Fundação Nacional do Índio, National Indian Foundation), the Krenak Reformatory and FUNAI's Punitive System were created in the Amazon forest in order to control indigenous resistance and avert rebellion.

### **Indigenous rights subject to government politics**

The organs in charge of defending indigenous rights were the SPI and its substitute, the FUNAI, both founded by the government itself. The SPI was founded by the Ministry of Agriculture and FUNAI was created by the Ministry of the Interior, the very “same Ministry in charge of opening new motorways and with development policies in general”.<sup>60</sup> The Truth Commission has expressed its concern with the lack of impartial institutions in charge of the protection of indigenous peoples in Brazil, and describes this phenomenon as “a legal abnormality”.<sup>61</sup> Therefore, the governmental institutions explicitly in charge of the protection of indigenous interests do not perform their functions, but instead “submit or even place themselves at the service of the State policies”.<sup>62</sup>

Studies also show “severe human rights violations associated with the extractive industries, colonialization process and infrastructural construction projects” involving the SPI and FUNAI's General Bandeira de Mello and Romero Jucá, among others.<sup>63</sup> The “appropriation of Indigenous land and the exploitation of resources was not controlled”, while the “extreme violence and corruption against indigenous groups has not been punished”.<sup>64</sup> With few exceptions, such as in the case of the Panará group who were forcibly removed in the 1970s and left to live without basic sanitation, no reparations were offered for the harms caused. This caused the decimation of half of their people, but the Panará were able to secure reparations from the Union and FUNAI in 1998.<sup>65</sup>

### **The Guarani Kaiowá, Mato of Grosso Do Sui, Brazil**

The second largest indigenous group in Brazil with a population of 43,000, the Guarani and Kaiowá, collectively known as Guarani Kaiowá of Mato Grosso do Sul, live on the frontier with Paraguay; they have been experiencing severe violations of their human rights for over 100 years. The remainder of this chapter is dedicated to understanding and establishing how the Guarani Kaiowá have been undergoing a process of cultural genocide with repercussions seen in all aspects of their lives.

A 2012 letter, written by the Guarani Kaiowá indigenous movement, Aty Guasu, to the Brazilian government states:

We ask the Government and the Federal Justice not to declare our eviction, but instead, declare our collective death and bury us all here. For once and for all, we ask you to declare our complete extinction/decimation, and to

send many tractors to dig a big hole on the ground to throw us and bury our bodies there. This is our plea to the Federal Judges.<sup>66</sup>

This is not a threat of mass suicide, but instead a plea to the Brazilian Government to abide by the 1988 Constitution, which guarantees the rights of indigenous peoples to their ancestral land. Crucial to understanding the Guarani Kaiowá way of life is the integral role of their ancestral lands to all aspects of their society, culture, and religious beliefs. According to CIMI, “The land is much more than a material asset; it is fundamental for the construction of identities, ways of being, thinking, living together, building life experiences.”<sup>67</sup> Indeed, the Guarani religious practices relate in very concrete ways to the land and to myths about the land. Although the group believes in “the imminence of a world-destroying cataclysm”,<sup>68</sup> they also believe in “the myth of the Earthly Paradise or Land Without Evil”.<sup>69</sup> The Guarani bands, the Ñandéva, the Mbuá, and the Kaiová (Kaiwoá), have searched for the “land without evil” for almost two centuries.<sup>70</sup>

### *The forest people*

The Guarani Kaiowá “are historically known as the forest people”, or the ones from the forest.<sup>71</sup> Based on field research, Brand and Colman explain that in order to understand the importance of ancestral land, as well as “questions relating to sustainability, it is necessary to seek an understanding of the way in which the Kaiowá and Guarani relate with nature and the supernatural”.<sup>72</sup> Both authors agree that the ceremonial space is central to the Guarani’s way of life, where the group “structures itself in its economic, social and political aspects”.<sup>73</sup> Based on tradition, their relationship with nature was harmonic and non-exploitative.<sup>74</sup> This is illustrated in the following quote:

Ñande reko means our way of life, with nature, with the land, with the animals, with our families ... ñande reko is everything for us, life is sacred, our spirituality, our chants ... for us ñande reko is the way of living a good life with nature.<sup>75</sup>

The Guarani Kaiowá social organisation is based on extended families in a *tekoha* (ancestral land). Besides the elders, which includes ancestors, there is usually a leader in each village who takes on political initiatives central to the *tekoha*.<sup>76</sup> The Guarani Kaiowá culture has its foundations in spirituality, which acts as pragmatic ideals or norms, that depend on certain socio-ecological conditions.<sup>77</sup>

*Jopói* is also manifested in the exchange of goods and words; food and poetry; in the collective work on the land, and the sharing of the earth’s harvest, the drinking together, in the cultivation of the sense of belonging and in the sharing of learned survival techniques.<sup>78</sup> Central to this are ideas such as:

- *joayhu*: mutual love
- *teko katu*: the good way of being

- *teko joja*: justice
- *kyre'y*: diligence and good mood
- *py'a guapy*: peace
- *teko ñemboró'y*: serenity
- *oñoñe'e*: mutual word
- *jopói*: economy of reciprocity

Lopes explains the connection between religion and ancestral land:

For the Guarani Kaiowá cosmology is a sacred vision. That is why we respect nature, the river, everything that is in nature we respect, because we depend upon it and it depends on us. We believe the land is also alive and needs the forest, the rain, the water, like we do. This is why we respect this cosmology, because we believe that the spirit, which we call Ñanderu, was created in order to create the earth for us. Therefore, we believe we need to take care of the rivers, the forest, the animals ... of all life.<sup>79</sup>

The above quote highlights the role of indigenous peoples in preserving nature. However, indigenous culture has been downplayed for centuries and the “study of contemporary Guarani culture inevitably turns out to be a study in acculturation”.<sup>80</sup> The Guarani’s acculturation process began in the middle of the nineteenth century when their territory in southern Brazil was reached by early colonisation. “The Guarani gradually became involved in the money economy of the Neo-Brazilians, and wage-earning on seasonal agricultural jobs became an established routine.”<sup>81</sup> This impacted their cultural practices and the Guarani “were ill-equipped for any kind of contact which might bring them to depend upon capitalistic systems”.<sup>82</sup> This affected their “elaborate ceremonial life, which was compromised by the demand for ‘economic pursuits’”.<sup>83</sup>

### ***Intensive colonial occupation***

The year 1882 was crucial for the Guarani Kaiowá as they lost their ancestral lands to forces of colonisation. An imperial decree was granted to the company Mate Larangeiras, awarding it the first concession to harvest tea leaves in the presumed “vacant land” that existed within Mato Grosso Province and the Republic of Paraguay.<sup>84</sup> Later, the Brazilian Republic endorsed the expansion of the concession further. From 1890 to 1895, the lease granted to Cia Mate Larangeiras “reached 5 million hectares under exclusive monopoly of power”.<sup>85</sup> It is estimated that half of the workforce was Guarani Kaiowá, meaning about 10,000 indigenous people were involved daily in the production of tea.<sup>86</sup>

As highlighted above, from 1882, the Guarani Kaiowá ancestral lands were being infiltrated by agribusiness.<sup>87</sup> With the creation of the Brazilian Federal Republic, in 1889, all “uninhabited land, which, paradoxically, also included indigenous occupied land, became the State’s property, as well as the catechism and education of indigenous peoples”.<sup>88</sup> In 1915, still under the auspices of Cia

Matte Larangeiras, the controversial SPI demarcated the first small reserve, amounting to a total of 3,600 hectares. By 1928, eight more small reserves, amounting to 18,297 hectares, were demarcated for the Guarani Kaiowá. This was the start of “a systematic, and relatively violent, process of confinement of the indigenous population in these reserves”.<sup>89</sup> Despite existing legislation, “the reduction and compulsory confinement process” resumed, relentlessly, until the end of the 1970s.<sup>90</sup> This section has contributed to a more in-depth understanding of the confinement process as the main the driver of the genocide of the Guarani Kaiowá.

### ***The confinement process – forced assimilation***

During the demarcation of these new small reserves, the SPI made official the compulsory confinement process imposed on the Guarani Kaiowá.<sup>91</sup> The creation of small reserves was based on denial of indigenous rights to ancestral land. This confinement undermined their cultural foundations, essential to collective existence.<sup>92</sup> Under colonial hegemony, the group started to disintegrate and suffer the effects of cultural genocide:

Specific to genocide is the harm inflicted on its victims’ social vitality ... when the group with its own cultural identity is destroyed, its survivors lose their cultural heritage and may even lose their intergenerational connections.... The special evil of genocide lies in its infliction of not just physical death (when it does that) but social death, producing a consequent meaninglessness of one’s life and even of its termination.<sup>93</sup>

According to Brand, these reserves were “the greatest obstacle for the sustainability of the Guarani Kaiowá cultural model”.<sup>94</sup> From 1928, malnutrition became severe. The group had to look for means of subsistence for their communities, as they could no longer live as hunter-gatherers and farmers on their own land. This is when the Guarani Kaiowá sought work in the sugar cane plantations, away from the reserves, where work conditions were very precarious. “The prolonged absences of parents were an important factor in the disintegration of families”, the foundation of their cultural model.<sup>95</sup> Brand writes that this disintegration forced them to “fight for ever smaller allotments within reservations”.<sup>96</sup>

The arbitrary confinement process, the need for paid work, the unavoidable overpopulation within reserves, and the reduced vital space affected their traditional economy and their “traditional agricultural system became unviable”.<sup>97</sup> Inside the reserves, the highest rates of suicide were verified.<sup>98</sup> For Brand and Almeida, the SPI was fully responsible for the misconceptions originating from the arbitrary demarcation of the reserves, without consultation, which undermined the Guarani Kaiowá’s “historical and culturally differentiated territories”.<sup>99</sup> The omission of ancestral indigenous land during this demarcation process, completed in 1928, led the Guarani Kaiowá to fight to repossess their

land. Sadly, their activism and determination have led to irreparable losses to the group, due to systematic murders by vengeful ranchers. In addition, the confinement of extensive Guarani Kaiowá families from different bands caused further conflict as they competed for scarcely available resources. Compulsorily moved to crowded reserves, the group was expected to live in harmony. However, in the SPI's reserves, the Guarani Kaiowá had to coexist with other Guaraní sub-groups. Therefore, the process of homogenisation was very intense.<sup>100</sup> This fueled constant conflict and later "it becomes impossible to distinguish, with the necessary rigour, the divisionary lines between one sub-culture and another".<sup>101</sup> In addition, a "captain" was chosen, becoming the new "indigenous leader nominated by the SPI to secure the success of the governmental project".<sup>102</sup> The captains were supposed to keep order and often arbitrarily intervened in the reserve's internal politics. Due to the "demographic density, the arrival of new residents and the high rate of vegetative growth, the reserves collapsed".<sup>103</sup> This was when suicide rates started to rise, malnutrition and high child mortality became severe, along with the rise of alcoholism and drug use, increasing internal tensions and violence.<sup>104</sup>

Once the SPI moved the Guarani Kaiowá to reserves, their ancestral land was sold to private individuals.<sup>105</sup> This was the beginning of the "systematic process of expropriation" by colonial settlers.<sup>106</sup> Cavalcanti argues that the inception of reserves "had two main objectives: first, free thousands of hectares of indigenous occupied land for agro-pastoral colonisation; and second, to promote State control of indigenous peoples under an assimilatory lens".<sup>107</sup> This practice was known as *sarambi* or *esparramo*, meaning "the dispersal of many families and dissolution of many alliances that sustain various communities".<sup>108</sup> By the end of the twentieth century the Guarani Kaiowá had lost almost all their ancestral lands. In part, this was due to government failure to implement the 1988 Constitution, which demanded the restitution of native lands to indigenous peoples by 1993.

Under systematic attacks and killings, the group are victims of "occupation and exploration of their traditional lands by agribusiness".<sup>109</sup> This phenomenon is referred to as the "productive state land occupation ... ignited by systematic strategies of expulsion and confinement of the indigenous population to restricted areas".<sup>110</sup> In response to violations, the group succumbs to despondency. It is now possible to grasp the social death experienced by the group as a result of the ongoing genocide.

***"Declare our extinction and bury us here..."***

Why are Guaraní Kaiowá youth committing suicide? Rosalino Ortiz Guaraní Ñandeva explains:

The Guarani Kaiowá are committing suicide because we don't have space anymore. In the old days, we were free, now we are no longer free. So our young people look around them and think there is nothing left and wonder

how they can live. They sit down and think, they forget, they lose themselves and then they commit suicide.<sup>111</sup>

The Guarani Kaiowá are currently undergoing one of the most mortally dangerous situations in Brazil as they bear witness to the suicide of their young people, “one every six days”.<sup>112</sup> The youngest Guarani Kaiowá to commit suicide was nine-year-old Eliza Ortiz. This is the “greatest example of the highest level of socio-political fragility within the national context of indigenous peoples” and for that reason, they “are frequently on the national news due to the constant suicides of their youth”.<sup>113</sup> Under a permanent state of siege for decades, they are targets of many abuses and violations.<sup>114</sup>

Their suicide rate is among the highest for indigenous and non-indigenous peoples in the world. According to the 2015 CIMI Report, there were 752 indigenous suicides from 2000 to 2015.<sup>115</sup> The National Health Foundation (NHF) reported that 221 children and teenagers between the ages of 5 and 19 were among the group. In 2008 alone the suicide rate among the Guarani Kaiowá reached 8,797 per 100,000.<sup>116</sup> Most suicides are committed by hanging, symbolising the “tightening of the throat,” “suffocated words,” or “imprisoned souls”.<sup>117</sup> For Martins, “this is an act of *jejuvi*, a ritual death, a cultural gesture that was identified by the Jesuits at the time of the conquest”.<sup>118</sup> The physical death here is seen as a consequence of the social and cultural deaths experienced by the group as removal from ancestral lands inhibits cultural practices and rituals.<sup>119</sup>

The homicide rate in the Dourados reserves is high with 145 murders per 100,000 inhabitants, higher than the national average by 49 percent (24.5 homicides per 100,000). Since 1980, approximately 1,500 young indigenous people took their own lives in Brazil.<sup>120</sup>

Researchers explain that this is due to young people’s lack of perspective in a time when they would be forming their own families. In this dire scenario, their future perspectives are either to work in the sugar cane plantations or become beggars. This perspective negates who they are, and perhaps for many, this is worse than death.<sup>121</sup>

One of the forms of violence in the traditional land recovery is perpetrated by the Federal Court in which judges not only condone the violence but endorse it.<sup>122</sup> What does this tell us about genocide? This clearly shows a destructive genocidal process inflicted on the group to undermine their wellbeing.

### ***Current situation***

Mato Grosso do Sul has been centre-stage for severe land conflicts between the ruralist farmers and the Guarani Kaiowá, and much indigenous blood has been shed. These events highlight “a political regression in the relation between the State and Brazilian Indigenous Peoples”, as the government reverts to the 1964 Dictatorship ideology of “guardianship, indigenous servility and the integration

of peoples into the state”.<sup>123</sup> Today, in Mato Grosso do Sul, more than forty indigenous camping sites line roadsides, sit at the back of farms and/or on town peripheries, while their inhabitants wait for the demarcation of their traditional territory. In the context of social instability, violations to life, health, security, and dignity occur.<sup>124</sup> The Guarani Kaiowá’s life in the campsites is especially dangerous for children who are often run over by trucks, adding to the already high indigenous child mortality rate in the area. Suicides are also major factors in claiming young Guarani Kaiowá people’s lives.<sup>125</sup> These further amplify the tragedy which undermines the life of the group.

Former President Rousseff prioritised agribusiness, which included the “serious failure in resuming indigenous land demarcation processes by 1993, as promised in the 1988 Constitution”.<sup>126</sup> This has meant a substantial increase in violence against the Guarani Kaiowá, fueled by agribusiness, injected with substantial public funds and sizeable donations by large corporations and multinationals.<sup>127</sup> A Special Commission was established by the ruralist contingency to propose Constitutional Amendment PEC 215/2000, which seeks to invalidate “new indigenous land demarcations” and to legalise “the invasion and exploitation of previously demarcated indigenous land”.<sup>128</sup> The attacks doubled and the indigenous leader Semião Vilhalva was murdered in 2015. Crimes continued in 2016 when seventy heavily-armed men attacked Guarani Kaiowá families, burnt tents, and arbitrarily shot at them, killing the twenty-six-year-old indigenous leader Clodiodi de Souza. Ten others were injured, including a twelve-year-old boy. The systematic killings of leaders adds to a rising death toll<sup>129</sup> and “more people have died in Mato Grosso do Sul – a ‘wild west’ border region that has been colonised by ranchers and soya growers – than in any other state”.<sup>130</sup>

The Guarani Kaiowá leader, Lopes, explains that on the border with Paraguay farmers conduct regular attacks with impunity.<sup>131</sup> Crimes range from systematic “assassinations, beatings, kidnappings, torture and rape”.<sup>132</sup> During 2015, “at least five chemical attacks were launched by tractors and airplanes. Poison is deliberately deposited in the river, the only available water source, on their plantations, the only food source, and directly over indigenous tents”.<sup>133</sup> While this is happening, “gunmen prevent people from leaving the area”.<sup>134</sup> On October 2016, Lopes, CIMI and FIAN visited the United Nations to denounce the atrocities to the international community. Upon his return to Mato Grosso do Sul, Lopes was ambushed by the militias. In light of this, CIMI writes:

What brings national and international shame on Brazil is the fact that sectors of agribusiness continue to assassinate indigenous leaders.... The criminals must be identified and punished. The genocide of the Guarani Kaiowá advances in the hands of the agro-crime.<sup>135</sup>

In summary, the violence reported against the Guarani Kaiowá represents only a small percentage of attacks under the hegemony of agribusiness. The history of oppression and violence, writes CIMI, “is the result of a disastrous State policy, which is fulfilled in the name of acute greed”.<sup>136</sup> Unable to “access



clean water, basic sanitation and decent housing”, the Guarani Kaiowá live without “the basic conditions for existence, which makes the farmers’ violations even more inhumane, heinous and indefensible”.<sup>137</sup> This links with Lemkin’s definition of cultural genocide as it is clear that all aspects of the group’s existence are being systematically undermined.

### **Ongoing genocide**

Contrary to the narrow interpretation of the concept of genocide in the Genocide Convention, Lemkin’s definition was more expansive, explaining that genocide is not necessarily based on mass killings, but on a “coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups with the aim of annihilating the groups themselves”.<sup>138</sup>

For Lemkin, “a culture possesses a biological life, and an interrelated and interdependent cultural life”,<sup>139</sup> such is the case of the Guarani Kaiowá people. In line with this, an attack on the group’s physical existence is also an attack on its cultural integrity and vice versa. Short explains, “This understanding is based on a functional view of national structure where the physical and cultural aspects are seen as interdependent and indivisible.”<sup>140</sup> Lemkin understood cultural destruction of group life, and that such destruction will impose critical physical consequences as a result.<sup>141</sup> This accurately fits in with the plight of the Guarani Kaiowá who are experiencing both cultural and physical symptoms as a result of the constant aggression and lack of the most basic requirements for their culture to remain alive.

Indigenous peoples worldwide share similar stories of land dispossession, environmental destruction, murders, suicide epidemics, destitution, malnutrition, and high levels of mortality. This is commonly described by Brazilian scholars, for example, Pereira, Neves, and Cunha, as a “slow and ongoing process of genocide”. The arduous separations and subsequent confinement caused a major change in the way they lived, on their self-determination, on their wellbeing, and sense of security and dignity as a group. Their culture, their connections, their land were no longer accessible. The young people in the reserves became frustrated. Lack of opportunity within their now embattled environment caused them to commit suicide. Infant mortality and malnutrition also became critical and, from living a peaceful life in their *tekoha*, they now live in tents on roadsides in fear of imminent violence.

Short explains that Lemkin’s genocide case studies involved attacks on the group’s culture as an underlying plan to impact negatively on the totality of the group, which led him to understand “cultural and physical destruction as inter-related, interdependent elements of a single genocidal process”.<sup>142</sup> In 1945, Lemkin writes, “The term does not necessarily signify mass killings although it may mean that.”<sup>143</sup> For Lemkin, genocide refers to a “coordinated plan aimed at the destruction of the essential foundations of the life of the national group so that these groups wither and die”.<sup>144</sup> This “may be accomplished by wiping out all basis of personal security, liberty, health and dignity”. crucial elements to a

thriving culture.<sup>145</sup> These four aspects are all experienced by the Guarani Kaiowá on an ongoing basis.

To establish the susceptibility of the harm of genocide to a group, it is necessary to understand the meaning of culture and how “it imprints itself on almost every area of an individual’s life” to the point that the individual is “influenced in profound and far-reaching ways”.<sup>146</sup> The rituals, cultural practices, and cultural ways are internalised, and the certainty of belonging provides an internal sense of safety and “an orientation in an otherwise confusing world”.<sup>147</sup> As Abed explains, exile denies individuals their past and condemns them to a future of diminished agency.<sup>148</sup>

The systematic killings of leaders, destitution, living in tents on roadsides, under constant threats of violence by militias supported by the agribusiness and, finally, the constant fight for space and resources in the fraught life of SPI reserves, show how their security has been thoroughly compromised. Their liberty is also at stake as they can no longer conduct their rituals which are closely connected with the land due to their being on small reserves. This has undermined the group’s “essential foundations and alliances” as well as their power structures and their dignity. All the above examples have a direct impact on the group’s right to a life with dignity.

Based on Lemkin’s definition of genocide, phase one is represented by “the destruction of the national pattern of the oppressed group”. Examples are disruptions to their ritualistic practices and cosmology, which are profoundly tied to the land. Their subsistence as hunter-gatherers is no longer a sustainable model. The destruction of the national patterns of the oppressed group here is seen in the loss of land, life in the small reserves, assimilation into wage earning on low salaries, and into an education system that denies their culture:

In regards to education, in order to go to school, the children have to leave at three in the morning to arrive on time, as the school is 40km away from our village. This makes it very hard for children and young people to want to go to school. The school is an indigenous school, which teaches the Guarani language, but the curriculum is taught in Portuguese.<sup>149</sup>

Lemkin’s second phase of the definition of genocide happens with the subsequent “imposition of the national pattern of the oppressor” and “may be made upon the oppressed population that is allowed to remain, or upon the territory alone, after removal of the population and the colonisation of the area by the oppressor’s own nationals”.<sup>150</sup> The imposition of the national pattern upon the oppressed group, the Guarani Kaiowá, began with plundering of their territory, their subsequent removal, and the forced transference to reserves demarcated without cultural considerations.

There, the group experienced a process of cultural disintegration, under what Brand described as “the confinement process”. Promoted by the State, this forced the separation of countless Guarani Kaiowá families, “politically fragmenting numerous communities and compromised the physical and cultural reproduction

of Guarani Kaiowá”,<sup>151</sup> creating a series of problems within the interior of the communities confined for the first time.

In the past 500 years, many parts of the world have suffered under the effects of colonisation. The effects of the “encounter” between the Portuguese and the Amazon natives exposed the violent process of decolonisation under the formation and imposition of European cultural models over the oppressed group and territory. Genocidal strategies have produced genocidal results – the decimation of almost the entire indigenous Amazon. This situation has not changed; what changed was the introduction of new more sophisticated strategies to assimilate culturally distinct indigenous groups across the globe. Undergoing genocidal destruction, the Guarani Kaiowá experience great loss. However, they are human beings experiencing the ultimate threat, as cultural genocide is concerned. If their culture fully disintegrates the group will cease to remember, as memories will be forgotten with new assimilated generations. When their elders die, the language, the myths, and their stories will also die.

## **Conclusion**

The genocide lenses inspired by Lemkin are vital to understanding the current predicament of the Guarani Kaiowá, as they demonstrate exactly what is at stake, that is, their very survival as culturally distinct people. This is not a label, but a way of understanding a people’s experience of suffering and cultural loss, which they experience as culturally and physically destructive. This experience is based on real genocidal attacks undermining their cultural, social, and physical integrities.

The survival of the Guarani Kaiowá is important because of the future contribution that such groups make to a “disappearing world”. I will leave the last word to the Guarani Kaiowá leader, Eliseu Lopes, who speaks of how the Guarani Kaiowá are one with nature and how they are dying:

Teko means life, and tekoha is land: the space where we live our lives. This is why we are fighting to go back to our tekoha. Tekoporã also means the Guarani’s way of life, historically, we used to have our tekoporã, tekojoja, a life without the problems we have today.... Tekojoja also means communion with all life.

Today we live a non-tekoporã’s life. We seek tekoporã and tekojojá. If we don’t have access to our land we lose our way of being, because we lose our culture, our chants, the medicinal plants, the food, fruits ... if we don’t have access to the land ... we no longer have the Guarani Kaiowá way of being.<sup>152</sup>

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# 6 A political economy of genocide in Australia

## The architecture of dispossession then and now

*Martin Crook and Damien Short*

### Introduction

Most of the scholarly works that consider the question of genocide in Australia focus on the “dispersal” extermination campaigns of the 1800s and/or the issue of the “Stolen Generations.”<sup>1</sup> Such studies often dwell on the seemingly ubiquitous problem of genocide scholarship – a preoccupation with positive and provable genocidal intent. In the Australian case this is perhaps understandable since many indigenous fatalities were not the direct consequence of an intended policy of extermination. Unknown illnesses such as smallpox accounted for the greatest number, while alcohol, malnutrition, demoralisation and despair played their fatal part. Moreover, it could be argued that the intent was to take over a land, not to eradicate an ethnic or religious group. In this sense we could say that territoriality is settler colonialism’s specific, irreducible element.<sup>2</sup> Yet, the British desire to plant colonies in Australia meant *supplanting*,<sup>3</sup> and as Patrick Wolfe observes “land is life – or, at least, land is necessary for life (and) thus contests for land can be – indeed, often are – contests for life.”<sup>4</sup>

Where culturally distinct indigenous or “placed-based” peoples are concerned, the basis of their culture is the land. When indigenous people struggle to preserve their cultural and spiritual distinctiveness, they are fighting to maintain control of their land<sup>5</sup> because their land embodies their “historical narrative.”<sup>6</sup> This means their “practises, rituals and traditions,” as well as their political and economic cohesion, in other words their mode of production (MOP), is insolubly bound up with the land and the concomitant ecosystems which constitute the essential foundations of most, if not all, indigenous groups.

The ensuing land grab involved such significant amounts of violence and, what some now term, “ethnic cleansing” against indigenous groups; when considered alongside the effects of illness and malnutrition, it seemed “inevitable” that the indigenous peoples of Australia would die out and disappear.<sup>7</sup> In a seminal essay, which takes issue with an overly intentionalist take on the question of genocide in Australian history, Tony Barta suggests that “it is not too simplistic to see in this dominant opinion the most comfortable ideological reflection of a relationship which could only be recognised in good conscience for what it was – a relationship of genocide.”<sup>8</sup>

While writers like Barta and Wolfe imply that genocidal structuring dynamics are still at work in Australia,<sup>9</sup> theirs is a distinct minority opinion in genocide scholarship and popular discourse. Present day indigenous/non-indigenous social and political relations, and the colonial structures in which they operate, are rarely discussed through the analytical lens of genocide. Yet, while direct physical killing and genocidal child removal practices may have ceased, some indigenous people contend that genocide is a continuing process in an Australia that has failed to decolonise and continues to assimilate.<sup>10</sup> Such a contention, we suggest, is predicated not only the original formulation of the genocide concept,<sup>11</sup> but also on a victim's understanding of the culturally genocidal dimensions of settler colonialism and the central importance of land to the survival of many indigenous peoples as peoples.

Moreover, Lemkin,<sup>12</sup> the Polish jurist and the neologian of the concept of genocide, understood that invariably throughout history, genocide was inextricably bound up with colonisation, arguing genocide involved a two-fold process of destruction of the group life of indigenous populations and their replacement by what he called the “national pattern” of the colonisers. However, the towering influence of the UN Genocide Convention and the overbearing expediencies of the Cold War bent the arc of intellectual history towards an impoverished and bowdlerised definition of genocide which served to occlude this critical cultural dimension of the genocidal process. Yet, it is precisely the overlooked and misunderstood categories and properties of genocide – the key concept of culture and the insoluble link with colonisation, that are pivotal in capturing both the historical and lived experience of culturally vulnerable groups like indigenous peoples around the world.

Of course, today, in a “post-colonial” world, where modern sovereign nation states with internationally agreed borders, rarely, with a few honourable exceptions, invade and annex other territory, colonialism and the colonial settler/indigenous relations reproduce themselves and endure in modified form. Thus, the colonial modality referred to as “internal colonialism” is a more apt category which captures the lived experience of vulnerable indigenous groups who continue to suffer from systematic legal, political and social oppression and discrimination at the hands of the colonial state machine, *within international agreed borders* (Tully, 2000). Thus, a Lemkian ontology is well suited to illuminating the kind of colonial-settler regimes, like Australia, that continue to subject internal indigenous populations to genocidal structuring dynamics.

### **A mode of eco-genocidal destructive production**

The colonial structures, which have yet to be dismantled, have persisted throughout the history of Australia as a colonial-settler state, in various modalities and historically specific phases; the long chain of genocide mutates and evolves through time. In other words, as with any social phenomenon, it has a history. There are common threads and sharp breaks, continuities and discontinuities. The task is to be able to identify and trace the varying modalities, discourse and

institutional formations.<sup>13</sup> The genocidal structuring dynamics that once fuelled the initial colonisation phase and frontier violence in North America and Australia were superseded by periods of forced assimilation and Eurocentric colonial discourses of “development” that sought to shroud colonial-settler relations in a cloak of authority and legitimacy.<sup>14</sup> In the post-Second World War juncture, the “logic of elimination”<sup>15</sup> that underpins colonial-settler land grabs were and still are farming, national park schemes and, above all, industrial mining. However, what all the various links in the chain have in common is the structure of the capitalist MOP: the settler state that sought to suppress indigenous sovereignty to preserve its own was also a capitalist state.

In the following section the authors will attempt not to provide an entire history of the political economy of genocide, but draw from the storehouse of history, as was the habit of Foucault,<sup>16</sup> to illustrate the manner in which the genocidal structuring dynamics, today, just as they were during the “rosy dawn”<sup>17</sup> of Australian settler capitalism, are ever being conditioned by the imperatives of capital accumulation and the global chain of capitalist production and trade.

The capitalist MOP was implicated in the genocide and dispossession of the indigenous population long before the British Empire first arrived on the Australian continent in 1788, with its first fleet of officers and convicts. The colonisation of New South Wales and Van Diemen’s Land was driven by the need to offload a surplus population of convicts, vagabonds, prostitutes and, generally, the immiserated and pauperised social layers filling British prisons; the deportation of this “surplus” population acted as a social and political pressure valve.<sup>18</sup> This penal settlement became all the more important with the loss of the American colonies in the 1770s.<sup>19</sup>

In order to understand the social and economic drivers behind the creation of a surplus population of “undesirables” and thus the initial impetus on the part of the British empire to establish a penal colony in Australia as a depository for criminals and then later political criminals, which ultimately set in train a historical process that would unleash ecocidal and genocidal forces, we must turn to the laws of motion of the capitalist MOP; in particular the general laws of capital accumulation. To accumulate the maximum extent of capital, the capitalist class will seek to exploit labour either extensively (by extending the working day) or intensively (by increasing the intensity of work and the output of labour in a given time period). With the introduction of laws governing the working day and increasingly other such labour regulations, the latter form of exploitation would become the dominant form in the colonial metropole. The manner in which this was and is done involves the application of labour-saving technology and machinery which enhances labour productivity and thus the relative extent of the means of production that it can transform into goods and services. The ultimate effect of this change in the technical and value composition of social production, however, is a pathological one (from the point of the capitalist system taken as a totality), since it reduces the labour component (labour power or its value form variable capital) as a factor of production relative to the means of production

such as goods, machinery, materials etc. (constant capital).<sup>20</sup> In other words, “the growing extent of the means of production, as compared with the labour-power incorporated into them, is an expression of the growing productivity of labour.”<sup>21</sup> Ultimately, the net effect is the production of a surplus population or “reserve army of the unemployed,” who at various moments in the production cycle can no longer be profitably employed.

“The lowest sediment of the relative surplus population dwells in the sphere of pauperism,”<sup>22</sup> a sediment that included “vagabonds,” prostitutes and the lumpenproletariat, many of whom had either failed to adapt to the fast-changing conditions of production, outlived their productive life span, or become victims of the dangerous conditions of industry. It would be many of these who, in a condition of pauperism, would commit crimes against the sanctity of property and fill the jailhouses of Great Britain and eventually the fleets sailing to Port Jackson (Sydney). In essence, the population dynamics unique to the capitalist MOP gave fateful impetus to the establishment of a penal colony on the other side of the globe.

Once the penal colonies had been established, of course, they would have to become self-sufficient. In the beginning this proved difficult, and when it became clear that the settlers were there to stay and competing for game, land and water, low intensity guerrilla warfare broke out between the aboriginal population and the colonists. Nevertheless, by the early nineteenth century, with the end of the Napoleonic wars and a deterioration in the state of the British economy, the flow of immigration, both convict exiles and emancipist free labourers, increased rapidly, providing a much needed supply of labour for the burgeoning capitalist economy.<sup>23</sup>

It is from this time that we see the emergence of a form of settler capitalism hitched to the rise of the world market created by the European empires and European industrialisation, a world market that involved both flows of capital and labour and manufactured goods into Australia and flows of strategic raw materials out of Australia. This would include the discovery of minerals such as copper and later gold, which would further fuel the displacement of aboriginal peoples from their lands and a rise in emancipist immigration. The temperate climate and extensive grasslands of New South Wales (NSW) and later Queensland (QLD) lent itself to European-style agriculture, and crucially sheep and cattle grazing, wool becoming a crucial export supplying the textile mills in the colonial metropole.<sup>24</sup> The thirst for wool in the heart of the empire would drive a land grab throughout Australia from the early nineteenth to the early twentieth century that would dispossess the indigenous population and deprive them of access to their means of subsistence and their way of life more generally.<sup>25</sup> By the 1860s, 400 million hectares of land in the south-east had been occupied by 4,000 Europeans with 20 million sheep;<sup>26</sup> this wasn't just genocidal but ecocidal.

In this connection is revealed the global interconnectivity of the structure of genocide with a larger chain of global capitalist production and trade. Wolfe remarked that settler colonialism:

presupposed a global chain of command linking remote colonial frontiers to the metropolis. Behind it all lay the driving engine of international market forces, which linked Australian wool to Yorkshire mills and, complementarily, to cotton produced under different colonial conditions in India, Egypt, and the slave states of the Deep South.<sup>27</sup>

In any case, whether it was settler pastoralism, the capital intensive and land extensive extractive industries or even the pearling industry, the impact on Aboriginal societies was devastating. The combination of dispossession of ancestral land, frontier violence that necessarily flowed from the dispossession, inter-tribal warfare compounded by the dispossession, malnutrition and disease, all contributed to the collapse in the aboriginal population and with rare exceptions, the total destruction of the aboriginal way of life and their MOP. Ultimately, their predominantly nomadic MOP was incompatible with settler capitalism. The “logic of elimination” that Wolfe speaks of<sup>28</sup> flowed from the imposition of an alien economic system, of capitalist property relations that would prove the undoing of the essential foundations of aboriginal group life, not a premeditated, state-led plan to kill a group.

To understand why relations of genocide equate here with capitalist relations we must turn to the study of political economy. The central economic mechanism behind this incursion into, invasion and annexation of indigenous land are “settler colonial expansionist land grabs,”<sup>29</sup> expropriations otherwise known as primary accumulation: the violent and predatory process that originally transformed feudal relations of production into market relations dependent on the commodification of the means of economic subsistence.<sup>30</sup> In violation of what Marx called “the everlasting nature-imposed conditions of production,” or ecological conditions for sustainable development, the “treadmill of accumulation”<sup>31</sup> that characterises the capitalist MOP transgresses the “metabolic interaction” between human beings and nature, accumulating beyond the “limits to growth” to feed its insatiable appetite for new resources.<sup>32</sup> This necessarily entails expanding into non-capitalist territory, “into a world dense with cultural difference”<sup>33</sup> beyond the circuits of capitalist production and outside the realm of ordinary “expanded reproduction,” to forcibly incorporate or “enclose” materials, resources and labour not yet subject to the laws of generalised commodity production, the global accumulation process and the realm of exchange value. In other words, the eco-destructive processes that help sever the relationship to the land that is key to the indigenous genos, processes manifest in industrial agricultural, extractive and other projects, are only made possible by a preceding history of forceful and violent colonisation of indigenous land by colonial-settler states.

This consolidates *de facto* and *de jure* control of indigenous land by creating the necessary legal and institutional architecture in the form of private property regimes and asserting the legal and political jurisdiction of the relevant settler colonial state. This process of primary accumulation is the essence of colonisation. In other words, as mentioned earlier, “territoriality is settler colonialism’s specific, irreducible element.”<sup>34</sup> Crucially, the processes of primary accumulation, or what



others have described as “accumulation by dispossession” (ABD),<sup>35</sup> necessarily involves the “‘creative destruction’ of pre-capitalist [indigenous] ecological-political orders.”<sup>36</sup>

In the second phase, the various eco-destructive industrial, agricultural and extractive processes referred to earlier, then follow. Taken together, these phases, properly understood, can be read as the political economy of genocide, or what elsewhere the authors have described as a *mode of eco-genocidal destructive production*.<sup>37</sup>

### ***Situation coloniale***

However, what is often elided from this account in the genocide studies literature and the popular understanding of the genocidal process in Australia is that it wasn't simply the land that was desired by the colonists, but occasionally the labour of the indigenous peoples too. In the vast majority of case studies conducted by post-liberal or structural genocide scholars,<sup>38</sup> the *situation coloniale* did not necessitate the retention of any native labour force, simply the expropriation of native land. Consequently, the indigenous nations were either physically eliminated or forcibly assimilated via a whole series of gambits that preserved and extended the reconstitution of native land into a Lockean form of alienable individual freeholds.<sup>39</sup>

The work of Schaller,<sup>40</sup> however, illustrates how Lemkin's formulation can be applied to modalities of colonisation such as that in colonial Africa, where the *situation coloniale* necessitated the retention of indigenous labour and not just the acquisition of land. Therefore, the population would have to be preserved as a servile class or “allowed to remain,” in Lemkin's words.<sup>41</sup> This would have implications for the methods of genocide that were to be employed. Total physical extermination would be impractical and not serve the interests of the white landed, mining and financial colonial elites; only those techniques that disable the group's ability to resist would prove consistent with the needs of capital accumulation.

Rarer still is this understanding examined through the lens of the political economy and a broader narrative of the changing imperatives of Australian settler capitalism and the broader exigencies of the world market. What is at issue here is the dialectical and contradictory relationship between *the logic of capital accumulation* and *indigenous “elimination.”* To borrow a phrase from the philosopher and sociologist Michel Foucault, doing this will deepen our understanding of the “history of the present,” as we shall see later, when we turn our gaze to contemporary genocidal structuring dynamics in Australia.<sup>42</sup>

It is beyond the scope of this chapter to examine the full range of literature on aboriginal participation in the Australian economy; suffice it to say that towards the latter half of the twentieth century pathbreaking works emerged on this theme, with a growing expansive literature emerging in the early twenty-first century.<sup>43</sup> However, due to institutional and academic inertia, it has taken time to filter through various disciplines, even Australian labour history taking relatively long to acknowledge Aboriginal involvement in the settler economy.<sup>44</sup>

What is generally meant by participation is what some scholars have described as “hybridisation,”<sup>45</sup> in which elements of both settler capitalist or market relations and the concomitant forces of production and technologies are fused with the largely nomadic Aboriginal MOP.<sup>46</sup> From the outset, it’s worth stressing that employment of aboriginal labour and hybridisation was not the general rule; it was the product of varying degrees of coercion and was confined to those industries that were to some extent compatible with those aboriginal communities who, as a necessary precondition, were already partially destroyed by colonisation and its associated techniques of land theft, violence and disease.

The relationship of dependence, though founded and reproduced through relations of genocide, did in fact swing both ways. As Lloyd argues:

Indigenous societies were “made ready” as it were for the possibility of hybridization.... Their traditional lands had been penetrated and they were now in a partially dependent relationship. On the other hand, the emerging settler-capitalist forms on the frontier also had to adapt, and that meant sometimes using indigenous people as labourers, trading with indigenous people for food supplies and using traditional knowledge.<sup>47</sup>

The industries that were compatible with the Aboriginal mode of life were so because they relied on intermittent and seasonal labour which allowed Aboriginal peoples to maintain a conditional though warped connection to their traditions and land. One such example from the mid-nineteenth century was cattle stations, where the landholdings, particularly on the land extensive developments in the northern semi-arid zones, could be as large as a million hectares, thus allowing aboriginal workers to live on the land on the cattle stations, in the forms of family camps. Once the terror and violence during the frontier violence phase had settled down, the squatter pastoralists slowly realised that Aboriginal peoples had skills and knowledge that could be harnessed in the cattle industries. In fact, aboriginal people would be hired as horse breakers, shepherds, stockmen, guides, diplomats and property managers.<sup>48</sup>

The work was poorly paid, often by rations, nomadic and seasonal and thus could not only be compatible with the Aboriginal MOP but was also very difficult to fill using fully proletarianised workers. Arguably, this form of labour was not just more convenient, given the difficulty of sourcing labour seasonally in very remote northern and central regions, but also hyper-exploitable both because they could be paid paltry wages, if at all, and because the capitalist agricultural industry didn’t have to concern itself with the *costs of their reproduction*. The fact that they were not fully and completely severed from their relationship to the land nor killed for that matter, and thus not fully integrated into the circuits of capital, increased further the surplus that could be extracted from their labour. With the advent of canning of meat by the 1860s and refrigeration by the 1880s, the Australian livestock and cattle industry was being exported around the world.<sup>49</sup>

In a landmark essay, Bob Thorpe argued that Aboriginal peoples were kept alive to the extent that they could be profitably employed as “colonised labour,”

using this framework to analyse Aboriginal participation not just in the nineteenth but also twentieth centuries, whether it was employment in the remote pastoral stations or employment, underemployment and mass unemployment in the most menial jobs in the late twentieth century.<sup>50</sup>

Ultimately, at each historical juncture, the precise nature and form in which the relations of genocide would take shape would be determined by the chain of global capitalist production and trade, the place within the global division of labour that Australian settler capitalist economy would assume, and of course “the rapacious alliances in the settler states and capitalist landed, mining and financial classes in all the settler zones.”<sup>51</sup>

### ***“Cultural genocide” and the politics of recognition***

Unlike the US, Canada and New Zealand, the colonisation of Australia did not entail any formal settlements, involving dialogue and treaties, between the European invaders and the indigenous people. Throughout the last 200 years, the indigenous peoples of Australia have been the victims of appalling injustice and racism that was compounded and legitimised by the lack of negotiated treaties and recognition of rights to land. It was this historical lack of a negotiated treaty or treaties that led the National Aboriginal Conference in April 1979 to instigate a concerted campaign for a treaty. The Aboriginal Treaty Committee (ATC) hoped to secure a treaty that would recognise and restore Aboriginal rights to land and self-determination, compensate for the loss and damage to traditional lands and way of life, while protecting Aboriginal identity, languages, law and culture.<sup>52</sup> The principle of self-determination imposes requirements of *participation* and *consent*, and comprises a world order standard at odds with colonialism.<sup>53</sup> Indeed, the substantive content of the principle inheres in the precepts by which the international community has held colonialism illegitimate.<sup>54</sup> By granting genuine self-determination<sup>55</sup> and meaningful land rights to indigenous peoples across Australia, a treaty or set of treaties of this nature had the potential to break the colonial “relationship of genocide.”<sup>56</sup>

The term “treaty,” however, elicited strong opposition from prominent politicians, which resulted in the treaty idea undergoing political dilution into a “reconciliation” initiative that made no commitments to address any of the treaty campaign’s key priorities, and certainly made no commitment to granting indigenous peoples self-determination or land rights. While the dilution of the treaty idea into reconciliation ensured that return of land to indigenous peoples was not promised as part of the process, the issue was thrust to the fore of political debate by the High Court shortly after the instigation of the official reconciliation process. In 1992, the High Court handed down its landmark *Mabo* judgement (*Mabo and Others v Queensland (No 2)* 1992), which held that in certain situations indigenous groups *might* have rights to land or “native title” that had survived colonisation.

However, in order to qualify for native title rights, a series of colonial tests to legitimate claims must be passed, claims that embody what Wolfe described as

“repressive authenticity,” such as: proof that your nation or clan have maintained occupancy and traditional governance structures since original colonisation in 1788, or that you still practise a culture considered “traditional” and authentic. Moreover, in the wake of the 1992 *Mabo* decision in the Australian High Court and the subsequent Native title legislation (NTA) passed one year later, for those few Aboriginal groups who were lucky enough to successfully claim native title rights on crown land (therefore land which hadn’t already been expropriated as private property in the previous 200 years), they were critically denied the right to veto where mining and other industrial development project were concerned, forcing them into an unenviable “colonial dilemma” between refusing to be party to the ecological destruction of their land or risking having the land expropriated by the relevant state authority anyway. This could happen under the provisions of the NTA if it was deemed in the “national interest” and thus not benefit from any potential royalties.<sup>57</sup> This amounts to a denial of effective indigenous sovereignty and de facto extinguishment of native title. ABD and the crippling of indigenous MOP is secured through such asymmetrical exchanges of mediated forms of state recognition and accommodation, and thus fails to purge Aboriginal identity of racist and derogatory images, leaving essentially untouched the capitalist MOP and its underpinning socio-economic structures of dispossession.

At this point, it is useful to note that Australia has the world’s largest reserves of uranium, lead, silver, zinc, titanium and tantalum, while there are large quantities of uranium on Northern Territory indigenous lands (approximately 30 per cent of the world’s currently identified uranium reserves). Australia is among the world’s top six countries in its reserves of coal, iron, aluminium, copper, nickel and diamonds.<sup>58</sup> Consequently, soon after the High Court had handed down its judgement in *Mabo* the Commonwealth came under immense pressure from powerful vested interests, and the extractive industries lobby in particular, to “limit” the application of native title, with some industry commentators advocating outright “extinguishment” – a modern-day example of what Patrick Wolfe has termed the “logic of elimination.”<sup>59</sup> This followed a long history of the mining industry vehemently opposing and degrading indigenous land rights from the beginning of the land rights era in the 1970s.<sup>60</sup>

A mining lobby campaign of misinformation was particularly successful, and in no small part influenced the government’s legislative response to *Mabo*,<sup>61</sup> ensuring that only a right to negotiate, rather than veto, was granted native title holders over future developments on their land. Indigenous groups would not be able to resist development or develop on their own terms. The right of veto was an integral part of the Northern Territory Land Rights legislation back in 1976, the absence of which, as Mr. Justice Woodward suggests, renders indigenous land rights largely meaningless<sup>62</sup> – which is why the veto was a key indigenous demand after *Mabo*. The 1993 Native Title Act’s primary purpose was the *validation* of existing commercial titles and the provision of guarantees that future land negotiations would be conducted within the parameters set by existing colonial power inequalities – thus ensuring that the native title regime would offer indigenous peoples no protection from settler colonial expansionist pressures

powered by the engine of global capitalism. Only this time dispossession would not happen through brute force and naked exercise of power but through ostensible attempts by the colonial power to “reconcile” with the indigenous population by offering to enshrine certain substantive and procedural rights. As Coulthard argued: “colonial relations of power are no longer reproduced primarily through overtly coercive means, but rather through the *asymmetrical exchange of mediated forms of state recognition and accommodation* [emphasis added].”<sup>63</sup> Once again, the precise form and modality of genocide would be shaped by the imperatives of the colonial settler state MOP.

In his pathbreaking book, Coulthard fruitfully adapts the insights of Marxist theories of imperialism and ABD, and re-orientates them to a study of how, through the modern politics of “recognition” and reconciliation conducted by colonial-settler states, such as Australia, Canada or Israel, indigenous peoples continue to be internally colonised.<sup>64</sup> Coulthard, Samson and Gigoux, and Crook and Short rightly emphasise that we must recognise that colonialism and ABD is not a purely historical process confined to the history books but is a contemporary, ongoing lived experience for indigenous peoples living under settler-colonial states all over the world.<sup>65</sup> “There has been no meaningful decolonisation applied to indigenous peoples.”<sup>66</sup> In the Australian “reconciliation” process, we see precisely the continuation of ABD through the beguiling modality of “recognition” politics and the granting of “rights” to land and procedural rights which merely act to enable the continued dispossession and colonisation of indigenous peoples and the expanded reproduction of Australian mining capital. In this current post-Cold War historical juncture and the salience of the human rights regime and human rights discourse in international diplomacy, such a reconfiguration of settler state–indigenous relations and the political economy of genocide, became a necessary ideological cloak to secure the expanded reproduction of Australian mining capital. To secure the interests of any particular fraction of the ruling class and by extension political power and the *active* consent of those ruled (a necessary prerequisite in Western-type societies with a developed civil society), the Italian Marxist philosopher Antonio Gramsci argued that two things were necessary. First, some concession to the interests of other social groups would be necessary. This would call for at least some sacrifice of the “corporate” interests of mining capital:<sup>67</sup> conceding procedural and consultation rights to affected Aboriginal groups under the NTA. Second, the elaboration of a sophisticated ideological discourse that could unite disparate class fractions and other social groups: the construction of the “recognition” and “reconciliation” paradigm. The reconciliation process – what Coulthard, in a Canadian context, called the “modus operandi” of colonial power in the modern period – was an exemplary exercise in securing the hegemony of mining interests. As Freeman reminds us, human and other rights are the products of balances of power such that during the process of institutionalisation, they are so, in a manner which diminishes, denudes and bowdlerises them in a form less able to challenge the structures of power they originally arose to address.<sup>68</sup>

In 1996, responding to another High Court case, the Howard government amended the *Native Title Act* to detail a host of white property interests that would automatically extinguish native title.<sup>69</sup> This modern day act of dispossession has been described, quite rightly, by the United Nations monitoring *Committee on the Elimination of all forms of Racial Discrimination* (CERD) as a racially discriminatory piece of legislation.<sup>70</sup> The Committee subsequently recommend the government enter into genuine negotiations with indigenous peoples to find an alternative. This has not been done; instead the Commonwealth Government began a process of erosion (termed “reform”) of the only land rights Act in Australia that contained a de facto right of veto over development on indigenous lands: the Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976.

Significant erosion of the veto had already begun in 1987 with amendments restricting the veto to the exploration stage where before that they had a veto at both the exploration *and mining stages*. During 2004–2005, the Commonwealth Government developed a new package of reforms to the ALRA, with a particular attention paid to changing arrangements for leasing of indigenous land, followed in September 2006 by a review of the permit system (which hitherto allowed a degree of indigenous control over access to their land). Of key importance are the new sections 19A–19E which provided options for 99-year head leases of Aboriginal land to a Commonwealth or Northern Territory government entity. The provision for long-term leases over townships on Aboriginal land was allegedly to “make it easier for Aboriginal people to own homes and businesses on land in townships,”<sup>71</sup> but while the leases were still subject to the provision of free, prior, informed consent by traditional owners, if a head lease were signed, then the permit system would be relaxed to allow in a sublease holder or anyone with “legitimate business” in the lease area. The overriding rationale of the amendments appears to be less about individual home ownership and more about promoting “economic development on Aboriginal land by providing for expedited and more certain processes related to exploration and mining on Aboriginal land.”<sup>72</sup>

Following the now familiar settler state tactic when dealing with indigenous interests, *none of these amendments were produced via consultations with those indigenous peoples likely to be affected by them*. It is unsurprising then that few indigenous communities have opted to go down this road to “economic development” with very little incentive being offered to forego the available exercise of authority over the land they own.<sup>73</sup> These amendments, however, were only the start of a far more sinister attack on indigenous land rights, autonomy and cultural integrity that has led some indigenous peoples to describe their present-day lived experiences as tantamount to genocide.

### **The “Intervention”**

The benign use of government language – mainstream services, practical reconciliation, mutual obligations, responsibilities and participation in the



real economy – cloaks a sinister destination.... The extinguishing of indigenous culture by attrition.<sup>74</sup>

(Pat Dodson)

This is about the beginning of the end of Aboriginal culture; it is in some ways genocide.<sup>75</sup>

(John Ah Kit)

In 2007, the Howard Government introduced the *Northern Territory National Emergency Response Act* (often referred to as the Intervention). The Intervention was a discriminatory package of changes to indigenous welfare provision, law enforcement, land tenure and basic freedoms. The Howard Government justified the legislation on the basis of the *Little Children are Sacred* report,<sup>76</sup> commissioned by the Northern Territory (NT) Government and written by former NT Director of Public Prosecutions, Rex Wild QC and senior Aboriginal health worker, Pat Anderson. *Little Children are Sacred* found that the sexual abuse of Aboriginal children in the NT was seriously widespread and quite often goes unreported. According to the Inquiry, sexual abuse of indigenous children was happening largely because of the breakdown of indigenous culture and society, *as a consequence of colonial dispossession* and the combined effects of poor health, alcohol and drug abuse, unemployment and poor education and housing. The Inquiry made 97 recommendations which included suggestions to: improve school attendance; provide education campaigns on child sexual abuse and how to stop it; reduce alcohol consumption in Aboriginal communities; build greater trust between Government departments, the police and Aboriginal communities; strengthen family support services; and *most importantly to empower Aboriginal communities to take more control and make their own decisions about their future*. This key recommendation would be decidedly ignored.

The Howard Government ignored the breadth of the *Little Children are Sacred* recommendations, and “suspended” the operation of the Racial Discrimination Act 1975 to enable what the United Nations has since denounced as racially discriminatory<sup>77</sup> measures, such as: bans on alcohol consumption, the compulsory acquisition of Aboriginal townships through five year leases, the removal of customary law and cultural practice considerations from bail applications and sentencing within criminal proceedings, the suspension of the permit system on indigenous land, retaining a proportion of welfare benefits to all recipients in the designated communities and of all benefits of those who “neglect” their children and the abolition of the Community Development Employment Projects, which had previously acted as an alternative to Welfare.

Beyond the government rhetoric, the compulsory land acquisition measure seemed to have little to do with preventing child abuse as it was simply a further development of a policy of land tenure reform *first started back in 2004 – well before the Little Children are Sacred* report. As discussed above, during 2004–2005 the Commonwealth Government developed a new package of reforms to the ALRA which altered leasing arrangements for indigenous land.



The Intervention's five-year lease compulsory acquisition provisions would further corrode aboriginal sovereignty and thus allow the Commonwealth to "negotiate" 99-year leases under grossly asymmetric colonial power relations, which would leave indigenous owners extremely vulnerable to "sweeteners" from the Commonwealth<sup>78</sup> – such as the promise of better housing and infrastructure in return.

The overarching human rights rationale of the Intervention's measures, though accepted by a few high-profile indigenous spokespersons,<sup>79</sup> betrayed a misunderstanding of international human rights law, since interpreting a state party's obligations under a human rights treaty is only possible by reading *all* of the human rights treaties to which a state is party as a whole. Australia's obligations under the *Convention on the Rights of the Child* must therefore be understood in conjunction with Australia's obligations under other human rights agreements such as the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>80</sup> and the *United Nations Declaration on the Rights of Indigenous Peoples* – which the Australian government has now belatedly endorsed. The right of Aboriginal people to enjoy their rights free from discrimination on the basis of race cannot be abrogated on the basis of promoting the rights of women and children as "more important." Moreover, since the enquiry recognised that colonial dispossession was a key driver of the rise of various social pathologies such as child and alcohol abuse, compulsory land acquisition, without free, prior and informed consent, and by extension the diminishing of aboriginal sovereignty, would ipso facto compound the very problem the Intervention sought to prevent.

At this juncture it is worth bearing in mind a crucial point made earlier: the social death that is central to the concept of genocide may result from forcible, and ultimately misguided, attempts "to do good." The overwhelming majority of indigenous peoples actually affected by the Intervention were strongly opposed and spoke of losing control, of losing land and of losing their culture. The combination of such factors caused some to talk in terms of *genocide*.

The Prescribed Area Peoples' Alliance (PAPA) represented Aboriginal people from communities affected by the NT Intervention. More than 130 people joined the Alliance over two meetings in Mparntwe – Alice Springs – on 29 September and 7 November 2008. Following the latter meeting, they released a statement, from which the following is an indicative extract:

These assimilation policies destroy our culture and our lives. It is the Stolen Generation all over again.... The government is refusing to build us any housing unless we sign over control of our land for 40 years or more. We say NO LEASES. We will not sign.... The government having this control is no good. Our lives depend on our land. It is connected to our songlines, our culture and our dreaming.<sup>81</sup>

The key issue was the forcible assimilationist nature of the Intervention and its consequences. Along with the immediate repeal of the Intervention laws,

territory-wide consultations and the implementation of the UN Declaration on the Rights of Indigenous Peoples, a key demand in the PAPA letter drafted for the media and key players and MPs was to: “Stop the promotion of genocide. By the UN Genocide Convention, one definition of genocide is; Conditions of life set to destroy the group in whole or in part.”<sup>82</sup>

In March 2010, the Australian Indigenous Doctors’ Association (AIDA), in collaboration with a University of New South Wales research centre, launched a comprehensive health impact assessment of the Intervention.<sup>83</sup> The research utilised a methodology, which invoked an *Aboriginal interpretation of health* that includes five dimensions – cultural, spiritual, social, emotional and physical – and which involved interviews with over 250 affected people.<sup>84</sup> The report unequivocally concluded that “the intervention does more harm than good” and predicted that “the intervention will cause *profound long-term damage to our Indigenous communities* ... with any possible benefits to physical health largely outweighed by negative impacts on psychological health, social health and well-being, and *cultural integrity* [emphasis added].”<sup>85</sup> Such a conclusion is entirely at odds with the claims of the then Rudd government, and those supporters of the Intervention like Langton and Pearson, who saw the Intervention as key to indigenous survival. On the contrary, in the context of an on-going colonial relationship and the culturally genocidal effects of the denial of self-determination, such a far-reaching policy of control measures imposed on indigenous groups, especially compulsory land acquisition, would inevitably produce yet more culturally genocidal effects. The AIDA report ended with the now familiar conclusion that negative impacts may be minimised, “*only if governments commit to working in respectful partnerships with Indigenous people* [emphasis added].”<sup>86</sup>

Returning to the crucial issue of land, given that the 2006 ALRA reforms were promoted to open up Aboriginal land to mineral exploration and development, the Intervention’s compulsory acquisition of townships has created a dangerous precedent for other Aboriginal lands.<sup>87</sup> In late 2007, the Howard Government signed up to the US-led Global Nuclear Energy Partnership initiative (GNEP),<sup>88</sup> which committed Australia to mine and enrich its uranium, export it to other countries, then re-import the resultant radioactive waste to be stored for ever more in the Australian desert. Approximately 30 per cent of the world’s currently identified uranium reserves are to be found on NT indigenous lands and since last year the number of exploration licences for uranium in the NT has doubled, with nearly 80 companies either actively exploring or having applied to explore. With the ALRA amendments and the Intervention’s compulsory acquisition measures, indigenous peoples will have no effective means to resist the now “inevitable” increase in uranium mining in Australia,<sup>89</sup> resulting in yet further culturally genocidal pressures on some indigenous groups, alongside the inevitable ecocidal impacts of uranium mining on their local environment.<sup>90</sup> This may seem to be conflating *forcible* settler appropriation and exploitation of land with the issue of cultural genocide, but if the relationship to land of many indigenous peoples is properly understood this is entirely correct. Indeed, when the *genos* in question is an indigenous social figuration with a relationship to land at

its identity core, and where the settler exploitation involves *intentional forcible* dispossession then the effect is quite simply culturally genocidal even where the primary *motive* is economic expansion.<sup>91</sup>

### **Rebranding the Intervention**

Despite the failure of the racially discriminatory government policies, broad policy continued with minor changes and a new name. In late 2008, following a review of the Intervention, the Australian Government pledged to form a legitimate relationship with the indigenous people based on “consultation,” acknowledge Australian human rights responsibilities and reinstate the Racial Discrimination Act of 1975. Following these consultations, on 23 November 2011, the government introduced legislation<sup>92</sup> to Parliament and released the “Stronger Futures” policy statement, which stated that the Australian Government was committed to providing voluntary five-year leases and would not extend the measure for compulsory five-year leases in the Northern Territory Emergency Response Act. In addition, the Australian Government and Northern Territory Government would continue to negotiate leases with Aboriginal landowners to “manage social housing in remote areas.” However, the legislation would continue the policy of opening up indigenous land for commercial use by designing regulations that “ease leasing on town camp and community living area land” in the Northern Territory in order “to encourage Aboriginal landowners to use their land for a wider range of functions such as economic development and private land ownership.”

The policy would be widely condemned by Aboriginal community leaders and “leading Australians”<sup>93</sup> because it continued to fall foul of the Racial Discrimination Act and fail to meaningfully consult or seek the consent of the aboriginal communities affected, thus continuing to entrench relations of genocide and secure the interests of mining and extractive capital in the long term. The requirement of neoliberal capitalism to secure more and more ever scarcer resources, and the process of extreme energy is a guarantee that the issue of land rights and opening up indigenous lands to development will never go away. Indeed, since the Stronger Futures policy was initiated the government has reiterated its push for 99-year leases over Aboriginal townships, once again on the back of a number of “review reports.” Two such review reports in 2014, Creating Parity – the Forrest Review and the Federal Parliament’s Joint Select Committee on Northern Australia’s: “Pivot North” would both be heavily laden in pro-market rhetoric and a Lockean logic of “mixing labour with land” that argued that Aboriginal Land Rights in the Northern Territory and the Native Title Acts were an impediment to “development” in the north.<sup>94</sup>

The Hon. Ian Viner, Aboriginal Affairs Minister responsible for the Aboriginal Land Rights (NT) Act in 1976, wrote a scathing critique of these developments in which he argued:

The whole framework and security of traditional Aboriginal land, protected by the Land Rights Act, is in danger of being subverted by Governments,

bureaucracies and people who have no real understanding or sympathy for traditional communal land ownership. 99-year town leases turn traditional ownership upside down. In reality they put the Commonwealth back into ownership and control of traditional Aboriginal land like it was before the Land Rights Act was passed. . . . A Commonwealth Head Lease is a device by the Commonwealth to take control of Aboriginal land away from traditional owners. It is thoroughly misleading for the Commonwealth to suggest giving the Office of Township Leasing a 99-year lease of Aboriginal land is the same as 99-year leases in the Australian Capital Territory (ACT). The ACT leases Crown land to people instead of granting freehold ownership. Aboriginal traditional owners already have freehold title, the best form of ownership in Australia. There is good reason to think the Commonwealth devised 99-year leases and the Office of Township Leasing as the head lessee as a way to avoid having to compensate Aboriginal people on just terms under the Constitution for taking control of their traditional lands. The Commonwealth objective is the permanent alienation of traditional land from Land Trusts.<sup>95</sup>

The culturally genocidal practice of alienating indigenous people from their lands shows no signs of abating, indeed, as we shall see later in this chapter, the indigenous peoples of Australia, like North America, are now having to deal with the genocidal and ecocidal process of extreme energy.

### **Cultural genocide through urbanisation**

In the early 1970s, an indigenous “post-colonial” initiative<sup>96</sup> saw Aboriginal peoples in the Northern Territory migrate out of government settlements and missions, returning to live once again on their traditional lands. This process of migration and decentralisation was termed the “outstations movement,” or “homelands” movement,<sup>97</sup> and today there are an estimated 560–630 communities with populations of fewer than 100 people dotted across the Territory.<sup>98</sup> Almost all are located on Aboriginal-owned land that covers 500,000 square kilometres – nearly half of the NT.<sup>99</sup> While there is significant diversity in outstations activities, some with vibrant local economies built on arts production, employment as rangers and wildlife harvesting; with others highly dependent on welfare income, their key commonality is the determined *choice* they have made to actively engage with their land; based on a desire to protect sacred sites, to retain connections to ancestral lands and ancestors, to live off the land, or to escape social dysfunction that might be prevalent in larger townships.<sup>100</sup> Despite this the “viability” of outstations/homelands has been under review in policy circles since the late 1990s and a public debate began in earnest in 2005 when the Indigenous Affairs Minister Amanda Vanstone described remote Aboriginal communities as “cultural museums.”<sup>101</sup> A neoliberal commentary ensued, largely championed by the Bennelong Society, including the “Leaving Remote Communities” conference in Sydney in September 2006,<sup>102</sup> which appears to have had significant influence on policy.

Indeed, in 2009 the Intervention was renamed “Closing the Gap in the Northern Territory” under the National Indigenous Reform Agreement plan purportedly to “address indigenous disadvantage in Australia.”<sup>103</sup> “Closing the Gap” is implemented through a series of “National Partnership Agreements,” which commit state and territory governments to a common framework of outcomes, progress measures, policy directions and, crucially, funding. A key agreement for people living in remote communities is the agreement on “Remote Service Delivery.” This agreement establishes the priority or “hub” town model, which effectively transfers funding to selected, larger economic centres, relying on them to act as “servicing hubs” for outlying areas where many Aboriginal peoples live.

The Northern Territory government sought to implement this agreement under the so-called “Working Future” initiative, which seemed designed to produce urbanising pressure on those remaining indigenous peoples living in remote communities by moving financial support away from outstations to 20 larger Aboriginal communities it called “Territory Growth Towns” (now expanded to 21 and rebranded as “Major Remote Towns” because they are stagnating and failing),<sup>104</sup> alongside which it committed to building *no more new homes outside these centres and no new homelands* would be established in the Northern Territory. The desired intention was clear:

Effective implementation of the broad policy objectives in “Closing the Gap” will inevitably require the elimination of those smallest dots on the landscape. A core element of approach is a re-energized state project to recentralise homelands people as occurred during the transformation at the frontier to colonial assimilation.

Underpinning such an approach is the neoliberal paradigm that seeks to meet the labour and resource needs of mature capitalism while eliminating non-state spaces.<sup>105</sup> But, as Altman points out:

During the past 30 years, a growing body of research has indicated that life at outstations is better – in health outcomes, livelihood options, and social cohesion, even housing conditions – than at larger townships, despite neglect.... Many Aboriginal people remain determined to live on their ancestral lands, pursuing a way of life that is informed by fundamentally different value systems. *Working Future* envisages only a conventional mainstream future for remote-living Aboriginal people.<sup>106</sup>

In a protest press release at the time the Gumatj clan nation from the MataMata Homeland in NE Arnhem Land wrote:

the Northern territory Government is “proposing to stop all funding to small remote communities, called Homelands or Outstations.” These communities – like that we live in here at MataMata – is the cultural source of identity,

pride and indigenous religion and law. These are sacred Homelands that the people WILL NOT leave.<sup>107</sup>

In 2011, an Amnesty International report took a rights-based critique of the initiative stating: “Aboriginal Peoples have the right to live on their traditional homelands without being effectively denied access to services like public housing and related infrastructure.” While Patrick Dodson argued that the Government has ignored the positive attributes of outstations, including the health benefits of people living on their lands and “to ignore that, in a manner to force people, ultimately, to come to these designated major centres, is really, slowly but surely, a way of *killing people’s culture and extinguishing the strength of Aboriginal life* [emphasis added].”<sup>108</sup>

In 2013 the then new Abbott conservative government introduced its Indigenous Advancement Strategy (IAS) which was yet again a rebranding exercise, this time of “Closing the Gap.” Examining the effects of the IAS framework on the Kuniñjku nation, Altman showed how each of the policy prescriptions of the IAS could be empirically linked to Lemkin’s original eight techniques of genocide. For instance:

In the *economic* field, the centralisation of Kuniñjku has seen them deprived of their means of existence, while their well-documented reduction in standard of living and access to cash has undermined their connection to country and ceremony, what Lemkin terms cultural-spiritual requirements. In the *political* field, local institutions of self-government have either been destroyed or depoliticised, with different patterns of imposed administration, many more police and a Canberra-appointed community overseer with powers to report back to Canberra.... In the *social* field, the legislated requirement to ignore customary laws and the enhanced imposition of Australian laws are further impoverishing already poor people with fines or imprisonment for fine defaulting; and depriving them of their contemporary means of production – trucks and guns.... In the *biological field*, children who are assessed as “failing to thrive” are removed to Darwin, fostered with non-Indigenous families and experiencing language and cultural loss. The struggle for livelihood is seeing a lowering of survival capacity, increased mortality rates and likely future morbidity risk for the young. This is partly because in the *physical field* there is an endangering of health with low-quality overcrowded housing, a lack of access to hunted game replaced in the name of “food security” by unhealthy fast foods in local shops [emphasis added].<sup>109</sup>

In essence, the Aboriginal residents of the Homelands are being herded into larger towns to imbibe norms and values, employing what Altman calls “a western logic of behavioural economics.”<sup>110</sup> Unfortunately, preliminary census-based indications are that the urbanisation feared has already started to happen. Indeed, a report on population shifts in the NT outlined a significant redistribution of people: “the



Indigenous population of the NT is redistributing internally over time with progressive urbanisation (lower proportions living in remote parts of the NT) being the main pattern.” Perhaps most worrying for cultural sustainability was the finding that “overall, in comparison to the Indigenous population of the NT as a whole, there was substantially higher growth in the young and youth cohorts (aged zero to 20 years) at Territory Growth Towns (TGTs).” There was a striking absolute increase in the Indigenous male population aged 10–14 years and 25–29 years at TGTs from 2006 to 2011. The report concluded that “the Indigenous population of TGTs grew at double the rate of the NT as a whole.”<sup>111</sup>

To return to the issue of the imperatives of the Australian settler capitalist MOP, the drivers behind this cultural destruction of the Intervention, homelands movement and indigenous lifeways more generally, appear once again to be the imperatives of extraction of minerals and fossil fuels and the engine of capital accumulation. We agree with Altman when he argues that much of the North, including NT, is prospective for mineral extraction and ABD<sup>112</sup> land, much of which, due to the legacy of the land rights movement, aboriginal resistance to colonisation and the ALRA and NTA more specifically, happens to be under Aboriginal land tenure and forms a part of the ever-expanding indigenous estate. This estate could prove an impediment to capital accumulation.

In the current world division of labour, Australian settler capitalist MOP is positioned within it as a major exporter of mineral and fossil fuels, where more than half of Australia’s commodity exports come from mineral and fossil fuels and is worth 15 per cent to the national economy. This, according to the UN, makes it a “mineral dependent economy.”<sup>113</sup> According to many, the mineral export trade is in the “national interest.”<sup>114</sup> It may be the case that, unlike at the dawn of Australian settler capitalism, in the pastoral and cattle industries, Aboriginal labour is not central to this process of ABD.<sup>115</sup> Nevertheless, again, we see genocidal structuring dynamics being conditioned by the imperatives of capital accumulation and the global market.

### **Ecocide and extreme energy<sup>116</sup>**

Indigenous peoples in Australia have had a difficult relationship with extractive industries to date,<sup>117</sup> and in recent years it has become even more problematic as the process of extreme energy has driven the development of new technologies to open up previously untapped resources such as natural gas (mostly methane) which is locked within coal seams (coal seam gas, CSG) under high pressure. It is an extreme energy technology which requires large numbers of wells across a landscape (as opposed to conventional gas which requires fewer wells that tap into large gas pockets that are thousands of metres below the surface). CSG-suitable coal seams are typically nearer the surface – usually no more than 400 metres below – and are often less than a metre thick and are clustered over large areas.<sup>118</sup> The process is considerably more intense than with conventional wells. Indeed before gas can be produced, the balance in the coal structure needs to be significantly altered through dewatering and hydraulic fracturing.<sup>119</sup> The well



must be drilled, the coal seam de-watered (sometimes at a rate of 400,000 litres of water per day as happened with one of the first wells in the Surat Basin), primed with potassium chloride and then hydraulically fractured with water, sand and chemicals that are pumped into the seam at high pressure; once the process is complete theoretically all the surface area of the coal is propped open and gas flows.<sup>120</sup> There are around 40,000 square kilometres of Queensland that have CSG leases currently being developed.<sup>121</sup> Like other fracking processes, what goes on below the surface is just part of the picture. Indeed, fracking's associated activities and infrastructure usually require the construction of roads and pipelines for the gas and saline water, building of water treatment facilities, gas compression stations, high tension power lines and well pad and pipe route rehabilitation.<sup>122</sup> Even though the environmentally destructive impact on the surface is only around two hectares during drilling and a half hectare thereafter, cumulatively CSG production is a landscape altering phenomena of some magnitude. In common with shale gas production, CSG wells do not produce large amounts of gas per well and production declines very quickly so every gas field requires a multitude of interlinked wells, some clustered on "pads," but which can extend thousands of square kilometres.

Much like shale gas fracking, CSG production has produced a similar range of negative environmental and social impacts, which include methane migration, toxic water contamination, air pollution, increased carbon emissions and a general industrialisation of the countryside; whereas CSG specific impacts include depletion of the water table and potentially subsidence.<sup>123</sup> Despite this, CSG is expanding rapidly in Queensland and is moving in to northern New South Wales and the industry anticipates development in other parts of Australia. The rapid expansion of CSG has made it even more difficult than with conventional mining for Aboriginal people to have any kind of say in how it develops and where it develops. In a recent study, Trigger *et al.*<sup>124</sup> found that "issues raised by Aboriginal people in relation to agreements arising from CSG and broader development aspirations" were largely concerned with "links to land (or 'country'), membership of groups of beneficiaries, cultural identity negotiations, representation of collective Aboriginal interests and related governance of groups, and leverage required to negotiate with and extract real outcomes from resource companies." They further note that "these challenges appear to reflect the scale and speed of CSG development, relative to the time taken for making collective decisions by Aboriginal groups and for resolving native title claims in the courts."<sup>125</sup> The study noted "a diverse range of views within and across Aboriginal populations about CSG developments," with some in favour of CSG development but many others objecting to it "as a form of land use." For many indigenous peoples CSG development is but the latest example of the colonial dilemma – accept environmental destruction, and its cultural corollary, for some degree of involvement (be it a negotiated land use agreement with some fiscal benefits, or short-term employment opportunities) with the "development" process. Three recent cases highlight the problems.

Determined in 2007, and covering some 1120 km<sup>2</sup> of Queensland and northern New South Wales, the Githabul native title determination (granting a

non-exclusive right), which includes 9 national parks and 13 state forests,<sup>126</sup> has been the source of significant conflict regarding the CSG issue of late.<sup>127</sup> Following an application by the New South Wales Aboriginal Land Council for gas prospecting in the Tweed and Byron Shires – areas covered by Githabul Native Title – some Elders and representatives decided to distance themselves from both the land council and the Native Title registrar.<sup>128</sup> Githabul spokeswoman Gloria Williams argued that the Native Title agreement was being wrongly used to allow coal seam gas interests into the region:

because we signed off on a consent determination agreement [...] and when we sign off on a consent determination agreement we are literally giving them consent to come and do what they want ... (via) Native Title ... they are coming through our country mining the hell out of it.<sup>129</sup>

Commenting on this statement, Trigger *et al.* argue that it “glosses over underlying factors in the dispute about CSG; namely, intra-Indigenous contestation about representation and authority among Githabul people,” when it seems to actually highlight such intra-indigenous contestation.

Sentiments like that of Gloria Williams are no doubt fueled, at least in part, by the fact that the NSW Aboriginal Land Council (NSWALC) lodged their application without prior consultation with NSW Aboriginal people. In January 2013, Githabul opponents of CSG were reported to be “planning a legal challenge in an international court if necessary against their own to dissolve the Githabul Nation Aboriginal Corporation (GNAC), which approved mining on their country without their consent or approval.”<sup>130</sup> However, NSWALC CEO Geoff Scott accused a reluctant NSW government of “pandering”<sup>131</sup> to opponents in the environmental movement who are fighting its plan to become a player in the coal seam gas industry. The land council’s board decided to become involved in resource extraction apparently in order to generate long-term income and job opportunities for Aboriginal people. In Geoff Scott’s words: “it’s employment opportunities and long-term income streams we are after from this.”<sup>132</sup>

Do you want to get benefit from it or do you want to continue to get the scraps off the table? Do you want to continue to rely on government for your livelihood? I think we owe our children better than that.<sup>133</sup>

For many indigenous peoples the rapid rise of CSG poses yet another stark choice between a settler colonial rock and a hard place; a native title system devoid of a veto power and extreme energy “solutions” being presented, counterfactually, as environmentally “safe” and the only realistic lifeline for economically disadvantaged indigenous communities. The economic reality of CSG production, however, is far more complicated. For example, a recent study<sup>134</sup> has highlighted how Aboriginal people are not as able to access employment opportunities as they had expected from CSG projects. CSG-impacted Aboriginal people identified a range of barriers to such access, including:

- the rapid development of the industry outpacing a group's ability to establish or expand a business interest;
- a lack of access to contracts/contractors, because contracts are too large for local or fledgling businesses to take on;
- a lack of requirements for indigenous business development in major contracts;
- balancing work and cultural responsibilities;
- lack of appropriate formal qualifications;
- limited ability to hold companies and contractors accountable for poor performance and failing to achieve commitments related to Aboriginal employment; and
- frustration with continued training without resulting employment.

As is the case with extreme energy projects around the world, the rhetoric doesn't square with the empirical reality. Despite disagreements between community groups and their elected representatives, such as can be seen with the Githabul example above, other potential CSG development areas are seeing more consistent resistance born out of a greater awareness of the ecocidal externalities of extreme energy technologies and the usual flow of economic benefits. For example, Gomeri country extends from the QLD/NSW border region to Tamworth, Aberdeen/Muswellbrook, Coonabarabran and Walgett, all areas rich in subsurface resources. In January 2012, representatives of the Gomeri people filed an application in the National Native Title Tribunal. The following year the Gomeri Native Title claimants lodged an injunction on mining.<sup>135</sup> Claimant Alf Priestley said the:

Aboriginal people are the land. We are connected to the land, trees, rocks and waters.... Aboriginal people have been forced to sit on the fence about this. Either way our land is being taken away from us. There is only 17 per cent of vegetation left in Australia and that's because these farmers and cities have cleared the land to put crops in and to build big towers. We aren't benefiting out of CSG and neither out of stopping CSG.

Fellow claimant Anthony Munroe stated:

Mining is coming to our country but we are going to fight them every step of the way through the courts, through the protests, and through the support of the Gomeri people. The Gomeri people will not be lying down.

While Michael Anderson, the last remaining member of the original Tent Embassy activists alive, and fellow Gomeri claimant argued that:

native title has not been extinguished on water, and Native Title has never been extinguished over our trees, plants, animals and everything else. We don't care what title you've got, but we're not going to allow you to destroy our connection with all those things.

Running through Gomeri perspectives on coal mining and CSG is an appreciation of the ecocidal impact it will have on their land and a hope that their decision to fight mining will inspire others in the country to do the same.<sup>136</sup> There was considerable support for the Gomeri stance from the anti-fracking movement's Lock the Gate Alliance<sup>137</sup> which is a national grassroots organisation made up of over 30,000 supporters and more than 230 local groups who are concerned about unsafe coal and gas mining. These groups are located in all parts of Australia and include farmers, traditional custodians, conservationists and urban residents. Many of such groups use the influential "CSG-Free Community Strategy" launched by CSG-Free Northern Rivers which goes beyond the idea of locking individual gates to take resistance to the community level; with communities being trained in non-violent civil resistance and encouraged to form local committees to lock local roads to CSG activity, the idea being that as local networks link up then whole valleys and communities will become CSG-Free areas.<sup>138</sup> North West Alliance representative Anne Kennedy said, "I am delighted to support the stand of the Gomeri people.... In our area, Wun-Gali representatives have resolved to declare a moratorium on all coal seam gas activities on their traditional lands and in the Coonamble Shire." Tambar Springs farmer David Quince stated, "I have the greatest respect for the stand made by the Gomeri people, working to make sure this magnificent land remains healthy and capable of supporting humans, and also fauna and flora."<sup>139</sup>

Indigenous resistance to CSG looks to be spreading. The Mithaka People, traditional owners of Queensland's Channel Country, have written to the UN's Special Rapporteur on the Rights of Indigenous Peoples arguing that the government has ignored international law by failing to consult with them over planned coal seam gas activity on their land.<sup>140</sup> Mithaka representative Scott Gorringe was particularly concerned about CSG's effect on water:

Most of our stories start and end around water.... Our main significant sites are around water. Not only culturally, environmentally I think it's critical for that country especially.... You start mucking around with rivers out our way and damaging underground water, it's sitting on the Great Artesian Basin. And we don't know what potentially can happen. You know, mining companies are telling us one thing and they're tainted with a brush. And Government's telling us another and I think they're tainted with the same brush. There's a whole lot of other opportunities that would present themselves out there if people would be strong enough to hold back and have a look at this stuff and have a talk to us about the opportunities we see. But we're not getting that opportunity. The Queensland Government's not talking to us.<sup>141</sup>

Following a tour of Australia's gasfield regions, international lawyer and prominent End Ecocide advocate, Polly Higgins wrote:

The stories I heard over the last two weeks about CSG, the fracking I saw and the extreme levels of community concern I experienced led to the

question: is this not an Ecocide? Surely it cannot be right to subject our people and planet to gasfield processes that cause significant harm.<sup>142</sup>

For indigenous peoples in Australia, many of whom are struggling to survive as distinct peoples in the face of the relentless culturally genocidal pressures we have just discussed, to feel that they have little option but to become involved with an ecocidal industry is a searing indictment of modern Australia and where it is heading. Jared Diamond has argued that Australia may well be the first world's "miners" canary: a developed country facing a rapid decline in living standards as its burgeoning population outstrips its rapidly degrading natural resource base.<sup>143</sup> Indeed, for all the corporate and political talk of extreme energy technologies providing "sustainable" energy, it is a gross misunderstanding at best and a barefaced lie at worst. There is nothing sustainable about scraping the bottom of the fossil fuel barrel. Indeed, as mentioned earlier, it is testament to the fact that most conventional sources of energy have peaked. In a holistic analysis, Diamond goes further than detailing unsustainable ecocidal energy extraction to discuss Australia's profound ecological crisis. He highlights acute problems of soil fertility and salinisation, land degradation, diminishing freshwater resources, distance costs, over-exploitation of forests and fisheries, importation of inappropriate European agricultural values and methods and alien species, alongside related problems of trade and immigration policies. Diamond concludes that the "mining" of Australia's natural resources, i.e. their unsustainable exploitation at rates faster than their renewal rates since European settlement began, means that Australia illustrates in extreme form the exponentially accelerating horse race in which the world now finds itself. ("Accelerating" means going faster and faster; "exponentially accelerating" means accelerating in the manner of a nuclear chain reaction, twice as fast and then 4, 8, 16, 32 ... times faster after equal time intervals.) On the one hand, the development of environmental problems in Australia, as in the whole world, is accelerating exponentially. On the other hand, the development of public environmental concern, and of private and governmental countermeasures, is also accelerating exponentially. Which horse will win the race?<sup>144</sup>

The environmental picture for Australia is even worse if we consider the wider impact of this "mining" of a continent – its impact on global emissions. Much like with recent studies of shale gas in North America, recent studies concerning fugitive emissions from CSG fields in Australia is reporting concerning results regarding potential methane emissions. The report<sup>145</sup> found consistently elevated methane and carbon dioxide concentrations within the CSG fields of the Darling Downs. The study clearly showed that there is something going on in these areas leading to increased atmospheric greenhouse gas concentrations but, of course, the negligent, arguably criminal, lack of baseline studies makes it very difficult to prove the chain of causation. However, the study's lead author, Dr Damien Maher, said there were clues as to where the methane and carbon dioxide was coming from: "The technology we used gives us additional information about the methane and carbon dioxide, and the methane in the atmosphere

of the Darling Downs gasfield has a very similar fingerprint to methane in the CSG of the region.”

National coordinator for Lock the Gate, Phil Laird, welcomed the report:

This study takes a landscape approach to fugitive emissions. It suggests that, not only do wells, pipes and other infrastructure leak, but the ground may also be leaking through cracks and fissures after the coal seams are depressurized and the gas is mobilized. It is devastating for human health and the environment. Fugitive methane emissions are strong indicators of the presence of toxic gases such as sulphur oxide, nitrogen oxide and volatile organic compounds. Gases that likely contributed to health impacts to the residents of Tara.... This study shows that people and gasfields should not mix.... The research clearly shows that unconventional gas is far from a “transition fuel” and is in fact a dirty, emissions heavy energy source that neither community health nor the planet can afford. It is reckless in the extreme that both state and federal governments allowed drilling to commence without strong baseline studies in place.<sup>146</sup>

It is not hard to see why Australia has recently been named the worst performing industrial country on climate change.<sup>147</sup> The report states:

The new conservative Australian government has apparently made good on last year’s announcement and reversed the climate policies previously in effect. As a result, the country lost a further 21 positions in the policy evaluation compared to last year, thus replacing Canada as the worst-performing industrial country.<sup>148</sup>

The report, produced by the thinktank Germanwatch and Climate Action Network Europe, covers the top 58 emitters of greenhouse gases in the world and about 90 per cent of all energy-related emissions. Jan Burck, one of the report authors, stated:

It is interesting that the bottom six countries in the ranking – Russia, Iran, Canada, Kazakhstan, Australia and Saudi Arabia – all have a lot of fossil fuel resources. It is a curse. The fossil fuel lobbies in the countries are strong. In Australia they stopped what were some very good carbon laws.<sup>149</sup>

While Erwin Jackson of the Australian charity the Climate Institute argued, “Australia has been heading backwards by undertaking actions such as attempting to kneecap the renewable energy industry through regressive policy changes.”<sup>150</sup>

Such a direction for Australia is particularly concerning given the world’s need to drastically reduce greenhouse gas emissions. Moreover, it is positively irrational if you consider that much of Australia’s environment is currently a very harsh and inhospitable place. Combine that with the ecological crisis Jared

Diamond has highlighted, and the recent Commonwealth Scientific and Industrial Research Organisation (CSIRO) and the Bureau of Meteorology report that predicts climate change will hit Australia harder than the rest of the world.<sup>151</sup> Indeed, the current irrational preference for a “business-as-usual” approach to burning fossil fuels will likely hit Australia with a catastrophic temperature rise of more than 5C by the end of the century, outstripping the rate of warming experienced by the rest of the world.

Here we can see another dimension of the genocide-ecocide nexus; the possibility of viable human adaptation and survival in an even harsher environment is currently being undermined by the continuing culturally genocidal policies inflicted on indigenous peoples by the settler colonial authorities. If we consider how we have responded as a species to environmental changes in the past, unlike other creatures that adjusted to change in their environment through gradual biological adaptation, humans generally created innovative ways to live and communicate, and passed such knowledge down to their children.<sup>152</sup> Cultural diversity – the multitude of ways of living and communicating knowledge – gave humans an adaptive edge; developing analytical tools to identify and assess change in their environment to search out or devise new strategies, and to communicate and incorporate these strategies throughout their group.<sup>153</sup> As anthropologist Barbara Rose Johnston points out, “for the human species, culture is our primary adaptive mechanism.” The continued culturally genocidal pressures on indigenous people in Australia endanger not just their own survival as distinct peoples but also the adaptation potential for the settler nation more broadly.

### **A series of ongoing capitalist genocides and ecocides**

Use of the term “genocide” to describe the colonial experience has been met with scepticism from some quarters.... Yet the political posturing and semantic debates do nothing to dispel the feeling Indigenous people have that this is the word that adequately describes our experience as colonised peoples.<sup>154</sup>

(Larissa Behrendt)

It may be that the Australian case is not a continuing genocide as such but *a series of continuing genocides* in which possibly hundreds of distinct indigenous social figurations are suffering dispossession, loss of autonomy, significant mental and physical harm, cultural erosion and ecocidal damage to their environment. Even though genocidal social death can be produced without specific “intent to destroy” we would argue that there is reasonably foreseeable intent here. Whatever the underlying *motives*, certainly the forcible dispossessions *are intentional*, the exertion of *forcible* control over peoples’ lives *is intentional*, and the moves to *forcibly* coerce people off their sacred Homelands *are intentional*. Although the resulting physical, cultural and mental harm may be the opposite of the alleged motivation and hence not *prima facie* intentional as such, in traditional British legal parlance “foresight and recklessness” as to the consequences



of action are “evidence from which intent may be inferred.”<sup>155</sup> How else should we interpret the repeated reckless disregard for the views of those indigenous peoples affected by policies like the Intervention in its various guises *and* the repeated failure of successive governments to learn the “great lesson” articulated by the Royal Commission into Aboriginal Deaths in Custody back in 1991?

The great lesson that stands out is that non-Aboriginals, who currently hold all the power in dealing with Aboriginals, have to give up the usually well intentioned efforts to do things for or to Aboriginals, to give up the assumption that they know what is best for Aboriginals ... who have to be led, educated, manipulated, and re-shaped into the image of the dominant community. Instead Aboriginals must be recognised for what they are, peoples in their own right with their own culture, history and values.<sup>156</sup>

Along with this emphasis on self-determination, a central conclusion of the Royal Commission was that the root cause of current structurally entrenched social inequality was the dispossession of land. Over the last few decades, numerous other official reports have reached the same conclusions and yet “Aboriginal Affairs” policy continues to move ever further away from measures that could halt the genocides – genuine de-colonising self-determination, meaningful land rights and respect for the principle of “free prior and informed consent” towards further dispossession, disempowerment and assimilation. This is genocidal, although of course not in international law since the cultural methods of genocide were largely removed from the final Convention. Nevertheless, by invoking a broader understanding of genocide in keeping with Lemkin’s ideas, this chapter has sought to highlight the *continuing* genocidal context in which many, but not all, indigenous peoples in Australia live, the seriousness of *present-day* culturally destructive state policies and a potentially de-colonising pathway out of the “relationship of genocide.”<sup>157</sup>

Fundamentally, this chapter has sought to reveal the important dimensions of the genocide-ecocide nexus; from the settler colonial land grabs at the “rosy dawn” of Australian settler capitalism, to the modern day “minocracy” that shapes Aboriginal affairs and episodes like the Intervention and the cultural destruction of the homelands movement, or the rise of the capitalist driven process of extreme energy and CSG production; at every juncture and turning point, the continuities, breaks and departures in the relations of genocide must be understood in articulation with the imperatives of capital accumulation and the global chains of capitalist production and trade.

## Notes

- 1 Indeed, Dirk Moses writes, “The term genocide is used to refer to two phenomena in Australian history: frontier violence, mainly in the nineteenth century, and the various policies of removing Aboriginal children of mixed descent from their families, mainly in the twentieth century.” A. Dirk Moses, “Genocide and Settler Society in Australian History,” in *Genocide and Settler Society: Frontier Violence and*

- Stolen Indigenous Children in Australian History*, ed. A. Dirk Moses (Oxford: Berghahn Books, 2004), 16. For detailed discussion on the question of cultural genocide in Australia, see Robert van Krieken, "The Barbarism of Civilization: Cultural Genocide and the 'Stolen Generations'," *British Journal of Sociology* 50, no. 2 (1999): 297–315; "Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation," *Oceania* 75, no. 2 (2004): 125–151; and in particular "Cultural Genocide in Australia," in *The Historiography of Genocide*, ed. Dan Stone, 128–155 (London: Palgrave Macmillan, 2008).
- 2 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 388.
  - 3 Tony Barta, "With Intent to Deny: On Colonial Intentions and Genocide Denial," *Journal of Genocide Research* 10, no. 1 (2008): 115.
  - 4 Wolfe, "Settler Colonialism and the Elimination of the Native," 387.
  - 5 Smith, A. (2005). *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: MA: South End Press), 121.
  - 6 Abed, Mohammed, "Clarifying the Concept of Genocide," *Metaphilosophy* 37, nos. 3–4 (2006): 326.
  - 7 As Barta put it, "They appear actually to vanish from the face of the Earth." See Tony Barta, "Aborigines and the European Project in Australia Felix," *Journal of Genocide Research* 10, no. 4 (2008): 519–539.
  - 8 Tony Barta, "Relations to Genocide: Land and Lives in the Colonization of Australia," in *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, eds. Isidor Wallimann and Michael N. Dobkowski (Syracuse: Syracuse University Press, 2000), 248.
  - 9 Barta ends his paper suggesting that "relations of genocide are alive," while Wolfe argues, correctly in our view, that settler colonialism is structure not an event. See Barta, "Relations to Genocide," 248; Wolfe, "Settler Colonialism and the Elimination of the Native," 387.
  - 10 Such as Kevin Buzzacot and Darren Blomfeld from the Tent Embassy, Michael Anderson and John Ah Kitt, to name a few.
  - 11 Martin Crook and Damien Short, "Marx, Lemkin and the Genocide–Ecocide Nexus," *The International Journal of Human Rights* 18, no. 3 (2014): 298–319.
  - 12 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace Division of International Law, 1944), 79.
  - 13 Wolfe, "Settler Colonialism and the Elimination of the Native," 388.
  - 14 Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016), 28.
  - 15 Wolfe, "Settler Colonialism and the Elimination of the Native."
  - 16 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977).
  - 17 This comes from Marx's infamous quip about the brutality and violence of the origins of capital accumulation or, as it is known technically, primary accumulation. See Karl Marx, *Capital, Vol. 1* (London: Penguin Books, 1976), 915.
  - 18 Christopher Lloyd, "The Emergence of Australian Settler Capitalism in the Nineteenth Century and the Disintegration/Integration of Aboriginal Societies: Hybridisation and Local Evolution within the World Market," in *Indigenous Participation in Australian Economies*, ed. Ian Keen (Canberra: Australian National University Press, 2010), 24.
  - 19 This was not the only consideration for London. The colonies in NSW also served a strategic importance, in that it would stymie efforts by the French empire to set up a Pacific trading hub on the Australian continent.
  - 20 Marx, *Capital, Vol. 1*, 773.
  - 21 *Ibid.*

- 22 Ibid., 796.
- 23 Christopher Lloyd, "The Emergence of Australian Settler Capitalism," 26. It would not be until the 1830s that a purely capitalist form of free labour predominated.
- 24 Ibid., 27.
- 25 Bill Thorpe, "Aboriginal Employment and Unemployment: Colonised Labour," in *Beyond Industrial Sociology: The Work of Men and Women*, eds. Claire Williams and Bill Thorpe (North Sydney: Allen and Unwin, 1992); Charles Rowley, *The Destruction of Aboriginal Society* (Canberra: Australian National University Press, 1972), 157–221.
- 26 A. Dirk Moses, "An Antipodean Genocide? The Origins of the Genocidal Moment in the Colonization of Australia," *Journal of Genocide Research* 2, no. 1 (2000): 96.
- 27 Wolfe, "Settler Colonialism and the Elimination of the Native," 394.
- 28 Ibid., 388.
- 29 Damien Short, "Cultural Genocide and Indigenous Peoples: A Sociological Approach," *The International Journal of Human Rights* 14, no. 6 (2010): 833–848.
- 30 Marx, *Capital, Vol. 1*, chapters 25–32; Jim Glassman, "Primitive Accumulation, Accumulation by Dispossession, Accumulation by 'Extra-Economic' Means," *Progress in Human Geography* 30, no. 5 (2006): 608–625.
- 31 John Bellamy Foster, "The Treadmill of Accumulation," *Organization and Environment* 18, no. 1 (2005): 7–18.
- 32 Crook and Short, "Marx, Lemkin and the Genocide–Ecocide Nexus," 300; Marx, *Capital, Vol. 1*.
- 33 David Norman Smith, "Accumulation and the Clash of Cultures: Marx's Ethnology in Context," *Rethinking Marxism: A Journal of Economics, Culture and Society* 14, no. 4 (2002): 79.
- 34 Wolfe, "Settler Colonialism and the Elimination of the Native."
- 35 Harvey, David, "The 'New' Imperialism: Accumulation By Dispossession," in *Socialist Register*, eds. Leo Panitch and Colin Leys (Halifax: Fernwood, 2003), 63–88.
- 36 Paul Havermann, "Mother Earth, Indigenous Peoples and Neo-Liberal Climate Change Governance," in *Handbook of Indigenous Peoples Rights*, eds. Corinne Lennox and Damien Short (New York: Routledge, 2016), 186; Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2016).
- 37 Martin Crook *et al.*, "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Global Ecosystems Environments," *Theoretical Criminology* 22, no. 3 (2018): 298–317.
- 38 The historian and genocide scholar Dirk Moses would describe in essentialised terms the rise of two schools in the genocide studies field: the liberal school which adopts a much more legalistic state-centred definition of genocide; and a post-liberal or colonial school which adopts a more holistic and historically nuanced definition which sees genocide emanating from social and political structures rather than necessarily inhering in individuals. This arguably stems from the understandable influence of the Holocaust and the legacy of a genocide convention, stripped of its master concept of "culture" and bowdlerized and truncated by expediencies of the Cold War. See A. Dirk Moses, "Conceptual Blockages and Definitional Dilemmas in the 'Racial Century'," *Patterns of Prejudice* 36, no. 4 (2002): 7–36.
- 39 Patrick Wolfe, "Structure and Event: Settler Colonialism, Time, and the Question of Genocide," in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (Oxford: Berghahn Books, 2008), 102–132; Martin Crook, "The Mau Mau Genocide: A Neo-Lemkinian Analysis," *Journal of Human Rights in the Commonwealth* 1, no. 1 (2013): 21.
- 40 Dominik Schaller, "Colonialism and Genocide – Raphael Lemkin's Concept of Genocide and its Application to European Rule in Africa," *Development Dialogue* 50 (2008): 75–93, and "From Conquest to Genocide: Colonial Rule in German

- Southwest Africa and German East Africa,” in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (Oxford: Berghahn Books, 2008).
- 41 Lemkin, *Axis Rule in Occupied Europe*.
- 42 Foucault, *Discipline and Punish*.
- 43 Two pathbreaking studies in Australian historiography which help unearth the history of aboriginal participation in the settler economy are Rowley, *The Destruction of Aboriginal Society*, and Henry Reynolds, *With the White People* (Ringwood, Vic., Australia: Penguin Books, 1990).
- 44 Terry Irving, *Challenges to Labour History* (Sydney, NSW, Australia: UNSW Press, 1994).
- 45 Jon Altman, “Development Options on Aboriginal Land: Sustainable Indigenous Hybrid Economies in the Twenty-First Century,” in *The Power of Knowledge: The Resonance of Tradition*, eds. Luke Taylor *et al.* (Canberra: Aboriginal Studies Press, 2005), 34–48.
- 46 For a detailed study of the Aboriginal MOP, see N.G. Butlin, *Economics and the Dreamtime* (Cambridge: Cambridge University Press, 2010).
- 47 Lloyd, “The Emergence of Australian Settler Capitalism,” 33.
- 48 Reynolds, *With the White People*; Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English Settler Colonialism* (Toronto: University of Toronto Press, 2005), 84–86; Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770–1972* (Sydney, NSW: Sydney University Press, 2008), 66–88.
- 49 Lloyd, “The Emergence of Australian Settler Capitalism,” 32.
- 50 Thorpe, “Aboriginal Employment and Unemployment,” 157–221.
- 51 *Ibid.*
- 52 Stewart Harris, *It’s Coming Yet: An Aboriginal Treaty within Australia between Australians* (Aboriginal Treaty Committee, 1979), 12.
- 53 S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004), 104.
- 54 *Ibid.*
- 55 Broadly speaking, this concept incorporates the political rights to autonomy and self-government and can be achieved without impacting upon the territorial integrity of the settler state itself. Furthermore, as Pritchard notes, “The right to self-determination embraces a comprehensive scale of realisation-possibilities, including: the creation of a State, secession, self-government and self-administration.” See Sarah Pritchard, “The Rights of Indigenous Peoples to Self-Determination under International Law,” *Aboriginal Law Bulletin*, available at [www.austlii.edu.au/au/journals/AboriginalLB/1992/16.html](http://www.austlii.edu.au/au/journals/AboriginalLB/1992/16.html). In the Australian context, the realisation of this right will stretch across the range of possibilities Pritchard lists, varying according to the nature of the indigenous group to which it is directed. For at least those 250 groups who have, to date, proven a continuing connection to their ancestral lands, and who still primarily live in accordance with distinct “traditional” laws and customs, referred to earlier (note 9) it could involve the negotiation of a decolonising international legal instrument (with the indigenous peoples being regarded as nations equal in status but not in form to the settler state) independent of the institutions of all parties and the establishment of an impartial implementation mechanism. This approach was advocated by the National Aboriginal and Islander Legal Service Secretariat (NAILSS) to the UN in the 1990s. See Pritchard (above) on this and for a more theoretical outline of such “treaty federalism,” see the excellent chapter by James Tully, “The Struggles of Indigenous Peoples for and of Freedom,” in *Political Theory and the Rights of Indigenous Peoples*, eds. Duncan Ivison, Paul Patton and Will Sanders (Cambridge: Cambridge University Press, 2000), 36–59. For those indigenous peoples whose indigeneity is primarily based on

- “placelessness,” as Paul Havemann has termed it, see “Denial, Modernity and Exclusion: Indigenous Placelessness in Australia,” *Macquarie Law Journal* 5 (2005): 57–80, or on a lack of culture and who have been dispossessed from their ancestral lands, it could simply involve having a meaningful role in the design and implementation of those government policies directed at them; loosely covered by Pritchard’s notion of “self-administration” (see Pritchard, “The Rights of Indigenous Peoples”).
- 56 Barta, “Relations to Genocide,” 248.
- 57 Damien Short, “The Social Construction of Indigenous Native Title Land Rights in Australia,” *Current Sociology* 55, no. 6 (2007): 857.
- 58 See Jared Diamond, *Collapse: How Societies Choose to Survive or Fail* (London: Penguin, 2006), 396.
- 59 Wolfe, “Settler Colonialism and the Elimination of the Native.”
- 60 Jon Altman, “Indigenous Rights, Mining Corporations, and the Australian State,” in *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State*, eds. Suzana Sawyer and Edmund Terrence Gomez (Basingstoke: Palgrave Macmillan, 2012), 46–74.
- 61 See Short, “The Social Construction of Indigenous Native Title Land Rights.”
- 62 Albert Edward Woodward, “Aboriginal Land Rights Commission: Second Report, Parliamentary Paper No. 69,” (April 1974), 418, available at <http://apo.org.au/system/files/36136/apo-nid36136-151601.pdf>.
- 63 Coulthard, *Red Skin, White Masks*, 3.
- 64 Barta, “Relations to Genocide”; Damien Short, “Australia: A Continuing Genocide?” *Journal of Genocide Research* 12, no. 1–2 (2010): 45–68; Haifa Rashed and Damien Short, “Can a Lemkin Inspired Genocide Perspective Aid Our Understanding of the Palestinian Situation?” *International Journal of Human Rights* 16, no. 8 (2012): 1142–1169; Coulthard, *Red Skin, White Masks*.
- 65 Coulthard, *Red Skin, White Masks*, 11–12; Colin Samson and Carlos Gigoux, *Indigenous Peoples and Colonialism: Global Perspectives* (Cambridge: Polity Press, 2017), xi; Damien Short, *Redefining Genocide*, 17; Crook and Short, “Marx, Lemkin and the Genocide–Ecocide Nexus.”
- 66 Samson and Gigoux, *Indigenous Peoples and Colonialism*, xi.
- 67 Chantal Mouffe (ed.), *Gramsci and Marxist Theory* (London: Routledge, 2014).
- 68 Martin Freeman, *Human Rights: An Interdisciplinary Approach* (Oxford: Polity, 2002), 85.
- 69 See Damien Short, *Reconciliation and Colonial Power* (London: Routledge, 2008), 65–86.
- 70 CERD. Decision 1(53); Cerd/C/53/Misc.17/Rev.2, 11 August (1998).
- 71 Mal Brough, Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Act 1976 Amendment Bill 2006, Commonwealth Parliament of Australia, House of Representatives.
- 72 Ibid.
- 73 Altman cites one community a whole year later. See Jon Altman, “The ‘National Emergency’ and Land Rights Reform: Separating Fact from Fiction: An Assessment of the Proposed Amendments to the Aboriginal Land Rights (Northern Territory) Act 1976,” briefing paper for *Oxfam Australia*, Centre for Aboriginal Economic Policy Research, The Australian National University, 7 August 2007, p. 6. Consequently, under the new Northern Territory policy “Stronger Futures” there is even more of a steer towards opening up indigenous land to economic development, with extractive industries no doubt at the top of the waiting list.
- 74 “Dodson lashes out at ‘sinister intervention’,” *Sydney Morning Herald*, 13 September 2007.
- 75 “Indigenous intervention ‘genocide’,” AAP, 7 August 2007.
- 76 Ampe Akelyernemane Meke Mekarle, *Little Children are Sacred*, Northern Territory Government, Board of Enquiry into the Protection of Aboriginal Children

- from Sexual Abuse, available at [www.inquirysaac.nt.gov.au/pdf/bipacsa\\_final\\_report.pdf](http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf).
- 77 See UN Special Rapporteur James Anaya's comments available at [www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.doc](http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.doc).
- 78 Altman, "The 'National Emergency' and Land Rights Reform," 9.
- 79 Marcia Langston, "Trapped in the Aboriginal Reality Show," *Griffith REVIEW*, 19, available at [www.griffithreview.com/images/stories/edition\\_articles/ed19\\_pdfs/langton\\_ed19.pdf](http://www.griffithreview.com/images/stories/edition_articles/ed19_pdfs/langton_ed19.pdf); Noel Pearson, "Noel Pearson discusses the issues faced by Indigenous communities," *ABC Lateline Interview*, 26 June 2007, available at [www.abc.net.au/lateline/content/2007/s1962844.htm](http://www.abc.net.au/lateline/content/2007/s1962844.htm).
- 80 Alison Vivian and Ben Schokman, "The Northern Territory Intervention and the Fabrication of 'Special Measures'," *Australian Indigenous Law Review* 13, no. 1 (2009): 97.
- 81 Prescribed Area Peoples' Alliance, Press Release, 7 November 2008, on file with author.
- 82 Ibid.
- 83 Peter O'Mara, "Health impacts of the Northern Territory Intervention," *Medical Journal of Australia* 192, no. 10 (2010). Executive summary, available at [www.mja.com.au/public/issues/192\\_10\\_170510/oma10307\\_fm.pdf](http://www.mja.com.au/public/issues/192_10_170510/oma10307_fm.pdf).
- 84 Ibid.
- 85 Ibid.
- 86 Ibid. The government has since engaged in "consultations" with some indigenous peoples but on the understanding that the Intervention will continue – only the fine detail is up for discussion. These "consultations" have since been exposed as grossly inadequate in a major response from the group known as "concerned Australians" in conjunction with the relevant Aboriginal Communities in the Northern Territory, and authors Michele Harris, Larissa Behrendt and Nicole Watson titled *Will They Be Heard?* Available at <http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf>.
- 87 Altman, "The 'National Emergency' and Land Rights Reform," 9.
- 88 See [www.gneppartnership.org](http://www.gneppartnership.org).
- 89 See comments by the then Resources Minister Martin Ferguson who stated "there's going to be uranium mining on an increasing basis in Western Australia, South Australia and the Northern Territory, we'll see uranium mining in Queensland in due course." Available at [www.abc.net.au/news/stories/2009/07/21/2631570.htm](http://www.abc.net.au/news/stories/2009/07/21/2631570.htm).
- 90 For a basic introduction and pictures of the surface impacts of these mines see [www.world-nuclear.org/info/Country-Profiles/Countries-A-F/Appendices/Australia-s-Uranium-Mines](http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/Appendices/Australia-s-Uranium-Mines), and for but one example of wider environmental impacts see Lindsay Murdoch (2009) "Polluted Water Leaking into Kakadu from Uranium Mine," *The Age*, 13 March 2009, available at [www.theage.com.au/national/polluted-water-leaking-into-kakadu-from-uranium-mine-20090312-8whw.html](http://www.theage.com.au/national/polluted-water-leaking-into-kakadu-from-uranium-mine-20090312-8whw.html).
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# 7 Colonialism and cold genocide

## The case of West Papua

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### Introduction

The Genocide Convention emerged in response to the Holocaust, and the more closely mass atrocities resemble the Holocaust in form, extent, and motive the more likely they are to be labelled genocide. Yet many cases of genocide are atypical in the sense that they do not conform closely to these Holocaust-based understandings of genocide. West Papua, the western half of the island of New Guinea, may be one such case.<sup>1</sup> The continuing influence of the Holocaust over our perceptions of genocide contributes to a substantial blind spot – so-called slow motion genocides – in genocide studies. Such genocides occur incrementally, over years, or even generations. Colonial or neo-colonial genocides targeting indigenous peoples often occur in such a manner. In these cases, the physical destruction of the indigenous nation may not be directly intended; rather, the perpetrators substantially undermine the foundations of existence for indigenous groups through systemic oppression or wilfully reckless policies. These policies are often rooted in dehumanising constructions of indigeneity whereby indigenous people are said to be primitive obstacles to the progress of civilisation and the collective interests of the legitimate political community.

West Papuan indigenous peoples have had their identity, autonomy, and physical security substantially undermined through the neo-colonial policies of the Indonesian state. This systematic campaign appears to be genocidal in that it aims at the disappearance of the (West) Papuan group, as an autonomous political and ethnic identity; yet, it is difficult to classify as genocide due to the survival of most Papuan individuals. Moreover, any ostensibly genocidal policies in West Papua have indirect intent and gradual result. In this chapter, I will explore the case of West Papua to address slow-motion genocides, or cold genocides, as I have labelled them in my analytical framework. It will situate (neo-)colonial cold genocides within the broader phenomenon of genocide, before analysing the case of West Papua. It will also critically assess the implications of the West Papua case, and similar cases, for our understanding of genocide. It will argue that not all genocides are high-intensity episodes of mass killing, rather the destruction of the group can also be realised through cold genocides characterised by gradual destruction, repression, and limited killing.



***Primitivism and progress: colonialism and genocide***

When Raphael Lemkin first crafted the concept of genocide in 1941, he was undoubtedly informed by contemporaneous atrocities in Nazi-occupied Europe, yet he saw genocide as a recurrent historical phenomenon. Moreover, his writings specifically linked genocide and the practice of colonialism.<sup>2</sup> Even so, colonial genocides, and neo-colonial genocides in particular, are far more contested in genocide scholarship than the canonical genocides of the twentieth century such as the Holocaust, Rwandan Genocide, and Armenian Genocide.

The colonial genocide debate often centres on the means and intention of the perpetrators; specifically, did the perpetrators act with the intent to destroy the group, and was the campaign focused on physical destruction? Much of this debate arises from a particular interpretative lens for the 1948 Genocide Convention, which privileges high-intensity campaigns of killing over other more gradual genocidal approaches.

Colonialism is characterised by a regime of foreign domination, the expropriation of land and resources, and the imposition of foreign ideologies and belief systems. Under colonialism the destruction of indigenous peoples is often seen as incidental and inevitable. In a sense, then, the destruction of the victims is motivated less by hate and more by assumed supremacy.<sup>3</sup> Supremacy can be distinguished from hate in that in supremacy crimes the victim is not seen as an existential threat. Once victims become a perceived existential threat, i.e. in cases where they resist the perpetrators' imposition of authority, perpetrator motivation may transition from supremacy to hate. Hate crimes, unlike supremacy crimes, require the complete destruction of the offending group – assimilation is no longer a reasonable possibility. Such destruction is deemed essential to the survival of the perpetrator group. The victim group's threat may be constructed in terms of their power or their *pollution*. In many cases victims may be so devalued that their destruction becomes immaterial, a functional means to an end.

In the colonial context, resistant groups, such as the Herero in German Southwest Africa, are no longer seen as so-called noble savages but rather a malevolent force. For example, in the official inquiry following the German genocide of the Herero and Nama indigenous peoples in 1904, the causes of the killing were determined to be "the arrogance of the natives and ... their confidence in their superiority over the Germans".<sup>4</sup> When colonial genocides are motivated by hate they are more likely to be manifested as direct killing and easier to identify as genocide. In contrast, many colonial genocides targeting indigenous peoples are built on notions of supremacy and utilise the broad destructive means foreseen in Raphael Lemkin's definition of genocide: "A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups."<sup>5</sup>

In contrast to Lemkin, I believe that the aim of colonial genocides is not always the annihilation of the group; rather, such annihilation could be a beneficial outcome, facilitating other policy goals. This destruction of the group is rooted in ideologies of racial supremacy whereby civilisation and culture exist in

direct opposition to biology. In fact, the closer a group is perceived to be to living in a “state of nature”, the more it can be said to lack civilisation. Bodies without civilisation are animal bodies. Thus, indigenous peoples, traditionally living in close connection to the natural world, are dehumanised and placed outside of the human moral community.

Peoples conceptualised as primitive, such as the indigenous inhabitants of West Papua, are not fully-valued but rather exist only as half-human obstacles to progress – components of a menacing topography. Colonialism seeks to exert total power over the environment of which indigenous peoples are a part. While some scholars have argued that the intention of colonial regimes was (and is) the exploitation of labour and natural resources rather than the destruction of the indigenous labour pool, this interpretation ignores the desire of the colonial regimes to possess the land in its entirety, irrespective of the local population.<sup>6</sup> Total possession is only possible if the indigenous inhabitants are a non-entity, either destroyed or invisible.

The removal or destruction of indigenous peoples is often instrumental, yet still deeply rooted in prejudicial notions privileging in-groups and denigrating out-groups. In many cases where indigenous peoples are substantially destroyed through interaction with foreign groups, this destruction lacks the directed nature of genocides, such as the 1994 Rwandan Genocide.

Rather, indigenous genocides bear the flavour of inevitability. The discourse goes that the extinction of indigenous groups is an inevitable result of historical progress – like the dodo bird, indigenous peoples suffer evolutionary unfitness: a failure to adapt and thrive in the modern world.<sup>7</sup> For example, British theologian Frederic Farrar, a pall-bearer at Darwin’s funeral, argued that indigenous peoples were “irreclaimable savages” predestined to “disappear from before the face of it [the earth] as surely and as perceptibly as the snow retreats before the advancing line of sunbeams”.<sup>8</sup> This inevitability also acts as a causal explanation for the disappearance of indigenous peoples.<sup>9</sup> Inevitability removes agency and neutralises the accountability of perpetrators, a pattern of perpetrator self-justification familiar to criminologists.<sup>10</sup> Where indigenous people are destroyed through disease, forced displacement, or cultural genocide, perpetration may not be intentional in the manner envisaged in the Genocide Convention, but rather, foreseeable. Inevitability also occurs in non-colonial genocides, yet in those genocides it arises from the power of the perpetrators and the context created by the state rather than racial notions of inferiority.<sup>11</sup>

Indigenous groups have long been subject to racist ideologies, which characterise them as primitive and inferior. Indeed, the assumption of all civilising missions is that only by removing indigeneity can progress be achieved. Prejudicial theories also provide a ready justification for the monopolisation of economic and political power by colonial regimes.<sup>12</sup>

The key features of colonial genocides include: their foreign (extraterritorial) origin, their strongly instrumental character (where the primary objective is the seizure of territory and resources), and their frequent focus on the essential conditions of life of indigenous groups rather than direct physical extermination,

although such exterminatory killing also takes place in certain cases. Indigenous groups are often characterised as racially inferior rather than being insidious enemies in the manner of, for example, the Tutsis of Rwanda. While colonies have mostly disappeared from the world, with exceptions such as French Polynesia, colonial ideologies in the form of justifiable dominion over so-called primitive groups persist in many countries worldwide, such as Indonesian West Papua.

### **The case of West Papua**

Since contact with Europeans, West Papua has often been seen by outsiders as a primitive and marginal region. Under Dutch rule, West Papua was a periphery of the periphery: it was marginal to the Dutch East Indies, which were themselves marginal in relation to the Netherlands core.<sup>13</sup> This marginality has continued under Indonesian rule, whereby West Papua is a kind of resource-rich hinterland – an empty treasure trove for the state of Indonesia. The Papuans themselves are often depicted as stone-age – a timeless people existing outside of the inexorable march of historical progress. This *apartness* of the Papuans is both romanticised and demonised: West Papua is an anachronistic museum piece to be preserved or destroyed in the context of modernisation.

West Papua has been inhabited by Papuan peoples for at least 42,000 years.<sup>14</sup> The Papuans are Melanesians, a cultural and ethnic grouping which includes indigenous peoples living in the Southwest Pacific (in countries such as Papua New Guinea, Vanuatu, the Solomon Islands, New Caledonia, and Fiji). For much of their history Papuans lived in small villages spread throughout the vast and rugged landscape of the island of New Guinea. This isolation contributed to a tremendous ethno-linguistic diversity with 1,319 languages spoken in the Melanesian region (the majority of which are in New Guinea).<sup>15</sup> Prior to foreign domination West Papua consisted of numerous indigenously-governed states.<sup>16</sup>

The island was named by Spanish explorers in 1546, who thought that the inhabitants resembled the Guineans of West Africa. The French and British also made incursions into West Papua but the Dutch were the first to set up a foreign presence on the island. The Dutch governed indirectly by recognising the sovereignty of its vassal state, the Sultanate of Tidore, over New Guinea in 1660. The island was seen as possessing too great a challenge with too meagre material rewards for the Dutch to directly colonise. Although the Dutch established administrative posts in West Papua in 1898 and 1902, Dutch intervention remained minimal. Nonetheless, local resentment towards colonial officials brought in from other parts of the Dutch East Indies grew.<sup>17</sup> Royal Dutch Shell also began to develop West Papua's oil reserves in 1907.

When Indonesia became independent in 1949, the Dutch retained West Papua as a separate territory, to be granted independence at a later date, on the grounds that the Papuans were a distinct people and territory, thus not really part of the Dutch East Indies at all. The Dutch argued that West Papuans needed protection because they were “on a much more primitive level than any other people in

Indonesia.”<sup>18</sup> The Dutch also desired to retain West Papua as a foothold in Southeast Asia. Indonesia continued to claim the territory, on the grounds that all of the former Dutch East Indies constituted a single territorial entity, to form the basis for the new state of Indonesia. This claim was rejected by some of Indonesia’s founding fathers, notably Mohammed Hatta, who recognised that Papuans were ethnically distinct.<sup>19</sup> Nonetheless, a propaganda campaign was initiated calling for the “reunification” of West Papua with Indonesia.

Upon rejection of a proposed 1957 UN resolution recognising Indonesian sovereignty over West Papua, Indonesian President Sukarno seized Dutch enterprises in Indonesia and announced the expulsion of Dutch residents.<sup>20</sup> Four years later, Papuans prepared for independence by creating their flag, the morning star, and electing representatives to a New Guinea Council. Sukarno responded by calling on Indonesians to liberate the territory of West Papua from Dutch rule so that it could be reunited with the rest of Indonesia. After significant Indonesian military incursions in 1962 (defeated by the Dutch), and facing growing international pressure, the Netherlands agreed to a staged transition of West Papua to Indonesian rule on the condition of a plebiscite on the future of the territory. Constantin Stavropoulos, the United Nations’ legal counsel at that time, argued that there was a strong presumption in favour of the self-determination of the Papuans,<sup>21</sup> although a contemporaneous British diplomatic cable argued that it was unthinkable to imagine “the US, Japanese, Dutch or Australian government putting at risk their economic and political relations with Indonesia on a matter of principle involving a relatively small number of primitive peoples”.<sup>22</sup> This international disinterest in West Papua contributed to spiralling violence, as (according to West Papua’s first Indonesian governor) 30,000 Papuans were killed in Indonesian military operations in violence leading up to a 1969 plebiscite.<sup>23</sup>

The referendum, dubbed the *Act of Free Choice* by Indonesia and the *Act Free of Choice* by the Papuan independence movement, gathered 1,025 tribal leaders who “decided” unanimously to join Indonesia.<sup>24</sup> These tribal leaders were under severe intimidation, even being threatened at gunpoint.<sup>25</sup> Survey evidence from the 1960s shows “overwhelming Papuan support for eventual independence and rejection of Indonesian rule”.<sup>26</sup>

Indonesian governance in West Papua has been characterised by this same indifference to the views and interests of the local populace. Under Indonesian rule, indigenous Papuans have been subject to a range of systematic and widespread human rights abuses such as torture, extrajudicial killings, forced labour, forced displacement, rape, and forced disappearance.<sup>27</sup> Indonesian policies have also done significant environmental damage, undermining the cultural, political, and economic bases of Papuan society, and contributing to the prevalence of disease among indigenous peoples in West Papua due to inadequate provision of health and sanitation facilities and the introduction of disease.<sup>28</sup> In 2002, West Papua represented 40 per cent of Indonesia’s total HIV and AIDS cases with only 1 per cent of its total population.<sup>29</sup> These policies may not have been intentionally directed at the destruction of the Papuans, yet they were undertaken with

deliberate disregard for the welfare of the Papuans and knowledge of the destructive consequences for the Papuan group.

Multinational enterprises (such as Freeport McMoRan) have exploited the significant oil, mineral, and timber wealth of West Papua, with limited benefits for the local population.<sup>30</sup> Freeport exercises tremendous influence in Indonesia as the country's biggest taxpayer, providing 2.4 per cent of the total GDP of Indonesia, and around half of the GDP of West Papua.<sup>31</sup> Freeport spends US\$1 million per year on a trust fund for the local population, but this pales in comparison to the US\$15 million per year it spends on security.<sup>32</sup>

Another manifestation of Indonesian oppression in West Papua is the severe restrictions placed on personal liberty. These restrictions encompass arbitrary detention for months or even years at a time, restricted movement in many regions for security reasons, restrictions on freedom of speech and assembly, and the requirement that people obtain a *Surat Jalan* (travel permit) before travelling to their home villages.<sup>33</sup> Foreign media access is heavily restricted to West Papua in the name of the safety of journalists, yet no foreign journalist has ever been harmed by Papuan separatists.<sup>34</sup> Indigenous Papuan journalists are also more closely monitored than their non-indigenous counterparts, with some journalists receiving threatening text messages or being subject to violence.<sup>35</sup> Despite the democratic reforms in Indonesia since 1998, West Papua functions under a kind of "subnational authoritarianism", as a region where authoritarian governance persists.<sup>36</sup>

Indonesia has also implemented a transmigration programme whereby Indonesians from densely populated provinces (such as Java, Madura, and Bali) are given incentives to settle in less densely populated provinces (such as Sumatra, Borneo, and West Papua). This programme originated with the Dutch colonial regime, but it continued and accelerated under Indonesia. It is difficult to locate accurate official statistics on the number of transmigrants but the International Working Group for Indigenous Affairs estimates that transmigrants now comprise about half of West Papua's population of 2.7 million inhabitants.<sup>37</sup> These transmigrants include both official transmigrants, who are part of government programmes, and spontaneous transmigrants who arrive in West Papua through Indonesian government encouragement but not official programmes.

The transmigration programme is similar to the colonisation initiatives which existed in other settler societies such as Canada, Australia, and South Africa. Such policies consider the land to be *terra nullius* – empty or underutilised land – and aim at both the pacification of the local indigenous population and the economic exploitation of their lands. Many of the transmigrants are retired Indonesian soldiers moved into strategic areas such as mines and ports, as well as the Papua New Guinea border, where the *Organisasi Papua Merdeka* (OPM or Free Papua Movement) guerrillas are most active.<sup>38</sup> Transmigrants are given many benefits not available to Papuans; this constitutes a form of structural discrimination, which limits Papuan economic opportunities.

In many cases, the settlement of transmigrants is preceded by the forced displacement of indigenous Papuans, who are only allowed to remain in a transmigrant

area at a ratio of one Papuan family to nine non-Papuan families.<sup>39</sup> By 1984, approximately 700,000 hectares of land had been confiscated, without compensation, from indigenous Papuans under the transmigration programme.<sup>40</sup>

Transmigration and settlement also serve the purpose of undermining the self-determination of the local population by rendering them a minority – a distinctive disadvantage in ethnically-polarised democratic systems. It appears that the transmigration process will continue for the foreseeable future, until the goal of moving millions of people is reached. This serves the purpose of helping to reduce over-population and encouraging development; however, these policies have also created conflict between indigenous peoples and settlers. The Indonesian government does not recognise indigenous groups as being distinct in any manner; rather it considers all Indonesians to be indigenous.<sup>41</sup>

Transmigration is part and parcel of a larger project of cultural assimilation, including the mandatory use of Indonesian as the medium of instruction in schools. This use of Indonesian has contributed to the decline and extinction of several indigenous Papuan languages.<sup>42</sup> Papuan beliefs, cultural practices, and lifestyles are deemed to be primitive and in need of benign custodianship. Progress, in this conception, requires the transformation of traditional subsistence lifestyles in service of the cash economy. For example, the so-called *Operasi Koteka* (Operation *Penis Gourd*) in 1971–1972 sought to encourage tribes in certain New Guinea highland areas to abandon the Koteka and to wear “modern” clothing.<sup>43</sup> Such markers of modernisation are also a repudiation of the “primitive” past.

Modernisation also entails moving away from environmental sustainability (relatively “light” land use such as traditional agriculture) to more intensive land uses such as mining. The environmental destruction in West Papua is a direct consequence of Indonesian development policies.<sup>44</sup> At the Freeport mine, “overburden is removed at the rate of 750,000 tonnes a day, with one-third processed as tailings and the remainder dumped in valleys and lakes”.<sup>45</sup> Although there have been material benefits to some indigenous Papuans (such as schools being built by mining companies), these economic activities have also displaced and alienated many indigenous peoples from their traditional lands. Between 1982 and 1990, an average of 163,000 hectares of forest was destroyed annually in West Papua.<sup>46</sup> Furthermore, a great deal of fertile land has been distributed to transmigrants. In towns where Papuans are a minority, there are few Papuan-owned businesses.<sup>47</sup>

Papuan resistance to these measures has been met with increasing militarisation and political oppression. The region is currently the most heavily militarised in Indonesia with an estimated 45,000 troops present.<sup>48</sup> These forces are supplemented by paramilitary forces such as the Red and White Defenders’ Front (*Front Pembela Merah Putih*), which was founded by Eurico Guterres, a notorious Timorese militia leader who has been convicted of crimes against humanity for his role in the 1999 violence in East Timor.<sup>49</sup> These militias are not well-armed but they could be rapidly mobilised, should the separatist threat grow.<sup>50</sup>



The Free Papua Movement (OPM) was founded in 1963 to advocate for the autonomy of West Papua. Over time it became increasingly militant. For example, in 1977 it cut the fuel and slurry pipelines to the Freeport (Grasberg) mine, resulting in indiscriminate reprisal attacks from the Indonesian military, which burned down entire villages in the vicinity of the mine.<sup>51</sup> By the 1980s, violence in West Papua had escalated into a low-intensity armed conflict, which continues to this day. As many as 100,000 people have been killed in subsequent years, mostly civilians killed by the Indonesian State.<sup>52</sup> Often the military engages in targeted killings designed to incite violence among Papuans, which then gives it a “military justification for widespread retaliation”.<sup>53</sup> Although the OPM is well-established throughout West Papua, it is lightly armed with most fighters not even having firearms; it operates more as a movement, than a cohesive organisation.<sup>54</sup>

Opposition to the Jakarta regime is seen by Indonesian nationalists as a rebellion against the rationalism of modernity. As such, indigenous resistance is a threat to the broader Indonesian nation-building project. Pluralism is seen as antithetical to state formation, which seeks to make the nation synonymous with the state, often through cultural genocide. As Dutch historian Uğur Ümit Üngör writes: “culture is a central focus of nationalist movements and nation states.”<sup>55</sup> Unity is enshrined as the second principle of the Pancasila philosophy, found in the preamble of the Indonesian Constitution.<sup>56</sup> This kind of state formation, a created monolithic nationalism arising out of diverse peoples and political units, is at the core of the dream of the nation-state. West Papua was “part of the imagined community of Indonesia ... but Indonesia was not part of the imagined community of Papuans”.<sup>57</sup>

The notion of danger increases when one couples this ideological threat to nation-building with the presence of an affine community in a neighbouring state (most directly the Papuans in Papua New Guinea, but also the Melanesians in the southwest Pacific). Non-conforming Papuans (i.e. those opposed to Indonesian rule) may therefore be seen as a fifth column within Indonesia. The prior renaming of West Papua as Irian Jaya (victorious Irian) reinforced the notion that West Papua is part and parcel of the Indonesian national project, which is itself supposedly anti-colonial in nature.

The Special Autonomy Law of 2001 was promulgated with the intention (on the part of Indonesian moderates) of giving West Papua a degree of autonomy.<sup>58</sup> However, this law seems to have made little difference on the ground. It has resulted in the *Papuanisation* of upper levels of the bureaucracy, but Papuans have little real autonomy.<sup>59</sup> A truth and reconciliation commission has not yet been established, despite its inclusion in the Special Autonomy Law.

The Indonesian military exerts great influence over Indonesian politics and, according to an Indonesian government official, it operates in West Papua as a “virtually autonomous government entity”.<sup>60</sup> Military interests in West Papua have increased since the loss of East Timor and the autonomy of Aceh; Jim Elmslie argues:



TNI [military] involvement in legal businesses, such as mining and logging, and illegal businesses, such as alcohol, prostitution, extortion, wildlife smuggling, etc., provide significant funds for the TNI as an organization and also for individual TNI members, especially senior officers.<sup>61</sup>

International pressure to resolve the West Papua situation has also increased in recent years. The violent suppression of the Papuan People's Congress, coupled with a strike at the Grasberg Mine in 2011, led to a statement from US Secretary of State Hillary Clinton that Indonesia needed to "address the legitimate needs of the Papuan people".<sup>62</sup>

## **Genocide and West Papua**

This brings us to the question as to whether the events in West Papua can accurately be characterised as genocide. The normative weight of the term "genocide" undoubtedly contributes to its overuse and abuse. Genocide, as the crime of crimes, is seen by many as a supreme validation of victimisation; this is true even when one considers that other international crimes, such as crimes against humanity, have grave consequences for the victims.

It is difficult to make the case that Indonesian oppression in West Papua amounts to a genocide resembling the Holocaust or Rwandan Genocide. There is no systematic pattern of mass killing; in fact, in gross terms, the indigenous Papuan population is actually increasing.<sup>63</sup> One could also argue that the Papuans are fragmented – that identity is more localised and tribal than national and as such Papuans may not constitute a national group. Paradoxically, Indonesian oppression in West Papua may have itself been instrumental in the formation of a national Papuan identity.<sup>64</sup>

The central elements which must be proven for any crime are the occurrence of the criminal act(s) and the intention of the perpetrator to commit these acts. In genocide there is the additional intention requirement of having the intent to destroy the group in whole or in part. Let us examine each of these elements as they relate to the case of West Papua.

In West Papua there has not been any large-scale campaign of killing, rather Indonesian policies in West Papua accomplish the destruction of the group through a combination of cultural genocide and extreme political repression. In 2001, the US State Department's Country Report on Indonesia notes:

Security forces were responsible for numerous instances of, at times indiscriminate, shooting of civilians, torture, rape, beatings and other abuse, and arbitrary detention in ... Papua.... Security forces in Papua assaulted, tortured, and killed persons during search operations for members of militant groups. The security forces inconsistently enforced a no-tolerance policy against flying the Papuan flag, tearing down and destroying flags and flag poles, and killing eight persons, and beating others who tried to raise or protect the flag.<sup>65</sup>

Indonesian soldiers have also assassinated independence leaders on several occasions, such as Yustinus Murib, Danny Kogoya, and Theys Hiyo Eluay, although the state of Indonesia has denied that it officially sanctioned these killings.<sup>66</sup> Such killings could arguably constitute the crime against humanity of persecution (if they targeted the group), rather than genocide. However, it is likely that many incidents of violence occurring in remote areas simply go unreported for fear of reprisals. The Indonesian government has also severely restricted access into the region for foreign journalists and human rights organisations.

There is a stronger argument to be made for Article 2(c) of the convention – causing serious bodily or mental harm. In his doctoral thesis, Budi Hernawan argued that the widespread use of torture functions as a mode of governance in West Papua. Effectively, the use of torture is a tool of subjugation – illustrating in graphic form that Papuan bodies are not sacrosanct. Moreover, the vulnerability of Papuans shows that they may not be considered to be full members of the political community. Indeed, the persecution of indigenous Papuans may constitute a self-evident statement as to the moral wrongfulness of opposition to the Indonesian state.<sup>67</sup>

The Indonesian counter-insurgency Operation Clean Sweep of 1981 was accompanied by the slogan *Biar tikus lari ke hutan, asal ayam piara dikandang* (Let the rats run into the jungle so that chickens can breed in the coop), i.e. Papuans should be displaced to make room for the transmigrants.<sup>68</sup> This is effectively what occurred in the aftermath of the operation.<sup>69</sup> Operation Clean Sweep resulted in the killing of between 2,500 Papuans (the Indonesian government estimate) and as many as 13,000 (an estimate given by Dutch journalists).<sup>70</sup> Many other such massacres have occurred through indiscriminate Indonesian attacks and collective punishment. For example, in 1977, the Indonesian military response to a Dani uprising was to strafe and napalm Dani villages resulting in the killing of 12,397 Papuans,<sup>71</sup> and in June and July of 1985, 517 civilians were killed in several highland villages in retaliation for a skirmish between the OPM and Indonesian Army.<sup>72</sup>

The collective punishment of the counter-insurgency operations, when coupled with the transmigration programme and forced assimilation, may constitute a sort of genocidal project, albeit occurring over the course of decades rather than months. Demographic projections indicate that Papuans, who represented 96.09 per cent of the population of West Papua in 1971, will only constitute 28.99 per cent of the population by 2020.<sup>73</sup> While relative demographic decline is not, in and of itself, genocidal, Indonesian policies foreseeably contribute to the disappearance of the Papuans as a politically-constituted nation; such policies and aims are consistent with Lemkin's definition of genocide (and with notions of cultural genocide), but not the Genocide Convention.

We must also consider whether the Indonesian state, through its policies, is “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” (Article 2(c) of the Genocide Convention). This provision was intended to cover cases of intentional indirect killing such as famine within concentration camps. However, the conditions of

life of groups must vary depending on their cultural, socio-political, and environmental context. For certain groups (i.e. those groups practising subsistence agriculture) land is an anchor for physical security. Forced displacement, environmental destruction, or even the suppression of traditional knowledge (such as techniques of food cultivation) could dramatically decrease the sustainability of the group. The UN has noted, for example, that current development plans in West Papua run the risk of decreasing the food security of tens of thousands of Papuans.<sup>74</sup> In some cases the Indonesian government has directly destroyed Papuan crops.<sup>75</sup> Such practices are harmful to the well-being of the group.

One can distinguish between voluntary and forced assimilation. In voluntary assimilation members of the group may decide, for example, to voluntarily adopt different cultural practices, to participate in mining or other non-traditional resource exploitation, or to adopt a different cultural identity. In contrast, forced assimilation involves an intentional state policy directed towards the ethnocide of the group. In practice ethnocide (cultural genocide) is difficult to separate from physical genocide. Cultural genocide was excluded from the convention as a result of political negotiations.<sup>76</sup> Yet, where cultural genocide is linked inextricably to physical genocide, acts that may be characterised as cultural genocide should in fact be plainly considered genocide.

Indonesia may also be responsible for violating Article 2(e) of the Convention which prohibits “forcibly transferring children of the group to another group”. Recent evidence suggests that there may be an organised programme to remove indigenous children from West Papua to bring them to Jakarta for re-education. Thousands of Papuan children have been offered “free education” and separated from their families, only to discover that their free education is at a *pesantren* (Islamic boarding school), where they spend more time studying religion than any other subject.<sup>77</sup> The expectation is that the children will return to Christian-majority West Papua to spread Islam. According to Fadzlan Garamatan, the leader of the radical Islamic organisation Al Fatih Kafah Nusantara (AFKN), which has brought at least 2,200 children from West Papua, “When [Papuans] convert to Islam, their desire to be independent reduces.”<sup>78</sup> Such policies have a historical precedent; in 1969, former president Suharto proposed transferring 200,000 children of the “backward and primitive Papuans, still living in the stone age” to Java for education.<sup>79</sup> They also resemble, in some respects, the historical system of residential schools in North America. It is difficult to determine whether the Indonesian government is directly involved in these programmes, but witnesses report that the planes taking the children were crewed by men in military uniforms; even if these reports are false, it is likely the programme at least enjoys “quiet consent” from state authorities.<sup>80</sup> This may not be enough to demonstrate genocidal intent.

Beyond the presence of genocidal acts, the Genocide Convention requires genocidal intent (the intent to destroy the group in whole or in part). This is difficult to prove in many circumstances, yet it can be inferred from the overall context.<sup>81</sup> Intent may also arguably be inferred from the nature of the criminal act itself. For example:

In 1970, soldiers patrolling the jungle border area shot and killed a pregnant woman, cut the baby from the mother's womb, and dissected it in front of 80 women and children of the village. At the same time, a group of soldiers raped and killed the pregnant woman's sister.<sup>82</sup>

There are also reliable accounts, for example, of a family being forced to eat the flesh of their father, and of tribal leaders being forced to drink the blood of another chieftain.<sup>83</sup> According to Braitwaite *et al.*: "In separate cases, we spoke with one informant who witnessed the penises being cut off a number of men in his village. Another informant saw the vagina cut out of a woman and her husband made to eat it."<sup>84</sup> Such acts of violence are indicative of genocide intent (the intent to destroy the group) as they symbolically and literally target the means of physically sustaining the group.

Prejudicial beliefs underlie many of these policies. For example, an Indonesian textbook discussed West Papua (Irian) in terms reminiscent of the *terra nullius* doctrine:

The countryside of Irian has not yet been cultivated because of the lack of people.... Civilization is uneven ... some are completely backward (in the interiors of Seram and Irian). It is clear that the level of civilization depends on the degree of intercourse with other, advanced ethnic groups or nations.<sup>85</sup>

Such a sentiment is not a direct or public incitement to genocide, as it does not call for the extermination or destruction of the Papuans, yet it does treat Papuans in a way that makes it clear that they have no intrinsic value as human beings. Papuans have a distinctive cultural identity defined partly on religious lines (Indonesia is a majority Muslim country while Papuans are predominately Christian), language, as well as cultural practices (the centrality of pigs in many Papuan cultures and diets reinforces Indonesian perceptions of Papuan primitivism).<sup>86</sup> Some Papuan villages engage in what Statsch calls the "performative primitive", intentionally reinforcing their primitivism in interactions with the Indonesian state, in order to align with outsider expectations.<sup>87</sup> The idea of Papuan primitivism, however, also eases the production and perpetuation of the "us-them" dichotomies necessary for systematic persecution.

In 2007 Indonesian General Colonel Burhanuddin Siagian, military commander of the Jayapura region, threatened the brutal and indiscriminate use of force against Papuan separatists when he told the *Cenderawish Pos* newspaper:

What is absolutely certain is that anyone who tends towards separatism will be crushed by the TNI.... In the interests of the Republic of Indonesia, we are not afraid of human rights.... If I meet anyone who has enjoyed the facilities that belong to the state, but who still betrays the nation, I will honestly destroy him.<sup>88</sup>

Such pronouncements may be indicative of the intention to destroy a group as such, one of the core tenets of the Genocide Convention. Yet the group in question could be arguably political (opponents of Jakarta), not ethnic. It may even not refer to a group at all, but to specific individuals. In practice, however, it is difficult to separate political identity from ethnic identity, particularly when ethnic groups or nationalities (such as the Papuans) become politicised. Arguably the destruction of Papuan nationalists would result in the near-destruction or absolute subjugation of Papuan ethnicities. Moreover, the destruction, through violent means, of political elites and the subsequent destruction of Papuans' right to political self-determination and cultural survival could set in motion the eventual physical disappearance of Papuans. However, targeting nationalists, as a political group, could constitute the crime against humanity of persecution, rather than genocide.

In many genocides targeting indigenous peoples, the perpetrator may desire the destruction of the group, and even hope that their acts further that objective, yet they do not act directly to bring about the destruction of the group. In such genocides there is a kind of historical intentionality which sees the destruction of the group as inevitable in the long term; it results in a set of policies which further this result in an incremental fashion. These policies encompass the destruction of cultural, political, economic, and environmental sustainability.

There is a fundamental flaw in the law's construction of genocide: the assumption that cultural practices are not essential to physical survival. This assumption is grounded in a European, civilising worldview which sees culture as being in direct opposition to corporeal needs. In such conceptions, culture is a matter of survival only in the sense that culture is connected to rationalism, thus the technological foundations of modern life. In many indigenous societies, culture is intimately connected to traditional knowledge. Such knowledge is not just a matter of ritual and rite but also of survival in the physical world. The forced removal of indigenous peoples from their means of both food and cultural production is a direct threat to their physical survival. In West Papua the reduction of land available to indigenous Papuans, through the settlement of transmigrants and other forms of economic development, have threatened the ability of indigenous Papuans to practice shifting cultivation – their traditional means of subsistence.<sup>89</sup>

In many contexts direct killing may not be necessary to effectuate genocide. The Genocide Convention already recognises this through its inclusion of such acts as the forcible transfer of children from one group to another group and the prevention of births. It is reasonable to consider that the scope of the convention can be interpreted to cover forms of cultural genocide that are directed at the destruction of the group, or other policies which may lack direct intent but that will foreseeably lead to the destruction of the group. The intentionality of such acts can be inferred from the context and the perpetrating group's view of the victim group.<sup>90</sup> In situations where prejudicial ideologies and views are prevalent and the perpetrator acts, with knowledge, in complete disregard for the negative consequences of their acts on the victim group, then the perpetrator arguably possesses an intent to destroy.

How can we distinguish the intent to destroy from mere oppression? In colonial and neo-colonial contexts, the perpetrator group harbours the intention not only to dominate the victim group but to possess their living space in its entirety, irrespective of their reduced prospects for continuity and survival. The perpetrators consider their presence in a territory to be worthier because of their advanced civilisation or enlightened ideology. Under the ideology of *supersessionism* groups may consider themselves to be history's true heirs, with the implication that other, less worthy groups are inevitably bound to die off.<sup>91</sup> Groups holding such ideological views may inculcate a self-fulfilling prophecy whereby they undermine the fundamental survival basis of groups deemed inferior; when these groups fail it is taken as proof of the inevitability of their disappearance. Structural violence is enabled by the complete disregard shown to the lives of colonial subjects. We should also recall as well that omissions may be genocidal.<sup>92</sup>

There seems to be misperception among many scholars that the Genocide Convention contains a motive requirement. They point to the phrase "as such" in Article 2 of the convention (the intent to destroy the group *as such*).<sup>93</sup> Yet, in *Jelisić* the ICTY Appeals Chamber found:

The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.<sup>94</sup>

The West Papua case is centred on an ideology justifying the Indonesian state's exercise of total political and economic power over primitive subjects.

Even if the Indonesian state is shown to be acting with careless disregard towards the welfare of Papuans, do the acts of the state of Indonesia amount to genocide? The Indonesian government disputes any genocidal intent; rather, it argues that its actions in West Papua have been directed at the suppression of a violent terrorist movement and the achievement of economic development.<sup>95</sup> While there have assuredly been widespread killings and other acts of violence, these still seem too sporadic to constitute a deliberate policy of annihilation. However, the Genocide Convention goes beyond mere killing to include acts such as the forcible transfer of children. One could argue that the inclusion of such acts goes beyond biological destructiveness to encompass cultural destruction.

It might be the case that the Indonesian state desires the destruction of the Papuans as a political and cultural community. Such destruction may not be directed towards the physical destruction of the members of the group, yet it undoubtedly targets the social relations and cultural knowledge necessary for the group's survival in the long term.<sup>96</sup> Like many indigenous peoples facing persecution in the name of progress, Papuan existence may be contingent on the absolute disappearance of separate Papuan political and cultural identity. In short, Indonesian policies may lack intentionality and urgency yet they do have genocidal implications in that they attack the sustainability of the group. How can genocide studies assess such cases?

## Reassessing genocide: hot and cold genocides

The lack of adequate engagement of policy-makers and theorists with colonial and neo-colonial slow-motion genocides is also a failure to engage with structural violence – violence in which a social structure prevents people from meeting their basic needs.<sup>97</sup> There are several explanations for this analytical deficiency. First, the concept of genocide largely arose from the historical context of the Holocaust. As such, there is a tendency among genocide scholars to ignore genocides which do not fit the Holocaust model of mass killing in pursuit of a racist ideology.

Second, structural violence is often subtler than mass killing. It entails undermining the conditions of life for targeted groups gradually, over years or even decades. Such genocides pose significant problems in terms of proof of criminal intentionality; in the absence of explicit statements of genocidal intent, structural violence requires a thorough understanding of complex socio-economic structures and policies.

Finally, there is the possibility that genocide studies suffers from colonial biases. The great majority of genocide scholars are in the Global North. Thus, in some sense, the privilege of many genocide scholars is built upon a foundation of past structural violence against indigenous and other subject peoples. We must ask whether genocide studies itself has the effect of merely reproducing, rather than challenging, existing power structures.

There is a need for a new analytical framework for genocide to account for cases, such as West Papua, where the disappearance of a national, ethnic, racial, or religious group is gradual and incidental, rather than rapid and intentional. Such cases are still genocidal in the sense that the perpetrating group knowingly performs acts that contribute to the eventual destruction of a group.

With this in mind it may be useful to conceptually distinguish between *hot genocides* and *cold genocides*.<sup>98</sup> When we speak of temperature in this context we refer to emotional passion and intensity of action. The concept of hot and cold war made a similar, but not identical, distinction between direct and indirect violence.<sup>99</sup> We can also draw a parallel here with low-intensity armed conflicts, which, although relatively limited in mortality, still indicate the presence of sustained conflict. The notion of genocide invokes popular perceptions of racial hatred and the desire to annihilate, ideas which are undoubtedly intense. Yet, by maintaining such a narrow view of genocide, we are blinding ourselves to alternative means for the destruction of groups.

We can distinguish between hot and cold genocides based on the following factors: perpetrator emotion, perpetrator perceptions of the victim, perpetrator intention, the speed at which genocide occurs, the tools utilised, and the motivation (see Table 7.1).

First, hot genocides are characterised by the passion/hatred of the perpetrator towards the victim group. This hatred is rooted in a sense of existential threat projected onto the victims. The victims are often seen as devious, sources of contamination, or evil. Hatred towards the victims is a source of inspiration and authorisation for genocidal killing.<sup>100</sup>



Table 7.1 Characteristics of hot and cold genocides

<i>Characteristic</i>	<i>Hot genocide</i>	<i>Cold genocide</i>
1 Perpetrator emotion	Hate	Supremacy
2 Perception of victim	Threatening	Contemptible
3 Perpetrator intention	Annihilation (direct)	Disappearance (indirect, eventual)
4 Speed	Fast (urgent, high-intensity)	Slow (inevitable, sustained, low-intensity)
5 Tools (actus reus)	Killing, assaults, concentration camps	Structural violence, biological genocide
6 Instrumentality	Background	Foreground

In contrast, cold genocides may be passionless. They are not motivated by hate but by the perpetrators' assumed supremacy over the victims. In the Holocaust, Jews were not merely seen as inferior but rather as "an aspect of the environment that had to be removed"; they were targeted not because of the supposedly disproportionate wealth that they possessed, but rather because they represented a mortal danger to the "Aryan race".<sup>101</sup> Although, in both cases, the perpetrators are prejudiced towards the victims, in cold genocides this prejudice may be manifested as pity, indifference, or annoyance rather than passion (anger or hate). We distinguish here between *hate* (a desire to destroy the victim group on the basis of their perceived negative characteristics) and *supremacy* (an assumed supremacy over the victimised population, which allows, but does not require, their destruction).

In cases where the victim group is seen as threatening, physical violence is more likely to be utilised. Perhaps this can explain the relatively higher levels of violence utilised by the Indonesian state against the separatist movement in East Timor (estimates place war-related deaths at up to a quarter of the population), in comparison to West Papua.<sup>102</sup> In West Papua, anti-regime activity has been relatively limited and sporadic.

Second, hot genocides rely heavily on killing and other direct acts of destruction such as harming the victim group or intentionally starving them in concentration camps. In contrast, cold genocides undermine the conditions of life of the victim group or destroy them through gradual policies such as the transfer of children from the victim group to the perpetrator group. The victim group disappears gradually through the destruction of their culture, their displacement from traditional lands, demographic dilution, and the destruction of the environment in which they live.

Third, the perpetrators in hot genocides intend to destroy the victim group completely. By contrast in cold genocides the destruction of the victim group may be accomplished through its extreme marginalisation or subjugation of the victim group. In one sense, this act of subjugation is more closely aligned to the crime against humanity of persecution than the crime of genocide, yet it is genocidal in that it still seeks (or foreshadows) the eventual disappearance of the victim group. Such destruction goes beyond mere persecution.

Fourth, in hot genocides the destruction of the targeted group takes place in a manner of a few years (such as occurred in the Holocaust) or months (such as in Armenia and Rwanda). The victim group's perceived threatening nature towards the perpetrators necessitates their urgent destruction. In contrast, in cold genocides the destruction of the victim group is seen as inevitable rather than imperative.

Finally, in hot genocides instrumental motives, such as the maintenance of power, are often secondary to ideological motives. Contrarily, in cold genocides instrumentality, such as the seizure of natural resources, is often a primary motivation. However, we must reiterate the complexity of motive, and, consequently, that in both hot and cold genocides instrumental and prejudicial motives are present. Moreover, the motives of individual perpetrators may be instrumental (i.e. the theft of a neighbour's property) even while group motives remain prejudicial.

In short, cold genocides, are defined by their subtlety (lack of publicly declared genocidal intent and mass killings) and multi-dimensionality (use of non-violent means alongside repressive violence). Since the initial publication of my 2015 article setting out the cold genocide framework in *Genocide Studies and Prevention*, other scholars have expanded on my reasoning and applied it to other cases. In applying my framework to the Falun Gong case, Cheung, Trey, Matas, and An have argued that beyond subtlety and multidimensionality, cold genocide also involves *normalisation* which weaves genocide "into the fabric of society".<sup>103</sup> The normalisation of repression, disenfranchisement, and forced assimilation in West Papua has been accomplished through an ideology of national development and national identity, which uses hegemonic national power to eliminate divergent identities in service of capitalist goals.

Genocide can shift from cold to hot in cases where victims resist, thus their perceived threat to perpetrators increases. This transition may be only temporary (isolated suppressive massacres) or it may result in a sustained policy shift towards more intensive killing. Such a pattern characterised the mass killings occurring in Ntega and Marangara communes in northern Burundi in 1988 where a minor episode of Hutu violence was met by a massively disproportionate response from the Tutsi-dominated army.<sup>104</sup> Colonial genocides are often cold, as the perpetrators view indigenous peoples as being primitive, non-entities rather than an existential threat to the survival of the perpetrator group.

Beyond forced assimilation, repression functions as a mode of governance, and an alternative means of making the group invisible. This invisibility may not align neatly with the physical destruction envisaged by the drafters of the convention, but it still serves to destroy the group over time. When the group is excised from the public realm its survival depends on its sustention in the private realm. This becomes increasingly difficult under the gaze of power, which incentivises the "voluntary" ceding of identity, and disincentivises (through violent force) the public expression of cultural identity.

Some may argue that expanding notions of genocide only serves to water down the definition of genocide until it has no legal, explanatory, or normative

power. However, the development of the notion of cold genocide provides an explanatory framework for cases where genocidal destruction is still intentional, but indirect. Paradoxically, in cases of cold genocide individuals may not be physically exterminated, even while the group is gradually destroyed. This gradual and intended destruction of the group is certainly genocidal in nature, even if it might not conform to existing notions of genocidal intent in the Convention.

## **Conclusion**

There are several fictions embedded in the legal definition of genocide. Foremost among these is the notion that the destruction of a group only occurs through acts such as killing and forced sterilisation. In fact, the cultural and political destruction of a group, when coupled with the violent suppression of cultural and political identity, is pursuant to the destruction of the group. This is particularly true when the group in question is an indigenous group, where identity is often centred on kinship and the relationship to the land. The denial of the right to self-determination is a denial of the right to exist. Moreover, the pervasive surveillance and harassment that characterise authoritarian states may dissolve the bonds of trust that sustain kinship and clan relations.<sup>105</sup>

Even without expanding the definition of genocide under the Convention, interpretations of genocide must be critically reconsidered so as to encompass cases of cold genocide. While many of the acts involved in low-intensity, cold genocides are already prohibited under an array of human rights instruments, these instruments fail to capture the pernicious harm involved in the destruction of an ethnicity.

Indonesia's national motto is "unity in diversity" yet there has been far too much emphasis on unity as a cultural, economic, and political hegemonic project and not enough recognition of ethnic diversity. This has resulted in numerous minor and major ethnic conflicts and secessionist movements including, for example, West Papua, Aceh, the Molucca Islands, East Timor, and indigenous-settler conflicts among the Dyaks in Borneo. It has also led to systematic atrocities targeting political opponents of the State (such as occurred in East Timor from 1975–1999, as well as throughout Indonesia in the anti-Communist killings of 1965–1966).

Indonesia's oppression of Papuans may be rooted in supremacist perceptions towards peoples called "primitive" rather than hatred, but this oppression still represents a deliberate attack on the sustainability of the group. Papuan apartness was made clear yet again in 2018 when a petition for self-determination was signed by 1.8 million West Papuans (some 70 per cent of the West Papuan population),<sup>106</sup> effectively Papuans "do not regard themselves as Indonesians and are not regarded as such by other Indonesians".<sup>107</sup> How can indigenous Papuans survive within a militarised, hegemonic state?

## Notes

- 1 In this chapter the term “West Papua” refers to Indonesian New Guinea (the western half of the island of New Guinea) and not just the Province of West Papua. The term “Papuan” in this context is an ethnic term relating to indigenous West Papuans and not immigrant populations.
- 2 Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for International Peace, 1944).
- 3 This discussion of hate crimes versus supremacy crimes is based on personal communications with historian Ingjerd Veiden Brakstad in April 2014.
- 4 Mark Levene, *The Rise of the West and the Coming of Genocide* (New York: I.B. Taurus, 2005), 249.
- 5 Lemkin, *Axis Rule in Occupied Europe*, 79.
- 6 Levene, *The Rise of the West*, 11.
- 7 Shayne Breen, “Extermination, Extinction, Genocide: British Colonialism and Tasmanian Aborigines”, in *Forgotten Genocides: Oblivion, Denial, and Memory*, edited by René Lemarchand (Philadelphia: University of Pennsylvania Press, 2011), 88.
- 8 Sven Linqvist, *Exterminate all the Brutes: One Man’s Odyssey into the Heart of Darkness and the Origins of European Genocide* (New York: New Press, 1996), 135.
- 9 This notion of inevitability also colours discussions of indigenous genocides in post-settler societies such as Australia; see: Breen, “Extermination, Extinction, Genocide”, 88.
- 10 See, for example, the criminological literature on moral neutralisation, including: Alexander Alvarez, “Adjusting to Genocide: The Techniques of Neutralization and the Holocaust”, *Social Science History* 21, no. 2 (Summer 1997): 139–178; and Kjell Anderson, “‘Who Was I to Stop the Killing?’ Moral Neutralization among Rwandan Genocide Perpetrators”, *Journal of Perpetrator Research* 1, no. 1 (2017): 39–63.
- 11 Kjell Anderson, *Perpetrating Genocide: A Criminological Account* (London: Routledge, 2018), 125–126.
- 12 Levene, *The Rise of the West*, 121.
- 13 Immanuel Wallerstein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1976), 229–233.
- 14 Richard Gillespie, “Dating the First Australians”, *Radiocarbon* 44, no. 2 (2002): 455–472.
- 15 M. Lynn Landweer and Peter Unseth, “An Introduction to Language Use in Melanesia”, *International Journal of the Sociology of Language*, 214 (2012), 1–3. <http://dx.doi.org/10.1515/ijsl-2012-0017>.
- 16 Carmel Budiardjo and Liem Soei Liong, *West Papua: The Obliteration of a People* (London: TAPOL, 1983), 9.
- 17 Budiardjo and Liong, *West Papua*, 13.
- 18 Secretariat of The Netherlands–Indonesia Union, *Report of the Committee New Guinea (Irian) 1950. Part 2: Text and Appendixes of the Netherlands Main Constituent* (The Hague: Secretariat of The Netherlands–Indonesia Union, 1950), 5.
- 19 Yohanes Budi Hernawan, *From the Theatre of Torture to the Theatre of Peace: The Politics of Torture and Reimagining Peacebuilding in Papua, Indonesia*, PhD thesis (Canberra: Australian National University, 2013), 91. See also Hernawan’s recent book *Torture and Peacebuilding in Indonesia: The Case of Papua* (London: Routledge, 2017).
- 20 John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969* (London: Routledge, 2006), 6.
- 21 *Ibid.*, 179.

- 22 Ibid., 189.
- 23 John Braithwaite *et al.*, *Anomie and Violence: Non-truth and Reconciliation in Indonesian Peacebuilding* (Canberra: Australian National University, 2010), 70. Elizabeth Brundige *et al.*, *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (New Haven, Connecticut: Allard K. Lowenstein International Human Rights Clinic, Yale Law School, 2004), 60–61.
- 24 Andrew K. Coleman, *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice?* (New York: Routledge, 2013), 64.
- 25 Ron Crocombe, *The South Pacific* (Suva, Fiji: University of the South Pacific, 2001), 427.
- 26 Saltford, *The United Nations and the Indonesian Takeover*, 10.
- 27 See, for example, Brundige *et al.*, *Indonesian Human Rights Abuses in West Papua*.
- 28 Ibid., 3.
- 29 Leslie Butt, Gerdha Numbery, and Jake Morin, “The Smokescreen of Culture: AIDS and the Indigenous in Papua, Indonesia”, *Pacific Health Dialogue* 2, no. 2 (September 2002): 63, 70.
- 30 Most foreign enterprises have historically been dominated by outsiders. See Crocombe, *The South Pacific*, 52 and 397.
- 31 Braithwaite *et al.*, *Anomie and Violence*, 70.
- 32 Ibid., 73.
- 33 John Wing with Peter King, *Genocide in West Papua? The Role of the Indonesian State Apparatus and a Current Needs Assessment of the West Papuan People* (Sydney: Centre for Peace and Conflict Studies, University of Sydney, 2005), 11.
- 34 Ross Tapsell, “The Media and Subnational Authoritarianism in Papua”, *South East Asia Research* 23, no. 3 (2015): 320. This closely controlled access persists despite recent reforms by President Jokowi. Prior to these reforms access was never technically banned but journalists wanting to visit West Papua lawfully had to obtain permission from 12 separate state agencies. See: Johnny Blades, “Watching This Space, West Papua”, *Pacific Journalism Review* 22, no. 1 (2016): 14 and 23.
- 35 Tapsell, “The Media and Subnational Authoritarianism”, 330.
- 36 Ibid., 319–334. Tapsell is drawing from: Edward Gibson, “Boundary Control: Subnational Authoritarianism in Democratic Countries”, *World Politics* 58, no. 1 (2005): 105.
- 37 International Working Group on Indigenous Affairs, “Indigenous Peoples in West Papua”, 2001. [www.iwgia.org/en/news-alerts/archive/143-uncategorised/751-indigenous-peoples-in-west-papua](http://www.iwgia.org/en/news-alerts/archive/143-uncategorised/751-indigenous-peoples-in-west-papua), accessed 15 May 2018.
- 38 Budiardjo and Liong, *West Papua*, 54.
- 39 Brundige *et al.*, *Indonesian Human Rights Abuses*, 33.
- 40 Ibid., 32.
- 41 Ellen Roy *et al.*, *Indigenous Environmental Knowledge and its Transformations: Critical Anthropological Perspectives* (London: Psychology Press, 2000), 121–122.
- 42 Wing and King, “Genocide in West Papua”, 21.
- 43 Braithwaite *et al.*, *Anomie and Violence*, 77.
- 44 See, for example: Esther Heidbuchel, *The West Papua Conflict in Indonesia: Actors, Issues, and Approaches* (Wettenberg: Johannes Hermann J & J Verlag, 2007), 14.
- 45 Denise Leith, *The Politics of Power: Freeport in Suharto’s Indonesia* (Honolulu: University of Hawai’i Press, 2003), 171.
- 46 Crocombe, *The South Pacific*, 26.
- 47 Rupert Stasch, “From Primitive Other to Papuan Self: Korowai Engagement with Ideologies of Unequal Human Worth in Encounters with Tourists, State Officials and Education”, in *From ‘Stone-Age’ to ‘Real-Time’: Exploring Papuan Temporalities, Mobilities and Religiosities*, edited by Martin Slama and Jenny Munro (Canberra: ANU Press, 2015), 6.

- 48 Gemina Harvey, "The Human Tragedy of West Papua", *The Diplomat*, 15 January 2014. <http://thediplomat.com/2014/01/the-human-tragedy-of-west-papua>, accessed 15 May 2018.
- 49 Braithwaite *et al.*, *Anomie and Violence*, 104.
- 50 *Ibid.*, 108.
- 51 Budiardjo and Liong, *West Papua*, 41–42.
- 52 Peter King, *West Papua and Indonesia in the 21st Century: Resilient Minnow? Implacable Minotaur?* Papuan Paper no. 1 (Sydney: Centre for Conflict and Peace Studies, University of Sydney, 2010), 3.
- 53 Braithwaite *et al.*, *Anomie and Violence*, 53.
- 54 Jim Elmslie and Camellia Webb-Gagnon with Peter King, *Anatomy of an Occupation: The Indonesian Military in West Papua* (Sydney: West Papua Project at the Centre for Conflict Studies, University of Sydney, 2011). Braithwaite *et al.*, *Anomie and Violence*, 67.
- 55 Uğur Ümit Üngör, "Cultural Genocide: Destruction of Material and Non-Material Culture", in *The Routledge History of Genocide*, edited by Cathie Carmichael and Richard C. Maguire (London: Routledge, 2015), 243.
- 56 The Pancasila philosophy includes the following central elements: (1) monotheism, (2) humanity, (3) unity, (4) democracy, and (5) social justice. See the Constitution of Indonesia, "Preamble", 1945.
- 57 Braithwaite *et al.*, *Anomie and Violence*, 58.
- 58 Indonesia: Law No. 21 of 2001, On Special Autonomy for the Papua Province 22 October 2001.
- 59 King, *West Papua and Indonesia in the 21st Century*, 5.
- 60 Richard Chauvel, "Policy Failure and Political Impasse: Papua and Jakarta a Decade after the 'Papuan Spring'", in *Comprehending West Papua*, edited by Peter King, Jim Elmslie, and Camellia Webb-Gagnon (Sydney: Centre for Peace and Conflict Studies, University of Sydney, November 2011), 120.
- 61 Jim Elmslie, *West Papuan Demographic Transition and the 2010 Indonesian Census: "Slow-Motion Genocide" or not?* Centre for Peace and Conflict Studies Working Paper No. 11 (Sydney: Centre for Peace and Conflict Studies, University of Sydney, 2010), 7.
- 62 Chauvel, "Policy Failure and Political Impasse", 120.
- 63 Elmslie, *West Papuan Demographic Transition*, 9.
- 64 In 2003 Indonesia split what was then called "Papua" province into the provinces of Papua and West Papua. A court later ruled that this split was contrary to the autonomy guarantees given to indigenous West Papuans, but decided that, since the split had already occurred it should be maintained. This dividing of Papua was ostensibly for administrative and development purposes, but it also had the effect of further undermining West Papuan national identity.
- 65 United States Department of State, Bureau of Democracy, *Human Rights, and Labour, Country Reports on Human Rights Practices: Indonesia*, 2001.
- 66 Pacific Islands News Association (PINA), "Soldiers Paid to Kill Eluay", *Fiji Times*, 9 May 2002.
- 67 Hernawan, *From the Theatre of Torture to the Theatre of Peace*, 68–69.
- 68 Budiardjo and Liong, *West Papua*, 75.
- 69 Brundige *et al.*, *Indonesian Human Rights Abuses*, 29.
- 70 Robin Osborne, *Indonesia's Secret War: The Guerilla Struggle in Irian Jaya* (Crow's Nest, Australia: Allen and Unwin, 1985), 87–88.
- 71 Braithwaite *et al.*, *Anomie and Violence*, 61.
- 72 Brundige *et al.*, *Indonesian Human Rights Abuses*, 32.
- 73 Elmslie, "West Papuan Demographic Transition", 6.
- 74 Olivier de Schutter and James Anaya, "Two United Nations Experts on Food and Indigenous Peoples...". [www.srfood.org/en/south-east-asia-agrofuel-un-rights-](http://www.srfood.org/en/south-east-asia-agrofuel-un-rights-)



- experts-raise-alarm-on-land-development-mega-projects, 23 May 2012, accessed 15 May 2018.
- 75 Brundige *et al.*, *Indonesian Human Rights Abuses*, 68.
- 76 The Soviet Union supported the inclusion of cultural genocide in the convention, while countries such as Canada, Sweden, and the United States opposed its inclusion, largely on the basis of feared claims from indigenous groups. See: Üngör, “Cultural Genocide”, 242.
- 77 Michael Bachelard, “They’re Taking Our Children”, *The Sydney Morning Herald*, 4 May 2013. [www.smh.com.au/lifestyle/theyre-taking-our-children-20130429-2inhf.html](http://www.smh.com.au/lifestyle/theyre-taking-our-children-20130429-2inhf.html), accessed 21 May 2018.
- 78 *Ibid.*
- 79 *Ibid.*
- 80 *Ibid.*
- 81 *Bagilishema*, Case No. ICTR-95-1A-A, Trial Chamber Judgement, 7 June 2001, para. 63.
- 82 Brundige *et al.*, *Indonesian Human Rights Abuses*, 63.
- 83 Braithwaite *et al.*, *Anomie and Violence*, 62.
- 84 *Ibid.*
- 85 Budiardjo and Liong, *West Papua*, 69–70.
- 86 Keith Suter, *East Timor and West Irian* (London: Minority Rights Group, 1982), 12. It is also the source of racial epithets directed against West Papuans. Human Rights Watch quotes one such incident in its report *Violence and Political Impasse in West Papua*, 2001, 17.
- 87 Stasch, “From Primitive Other to Papuan Self”, 27.
- 88 King, *West Papua and Indonesia in the 21st Century*, 9–10.
- 89 Brundige *et al.*, *Indonesian Human Rights Abuses*, 27.
- 90 See, for example: *Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence, 6 December 1999, paras. 56–58. *Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 523.
- 91 John Docker, *The Origins of Violence* (London: Pluto Press, 2008), 6. Both Christian and Islamic theology have supersessionism doctrines – Christians believe they supplanted the (older) Jewish religion as God’s chosen people, while some Islamic scholars have argued that Islam supersedes both other Abrahamic religions as God’s authentic doctrine.
- 92 See: Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Trial Judgement, 4 September 1998 (holding that failure by government leaders to act to stop ongoing, known massacres, constituted genocide).
- 93 See, for example, the discussion found in John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot, UK: Ashgate, 2008), 120–123.
- 94 Prosecutor v. Jelisić, Case No. IT-95-10-A, Decision, 5 July 2001, para. 49.
- 95 Brundige *et al.*, *Indonesian Human Rights Abuses*, 5.
- 96 See Donald Bloxham and Dirk Moses, *Oxford Handbook of Genocide Studies* (New York: Oxford University Press, 2010).
- 97 Johan Galtung, “Violence, Peace, and Peace Research”, *Journal of Peace Research* 6, no. 3 (1969): 167–191.
- 98 See also Andrew Kimbrell’s notion of “hot evil” and “cold evil”. Although my conceptualisation of hot genocide and cold genocide bears some similarity to Kimbrell’s theory, he is primarily concerned with emotional and physical distance (particularly in terms of technology and social structures) as a form of “cold evil”. Andrew Kimbrell, “Cold Evil: Technology and Modern Ethics”, Twentieth Annual E.F. Schumacher Lecture (Salisbury Connecticut: New Economics Institute, 2004).
- 99 The term “cold war” was first used in modern times by George Orwell in his essay “You and the Atomic Bomb”, published 19 October 1945, in the British newspaper *Tribune*.



- 100 Robert J. Sternberg and Karin Sternberg, *The Nature of Hate* (New York: Cambridge, 2008).
- 101 Kitty Millet, “Caesura, Continuity, and Myth: The States of Tethering the Holocaust to German Colonial Theory”, in *German Colonialism: Race, the Holocaust, and Postwar Germany*, edited by Volker Langbehn and Mohammad Salama (New York: Columbia University Press, 2011), 111.
- 102 Ben Kiernan, “The Demography of Genocide in Southeast Asia”, *Critical Asian Studies* 35, no. 4 (2003): 594.
- 103 Maria Cheung *et al.*, “Cold Genocide: Falun Gong in China”, *Genocide Studies and Prevention* 12, no. 6 (2018): 54–55.
- 104 For analysis of this episode see: René Lemarchand, *Burundi: Ethnocide as Discourse and Practice* (New York: Cambridge University Press, 1994).
- 105 Elmslie and Webb-Gagnon, “Anatomy of an Occupation”, 35.
- 106 The petition was delivered to the UN Special Committee on Decolonization on 26 September 2017. The committee chair, Venezuelan diplomat Rafael Ramirez refused to accept the petition, saying at the time: “One of the principles of our movement is to defend the sovereignty and the full integrity of the territory of our members. We are not going to do anything against Indonesia as a C24 [Special Committee on Decolonization].” The issue would not be considered by the body, as West Papua is not on the UN’s list of non-self-governing territories. An Indonesian envoy was the vice-chair of the committee. See: Ben Doherty and Kate Lamb, “West Papua Independence Petition is Rebuffed at UN”, *Guardian*, 30 September 2017.
- 107 King, *West Papua and Indonesia in the 21st Century*, 3.

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## **Section two**

# **CULTURAL DESTRUCTION**



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# 8 Heritage wars

## A cultural genocide in Iraq

*Helen Malko*

Diversity is an aspect of human existence that cannot be eradicated by terrorism or war or self-consuming hatred. It can only be conquered by recognizing and claiming the wealth of values it represents for all.

(Aberjhani)

### Introduction

On June 5, 2014, the so-called Islamic State (IS) began a wide campaign to conquer territories in Iraq that tore the region to pieces. It was in the Nineveh Province that the group's strict ideology and territorial ambitions came together in a bloody and ruthless experiment. Thousands of people were murdered, women and children were enslaved, and hundreds of thousands were displaced. Ancient communities, such as the Assyrian Christians and the Yezidis, were driven out and killed. The remaining, mostly Muslim, population was subjected to extreme religious rules based on IS's interpretation of Islam, according to which Shi'i Muslims were eradicated. Simultaneously, IS undertook a systematic campaign targeting cultural heritage sites, including churches, shrines, cemeteries, mosques, ancient cities, and artifacts. In addition, IS looted and destroyed museums and libraries, and burned books and rare manuscripts.

Although crimes conducted by IS against the Yezidis, Christians, and Shi'i Muslims have formally been recognized as genocide,<sup>1</sup> and were repeatedly described as ethnic and cultural cleansing by UNESCO,<sup>2</sup> discussion of the implications of the destruction of cultural heritage for the local communities of Mosul and the people of Iraq remains absent in academic work. While, for instance, the 1990s destruction of the Balkans' cultural heritage has been treated as an attack against heterogeneous communities,<sup>3</sup> that targeted collective identity,<sup>4</sup> and encouraged ethno-religious sectarianism and violence,<sup>5</sup> this has not been the case when it comes to the deliberate destruction of heritage sites and monuments in Iraq. Instead, scholarly research has focused on documenting damaged heritage,<sup>6</sup> IS revenues from selling looted cultural artifacts,<sup>7</sup> the destruction of heritage sites that were used by previous regimes,<sup>8</sup> international laws regarding the destruction of cultural heritage,<sup>9</sup> and the media usage by the IS.<sup>10</sup> Other studies examined the motives and rituals involving the IS attacks on



heritage sites.<sup>11</sup> Except for Bevan, who examined the group's aggression against cultural heritage in Iraq as cultural crimes, there exist no studies on the destruction of this heritage within the context of ethno-religious cleansing. This is partially due to the presumed disconnection between local communities and heritage places, particularly when it comes to ancient Mesopotamian sites and artifacts. Most of the time, this heritage is analyzed in isolation from the local communities, and its destruction is considered primarily an attack against the West and the "global" cultural heritage, overlooking its local dimension.

The central arguments of this chapter are that Iraq's "global heritage," both monotheistic and pre-monotheistic, is also *local*, and that its destruction has a direct cultural and psychological impact on the people of Mosul and Iraq. Cultural heritage is neither static nor frozen in time, as conservation and authorized heritage discourse tend to frame it. It is rather a living and evolving cultural process of meanings and memory making and remaking. Its destruction, therefore, is an attack on memory, identity, and the sense of belonging felt by local communities, i.e. a cultural genocide. This chapter presents a brief discussion of cultural heritage and its role in the formation of memory and identity of groups and communities. It then provides an overview of the emergence of IS and its ideology toward multiculturalism, highlighting the plight of two indigenous communities – the Yezidis and Assyrians – both with roots in ancient Mesopotamia.<sup>12</sup>

### **Cultural heritage, memory, and identity**

It is often understood that memory and identity are connected, and that heritage sites and places may evoke individual and/or group collective memory. Following the concept of "site of memory," or *lieu de mémoire* developed by the French scholar Pierre Nora,<sup>13</sup> heritage places, museums, and monuments play a fundamental role in the formation of identity and memory, including collective and cultural memories. Collective memory emphasizes the internalization of group identities, in that every group constructs an identity for itself through shared memories that are socially constructed in the present, and collectively legitimized, making meaningful common sense of the collective identity.<sup>14</sup> Cultural memory explores the connection between time, identity, and memory in their three dimensions – personal, social, and cultural.<sup>15</sup> It constitutes transformative historical experiences that define a culture, even as time passes, and it adapts to new influences. Cultural memory is formed by symbolic heritage embodied in monuments, objects, texts, rituals, performances, and other media that serve as cue triggers to initiate meaning associated with what has happened.<sup>16</sup> It brings back the time of mythical origins, crystalizes collective experience of the past, and can last for millennia.<sup>17</sup> Although cultural memory may seem like something stuck in the past, it is in fact dynamic: it is evoked in the present, referring to the past, and always viewing the future.<sup>18</sup> Like other memories, it is contested and changes over time. This, however, does not mean that memories and remembering are untrue or false, but rather a process that is always unfolding and remains

unfinished.<sup>19</sup> As a unifying force, cultural memory allows groups and communities to build a narrative of the past and develop an identity of a nation or a sub-national community.

Cultural heritage provides a physical representation and a grounding in reality to the concept of identity. It offers meaning to human existence by transmitting the ideas of timeless values and unbroken lineages that reinforce identity.<sup>20</sup> Although the representational and symbolic values of heritage in constructing identity are well recognized, the interpretation of the ways in which heritage is used has often been articulated in terms of national identity, especially when it comes to Iraq.<sup>21</sup> This focus may be the result of the way authorized heritage discourse both constructs the idea of heritage and the practice of heritage, which tend to emphasize the significance of material culture in playing a key role in defining national identity.<sup>22</sup> Indeed, heritage places, symbols, activities, and habits help members of social, ethnic, religious, or cultural groups within a nation define their identity. Links between heritage and identity can be expressed in many ways, actively or passively, within or in opposition to the heritage discourse.<sup>23</sup>

In addition to the abstracted sense of identity, heritage places and landscapes provide communities with a sense of place and belonging and help them to position themselves as groups and individuals in the cultural, physical, and social world.<sup>24</sup> Places are socially constructed; they are politicized, culturally relative, historically specific.<sup>25</sup> Heritage places, therefore, are not simply a representation of past human experience; rather, they also affect current experiences and perceptions of the world and may stand for a sense of identity and belonging for particular individuals or groups. To this end, this chapter argues that the destruction of Mosul's cultural heritage and built environment by the IS is not only an attack on global or national cultural heritage, it is a cultural genocide aimed at wiping out the experience, memory, identity, and belonging of local groups, including the indigenous Assyrian Christians and Yezidi communities.

### **The rise of IS and its ideology**

The origins of the Islamic State organization go back to before the Iraq War of 2003. Established as Jama'at al-Tawhid wa-l-Jihad by Abu Musab al-Zarqawi, the organization operated in coordination with al-Qaida in Afghanistan before relocating to Iraq prior to 2003.<sup>26</sup> After al-Zarqawi was killed in June 2006 in an American airstrike,<sup>27</sup> Ibrahim Awad Ibrahim al-Badri (known as Abu Bakr al-Baghdadi) became the leader of the group. In the same year the group declared itself an Islamic State and began to identify as the Islamic State of Iraq.<sup>28</sup> In 2010, al-Baghdadi became the leader of the group and in the following year (the first year of the Syrian uprising) started developing a branch in Syria.<sup>29</sup> On April 8, 2013, al-Baghdadi announced that the organization had changed its name to the Islamic State in Iraq and as-Sham (ISIS), reflecting its expanded area of operation. After taking over Mosul, ISIS announced that it was declaring itself a *caliphate* on June 29, 2014, under the leadership of Abu Bakr al-Baghdadi. It also modified its name at this point to the Islamic State (IS).<sup>30</sup>

Purification, iconoclasm, and ethnic and cultural cleansing characterized IS's ideology in the lands they occupied. After controlling large swaths of land in Iraq, IS waged vicious war on the people, committing genocide. They attacked almost every ethno-religious community, including Sunni Muslims who did not conform to their version of Islam. They also launched a systematic ethno-religious cleansing campaign that targeted certain local communities, including Shia Muslims, to permanently change the demographic formation of the region. At greater risk, however, were minority groups such as the Yezidis, Assyrian Christians, Turkmans, and others. During the years that IS has operated in Nineveh Province, thousands of Assyrians and other Christians have been driven out of their historical homeland in Mosul and its vicinity. Their houses were confiscated and their villages leveled. Likewise, thousands of Yezidis were forced out of their homes in the Sinjar region.<sup>31</sup> Hundreds of Yezidi men were killed; women and girls were kidnapped and later sold in slave markets in Syria.

Concurrently, Assyrian and Yezidi places of worship and ancient sites were destroyed and reduced to dust. For instance, in July 2014, IS vandalized and looted the fourth-century monastery of Mar Behnam and Sarah. Likewise, the Yezidi shrine of Baate was blown up in August 2014, alongside other Yezidi religious sites throughout Nineveh Province. In February 2015, they destroyed ancient Assyrian and Mesopotamian artifacts housed in the Mosul Museum, and rampaged the main library, where centuries-old manuscripts were looted and destroyed. A month later, in March 2015, the militant group violated the cemetery in St. George Monastery and several other Christian and Yezidi heritage sites.<sup>32</sup>

The concept of cosmopolitanism, of living alongside with the artifacts and buildings of another culture, was something IS could neither accept nor tolerate. The group's iconoclastic approach to cultural heritage sites worked in tandem with direct physical violence against people. The historical landscape of northern Iraq went through forceful changes as a part of the group's cultural genocide campaign. While IS cited Islam and idolatry as a base for its attacks on Shi'i and non-Muslim religious architecture and artifacts, the destruction of ancient Assyrian sites and museums suggest motives other than religious conservatism. Shi'i, non-Muslim, and Mesopotamian cultural heritage was in fact entangled within a process of ethno-religious cleansing and conquest, as seen in the case of the Assyrian Christian and Yezidi communities discussed later in this chapter. Aggression against cultural heritage as a part of ethnic and cultural cleansing is not a new phenomenon. The Nazi occupation of Europe resulted in the obliteration of thousands of historical buildings and religious sites. More recently, countless mosques, churches, and libraries were intentionally targeted during the Bosnian War of the 1990s, while the Taliban's campaign against idolatry in Afghanistan in 2001 caused the eradication of the 1500-year-old Bamiyan Buddhas. What makes IS different, however, is their extensive use of visual media that accompanied the destruction of heritage sites. Video recording of assaults against heritage places in what could be best described as theatrical performances were shared worldwide to provoke national and international governments, but

also to break the essence, collective memory, and identity of the remaining Iraqi people, and especially members of the attacked minority communities. Although Western media broadcast this destruction, especially of the pre-monotheistic heritage of Iraq, mainly as strikes against the culture of the West, it in fact has tremendous impact on the overlooked local population. Communities such as the Assyrian Christians, Yezidi, and Muslims of various backgrounds are connected to this heritage, and lived and interacted with it, be it Islamic, Christian, or ancient, and its destruction is a war on their communities.

One part of the IS hostile ideology toward cultural heritage was the assassination of the intellectual strengths of the subjected population. The group dismissed, threatened, and publicly executed teachers, intellectuals, and professors, burning down libraries and books, destroying museums and looting artifacts and rare manuscripts. By doing this, IS gained full control not only over the present, but also the past and the future of the subjected population. It attempted to disconnect the land and its people from their local history and distance the new order – “the Caliphate” – from what things looked like before their arrival. Because of the simultaneous acts of genocide and destruction of cultural heritage sites, centuries-old communities were broken up and their members were killed or displaced. Those who fought back were publicly executed to crush any future resistance. By encouraging the hardline Sunni Muslim residents of Mosul to attack their non-Muslim neighbors and loot their property, IS successfully shattered the historical ties among a once culturally diverse community. It set the stage for an intolerant environment in which a whole new generation of young Iraqis lived without experiencing the “Other”. This aspect of IS’s ideology relied heavily on the destruction of cultural heritage. It has had a significant impact on attempts for post-conflict reconciliation and resettlement in Mosul and Nineveh Plain as further discussed in the following.

### **The Islamic State and a cultural genocide in Iraq**

The task of the IS was not only territorial and political victory. The controlled population had to be deprived of a future and its cultural memory of a different, IS-free, past to be suppressed. The destruction of the local communities, their built environment, monuments, practices, and rituals would transform the land and its people and would make the IS conquest of the region permanent and irreversible. This transformation required targeting buildings and sites that constitute heterogeneous shared spaces, where communities connect with each other, such as the site of Nabi Yunus Mosque.<sup>33</sup> It also targeted individual buildings and the cultural landscapes of certain communities of which IS did not approve. Ethno-religious minority groups were singled out and eradicated, their cultural values and practices systematically destroyed. While the Shi’i Muslim community of Mosul was attacked, and its religious sites destroyed, IS assaults against the Assyrian Christians and Yezidis threatened not only their cultural heritage, but also their very existence in the whole region. Under the hierarchy developed by IS, Assyrians and other Christians were given the ultimatum of

either converting to Islam or being killed, along with the option of leaving IS-controlled territories, while the Yezidis were killed and enslaved. Heritage sites of both indigenous communities were destroyed in an attempt to wipe out any trace of their physical and cultural existence. Both the Assyrian Christians and Yezidis had already suffered a long history of persecution and suppression in this region, resulting in a drastic reduction in their numbers, and continuous destruction of their homes and cultures. Both find their cultural roots in northern Mesopotamia and view ancient Assyrian heritage a part of their ancestral heritage.

### *The Yezidis*

On August 3, 2014, IS attacked the Yezidi homeland in Sinjar. Abandoned by the Kurdish forces responsible for the area's security,<sup>34</sup> more than 300,000 Yezidis were displaced, and a still-unknown number were massacred. IS attacked the Yezidis with a planned strategy of ethnic and cultural cleansing that extended to mass enslavement never seen before in this region.<sup>35</sup> In a public statement, the Jihadist group uttered their plan to either convert or eradicate the Yezidis, declaring that God would punish Muslims for having allowed a group whose religion does not qualify for protection under Islamic jurisprudence to continue to exist in the region.<sup>36</sup> In its 2016 Genocide Documentation Report, Yazda<sup>37</sup> recorded around 35 sites of mass graves and numerous Kill Sites<sup>38</sup> in the region of Sinjar Mountain, where bodies of Yezidi civilians had been either recorded by the organization or reported, but not investigated yet.<sup>39</sup>

The Yezidis are an ethno-religious group in northern Iraq, specifically in the regions of Sinjar and Shaykhan in Nineveh Province. Their origins are uncertain, and scholars have different, often contradicting, theories about their ethnicity and religion.<sup>40</sup> The Yezidis, however, believe that their community and religion are ancient and belong to this land.<sup>41</sup> Yezidi religious belief appears to have roots in antiquity, and shares affinities with the regions of northern Mesopotamia, Syria, and Iran.<sup>42</sup> The Yezidi religion is a monotheistic one, with the God being the creator of the universe and man.<sup>43</sup> The story of the great angel Azazel, his disobedience to God and banishment from the sight of God, is an ancient tradition found in Judaism, Christianity, and Islam alike. But the consequence that identifies the fallen angel with evil has no presence in the Yezidi belief. Instead, the Yezidis believe that the angel has been forgiven by God and that those who recognize the angel as once again supreme will benefit from his special protection.<sup>44</sup> Here, the Yezidis are in disagreement with their Christian and Muslim neighbors, who recognize the fallen angel as Satan. The community therefore has been suspected of having polytheistic religious elements, with their religion described as "pagan" and its followers labeled as "devil worshippers." The Yezidi lack of a written scripture, an important element of protected non-Muslim communities, jeopardized their communities under various Muslim governments that ruled the region. For instance, under Ottoman rule, the pressure was to convert the Yezidi community to Islam and otherwise to massacre those who

refused.<sup>45</sup> They continued to be persecuted and marginalized in the modern state of Iraq and suffered under Saddam's policy of Arabization, as did other non-Muslim and non-Arab communities.<sup>46</sup>

With the arrival of the IS in the region, the Yezidi community and its cultural heritage came under unprecedented attack. Yezidi heritage sites consist of religious structures, sanctuaries, and mausolea. Their main architectural features are domes in the forms of fluted cones with exteriors dominated by ribs. It is believed that the ribs of the conical dome represent the rays of the sun, manifesting the divinity of the sun, which was most likely derived from ancient Mesopotamian iconography. The simplicity of Yezidi architecture works in harmony with their belief that both nature and architecture are integral to the sacred environment. Each stone, plant, and building has a sacred meaning.<sup>47</sup> The mausolea, usually a single large room with a burial in the middle, are the most common places of worship for the Yezidi people. Each Yezidi village or town has its own mausoleum, where the faithful, individually or groups, come to express devotion and perform pious duties.<sup>48</sup> They are respected as tombs of saints and place of worship, where faithful expect their prayers to be answered. This very idea stands in contrast with the IS version of Islam in which such places and activities are considered idolatry.

Because of the lack of a systematic documentation of the destroyed Yezidi sites and the challenges of accessing the region even today, it is hard to know exactly the extent of what has been destroyed by the IS at this point. An estimated 68 sanctuaries and shrines have been blown up by IS, including shrines of Sheykh Hasan in Gabara village, Sheykh Man in Jiddala village, Malak Fakhraddin in Sikeeniya, Mahma Rasha in Solagh, all in the Sinjar area, and Sheykh Amadin (Imad al-Din) in Welat village in Sheykhkan.<sup>49</sup> The consequences of the destruction of these shrines and sanctuaries extend beyond the heritage site itself; they terminate the associated rituals and performances that together form the cultural identity and collective memory of the Yezidi community. Feasts, such as the *Sarisal*, New Year, for instance, used to be celebrated in every village where Yezidis lived. Preparations included visiting family graves, where food used to be presented for passersby, gathering scarlet ranunculus to decorate homes, and coloring eggs.<sup>50</sup> It is believed that the angels would pass by at midnight.<sup>51</sup> In the Sinjar Mountain, for instance, this celebration used to be held at the small shrine of Sheref ed-din on the peak of Mount Chilmeran, with fireworks marking the start of the New Year. Sheref ed-din is the patron saint of the Sinjar, and has a second, larger, shrine in a village at the foot of the mountain.<sup>52</sup> The local Yezidis regard him as the man who introduced their religion to the mountain. The tribesmen in this region used to wear their hair hanging down in long braids in accordance with his command. Sheref ed-din and other semi-divine companions and successors of Sheikh Adi, the prophet of Yezidism, are identified in Yezidi mythology with the angels who assisted God and Melek Taus in the creation of the world.<sup>53</sup> These places are therefore not only religious structures, but rather they are landscapes, where memories were made, and collective identity was formed and repeatedly confirmed.



Yezidi villages, their environs, and geography constituted a significant part of the community's culture and identity. For instance, for over a century, in the tradition of *Kawala*, reciters, who were usually members of two families from the villages of Bashika and Bahzani,<sup>54</sup> traveled to every Yezidi village in the region carrying a replica of a peacock as a proof of their identity. In each village, they would be received by the headman and would stay in his house, where they would conduct religious services and collect funds for charities.<sup>55</sup> It is in this landscape that the Yezidis were able to preserve their traditions and customs and develop their distinct religious architecture. These structures, along with the land and the mountain, constitute their sacred environment. Mountains especially are regarded as sacred and even have a role during religious ceremonies. Yezidi tradition regards the mountains as neighbors of the sky, where God resides.<sup>56</sup> The displacement of the community and the destruction of its built environment could result in disorientation and exile from the memories it evoked. They pose a threat to collective identity, even though this identity is always shifting. Shrines and sanctuaries gave Yezidi individuals a social image, tying them back into a wider community and boosting a sense of belonging. The Yezidi community of Iraq has not only been displaced and its members forced to become refugees, but they have been dehumanized; their identity and culture are shattered. One year after the defeat of the IS in Mosul, rebuilding shrines destroyed by IS appears to be a priority of what remains of the Yezidi community. For instance, residents of the predominantly Yezidi village of Babire have nearly completed the reconstruction of the Baate Shrine, among the first sites destroyed by IS in 2014. Although resettling the Yezidi community in its historical villages would take a lot more than rebuilding individual shrines, the newly reconstructed Baate Shrine with its seven domes surmounting the tomb provides hope and orientation for the community and confirms their cultural and physical survival. It memorializes past events and allows for new memories and identities to be created.

### *The Assyrians*

Like the Yezidis, the IS persecuted Assyrians and other Christians as a part of their ethno-religious cleansing campaign. Shortly after taking over Mosul, the region lost its historic Christian community that, for the most part, finds its origins in ancient Mesopotamia and the Assyrian homeland. IS started its campaign against this community with economic discrimination and acts of terror, including freezing the salary of Christian employees, destroying and looting their businesses, and marking their houses and properties with the Arabic letter *nūn*.<sup>57</sup> The symbol served to expose the Christian population and single them out, and to mark the property that IS felt entitled to possess.<sup>58</sup> On July 17, 2014, IS gave the Christian citizens of Mosul the option to convert to Islam, pay *jizya* (tax on non-Muslims), or be killed. Christians were also given one day to leave the city if they did not select one of the previous choices.<sup>59</sup> On July 18, Christian families gathered their belongings and what valuables they could fit into their



cars and began driving out of the city. Upon reaching IS checkpoints, every fleeing family or individual was confronted by IS fighters and were made to give up their cars and everything they carried.<sup>60</sup> When IS fighters suspected that families were not giving up all the jewelry or cash they had on them, they would threaten to kill them or abduct their children. Medicine was taken away from sick and elderly people, as was water and infant formula, which was poured on the ground.<sup>61</sup> The experience combined humiliation with terror and cruelty by IS fighters against this community.

Following the cleansing of Christians from Mosul, IS turned its attention to Nineveh Plain, where many historical Assyrian Christian villages exist. On August 6, 2014, the villages of Telkef, Batnaya, Baqufa, Mar Oraha, and others fell to IS fighters after the Peshmerga forces withdrew and left the citizens without armed protection. On August 7, Qaraqosh (the largest Christian village in Iraq) finally fell to IS, when as many as 100,000 fled their homes to become internally displaced persons (IDPs) living in churches, camps, and schools throughout Iraqi Kurdistan. A few months later, IS attacked 35 Assyrian villages around the Khabur River in northeastern Syria, razing homes and plundering churches and shrines, all whilst rounding up and imprisoning innocent civilians. Several thousand Assyrians were displaced from these villages. An estimate of 250 individuals, many of whom were women and children, were abducted by IS fighters to be dispersed in areas such as Raqqa and Tel Hamis in Syria. Most of these individuals were released through secret negotiations between the Assyrian Church and the terrorist group.<sup>62</sup>

Assyrians are a transnational population indigenous to northern Mesopotamia, part of northern Iraq (including today's Iraqi Kurdistan), southeast Turkey, northwestern Iran, and northeastern Syria. Today they are Christians and continue to affiliate with one of the following churches: the Assyrian Church of the East,<sup>63</sup> the Chaldean Catholic Church, the Syrian Orthodox Church,<sup>64</sup> and the Syrian Catholic Church.<sup>65</sup> Because they were incorporated into Muslim-dominated empires and states, Assyrians became gradually known by their ecclesiastical designations, undermining the uniqueness of their culture and their long history in this region.<sup>66</sup> Indeed, their language and material culture constitutes the oldest continuous tradition in Iraq today. The Assyrian presence and culture endured from ancient Arba'ilū, for instance, to Arbela during the Christian period in the ecclesiastical province of Adiabene between the fifth and fifteenth centuries.<sup>67</sup> The Assyrian community believes that they are the descendants of the ancient Assyrian people and their homeland is in northern Mesopotamia, and they identify as being Assyrian long before being Christian.<sup>68</sup>

The community derives its shared identity and cultural memory from three cultural elements – language, homeland, and religion. The most important thread of cultural continuity has been the linguistic continuity of the Assyrian language, also referred to as Neo-Aramaic/Neo-Syriac, with heavy Akkadian influence. Both Akkadian and Aramaic were the official languages of the Neo-Assyrian Empire that flourished from 934 to approximately 600 BCE, as well as utilizing classical Syriac as an ecclesiastical tongue. The fact that the modern Assyrian

language continued as a minority-spoken language based on a high percentage of Akkadian is an impressive index of in-group particularity.<sup>69</sup> Assyrian villages exist in northern Mesopotamia, spanning the region from today's southeast Turkey in the north to Nineveh Plain and Mosul in the south, and from Khabur River in northeastern Syria to Lake Urmia in northwest Iran.<sup>70</sup> The Assyrians' language and homeland provide direct connections to their ancestral history and relate to the memory of the powerful ancient monarchs and civilization, to the ruins of ancient Nineveh, Ashur, and Erbil. The continuous usage of ancient Assyrian and Mesopotamian names, such as Sargon, Ashur, Sennacherib, Ninurta, Enki, and Nineveh, in their family life until today reflects their cultural identity.<sup>71</sup>

In addition to ancient Assyria and Mesopotamia as an orienting cultural feature, the adoption of Christianity early on highlights this enduring people's collective identity. The gospel appeared in the language the Assyrians spoke, and transmitted a message of salvation that appealed to the Assyrian seers and magi.<sup>72</sup> Christianity was present in this region as early as the second century;<sup>73</sup> and Mosul itself was an Episcopal seat of the Assyrian Church of East in the sixth century.<sup>74</sup> The city was then incorporated into the Islamic Empire in the seventh century.<sup>75</sup> Some of the earliest churches and monasteries exist in this region, including the Mar Elia and Rabban Hormized monasteries, dating to the fourth and sixth centuries, respectively. Assyrian Christianity displays certain rituals and festivals that are unique to this community and link to its ancient heritage, including the Petition of the Ninevites during which members of the community fast for three days commemorating the repentance of the Ninevites at the hands of Prophet Jonah according to the Bible. Another celebration is the day of Nusardel (Feast of God), usually celebrated in Tammuz (July). Following the holy mass, members of the community throw water at each other in an act of cleansing the path of the God. This tradition most likely has its origins in ancient Assyrian and Mesopotamian rituals, such as those of the New Year. These and other festivals have been celebrated in Assyrian villages and towns for centuries and everywhere they live, including the diaspora.

Like the Yezidis, Assyrian Christians suffered persecution throughout the region's long history. Assyrians, along with Armenians and Greeks, suffered a genocide at the hands of the Turkish and Kurdish forces during World War I.<sup>76</sup> Thousands of Assyrians fled to Iran, where they were massacred by Kurdish tribes, while others settled in the northern part of what would shortly become the modern state of Iraq. The violence of the era resulted in a great reduction of the numbers of people in this indigenous community and redrew the demographic landscape as their communities were displaced and relocated time and again. The formation of the Iraqi state did not bring relief for the Assyrians and other Christian communities, who were subjected to violence carried out by national forces led by a Muslim Sunni state. The massacre at the Assyrian village of Simele in 1933 was the first massacre in the history of the young state of Iraq, when the Iraqi army, assisted by Muslim Kurdish and Arab tribes, murdered several thousand Assyrians in the region of Duhok and Mosul, looting their

villages, burning their houses, and abducting women and children.<sup>77</sup> Occurring soon after the establishment of the state of Iraq, the Simele massacre marks a bloody initiation into a nation state that would continue to exclude and oppress the Assyrian community.<sup>78</sup>

Although Assyrians and other Christians have survived a long legacy of persecution and forced cultural assimilation,<sup>79</sup> the appearance of IS threatened their very existence and what remained of their culture and identity. As mentioned above, the Assyrian Christian community finds its heritage in the Christian and ancient Mesopotamian and Assyrian traditions of the region. With the eradication of the Christian population, historical churches and monasteries were blown up, crosses were replaced with IS flags, religious statues were smashed, and century-old manuscripts were burned and looted. In Mosul alone, more than 30 churches were looted and either partially or completely destroyed, and an estimated 40 churches and monasteries have been destroyed and looted throughout the villages in the Nineveh Plain.<sup>80</sup> In addition to churches, Christian cemeteries in the villages of Bartella, Qaraqosh, Telkeppe, and Bashiqa in the Nineveh Plain were violated and demolished.<sup>81</sup> The villages themselves were plundered, homes were burned and looted, and businesses were destroyed,<sup>82</sup> disrupting a lifestyle and traditions that have survived for thousands of years in this region.

The IS also attacked and destroyed pre-Christian Assyrian heritage sites and artifacts, including the gates and walls of ancient Nineveh, the relics of Nimrud and its decorative wall reliefs and lamassus (winged bulls). While these sites and artifacts represent symbols of patrimony and national pride for all Iraqi people, they are places and objects directly related to the collective identity and cultural memory of the Assyrian people. For members of this group, Assyrian ancient heritage defines who they were in the past and are today and it is through this heritage that they project their future. Assyrian individuals, groups, and students from around the world visit these and other ancient places and landscapes on guided educational and heritage tours aimed at connecting with their ancestral past. Grassroot organizations, such as *Etuti* (My existence), promote Assyrian ancient heritage among the community in the homeland and in the diaspora through visits to heritage sites, short educational videos, and documentation of traditional crafts and local folklore.<sup>83</sup> Demolishing Nineveh's walls and lamassus, blowing up the site of Nimrud, and destroying Assyrian artifacts in museums therefore are not only attacks on important archaeological sites and material culture, they are also acts aimed at wiping out the history of local communities, destroying their collective memories, and creating a new identity for the city and its inhabitants. It is true that memories live in people's heads or they are written down as history, but the built environment is a quick physical reminder of the events involved in its building, usage, and destruction. The removal of such monuments and the eradication and displacement of related communities eventually result in forgetting – “out of sight” becomes literally “out of mind” for those whose patrimony has been destroyed and for the destroyer.<sup>84</sup>

## **Conclusion**

Although cultural genocide remains absent from international law, it is increasingly being adopted as a tool for human rights advocacy, especially the right to access cultural heritage. This chapter argues that the destruction of cultural heritage in Iraq is a cultural genocide and its perpetrators, therefore, should be brought to justice. It is a significant element of the genocide conducted by the IS against the people of Mosul. Through highlighting the case of two overlooked indigenous groups – the Assyrian Christians and Yezidis – it demonstrates how destruction of religious sites and ancient monuments and artifacts affects the identity, cultural memory, and belonging of these communities with long-term repercussions. Destruction of shrines, churches, and ancient historical cities and art is an attack on places and symbols of memory that are linked to self-image and unity. Buildings and shared spaces are locations where groups and individuals come together through shared experience, where collective identities are forged, and traditions are invented and preserved. The loss felt by those whose cultural patrimony has been demolished is not different from that felt by those who have lost their family photographs and inheritances in a fire or natural disaster, but on a significantly larger scale, affecting entire groups of people. It is not simply dismay at the material cost involved or sorrow for the damage of the aesthetic worth of the monuments in question, it is rather the reality that our world as human rests on the fact that we are surrounded by things more permanent than the activity by which they were produced. As a tangible trace of past lives made permanent through building activities, cultural heritage sites provide evidence for the endurance of the human world in the face of the brevity of human life. Thus, what is lost is the evidence for endurance. No longer surrounded by a landscape of the past, peoples feel their present and future increasingly threatened.

A year after IS was driven out of Nineveh Province, Yezidis and Assyrian Christians remain internally displaced, struggling to gather back their shattered communities and return to their homes. Faced with tremendous human, cultural, and economic losses, these communities face political challenges, posed by both the Iraqi central government and the Kurdistan Regional Government (KRG). The fact that the ancestral home of the Yezidi and Assyrian Christians is in what is today described as “disputed territories” complicates their return to their villages and towns. In several cases, abandoned Yezidi and Christian villages have been occupied now by different populations fulfilling the political agendas of one Iraqi government or the other. Even when some families manage to return to their homes, they come to ruined villages with no essential services, such as clean water and electricity. Many of the returning families have nothing, their savings exhausted, their homes destroyed and looted, and their community shattered by IS actions. Within this context, the destruction of cultural heritage in Iraq needs to be understood on its local dimension, as well as within the global perspective. It should be addressed within the framework of ethnic and cultural cleansing and cultural genocide alongside other international cases of genocide.

## Notes

- 1 Both the European Parliament and the United States declares ISIS acts as genocide. See Mindy Blez. "EU Declares ISIS Actions Genocide." *World*, February 5, 2016. [https://world.wng.org/2016/02/eu\\_declares\\_isis\\_actions\\_genocide](https://world.wng.org/2016/02/eu_declares_isis_actions_genocide) (accessed August 28, 2018); Amanda Holpuch. "John Kerry: ISIS is Committing Genocide in Syria and Iraq." *Guardian*, March 17, 2016. [www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq](http://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq) (accessed August 28, 2018).
- 2 Alexander Sehmer. "Isis Guilty of 'Cultural Cleansing' Across Syria and Iraq, UNESCO chief Irina Bokova says." *Independent*, October 5, 2015 [www.independent.co.uk/news/world/middle-east/unesco-chief-irina-bokova-accuses-islamist-groups-of-cultural-cleansing-isis-a6679761.html](http://www.independent.co.uk/news/world/middle-east/unesco-chief-irina-bokova-accuses-islamist-groups-of-cultural-cleansing-isis-a6679761.html) (accessed September 8, 2018).
- 3 András J. Riedlmayer. *Destruction of Cultural Heritage in Bosnia-Herzegovina, 1992–1996*. A Post-war Survey of Selected Municipalities (No. P486). International Criminal Tribunal for the Former Yugoslavia. 2002; András J. Riedlmayer. "Crimes of War, Crimes of Peace: Destruction of Libraries during and after the Balkan Wars of the 1990s." *Library Trends*, 56 no. 1 (Summer 2007): 107–132.
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- 5 Martin Coward. "Community as Heterogeneous Ensemble: Mostar and Multiculturalism." *Alternatives: Global, Local, Political*, 27 (2002): 29–66.
- 6 Michael Danti *et al.* "The American Schools of Oriental Research Cultural Heritage Initiatives: Monitoring Cultural Heritage in Syrian and Northern Iraq by Geospatial Imagery." *Geosciences*, 7 (September 2017): 1–21; Suzanne Bott. "Mapping the Heart of Mesopotamia: A Bittersweet Legacy in the Landscape of War." *Near Eastern Archaeology*, 78 (September 2015): 162–170; Benjamin Isakhan. "Creating the Iraq Cultural Property Destruction Database: Calculating a Heritage Destruction Index." *International Journal of Heritage Studies*, 21, no. 1 (2015): 1–21.
- 7 Andrew Keller. "Conflict Antiquities." Metropolitan Museum of Art and United States Department of State, Bureau of Educational and Cultural Affairs, October 16, 2015 <https://eca.state.gov/video/conflict-antiquities-panel-1-video/transcript> (accessed July 14, 2018); Pierre Losson. "Does the International Trafficking of Cultural Heritage Really Fuel Military Conflicts?" *Studies in Conflict and Terrorism*, 40 (September 2017): 767–780.
- 8 Chiara De Cesari. "Post-colonial Ruins: Archaeologies of Political Violence and IS." *Anthropology Today*, 31(2015): 22–26.
- 9 Salam Al Quntar and Brian Daniels. "Responses to the Destruction of Syrian Cultural Heritage: A Critical Review of Current Efforts." *International Journal of Islamic Architecture*, 5, no. 2 (July 2016): 381–397.
- 10 José Antonio González Zarandona *et al.* 2017. "Digitally Mediated Iconoclasm: The Islamic State and the War on Cultural Heritage." doi:10.1080/13527258.2017.1413675.
- 11 Sofya Shahab and Benjamin Isakhan. "The Ritualization of Heritage Destruction under the Islamic State." *Journal of Social Anthropology*, 18 (March 2018): 1–22; Christopher W. Jones. "Understanding ISIS's Destruction of Antiquities as a Rejection of Nationalism." *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, 6 (July 2018): 31–58.
- 12 Although neither the Assyrians nor the Yezidis have the official status of indigenous people in Iraq, their historical presence in this region, distinct social and cultural characteristics, and their minority status qualify them to be identified as indigenous under the 2007 UN Declaration on the Rights of Indigenous Peoples and its criteria for defining and identifying indigenous people. Brooke E. Hamilton. "Why Indigenous People's Property Rights Matter: Why the United Nations Declaration on the Rights of Indigenous Peoples May Be Used to Condemn ISIS and the State of Iraq for Their

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  - 15 Jan Assmann. “Communicative and Cultural Memory.” In *Cultural Memory Studies: An International and Interdisciplinary Handbook*, edited by A. Erll and A. Nünning (Berlin: de Gruyter, 2008), 110; Scot A. French. “What is Social Memory?” *Southern Cultures*, 2 (Fall 1995): 9–18.
  - 16 Jan Assmann and John Czaplicka. “Collective Memory and Cultural Identity.” *New German Critique*, 65 (1995): 129.
  - 17 Richard Meckien. “Cultural Memory: The Link between Past, Present, and Future.” Institute of Advanced Studies of the University of São Paulo, 2013 [www.iea.usp.br/en/news/cultural-memory-the-link-between-past-present-and-future](http://www.iea.usp.br/en/news/cultural-memory-the-link-between-past-present-and-future) (accessed September 3, 2018).
  - 18 Assmann. “Communicative and Cultural Memory,” 113–114.
  - 19 Robert Bevan. *The Destruction of Memory: Architecture at War* (London: Reaktion, 2016), 27.
  - 20 Brian Graham *et al.* *A Geography of Heritage: Power, Cultural and Economy* (London: Arnold, 2002), 41.
  - 21 Amatzia Baram. *Culture, History and Ideology in the Formation of Ba’thist Iraq, 1968–89* (New York: St. Martin’s Press, 1991); Magnus T. Bernhardsson. *Reclaiming a Plundered Past: Archaeology and Nation Building in Iraq* (Austin: University of Texas Press, 2005); Eric Davis. *Memories of State: Politics, History and Collective Identity in Modern Iraq* (California: University of California Press, 2005).
  - 22 Smith, *Uses of Heritage*, 48, 29–35.
  - 23 *Ibid.*, 53.
  - 24 *Ibid.*, 75.
  - 25 M.C. Rodman. “Empowering Place: Multilocality and Multivocality.” In *The Anthropology of Space and Place: Locating Culture*, edited by S.M. Low and D. Lawrence-Zúñiga (Malden: Blackwell, 2003), 205.
  - 26 Zelin Y. Aaron. “The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement.” *Research Notes*, WINEP, no. 20 (2014): 1–4.
  - 27 John F. Burns. “U.S. Strike Hits Insurgent at Safehouse.” *New York Times*, June 8, 2006. [www.nytimes.com/2006/06/08/world/middleeast/08cnd-iraq.html](http://www.nytimes.com/2006/06/08/world/middleeast/08cnd-iraq.html) (accessed July 14, 2018).
  - 28 Matthew Barber. “That They Remain: Syrian and Iraqi Christian Communities amid the Syrian Conflict and the Rise of the Islamic State.” In *Christianity and Freedom, Vol. II: Contemporary Perspective*, edited by Allen D. Hertzke and Timothy Samuel Shah (Cambridge: Cambridge University Press, 2016), 464.
  - 29 *Ibid.*, 464.
  - 30 For further details on the history of IS, see *ibid.*, 464–465; Aaron, “The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement.”
  - 31 This region is located in northwestern Iraq within the Nineveh Province.
  - 32 What was not destroyed was looted and sold on the antiquities black market. The sale of antiquities, religious artifacts, and ancient manuscripts has been one of IS’s main sources of funding. Documents recovered in an IS camp in Syria included collection receipts for what IS calls “war booty” tax (20 percent of the value of the antiquities sold) imposed on each transaction. A small sample of such receipts indicates that IS generated about \$265,000 from 11 transactions between December 6, 2014 and March 26, 2015. The US government estimated that IS probably earned several million dollars from antiquities sales since mid-2014. Keller, “Conflict Antiquities.”



- 33 The site of Nabi Yunus is a symbol of Mosul's multiculturalism. The Mosque that was destroyed by IS was dedicated to the Biblical prophet Yunus, or Jonah. It was built on top of a church dating to the early Christian era, which in turn was built on top of an ancient Assyrian palace. The site of Nabi Yunus is in fact an archaeological mound, part of the ancient city of Nineveh. The presence of the various cultures and religions in this one site connects different cultural and religious groups with each other.
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- 35 See HRC June 2016 report on ISIS crimes against the Yezidis. [www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf) (accessed September 21, 2018).
- 36 Yazda. 2016. Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates on or after August 3, 2014, 4.
- 37 Yazda is a Yezidi NGO based in the USA. [www.yazda.org](http://www.yazda.org).
- 38 Kill site is where a small number of individuals were executed by IS but who were not buried.
- 39 Yazda, Mass Graves of Yazidis Killed by the Islamic State Organization, 7–20.
- 40 Birgül Açıkyıldız. *The Yezidis, the History of a Community, Culture and Religion* (London and New York: I.B. Tauris, 2010); John S. Guest. *Survival Among the Kurds: A History of the Yezidis* (London and New York: Routledge, 2010); John S. Guest. *The Yezidis. A Study in Survival*. (London and New York: KPI, 1987); Arakelova, Victoria. "Yezdistan versus Kurdistan: Another Legend on the Origins of the Yezidis." *Iran and the Caucasus*, 21 (2017): 376–380.
- 41 Before the rise of local nationalism in this region, some of the Yezidis, like the Assyrian and other Christian communities discussed below, adopted Assyrian descent, and several nineteenth- and twentieth-century scholars believed that to be the case. See Sargon Donabed *Reforging a Forgotten History, Iraq and the Assyrians in the 20th Century* (Edinburgh: Edinburgh University Press, 2016), 23, footnote 12.
- 42 Açıkyıldız, *The Yezidis*, 35–70; Guest, *The Yezidis*, 28–41; Victoria Arakelova. "Ethno-religious Communities: To the Problem of Identity Markers." *Iran and the Caucasus*, 14 (2010): 1–18.
- 43 This god is "assisted" by seven angels, the greatest is Azaziel, who was given the task of the creation of plant and animal life on earth. Guest, *The Yezidis*, 29. God appointed the Peacock Angel to take care of worldly affairs, while he focuses on heavenly affairs only. Açıkyıldız, *The Yezidis*, 71.
- 44 Guest, *The Yezidis*, 29.
- 45 Yazda. Mass Graves of Yazidis Killed by the Islamic State Organization, 4.
- 46 For details about the Yezidi community's struggle post the American Invasion of Iraq, see Mokhtar Lamani. "Minorities in Iraq, the Other Victims." In *Cultural Cleansing in Iraq*, edited by Raymond Baker, Shereen Ismael, and Tareq Ismael (London: Pluto Press, 2010), 239–253.
- 47 Açıkyıldız, *The Yezidis*, 115–117.
- 48 *Ibid.*, 146.
- 49 HRC June 2016, 19. Report on ISIS crimes against the Yezidis, Karel Nováček, personal communication July 2018. Also see Rudaw, February 15, 2017. [www.rudaw.net/english/kurdistan/15022017](http://www.rudaw.net/english/kurdistan/15022017) (accessed September 22, 2018); ASOR Cultural Heritage Initiative.
- 50 Açıkyıldız, *The Yezidis*, 108–109.
- 51 Guest, *The Yezidis*, 36.
- 52 Guest, *Survival Among the Kurds*, 34.
- 53 *Ibid.*, 35.



- 54 These are ancient villages in northern Mesopotamia. The Yezidi community live in these villages alongside the Assyrian Christian communities and others.
- 55 Guest, *The Yezidis*, 34.
- 56 Açıkyıldız, *The Yezidis*, 117.
- 57 This letter stood for the Arabic word “Nazarene,” a term that has been used by Muslims to refer to Christians.
- 58 Barber, “That They Remain,” 470–472.
- 59 Shlomo Organization for Documentation. *The Third Anniversary of the Occupation of the Islamic State Organization of the Province of Nineveh* (Erbil, Iraq, June 9, 2017), 9. Shlomo is a Human Rights Organization based in Baghdad. <http://shlomoo.org/main-page> (accessed September 22, 2018).
- 60 Barber, “That They Remain,” 467.
- 61 See survivors’ testimonies in Shlomo Organization for Documentation, *The Third Anniversary of the Occupation of the Islamic State Organization of the Province of Nineveh*, 28–59.
- 62 See Lori Hinnant. “The Syrian Bishop who Saved 226 Christian Hostages from ISIS.” *Independent*, December 6, 2016. [www.independent.co.uk/news/world/middle-east/syrian-bishop-mar-afrah-athneil-saved-226-christian-hostages-isis-a7458376.html](http://www.independent.co.uk/news/world/middle-east/syrian-bishop-mar-afrah-athneil-saved-226-christian-hostages-isis-a7458376.html) (accessed September 22, 2018).
- 63 Wrongly referred to as Nestorian church and its followers as Nestorians.
- 64 Referred to as Jacobite.
- 65 Donabed, *Reforging a Forgotten History*, 3.
- 66 For the various identities, imposed by the outsiders and sometimes actualized by the community itself, see Donabed, *Reforging a Forgotten History*, 5.
- 67 This province included Mosul, Nineveh, Karkā d-Beth Slōkh (ancient Arraphā and today’s Kirkuk), Beth Nuhadra (today’s Duhok), etc. Donabed, *Reforging a Forgotten History*, 3.
- 68 Sami Hermes. “The Assyrians in History.” *Nineveh*, 4 (1986): 4–5.
- 69 On the language of the Assyrian communities in the Middle East, see Geoffrey Khan. *The Neo-Aramaic Dialect of the Assyrian Christians of Urmi* (Leiden, Brill, 2016); Geoffrey Khan. *The Neo-Aramaic Dialect of Barwar* (Leiden, Brill, 2008); Geoffrey Khan. *The Neo-Aramaic Dialect of Qaraqosh* (Leiden: Brill, 2002).
- 70 For information on these villages, see [www.atour.com/news/assyria/20080813a.html](http://www.atour.com/news/assyria/20080813a.html); [www.aina.org/articles/turkish.htm](http://www.aina.org/articles/turkish.htm) (accessed on September 22, 2018).
- 71 Mordechai Nisan. *Minorities in the Middle East* (North Carolina and London: McFarland, 1991), 157.
- 72 *Ibid.*, 158; Robert Betts. *Christians in the Arab East: A Political Study* (Athens: Lycaettus Press, 1975), 135–136.
- 73 Yousif Habbi. *The Church of the East* (Baghdad: Al-Mashriq Publisher, 1989), 67.
- 74 Odisho Ashitha. *Assyrians at Present: Origins, Languages, and National Presence* (Baghdad: Morocco Press, 2004), 22.
- 75 ‘Izz al-Dīn ibn al-Athīr. *Al-Kāmil fī al-tārīkh, al-juz’ al-thānī* [The Chronicle of Ibn al-Athīr] (al-Qāhīrah: al-Maṭba‘ah al-Amīrīyah, 1301/1883), 258.
- 76 Frederick Aprim. *Assyrians: From Bedr Khan to Saddam Hussein* (Bloomington, IN: Xlibris, 2006), 50; Riccardo Armillei *et al.* “Forgotten and Concealed: The Emblematic Cases of the Assyrian and Romani Genocides.” *Genocide Studies and Prevention: An International Journal*, 10 (2016): 98–120; Hannibal Travis. *The Assyrian Genocide: Cultural and Political Legacies* (London and New York: Routledge, 2018).
- 77 Odisho Ashitha. *Semele Catastrophe in 1933: Local and International Causes and Influences* (Mosul: Nesibin Publisher, 2013).
- 78 See Sargon Donabed and Shamiran Mako. “Between Denial and Existence: Situating Assyrians within the Discourse on Cultural Genocide.” In *The Assyrian Heritage*,

*Threads of Continuity and Influences*, edited by Önvör Cetrez, Sargon Donabed, and Aryo Makko (Sweden: Uppsala University, 2012), 281–295; Barber. “That They Remain,” 455–456.

79 Ibid.

80 Shlomo Organization for Documentation, *The Third Anniversary of the Occupation of the Islamic State Organization of the Province of Nineveh*, 68–82. There are at least 177 registered Assyrian Christian religious sites in Nineveh Province, see Hammurabi Human Rights Organization Report, [www.hhro.org/uploads/files/archives/file\\_art/cover%20page%20for%20report%202014/%D8%AC%D8%AF%D9%88%D9%84%20%D8%B1%D9%82%D9%85%204.pdf](http://www.hhro.org/uploads/files/archives/file_art/cover%20page%20for%20report%202014/%D8%AC%D8%AF%D9%88%D9%84%20%D8%B1%D9%82%D9%85%204.pdf) (accessed September 22, 2018).

81 <https://indefenseofchristians.org/wp-content/uploads/2018/05/Shlomo-Report-on-Christians-in-Iraq.pdf>, 83.

82 Ibid., 66–67.

83 Savina Dawood, Co-founder of Etuti, E-mail exchange, July 29, 2018.

84 Bevan, Robert. *The Destruction of Memory: Architecture at War* (London: Reaktion, 2016), 28. This has already happened once with the Assyrian Genocide of World War I. See Armillei *et al.* “Forgotten and Concealed,” 98–120.

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# 9 A century of cultural genocide in Palestine

*Daud Abdullah*

## Introduction

Throughout their long struggle for national liberation and self-determination, the Palestinian people have been subjected to policies that have often been described as genocidal and are aimed at destroying their national culture, political autonomy, and national will. This chapter examines the theoretical framework and empirical evidence for the case of cultural genocide against Palestine.

The term genocide, as used in international law, is attributed to the Polish jurist and academic Raphael Lemkin. He first explored the origins of the term in 1933 at the Fifth International Conference for the Unification of Penal Law in Madrid and later developed it in his groundbreaking work, *Axis Rule in Europe*. Genocide, he wrote, is a term used to denote an old practice in a modern context; it stems from the Greek word *genos* (race, tribe) and the Latin root *cide* (killing).<sup>1</sup> It signifies a coordinated plan of different actions designed to destroy the essential foundations of the life of national groups. Lemkin identified eight dimensions to the objectives of genocide. These are the

disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.<sup>2</sup>

Lemkin argued that there are two phases to genocide; the first is the “destruction of the national pattern of the oppressed group” and the second is “the imposition of the national pattern of the oppressor.”<sup>3</sup> This imposition, he noted, “may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonisation of the area by the oppressor’s own nationals”.<sup>4</sup>

This dual paradigm of destruction and imposition is especially noticeable in Palestine where, in March 1948, the Zionist leaders in the country decided to implement their master plan, Plan *Dalet*, or Plan D, which was drawn up to expel as many Palestinians as they could from their towns and villages. The orders given to their paramilitary forces specified the following methods to bring about

expulsion: intimidation, a siege on villages, bombing of neighbourhoods, setting fire to houses and fields, and the planting of TNT to prevent the return of villagers.<sup>5</sup> Ultimately, the Zionists expelled 750,000 Palestinians from their villages in 1948. With this expulsion of three-quarters of the Palestinian population, a total of 531 towns and villages were depopulated and destroyed.<sup>6</sup>

Given the declared intent of the Zionist leaders, this wholesale destruction and depopulation of Palestinian villages fit easily with the definition of genocide as cited in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In discussing the specific crime of cultural genocide, this chapter adopts the definition used by Lawrence Davidson; that it is the “purposeful destructive targeting of out-group cultures so as to destroy or weaken them in the process of conquest or domination”.<sup>7</sup> Accordingly, cultural genocide involves the following acts:

- a Prohibiting the use of language of the group;
- b Destroying the books, publications, or texts printed in the language of the group or of religious works or the prohibition of new publications;
- c Destroying or preventing the use of the libraries, museums, schools, historical monuments, places of worship, or other cultural institutions and objects of the group;
- d Forced exile of members of the group; and
- e Forced dislocation.<sup>8</sup>

In this context, it must be emphasised that there are two interdependent components of cultural heritage. The first, which is tangible, includes: artistic creations, buildings, monuments and other physical products of human endeavour that are regarded as culturally significant by a given society. The second component is intangible; it includes: practices, representations, expressions, knowledge, skills, language, rituals and festive events that have been transmitted from one generation to another.<sup>9</sup> The destruction of a people’s cultural heritage, in whole or in part, results in the same consequences, cultural genocide. Kevin Chamberlain summed it up thus: “The destruction of a people’s cultural heritage amounts to the destruction of a people’s memory, its collective consciousness and identity. In other words it is ethnic cleansing by another name.”<sup>10</sup>

### **Cultural bareness**

Despite the Nakba (Catastrophe) of 1948, 150,000 Palestinians remained in their homeland, becoming in the process Palestinian citizens of Israel (PCI). Throughout the period 1948–1966, the Israeli establishment imposed a system of military rule on the PCI, severely limiting their freedom of movement, livelihoods and expression. In effect, they were subjected to what Lemkin referred to as “the imposition of the national pattern of the oppressor”. Land which formed the bedrock of their local economy was gradually taken away from them as the Israeli state passed a series of laws to transfer Palestinian land to state ownership or control.



These acts were not accidents of history or consequences of war; they were, in fact, carefully planned and executed. Like other strands of European colonialism, Zionism considered any territory “empty” and available if its people had not achieved national independence and statehood. For them, it was simply a matter of finding this open empty space – open not in a physical sense but in the form of “cultural bareness”.<sup>11</sup> In the case of Palestine, it was deemed barren and devoid of culture and the Palestinian people were portrayed as marginal and uncultured. The Zionist mission was, therefore, to ethnically cleanse the land. Theodore Herzl, the movement’s founder, was convinced that the fulfilment of their dream would result in the acute suffering and misery for the indigenous population. On 12 June 1895, he wrote in his diary, “We shall try to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our own country.”<sup>12</sup>

Israel Zangwill, another leading Zionist, who is often acclaimed for popularising the slogan “a land without a people for a people without a land”, was even more explicit when he told a gathering in Manchester in April 1905, “We must be prepared either to drive out by the sword the [Arab] tribes in possession as our forefathers did or grapple with the problem of a large alien population, mostly Mohammedan and accustomed for centuries to despise us.”<sup>13</sup> In retrospect, it was evident that the early Zionist leaders did not see their project as a Jewish liberation movement; it was, for all practical purposes, a “Jewish movement for colonial settlement in the Orient”.<sup>14</sup>

The project to colonise Palestine was thus conducted on the premise of more land for Jews and less land for Arabs. Yosef Weitz, director of the Settlement Department of the Jewish National Fund (JNF), and later head of the Israeli government’s official Transfer Committee, wrote in his diary on 20 December 1940:

Between ourselves it must be clear that there is no room for both peoples together in this country.... We shall not achieve our goal of being an independent people with the Arabs in this small country. The only solution is Palestine, at least Western Palestine [west of the Jordan River] without Arabs.... And there is no other way but to transfer the Arabs from here to the neighbouring countries; to transfer all of them; not one village, not one tribe should be left.<sup>15</sup>

So, in an apparent attempt to delete Palestine from history and cartography, Israeli leaders replaced historical place names with that of Hebrew names. Former defence minister of Israel, Moshe Dayan, in an address to students at the Technion University in Haifa on March 1969, was cited in *Haaretz* on 4 April 1969 as saying:

Jewish villages were built in the place of Arab villages. You do not even know the names of these Arab villages, and I do not blame you because geography books no longer exist, not only do the books not exist, the Arab villages are not there either. Nahlal arose in the place of Mahlul; Kibbutz

Gvat in the place of Jibta; Kibbutz Sarid in the place of Huneifis; and Kefar Yehushu'a in the place of Tal al-Shuman. There is not one single place built in this country that did not have a former Arab population.<sup>16</sup>

Significantly, the process of erasing Arab place names and replacing them with Hebrew names started as early as the 1920s; this was conducted by what was referred to as the “naming committee”. In 1949, this committee became a subdivision of the Jewish National Fund (JNF) which, with the help of the archaeologists, geographers and religious scholars, accelerated the “Hebraising” of Palestine.<sup>17</sup>

The Palestinian Nakba was unparalleled in modern history. The wholesale emptying of the country of its population was, according to Zionist officials, their way of solving what they termed the Arab demographic problem. In order for Israel to emerge as a Jewish State, according to the vision of its founding fathers, three requirements had to be fulfilled. It had to be, first and foremost, a state for all the Jews in the world. They had to become its majority population and, at the same time, be afforded special privileges and preferential laws. The upshot of such exclusivist claims was two-fold: one, it precluded by definition the return of the refugees expelled in 1948 and 1967, and two, it facilitated the emergence of an apartheid system throughout historic Palestine.

### **Vandalising Palestinian institutions**

The targeting of Palestinian cultural institutions and identity did not stop with the establishment of the state of Israel. It has continued until today, taking various forms in Palestine as well as against Palestinians in the diaspora. From the occupied territories, Israeli soldiers and civilians have removed numerous objects of historical, cultural and archaeological importance. The data and objects obtained from the Israeli excavations, in violation of international law, were never made accessible to Palestinian researchers. Instead, they were used to reinforce the illegitimate occupation.<sup>18</sup>

Geographically speaking, Palestine is unique for several reasons. It lies at the crossroads of three continents – Asia, Europe and Africa – and its association with the three monotheistic faiths Judaism, Christianity and Islam, has rendered it the spiritual and religious heritage of more than half of all humanity. Excavations near Jericho have revealed artefacts which suggest that it may be the oldest city in the world. It was here, in Jericho, that humankind made the transition from hunter-gatherer to stable lives of food production around 6000–7000 BCE.<sup>19</sup> Recent surveys have revealed that there are more than 12,000 archaeological and cultural heritage sites in the occupied West Bank (including Jerusalem) and the Gaza Strip alone.<sup>20</sup>

Since 1967, the Israeli occupation has dominated and assumed effective control of exploration, excavation, protection and preservation in the occupied territories.<sup>21</sup> Under the Oslo Accords, the West Bank was divided into three zones (A, B, C), which, in hindsight, has aided Israel’s control and expropriation

of Palestinian archaeological sites. Area C, which falls entirely under Israel's control and represents about 60 per cent of the West Bank, contains 53 per cent of the archaeological sites in the West Bank. This predominance over Palestinian cultural heritage has "placed thousands of artefacts discovered in archaeological excavations in the custody of the Israeli Authority, and beyond the reach of Palestinian Archaeologists or the general public".<sup>22</sup> Not only do such acts fall under the definition of cultural genocide, they are also a violation of Article 49 of the Fourth Geneva Convention, which specifically states, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

One of the most grotesque acts of vandalism recorded in the occupied West Bank took place in the Ministry of Culture in 2002. The new multistorey building located in the centre of El Bireh was occupied by the Israeli army for most of April that year. When the soldiers left at the beginning of May, the employees were shocked by the sheer vindictiveness of what had occurred. The Israeli journalist Amira Haas recorded the carnage in graphic terms:

All the high-tech and electronic equipment had been wrecked or had vanished – computers, photocopiers, cameras, scanners, hard disks, editing equipment worth thousands of dollars, television sets. The broadcast antenna on top of the building was destroyed.... In every room of the various departments – literature, film, culture for children and youth books, discs, pamphlets and documents were piled up, soiled with urine and excrement.... There are two toilets on every floor, but the soldiers urinated and defecated everywhere else in the building, in several rooms of which they had lived for about a month.... Someone even managed to defecate into a photocopier.<sup>23</sup>

At the height of the Al-Aqsa Intifada, 2003–2004, Israel's occupation forces repeatedly attacked the historic city of Nablus with rockets, shells, and tanks; large areas were cleared by military bulldozers, causing widespread destruction to historical and archaeological sites. Nablus, which was built around 72 AD, derives its name from the ancient Roman town of Neapolis. An estimated 310 buildings were destroyed or damaged, including mosques, churches, monuments and other historic buildings.<sup>24</sup>

Just 20 kilometres north-west of Hebron city, the historic site at Tell Qilla also witnessed similar acts of extreme vandalism in 2003. Israeli bulldozers moved into the area and demolished large parts of the walls of the Canaanite city, which were later smuggled onto the illicit market. Unsurprisingly, the occupation forces prevented Palestinian police from stopping the pillage. According to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the term "cultural property" covers, irrespective of origin or ownership:

Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether

religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

The Hague Convention is regarded as the most important international instrument for the protection of cultural property. As a state party to the Hague Convention, Israel is obliged to prevent the exportation of cultural property from the occupied territory. Article 4(3) stipulates:

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

Although Israel signed the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations of 1956, it has refused to ratify the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It chose instead to interpret international law to claim that there is no prohibition of excavation in occupied territories. Had it adhered to this principle it would not have been able to proceed with its settlement programme in the territories, which involves large excavations to build bypass roads and other infrastructure.<sup>25</sup>

### **Destruction of cultural property**

Numerous properties have been irreversibly destroyed or damaged by Israel's occupation. Immediately after the capture of East Jerusalem in 1967, Israel proceeded to destroy the Moroccan Quarter, including the four Muslim religious sites it contained. It was established in 1193 by Al Malik Al Afdal, the son of Salah al Din al Ayubi. As a *waqf*, or inalienable pious endowment, it served as a residential quarter for North African pilgrims. Additionally, Al Afdal had established a school on the site for advanced religious studies, which was later called Al Afdaliyah after him.<sup>26</sup>

Literally, the term *waqf* means prevention or restraint. In Islamic law, however, it refers to a property which, having been made into a pious foundation, is protected from being alienated and safeguards in perpetuity the use of its usufruct for the benefit of mosques, schools, hospitals, maintenance of scholars and assistance to the poor.<sup>27</sup> The demolition of the Moroccan Quarter was by no means restricted to the Islamic endowments. The Harat ash-Sharaf and parts of the Armenian Quarter, and the lands owned by the Syrian (Jacobite) convent, were also decimated. Furthermore, in recent years, there has been an upsurge in attacks on Christian holy sites in Jerusalem. The Ma'amadaniya Church in West

Jerusalem was set ablaze after an arson attack by Jewish settlers in October 2010. Other churches were similarly attacked in what appears to be an attempt to eliminate any Christian presence in the west of the city. Under these circumstances, the percentage of Christians in Jerusalem dropped from 20 per cent in 1948, to 2.9 per cent in 1988, and to 1.9 per cent in 2009.<sup>28</sup>

Should current trends continue, it is very likely that the Christian presence in Jerusalem will soon come to an end.

The scale of usurpation was so extensive that the Palestinian historian Abdul Latif Al Tibawi observed it was reminiscent of the worst practices of the Middle Ages.<sup>29</sup> Scores of archaeological finds from the Palestine Archaeological Museum in East Jerusalem were seized and sent to the Israel Museum in West Jerusalem. Because the affected area was connected to the Haram ash-Sharif, institutions linked to every facet of life were affected. They included: schools (*madrasahs*), retreats for meditation (*zawiyahs*), hostels for pilgrims (*ribats*), public drinking fountains (*sabils*), public baths (*hammams*), traditional inns (*khans*) and traditional markets (*suqs*).<sup>30</sup>

In June 2002, the Israeli authorities began constructing a 700-kilometre “security wall” across the occupied West Bank. During the construction, hundreds of Palestinian archaeological sites were cut off and annexed to Israel.<sup>31</sup> Palestine’s cultural heritage suffered irreparable damage after Israel demolished a number of classified buildings in the old towns of Hebron and Nablus in 2003 and 2004.<sup>32</sup> The construction of the Israeli wall and settlements in the occupied territories often required large-scale archaeological excavations which cannot be identified as “salvage” or “rescue” excavations. It is believed an estimated 1,100 archaeological landmarks were ruined and destroyed by the erection of the wall. Kevin Chamberlain argues that:

When a site is uncovered the Israelis institute a “salvage excavation”, i.e. the rapid removal and recording of artefacts before the site is covered up. In most cases this results in the destruction of the site, treasure hunting for objects, although occasionally some sites are covered up. Others are lost to all future investigation, which is often the case, among others, of exposed mosaic floors. Furthermore, the effect of these so-called ‘salvage excavations’, is the fact that the all-important context of the site is destroyed, and the knowledge that it yields is lost forever.<sup>33</sup>

Still, in the West Bank, the Israeli wall has had similar devastating consequences on the village of Al Walaja. Its tragedy began in 1948 when Zionist militias forced most of its inhabitants into exile; many ended up in refugee camps in Jordan. The village, which is about 5,000 years old, is famous for its water resources, its breathtaking landscapes and agricultural terraces. Al Walaja is watered by 18 natural springs; one of its most famous, Ain al-Haniyeh, has arches, buildings and Byzantine mosaic floors. In December 2016, the Israeli authorities announced plans to move the permanent checkpoint between the occupied West Bank district of Bethlehem and Jerusalem further into Palestinian

territory. The Palestinian Authority called on UNESCO and other international organisations to intervene because the move was going to block Palestinian access to the area and isolate several hundred acres of privately-owned Palestinian land in the outskirts of the village.

According to the United Nations Relief and Works Agency (UNRWA), Al Walaja used to span more than 17,793 dunums (4,400 acres).<sup>34</sup> However, decades of Israeli drilling, exploration, theft of artefacts and, more recently, expropriation by the Israeli wall have resulted in a loss of almost 85 per cent of Al Walaja's agricultural and cultural heritage. Responding to a request from the United Nations General Assembly in July 2004, the International Court of Justice (ICJ) issued an advisory opinion declaring that the construction of the Israeli wall was illegal and should stop immediately. The ICJ observed that "the construction of the wall and its associated régime created a 'fait accompli' on the ground that could well become permanent, and hence tantamount to a de facto annexation". It noted that Israel was obliged "to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory".<sup>35</sup>

In conclusion, the ICJ ruled that "Israel cannot rely on the right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall."<sup>36</sup> With regard to the legal obligations of states in relation to Israel's actions, the ICJ asserted that

States are under an obligation not to recognise the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to cooperate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefore.<sup>37</sup>

By August 2009, there were 25 disclosed excavation sites beneath Al Aqsa Mosque and its surroundings. These include residential, commercial and religious buildings. During the period from 21 August 2009 to 21 August 2010, the number of excavations beneath and around Al Aqsa Mosque increased from 25 to 34, which have led to a number of cracks and fissures in the mosque and its surroundings.<sup>38</sup> A section of Wadi Halwa Street, south of the mosque, collapsed in January 2010. Likewise, fissures and erosions were discovered in the walls of the Marwani prayer area.<sup>39</sup>

The Islamic endowments and religious sites were not the only targets of the occupation. The Israeli aggression in Jerusalem has even extended to the cemeteries. The city's municipality has approved the construction of a "Museum of Tolerance" in Maman Allah Cemetery, which is located about 2 kilometres west of Al Khalil Gate. This is an Islamic endowment which bears the remains of several companions of the Prophet Muhammad, the generation of his successors and thousands of Islamic scholars. Maman Allah is the largest Islamic cemetery in Jerusalem and covers an area of 200 dunums. The project, which is financed by the Simon Wisenthal Centre, is estimated to have cost some \$200 million.

The process of transforming the cemetery has been gradual. In 1985 the Israeli ministry of transportation built a car park on a section of it. Between 1985 and 1987, a number of excavations and a network of drains were constructed to expand the car park. Work on the “Museum of Tolerance” began in January 2005. Ninety-five percent of the graves have been exhumed to build the car park and a public park.<sup>40</sup>

Article 56 of The Hague Regulations prohibits “all seizure of, and destruction, or intentional damage” done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science. More recently, the violation of this provision was included among the violations of the laws and customs of war in the Statute of the International Criminal Tribunal for the Former Yugoslavia. Furthermore, under the Statute of the International Criminal Court, destruction of buildings dedicated to religion, education, arts, science, or charitable purposes and historic monuments, and destruction and seizure that is not imperatively demanded by the necessities of the conflict constitute war crimes in both international and non-international armed conflicts.<sup>41</sup>

Several resolutions have been passed by the Security Council and UNESCO calling on Israel to end its excavations and damage to historical sites, but it has refused to comply. Under international law, excavations by the occupier in occupied land are strictly forbidden. The excavations are now dangerously close to Bir Al Waraqa and Bir Al Ka’as, beneath Al Aqsa Mosque, destabilising its foundation. These excavations cover an area of almost 10 dunams. They have not stopped since the occupation began; on the contrary, they have intensified.

These innumerable acts of vandalism, to use Lemkin’s term, that were just described include the destruction of the Moroccan quarter in the old city of Jerusalem, the transfer of artefacts from the Palestine Archaeological Museum in East Jerusalem to the Israel Museum in West Jerusalem, and the destruction and demolition of classified buildings in the old towns of Hebron and Nablus, especially in 2003 and 2004.<sup>42</sup> These activities, which are often described as “salvage excavations”, do not in the least conceal the fact that they amount to crimes against Palestine’s cultural heritage.

### **The theft of archives and libraries**

Two broad categories of Palestinian cultural property have been destroyed and looted on an industrial scale since 1948. They include the items listed in Article 1(a) of the 1954 Hague Convention which were detailed above, as well as those listed in Article 1(b): “buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives...”<sup>43</sup>

Of course, the Hague Convention did not emerge out of the blue from a vacuum. It was, on the contrary, a response to the excessive destruction of historic buildings and works of art during the Second World War. In the aftermath, UNESCO, whose mandate includes the preservation of cultural heritage,



assumed the responsibility to organise legal provisions to protect “all objects of cultural value”.<sup>44</sup> Both the 1954 Convention and the 1954 Protocol are considered integral parts of international customary law; that is to say their provisions are binding on all parties to conflict regardless of whether they are signatories to these instruments.<sup>45</sup>

In its 2005 Compendium of Rules, the International Committee of the Red Cross (ICRC) adopted in Rule 38 the view that “Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.”<sup>46</sup> Further, Rule 41 notes, “The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.”<sup>47</sup> During the 1948 ethnic cleansing of Palestine, several private collections of manuscripts and tens of thousands of books were looted by the Zionist militias. While conducting research in a number of Israeli state archives, Gish Amit, an Israeli PhD student at Ben Gurion University, discovered that an estimated 60,000 books were looted during that period. They included the private collection of the renowned Palestinian educationist Khalil Al Sakakini (1878–1953).<sup>48</sup> When members of his family tried to retrieve the stolen books from Israel’s National Library they were told, “You have no right to anything because each volume individually, and all of them together, are abandoned property.”<sup>49</sup> This was, no doubt, a breach of Rule 41 of the Protocol of 14 May 1954, which calls for the return of cultural property to the competent authorities of the occupied territory from which they came.<sup>50</sup> There are currently about 6,000 looted Palestinian books held in Israel’s National Library; their spines bear the label AP, which means “abandoned property”. Apart from these, there some 30,000 other books stolen from private Palestinian libraries, also kept in the National Library. They were not incorporated in the library’s general catalogue and are thus more difficult to locate.<sup>51</sup>

Another prominent family, Al Barghouti, also suffered a similar loss of valuable books, documents and memoirs. Omar Saleh Al Barghouti was a renowned lawyer and leading figure in the Palestinian resistance against the British occupation. During the 1948 war, he was forced into exile and hundreds of books were looted from his home in Jerusalem. Many of this prized collection were, according to his granddaughter Rasha, found in Israel’s National Library. The library director, Oren Weinberg, told Al Jazeera Network that the books were stored there for the Custodian of Absentee Property.<sup>52</sup>

Although Palestinian urban centres like Haifa, Jaffa, Nablus, Hebron, Nazareth and Gaza were recognised as important cultural and intellectual centres, Jerusalem was, undoubtedly, the main hub in the decades prior to 1948. Many of the formally educated resided in Jerusalem; hence the city became a main target for the looters. Before the Nakba, the port city of Haifa provided a railway line that linked Palestine with Damascus and Cairo. There was a constant coming and going of theatre troupes, poets, educators, jurists and literary critics.<sup>53</sup> Far from being ordinary mass-produced fiction, Mermelstein observed that most of the books that were looted from Palestinian families were in fact scholarly volumes.<sup>54</sup>

The War of 1948–1949 left the Palestinians dispossessed, stateless and scattered. Faced with an enemy that was far better organised and equipped, the Palestinians failed to achieve the statehood and independence they long aspired to. As far as the new state of Israel was concerned, the process of cultural obliteration was incomplete. In 1958, ten years after the Nakba, the Israeli authorities ordered the eradication of 27,000 books. Amit said they were sold to a paper plant. He described the act as “a cultural massacre undertaken in a manner that was worse than European colonialism, which safeguarded the items it stole in libraries and museums”.<sup>55</sup> The Israelis claimed the books posed a threat to the state.

The formation of the Palestine Liberation Organisation (PLO) in 1964 was, for all intents and purposes, the first major attempt after the Nakba to provide the Palestinian people with a national leadership. They had been, throughout the preceding decade, bereft of any formal political and social representation. National identity and culture were to become key components in the reconstruction of their nationalism. In 1965, a leading Palestinian intellectual, Dr Fayez Sayigh (1922–1984), founded the Palestine Research Centre in Beirut. The PLO provided most of the funding for the Centre, which later became a major repository of Palestinian archives. Sayigh had himself written over 500 works and possessed a personal library of over 5,000 volumes, hundreds of tape recordings, and films which were lodged with the Centre.<sup>56</sup> Apart from the collection of documents and manuscripts, the Centre also published hundreds of scholarly works, as well as an academic periodical, *Shuun Filastiniyah*, which became its main organ.

### **Destroying Palestinian culture beyond Palestine**

The crimes committed by Israel were not confined to Palestine. They were transnational, threatening other states in the region and the wider international community. During its 1982 invasion of Lebanon and the attendant massacre at Sabra and Shatila refugee camps, the Israeli army systematically destroyed and looted tens of thousands of documents, artefacts and books associated with the Palestinian people. That pillage includes the destruction of the Palestine Research Centre and the Beirut-based Institute for Palestine Studies, whose entire archives were stolen. Dr Sabry Jiryis, director of the Research Centre, said the troops took away its entire library of 25,000 volumes in Arabic, English and Hebrew, a printing press, microfilms, manuscripts and archives. To add insult to injury, Jiryis said they even smashed filing cabinets, desks and other furniture and made off with telephones, heating equipment and electric fans.<sup>57</sup>

The International Commission of Enquiry into the Violations of International Law by Israel during its invasion of Lebanon reported that it had documented evidence that Israeli forces destroyed schools, training centres, museums and even hospitals.<sup>58</sup> The Commission pointed out that the Palestinians in Lebanon had built up a considerable infrastructure to provide economic and social support for the refugees, as well as educational training, medical services and institutions

to “preserve memories and traditions”.<sup>59</sup> The majority members of the Commission concluded that all the evidence submitted to it substantiated “the allegation of deliberate destruction of the national and cultural rights and the identity of the Palestinian people and that that this constitutes a form of genocide”.<sup>60</sup>

Still on the issue of genocide, the Commission noted that governments rarely, if ever, document genocidal plans as the Nazis did. The matter of intent, they argued, was reflected in the effect of governmental policies. So, while the term genocide as applied to the Palestinians did not involve their systematic killing as it occurred in the Holocaust, there was evidence of measures adopted to destroy their national will and culture in the context of their struggle for liberation and self-determination.<sup>61</sup>

The 1982 theft of Palestinian archives and libraries from Beirut was not the last of its kind. In August 2001, Israeli police closed Orient House in East Jerusalem along with nine other Palestinian institutions in the city. They confiscated its entire archive and other valuables. The office of its director, Faisal Al Hussein, who had passed away three months earlier, was emptied completely. Another institution, the Arab Studies Society, which was housed in the same building, was also looted. Numerous documents, photographs and maps were taken by the Israelis. The Society’s document centre contained 200,000 hard copies of documents and 300,000 on microfilm and microfiche.<sup>62</sup> The collection documented the latter years of Ottoman rule and was classified into areas such as politics, economy, education and land ownership.

The closure and looting of Orient House was a serious setback for Palestinians in Jerusalem. It was their only internationally recognised political institution in the city. The Israelis had themselves also undertaken to respect its legitimacy. In a letter dated 11 October 1991, former Israeli foreign minister Shimon Peres explicitly acknowledged to his Norwegian counterpart Johan Jørgen Holst the “great importance” of Palestinian institutions in Jerusalem and promised that “[Israel would] not hamper their activity.”<sup>63</sup>

More recently, similar acts of wilful destruction were carried out in the Gaza Strip where no less than three universities, seven United Nations schools and an estimated 141 locally-run schools suffered severe damage in the month-long offensive launched by Israel against the Islamic Resistance Movement (Hamas) and other groups in the summer of 2014. Justice Mary McGowan, who headed a UN Independent Commission of Inquiry into the conflict said, “The extent of the devastation and human suffering in Gaza was unprecedented and will impact generations to come.”<sup>64</sup>

There are other aspects of the Palestinian reality that strengthens the case for cultural genocide. They include the systematic denial and attempts to erase Palestinian history and the prohibition of the use of the Arabic language, even though 20 per cent of Israel’s population is Arab. In July 2009, the minister of transport in Israel announced that road signs would no longer be written in Arabic and would appear in Hebrew only.<sup>65</sup> Since then, municipal officials and members of the national parliament have worked concertedly to eradicate the use of Arabic in public life. In 2012, the Mayor of Tel Aviv, Ron Huldai, rejected

demands to adopt Arabic on the city's official logo; this was three years after English was added. Tel Aviv is said to be one of Israel's most cosmopolitan and liberal cities. If this is the attitude displayed to the country's second official language, it leaves no doubt as to what happens in more conservative municipalities. The upshot has been an incremental reduction in the appearance of Arabic in public services, including government ministries, welfare offices, hospitals, universities, Inland Revenue, the national electricity company, the post office, and sports and leisure centres. Jamal Zahalkha, a Palestinian member of the Israeli parliament for Al Balad Party, told Al Jazeera Network, "The hostile attitude of official bodies, including municipalities like Tel Aviv, encourages a general climate that treats Arabic as an alien and despised language."<sup>66</sup>

The process of removing Arabic from the public sphere was accompanied by a similar assault on Palestinian history. In July 2009, the Israeli ministry of education ordered the removal of the word *Nakba* – Arabic for the catastrophe of the 1948 war – from school textbooks for young Arab children. Since 1948, Palestinians at home and in the diaspora have commemorated the Nakba, which they view as a tragedy from which they have never recovered. The loss of their land, the pain of exile and the denial of return has left an indelible scar on their national psyche. In his book *The Disinherited*, Fawaz Turki summed up the experience: "The nation of Palestine ceased to be. Its original inhabitants, the Palestinian people, were dubbed Arab refugees, sent regular food rations by the UN, and forgotten by the world."<sup>67</sup>

The world may have forgotten, but the Palestinians have not. They have commemorated the Nakba every year on 14 May to keep the hope of return and self-determination alive. Without its commemoration their cause would not have passed from one generation to another. It is in this context that Israel has, since 2011, criminalised the marking of Nakba Day.

## **Conclusion**

All told, it may be concluded that cultural genocide was an inevitable consequence of the Zionist settler colonialist project in Palestine. From the beginning, both the British and Zionists took as their point of departure the cultural view that the Arab need not be heard. Indeed, they sought to reduce them to a non-existent population or strip those who remained to the status of a silent coolie class.<sup>68</sup> Those who were displaced from their villages and towns in 1948 and were not allowed to return were classified as "present absentees", a metaphorical and actual legal term used by the Israeli establishment. Although they were present by virtue of citizenship in the newly created state, they were considered "absent" according to the 1950 Absentee Property Law. The overriding feature of this peculiar legal infrastructure was its discriminatory measures as applied to areas such as land ownership, housing, municipal planning, education and immigration.<sup>69</sup>

Historically, European settler colonialism was premised on the popular notion of the "white man's burden" to civilise the darker races. In his attempt to impress

European leaders, Herzl claimed that Jews returning to their “historic fatherland” would act as representatives of western civilisation. “For Europe”, he said, “we could constitute part of the wall of defence against Asia; we would serve as an outpost of civilisation against barbarism”.<sup>70</sup> The Zionist settler project was not as benign and altruistic as it sounded. It had no intention of leaving Palestine after its inhabitants were supposedly endowed with the virtues of western culture and civilisation; it was a structure and not an event.<sup>71</sup> But, in order to replace the existing culture, it had to destroy it. Herzl wrote, “If I wish to substitute a new building for an old one, I must demolish before I construct.”<sup>72</sup> That objective was realised in 1948 when, in the words of Edward Said, Palestine was “rebuilt”, “reconstituted” and “re-established” as the state of Israel.<sup>73</sup> Hence, the accompanying process of cultural genocide in Palestine was the natural outcome of the project to destroy and replace.

Throughout its 70-year history, the Genocide Convention has failed to prevent or punish those responsible for the destruction of Palestinian cultural heritage, which by Lemkin’s definition and that of the UN Secretariat and the Ad hoc Committee on Genocide would be considered cultural genocide. The consensus view on the shortcoming is that is a direct consequence of the restrictive definition adopted in the 1948 Convention. Therefore, there are growing calls from international human rights organisations, including those working in Palestine, for a broader working definition of genocide to protect Palestinian cultural heritage.<sup>74</sup> While acknowledging that the Convention has enabled the arrest and punishment of the perpetrators of genocide in the former Yugoslavia, Rwanda and Cambodia, the time has come to adopt effective legal instruments and enforcement mechanisms for the protection of Palestinian cultural heritage as well as the prosecution of those individuals and entities involved in its destruction.<sup>75</sup> Although there are a number of international treaties that aim, in theory, to protect cultural rights, property and heritage, they are not equipped with the necessary instruments of criminal law to punish those who commit acts of cultural genocide, whether through the establishment of special criminal tribunals or through the International Criminal Court (ICC).<sup>76</sup>

Surely the international community can no longer afford to perpetuate its fixation with body counts when it comes to genocide while ignoring the destruction of the cultural characteristics that have made the Palestinian people unique and distinct. As long as the rule of law remains in abeyance and universal principles of human rights are disregarded, justice in Palestine will continue to be an illusion.

Ultimately, Israel remains a belligerent occupier of the Palestinian West Bank (including Jerusalem) and the Gaza Strip; in law, this means that Israel has no sovereign rights over said territories. Consequently, all the excavations, removals and destruction of archaeological and religious sites conducted since 1967 in these territories have been in clear breach of the 1954 Hague Convention and its associated Protocol, which is regarded as the principal instrument of international humanitarian law for the protection of cultural property in armed conflict. Israel ratified the Convention in 1957 and the Protocol in 1958. Moreover,

it is also bound by the Fourth Geneva Convention of 1949, the 1977 Additional Protocol, as well as the 1907 Hague Regulations to safeguard cultural property from plunder and vandalism.

As the occupying power, Israel bears full legal responsibility for the crimes committed against the Palestinian people and their cultural heritage. Israel might be tenuously protected from the scope of the Genocide Convention, but the Geneva Conventions of 1949 hold that States party to the Conventions must prosecute individuals, regardless of nationality, for serious breaches of their provisions. There is no doubt that failure to identify leaders, institutions, instigators and accomplices who planned and executed these crimes will erode trust in the international community and its institutions and undermine all efforts to bring about a peaceful resolution of the conflict in Palestine.

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- 70 *Ibid.*
- 71 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native", *Journal of Genocide Research*, 8, no. 4, 2006, 388.
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# 10 The Baha'i community of Iran

## Cultural genocide and resilience

*Moojan Momen*

### Introduction

The events described in this chapter represent almost an inversion of what is usually considered the typical example of cultural genocide. Typically, a modern culture attempts to obliterate a traditional culture, while representing its actions as being necessary to bring about progress and modernity (examples include what occurred to native peoples in most of the Americas as well as the Aboriginal population of Australia). In tracing the history of the Baha'i community of Iran, however, we find that over a period of more than 100 years, a religious community that has represented modernity and a global vision has been persecuted and culturally suppressed by the religious establishment and successive governments that have perceived its progressive social agenda (modern education, the advancement of the social role of women, democracy, etc.) and internationalism as a threat to their worldview and political continuity.

The Baha'i Faith originated in Iran in the mid-nineteenth century and since then has spread such that there are now functioning Baha'i communities in almost every country in the world and an estimated global population of 5 million, with about 400,000 in Iran, the largest non-Muslim religious minority in that country.<sup>1</sup> Throughout its history in Iran, the Baha'i community has been subjected to a level of persecution that has amounted at times to genocide at local or national levels. Alongside the attempt to eliminate the Baha'is physically, there has been a cultural genocide. The religious leaders of Iran have usually instigated this persecution, fearing both the religious challenge presented by the new religion and also the social changes it advocates. But the state has often also played a willing and sometimes primary role. Since 1979, however, the state and religious leadership have merged and become effectively a single agent, thus intensifying the persecution of the Baha'i community.

After a brief historical survey of the persecutions of the Baha'i community, this chapter focuses on the manner in which the present regime in Iran has waged a campaign of cultural genocide against the Baha'i community since it came to power in 1979, and the manner in which the Baha'is have met this threat. Finally, the question of what measures are available to counter this persecution is addressed.

## Persecutions of the Babi and Baha'i communities, 1844–1979

The Baha'i religion began in 1844 in Iran as the Babi movement, led by a young merchant who took the title the Bab and in 1848 claimed to be the Imam Mahdi, a messianic figure expected by the majority religion of Iran, Twelver Shi'i Islam. From the start, the Shi'i Muslim religious leaders perceived the movement as a threat to the traditional forms of religion over which they presided and, after four years, they dragged the country's government into the conflict, resulting in five major episodes in 1848–1853, in which thousands of Babis were killed.<sup>2</sup>

After its suppression in 1852–1853, the new religion re-emerged towards the end of the 1850s. Its new leader took the title Baha'u'llah and claimed to be the messianic figure foretold by the Bab, and indeed the messianic figure of all religions. The name of the movement now became the Baha'i religion. Throughout the rest of the nineteenth and the early twentieth century, the Baha'is represented an indigenous pathway to modernity for Iran for many. However, there continued to be periodic persecutions of the Baha'is, usually instigated by a local religious leader who declared his intention to initiate a genocide of the Baha'is by issuing a *fatwa* decreeing the death of all the town's Baha'is.<sup>3</sup> When the Qajar dynasty fell, the clerical persecution continued. However, the new shah, Reza Shah Pahlavi, who came to power in 1921–1925, made the first organized national campaign of cultural suppression of the Baha'is, closing their schools, which were among the most modern and forward-looking in the country, suppressing Baha'i community structures and preventing them from publishing or importing books.

When Mohammad Reza Pahlavi ascended the throne in 1941, he relaxed the iron grip of his father, allowing the creation of fiercely anti-Baha'i organizations by the Islamic clerics. These organizations, apart from disrupting Baha'i meetings, threatening Baha'is and anyone associating with them, and arranging boycotts of Baha'i businesses, began the decades of spreading false accusations and disinformation about the Baha'is that has continued and intensified up to today and laid the groundwork for cultural genocide.<sup>4</sup> After the 1953 coup, the shah was indebted to the religious leadership, who pressured him into allowing a campaign against the Baha'is in 1955, including anti-Baha'i sermons on national radio, beatings and killings of Baha'is, expulsion from employment, and the destruction of their meeting places and holy sites.<sup>5</sup>

## Persecutions since the 1979 Islamic revolution

The most recent phase of persecutions of the Iranian Baha'i community began under the present Islamic government of Iran which came to power in 1979. The clerical hierarchy that had for over 100 years been the relentless enemy of the Baha'is was now the country's government and lost no time in launching its attack on their community. The national Baha'i leadership, many local leaders, intellectuals, and prominent Baha'is were eliminated in the first few years of the revolution through secret trials followed by executions. Extreme pressure was brought to bear on the rest of the Baha'i community through a variety of measures that ranged

from the unjust – such as imprisonment on false charges, confiscations of property and dismissals from employment – to the outright ridiculous – such as the ruling by Khomeini that Baha’is had no right to any payment from the government and so all Baha’i government employees and pensioners must repay everything that they had earned or received from the government throughout their working lives.<sup>6</sup> The present supreme leader has made the following public pronouncement: “Keep away altogether from this perverse and misguided sect ... they are completely perverted ... they are *najis* [ritually unclean].”<sup>7</sup>

The Islamic government perceives the Baha’i community as an ideological threat to its world-view. Khomeini launched a campaign to reverse all the changes modernity had brought to Iran – women’s rights were rolled back, education was put under the control of Islamic fundamentalist “guides”, democracy was made conditional on conforming to Khomeini’s view of Islam, and, in place of Iran’s former outward-looking modern culture, a paranoid regressive culture was created. Baha’is epitomized everything the regime hated and wanted to destroy, therefore they had to be destroyed. This destruction needed to be both physical and cultural. Physical destruction involved executing leading Baha’is and subjecting the rest of the Baha’i community to intense pressure to either leave the country if they were able or to recant and become Muslims. The cultural destruction described in the rest of this chapter was revealed in a leaked government document to be a systematic strategy the government had devised at the highest level (see below).

With the election of President Ahmadinejad in 2005, the situation worsened considerably. The national media were commandeered by the government to provide a torrent of abusive and scurrilous articles written about the Baha’is, falsifying their history, distorting their motives and vilifying their leadership (see below). Even small Baha’i-owned businesses were refused licenses, boycotted or closed down. Lists of individual Baha’is and their addresses were circulated encouraging people to attack them. Courts refused to punish those who beat and killed Baha’is for no reason on grounds that Baha’is deserved such treatment and were not worthy of the law’s protection.

Although many thought Rouhani’s election as president in 2013 and his re-election in 2017 would signal an improvement in the human rights situation, in fact matters became worse, partly due to the actions of Rouhani’s opponents seeking to embarrass and constrain him.

Although few Baha’is have been killed since about 1987, a number of reports and academic papers have examined the potential for genocide of the Baha’is and concluded that all the markers for genocide are present. The Sentinel Project report in 2009, for example, described how the situation for the Iranian Baha’is has gone through all six stages in the schema developed by Gregory Stanton<sup>8</sup> of the process leading up to genocide (in Stanton’s classification, stage 7 is the genocide itself and stage 8 is denial) and stated that it considered the threat level of genocide of the Baha’i community of Iran to be “High” and that “Preparation is sufficient for extermination”, and “intent is apparent”.<sup>9</sup> Their 2010 Supplementary Report stated that the threat of genocide “remains high and may only be awaiting the right trigger event”.<sup>10</sup> This state of traversing all the preparatory stages for genocide

with the final stage of “extermination” being prevented only by international pressure has been called a “suspended genocide”.<sup>11</sup>

### **The cultural genocide of the Iranian Baha'is after 1979**

When Raphael Lemkin first conceptualized the crime of genocide, he envisaged a systematic and synchronized attack on a people that was multi-faceted, including physical and cultural elements. In marked contrast to the situation with physical genocide, the international community has collectively failed to establish a formal legal instrument to define and act against cultural genocide.<sup>12</sup> Although subsequent developments in international law have tended to emphasize the physical and marginalize the cultural elements in an attack, it is clear that, in Lemkin's original concept, genocide was a synchronized attack on all fronts.<sup>13</sup> The persecution of the Baha'is of Iran since 1979 can best be framed as exactly the sort of “synchronized attack” that Lemkin envisaged, involving both a physical attack and a cultural genocide.<sup>14</sup>

The above historical review of the persecution of the Baha'i community before 1979 acts as background to the cultural genocide that has occurred since 1979. After the first decade of the Iranian Revolution, during which Baha'i leaders were killed and there was imminent danger of a physical genocide, the Iranian government, under intense international pressure, switched to a policy of maintaining a severe economic blockade of the Baha'i community, hoping to pressure individual Baha'is into recanting and becoming Muslims, and a campaign of cultural genocide, aimed at obliterating all traces of Baha'i culture in Iran, destroying the Baha'is' morale and creating enmity towards them in the general population.

That this is an organized and systematic campaign is proved by the text of a document dated 25 February 1991 which came to light in 1993 when it was leaked to Reynaldo Pohl, the United Nations Special Representative of the Commission on Human Rights on the situation of human rights in Iran. The document had been drawn up at a joint meeting of 'Ali Akbar Hashemi-Rafsanjani, then President of the Islamic Republic of Iran, and the Supreme Revolutionary Cultural Council, and was then forwarded to the Supreme Leader, Ayatollah 'Ali Khamenei, who appended his signed approval at the bottom of the document. The document has thus been endorsed by the highest authorities in Iran. It grew out of the realization by the Iranian government that the execution and arrest of Baha'is solely because of their religion was causing adverse international effects for Iran. Therefore in paragraph (a)(ii) below, they ordered a suspension of this type of persecution, substituting economic and cultural measures against the Baha'is:

- a With regard to the general condition of Baha'is, the following guidelines are hereby adopted:
  - i they shall not be expelled from the country without reason;
  - ii they shall not be detained, imprisoned or punished without reason;
  - iii the Government's treatment of them shall be such that their progress and development shall be blocked;



- b With regard to their educational and cultural situation, the following directions are hereby adopted:
  - i they may be enrolled in schools provided that they do not identify themselves as Baha'is, but they shall if possible be assigned to schools with a strong religious ideology;
  - ii when a student is known to be a Baha'i, he shall be expelled from university, either during the admission process or in the course of the academic year;
  - iii their political activities, "including espionage", shall be countered by means of the relevant official policies and laws, and their religious activities and teaching shall be confronted by means of other religious activities and teaching, cultural responses and propaganda;
  - iv the propaganda institutions, such as the Islamic Propaganda Organization, shall establish special sections to counter the religious activities and teachings of the Baha'is;
  - v a plan shall be formulated to combat and destroy the cultural roots which this group has outside the country;
- c As regards their legal and social position, the following guidelines are hereby adopted:
  - i they shall be permitted to lead a modest life similar to that of the population in general;
  - ii to the extent that this does not constitute encouragement for them to persist in their status as Baha'is, they shall be allowed the normal means to live like all other Iranian citizens, such as ration books, passports, death certificates and work permits;
  - iii employment shall be refused to persons identifying themselves as Baha'is;
  - iv they shall also be denied positions of influence, for example in the education sector.<sup>15</sup>

But the Iranian government did not keep even to those few areas in this document which allowed the Baha'is some relief. Very soon, arrests and imprisonments "without reason" restarted and Baha'is were not allowed "to lead a modest life similar to that of the population in general". Baha'is were dismissed from employment and even small single-person Baha'i businesses were targeted for forced closure and withdrawal of licenses.

The attempt by the Iranian government to bring about a cultural genocide of the Baha'i community can be detailed under a number of headings.

### ***Black propaganda and disinformation***

Fundamental to both the physical and cultural genocide of Baha'is in Iran has been the black propaganda and disinformation campaign against the community, calculated to turn the mind of the population against the Baha'is and to justify their obliteration from Iran both physically and culturally. As noted, this campaign

began in the 1940s when Islamic organizations, such as the Hujjatiyyih (called the Anti-Baha'i Society when first formed) and Tablighat-i Islami, directed a major part of their activities against the Baha'i Faith. Although these efforts were instigated by Muslim clerics, the surprising aspect is the extent to which Iranians who are considered to have been scholars, liberals and intellectuals either failed to counteract the campaign or in many cases actively supported it.<sup>16</sup>

This campaign sought to present Baha'i culture as anti-Iranian, anti-Islamic and evil: the "enemy within". The anti-Iranian element was fed by such strategies as publishing a fake autobiography of the Russian ambassador in Iran in the 1840s–1850s, in which he is said to have created the Babi and Baha'i movements.<sup>17</sup> Alternatively, the respected Iranian academic historian Fereyduun Adamiyyat presented false evidence of the British being founders of the Babi movement.<sup>18</sup> The message to ordinary Iranians was clear – the Baha'i Faith is a foreign creation, designed to weaken Iran. Attacks were also launched showing the Baha'i Faith promoting such concepts as an increased social role for women in order to weaken Islam. Perhaps the most damaging of all were the attacks designed to present the Baha'is as inherently evil. For example, a woman and her five children were murdered in Abarqu in January 1950 by the agents of Isfandiyar Salari, one of the notables of the area, because the woman was standing in the way of his marriage to a wealthy heiress. Salari managed to get an innocent neighbour and 15 Baha'is arrested, accused and, as a result of the severe pressure brought to bear on the prosecutors and the government by the Tablighat-i Islami and leading clerics, convicted of the crime despite the lack of evidence and amidst a blaze of publicity.<sup>19</sup>

After the 1979 Iranian Revolution, however, the volume and intensity of the black propaganda increased. The accusations of Baha'is being linked to foreign powers and plotting to destroy Islam continued. A recent pronouncement by Khamenei continues this pattern by accusing the Baha'is of being an artificial religion created by the British to destroy Islam.<sup>20</sup> To this has been added intense efforts to depict the Baha'is as inherently evil, paralleling, for example, the same "blood libel" that Jews in the Middle Ages had been accused of – that they kidnap Muslim children and kill them in their meetings;<sup>21</sup> or the Iranian equivalent of "flirty fishing" (the practice of women attracting men to a religion by sexual means).<sup>22</sup>

As with all propaganda campaigns based on disinformation, the emerging claims are often contradictory. For example, the welter of claims that the Baha'i Faith was started by the Russians and the British is apparently oblivious to the fact that the British and Russians were keen and deadly rivals in the area at this time and to suggest they acted in concert in such a venture demonstrates historical ignorance. Some government statements claim that the Baha'i Faith is not a religion at all but a political movement.<sup>23</sup> More recent statements seem to allow that the Baha'i Faith is a religion but try to depict it in the manner in which "cults" were depicted at the height of the cult hysteria in the West in the 1990s.<sup>24</sup> This is in effect an admission by the government that its former stance that the Baha'i Faith is not a religion is no longer credible, especially with Iran's young population.

With government funding of several so-called “research institutes” dedicated to producing anti-Baha’i material, the number of articles and books published against the Baha’i Faith has increased greatly. In the Iranian media between April 2014 and August 2015, for example, there were an average of 376 anti-Baha’i articles per month with a peak of 1046 in August 2014.<sup>25</sup>

A major problem faced by the Baha’i community is that it has never, since its origins in the mid-nineteenth century, been able to publish any refutation of the black propaganda directed against it. Successive governments have consistently refused to allow the Baha’is to publish any sort of publication (books, pamphlets, magazines, etc.), while newspapers and other media have never accepted anything written by Baha’is defending their faith. As a consequence, the population of Iran has never heard a Baha’i rebuttal of the black propaganda. With the media promoting the attacks on the Baha’i community and no counter-narrative being put forward, it is little wonder that generations of Iranians have grown up with negative impressions of the Baha’is. It can be said this has been an attempt to drive the Baha’is into a cultural ghetto.

### *Erasure from history*

Alongside distorting and falsifying history with respect to the Baha’i community, there has also been an effort to erase all positive achievements of individual Baha’is and the Baha’i community from the history of Iran. Scholars and intellectuals have been prejudiced against the religion to the extent that they do not even mention the name of the religion in their discourses. If one were to read the literature published inside Iran during both the Pahlavi and Islamic Revolution period, one would find the Baha’is almost completely erased from Iran’s history except for some negative mentions. The epitome of this was the statement by Mrs Teimurtash, on behalf of Iran’s delegation, to the United Nations, that there were no Baha’is in Iran,<sup>26</sup> a position that was backed up by census statistics showing no Baha’is.<sup>27</sup> There is no attempt in the literature published in Iran to describe the Baha’i teachings or the Baha’i community except in polemical tones. One might think they were a small group of recidivists lurking on the margins of society. Yet, the Baha’is are a highly educated segment of the population and contributed greatly in all areas of Iranian culture: art, architecture, literature, education, as well as commerce, medicine and the social and physical sciences.<sup>28</sup> Many Muslims and Baha’is who rose to eminent positions were educated at the Baha’i schools in Iran. And yet the Baha’i Faith is never mentioned in any positive way in material published inside Iran and if the names of the Baha’i schools are mentioned it is never stated that they were Baha’i schools.<sup>29</sup>

### *Destruction of Baha’i holy places*

The Baha’i Faith began in Iran and thus many of the holy places associated with the early history of the religion are in Iran. Many of these are significant to all Baha’is around the world; others are of national and local significance. An

important way in which the Islamic Republic is seeking to eradicate Baha'i culture in Iran is through destroying Baha'i holy places. The most important Baha'i holy place destroyed was the House of the Bab in Shiraz, which was pulled down in 1979.<sup>30</sup> Its significance lay in that Baha'is regard it as the place where their religion began in 1844 and also in that it is one of only two places of pilgrimage ordained by Baha'u'llah (the other being outside Iran). This was just one of several important holy sites that were first confiscated and most then destroyed.

Although the destruction of holy places has saddened Baha'is in Iran and throughout the world, the danger to them had been anticipated and detailed architectural plans and photographs of these buildings had already been taken with a view to rebuilding them when conditions improve.

### ***Elimination of community institutions***

Part of cultural genocide involves the destruction of the social structure of a community that makes it distinctive from other communities. The Baha'i community is distinctive in that it has no clerics or other paid religious professionals. It is administered by elected councils. Very early in the Islamic Revolution, the government struck at this elected leadership thinking they could gain a quick and easy victory by decapitating the community. Members of the national council and several local councils were arrested and executed in August 1980. However, elected councils have an inbuilt resilience in that they can be replaced. A new national leadership council came into being and when that was also arrested and executed in December 1981, a third one appeared. Next the government decided to issue instructions to the national council to disband all Baha'i institutions in the country. Since the Baha'i community has a policy of obedience to the government (which has been in force since the time of its founder Baha'u'llah in the nineteenth century), it complied. However, this had the unintended consequence of releasing individual Baha'is from any institutional oversight. Thus the action not only failed to suppress the activities of Baha'is, these actually increased in general and the government no longer had any instrument for sending instructions to individual Baha'is. Therefore after a time, the government decided to give tacit recognition to a group of five, later seven, Baha'is, called the Yaran, as an informal leadership cadre of the national Baha'i community. Despite the fact that the Yaran were actively cooperating with the government, they were all arrested during 2008 and eventually sentenced to ten years imprisonment, which they completed in full.<sup>31</sup>

Baha'i community life was also disrupted by such measures as the confiscation of local Baha'i community offices and meeting halls. However, meetings continued in the homes of Baha'is. Of great concern was the confiscation of Baha'i cemeteries and the refusal of the authorities to allow burials in them (many were destroyed and built over). This causes particular hardship because almost all cemeteries in Iran belong to specific religious communities and so, when Baha'is die, great problems and anxieties result for their families. Government

forms, such as registration of births and deaths, pose difficulties as officials refuse to accept forms with “Baha’i” or a blank in the “Religion” space and Baha’is refuse to dissimulate by naming one of the accepted religions.

### ***Ethnic cleansing (forcible transfer of population)***

The term “ethnic cleansing” was employed to describe a major humanitarian crime committed in the Balkans in the 1990s. The definition of “ethnic cleansing” adopted by the UN Commission of Experts in its final report on violations of international humanitarian law committed in the territory of the former Yugoslavia included “religious groups”: “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”.<sup>32</sup>

As in the Balkans where the whole Muslim population of an area was driven out to make the area “ethnically pure”, so too in many tribal and rural areas in Iran following the 1979 Islamic Revolution, Baha’is were proclaimed by local religious leaders to be “unclean” and the Muslims in the area were urged to drive the Baha’is out to “purify” the area. Even in villages such as Mahfuruzak, Mazandaran; Saysan, Azarbayjan; and Kata, near Isfahan, where Baha’is had previously been the majority in a village, they were driven out by their Muslim neighbours, urged on by their clerical leaders who now also held political authority. These Baha’is, forced to leave behind all their possessions and completely destitute, would usually take refuge in the nearest city. The authorities refused to take any steps to redress these injustices or to give Baha’is any assistance. Their survival depended on the assistance given them by fellow Baha’is.<sup>33</sup>

### ***Educational exclusion***

The Baha’i teachings place a high value on education, making it obligatory for all Baha’i parents to educate their children; if they are unable to do this, the obligation falls on the Baha’i community.<sup>34</sup> As a result, in towns and villages across Iran, the Baha’i community led the way in setting up modern schools for both boys and girls in the early twentieth century (they were closed by order of Reza Shah in 1934).<sup>35</sup> By 1973, the Baha’i community was able to claim 100 per cent literacy among women under 40,<sup>36</sup> this at a time when the literacy rate for women under 40 in Iran was 44 per cent.<sup>37</sup> Given the high priority education has in Baha’i culture, the Islamic Republic’s consistent refusal to allow Baha’i students access to universities is not just an attack on the economic prospects of individual young Baha’is but also a blow against Baha’i culture calculated to depress the community’s morale.

After years of failed attempts to enroll their youth into Iran’s universities, the Baha’i community established an underground university, the Baha’i Institute for Higher Education (BIHE),<sup>38</sup> using Baha’i university teachers who had been expelled from their jobs to teach young Baha’is university-level courses in a formal and structured programme. The BIHE has been successful, even

managing to get its degrees accepted by many Western universities as formal qualifications for entry to higher degree courses. However, the Islamic government was so determined to strike at all Baha'i culture that it pursued even this manifestation of it, raiding the premises (often private homes) used for teaching courses and arresting the teachers on several occasions in the last 2 decades; 17 educators and administrators of the BIHE were sentenced to terms of imprisonment up to 5 years.<sup>39</sup> The Baha'is responded by shifting most of the teaching to online courses offered by professors outside Iran.

### ***Apartheid***

“Apartheid”, as defined in the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA), is restricted to racial groups: “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”.<sup>40</sup> However, its definition has now been extended to include “segregation on grounds other than race”.<sup>41</sup>

Many features of the situation of the Baha'is in Iran parallel that of black and other people of colour in apartheid South Africa described in the ICSPCA:<sup>42</sup> the forced removal of Baha'i communities from certain areas; the planned and systematically implemented campaign of the Iranian government to curtail the rights of Baha'is; their exclusion from government employment; the refusal to grant business licenses to Baha'is and their exclusion from many areas of trade; the refusal of the police to act in cases where Muslims have committed crimes against Baha'is; the refusal of the courts to convict or give legal redress in cases where Muslims have committed crimes against Baha'is; the random and disruptive nature of the arrests of Baha'is; the torture of Baha'is; the exclusion of Baha'is from higher education; and the persecution of individuals such as lawyers who seek to assist Baha'is or point out the injustices being committed.<sup>43</sup>

### ***Disruption of community life***

One way of striking at the culture of a community is to disrupt community life. Since the 1979 Revolution, Baha'i community life has been constantly disrupted. Religious meetings have been raided and dispersed; children's class teachers have been arrested and some executed; and study groups and other activities have been banned or disrupted. Each individual Baha'i faces what has been called “revolving door arrests”,<sup>44</sup> repeated cycles of arrest, interrogation, detention for periods of time and then release, making it impossible for them to earn a livelihood through employment or to run a small business, and instigating fear and uncertainty in the community at large. Some are put on trial, with inadequate opportunity to consult lawyers, vague non-specific charges such as “causing corruption upon the earth” and scanty knowledge of the evidence against them. They are then sentenced to imprisonment, not uncommonly for seven to ten years.

These repeated arrests and imprisonment of Baha'is has had unintended consequences. Imprisoned Baha'is meet other prisoners of conscience such as political activists, intellectuals and journalists and have ample opportunity to explain the Baha'i Faith to them and to dispel the suspicions that were in their minds due to black propaganda. As a consequence, the negative attitude of these secular individuals has to some extent been reversed. Many political reformers and journalists now know and appreciate the Baha'i Faith.<sup>45</sup> Barriers erected by clerical leaders and intellectuals over the last century and a half, isolating the Baha'i community in a cultural ghetto, have diminished.

### ***Forced change of community mores***

In common with other religious minorities in Iran, Baha'is have been forced to give up the public expression of some of their communal ethos and mores and adopt those of the Muslim majority. For example, before the Revolution, men and women mixed and conversed freely at Baha'i meetings. Such social freedom for women is strictly forbidden by the Islamic republican government and considered equivalent to sexual immorality, deserving of arrest and imprisonment, even if the individuals are not Muslims. Therefore the Baha'is have been forced publically to adopt the mores and ethos of the government's religious ideology. Although some degree of freedom exists in the privacy of Baha'i homes, this must necessarily be with small groups only and is a danger to all participants.

### **The reaction of the Baha'i community**

Based on principles established by Baha'u'llah and his successors, the Universal House of Justice, the present head of the worldwide Baha'i community, has called for a non-violent, non-contentious response to the persecutions, seeking ways of collaborating with other social actors to form alliances for alternative constructive social action. This approach has been termed "constructive resilience".<sup>46</sup> Their consistent and firm insistence on their human rights and their refusal to submerge their identity in the way the government wishes has gained the Baha'is many admirers in Iran,<sup>47</sup> beginning to roll back some of the effects of the black propaganda directed against the Baha'is. Even voices from inside Iran are daring to call for the end of the cultural genocide of the Baha'is.<sup>48</sup>

The above description of the persecutions demonstrates that the Baha'i community of Iran has been remarkably resilient to the unrelenting campaign waged against it by the Iranian government. Very few have acquiesced to the government's aim of forcing them to recant their faith and become Muslims. Nor has the community in general allowed itself to be ground down into a state of passive victimhood. Some have been demoralized and have distanced themselves from community activities, knowing that they could be subject to arbitrary arrest and detention just for attending. Most, however, have participated in a global change of direction in community affairs initiated by the Universal House of Justice in 1996. Briefly, the change can be described as a movement away from a hierarchical,



inward-looking administration of community affairs and towards a more participatory, consultative, collaborative, outward-looking style of community life. A programme to train people for this more participatory community life was rolled out to the Iranian Baha'i community beginning in the early 2000s.<sup>49</sup>

This new pattern of Baha'i community life has helped Baha'is to be resilient to the campaign of cultural genocide waged against them. First, the move from a hierarchical structure to a more decentralized community life has rendered less effective the government's attempts to "decapitate" the movement by executing national and local leaders. Second, an important component of the training programme accompanying this change has been to encourage every individual Baha'i to take responsibility for the educational and pastoral needs of the community (children's classes, junior youth empowerment programmes, holding devotional meetings, etc.), rather than leaving this to local leaders and administrators. This allows the community to function at the micro level even in the face of persecution at the macro. The third important factor is that the programme has been designed to be open to all. It can be undertaken in small groups to which friends who are not Baha'is can be invited. Utilizing networks of friends, Baha'is, especially young Baha'is, have been able to gather in groups, including their friends who are not Baha'is, to study the training programme together and to carry out social action programmes such as literacy classes for the poor and disaster relief after earthquakes.<sup>50</sup> Whereas, throughout the twentieth century, the Baha'i community tended to be somewhat inward-looking with Muslim Iranians often complaining of its secretive nature, now the emphasis is on individual Baha'is welcoming neighbours to participate in social action and community activities. This has helped the Baha'is to forge links with others in their community and thus break out of the cultural ghetto that the government has tried to force them into.

### **Cultural genocide: discussion**

The progress towards a genocide of the Baha'i community in the early years after the 1979 Islamic revolution was halted mainly as a result of international pressure and this remains the most effective means of countering the cultural genocide that the Baha'i community is now experiencing.

But can any measures be taken in international law against these actions of the Iranian government? Unfortunately, in marked contrast to the situation with physical genocide and Raphael Lemkin's original holistic description of genocide, the international community has collectively failed to establish a formal legal instrument to define and act against cultural genocide.<sup>51</sup> The first draft of the Genocide Convention in 1947 included:

Article I.3: Destroying the specific characteristics of the group by:

- a forcible transfer of children to another human group; or
- b forced and systematic exile of individuals representing the culture of a group; or

- c prohibition of the use of the national language even in private intercourse; or
- d systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- e systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Article III: All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.<sup>52</sup>

Baha'is have suffered from all the acts listed in Articles I.3 and III above except I.3.c. There is anecdotal evidence that I.3.a has occurred but to a limited extent. However, Article I.3 did not become part of the agreed Convention and Article III is a much weaker text.

In practice, therefore, crimes of cultural genocide have been prosecuted under other labels, some as “crimes against humanity”, the prohibition of which “has been considered a peremptory norm of international law, from which no derogation is permitted and which is applicable to all States”.<sup>53</sup> Thus, the 1998 Rome Statute establishing the International Criminal Court states: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Of the list that is then given, the following “crimes against humanity” may also be regarded as acts of cultural genocide that have been committed against the Baha’i community of Iran:

- Deportation or forcible transfer of population;
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- The crime of apartheid.<sup>54</sup>

It can be seen from the above description of what has happened to the Baha’i community that every one of these facets of cultural genocide has been experienced by them repeatedly and over an extended period, especially since the 1979 Islamic Revolution. There are also UN declarations that set out situations of cultural genocide analogous to that which the Baha’is of Iran are experiencing.<sup>55</sup>

The Iran Tribunal is an international people’s court and a non-binding legal tribunal that was set up in The Hague, the Netherlands, to investigate, document and hand down judgements on human rights abuses in Iran. In its judgement of

5 February 2013, it cited the treatment of Baha'is as examples of "cruel, inhuman and degrading treatment" and "persecution".<sup>56</sup>

## Conclusion

A campaign against the Baha'i community has been deliberately and systematically carried out by the Iranian government since 1979. This campaign began with a steady progression towards a physical genocide. When this was halted through international pressure, the government devised a programme attacking the Baha'is psychologically (through black propaganda and undermining morale), economically (through removing all means of earning a livelihood and excluding them from higher education) and culturally (by destroying Baha'i holy places and eliminating Baha'is from Iranian history and culture). Many elements of the campaign are clearly instances of cultural genocide. Although cultural genocide itself is not regarded as a crime in international law, there are many grounds on which the government of Iran could be indicted for its cultural genocide of the Baha'i community. These include contraventions of the international legal statutes and treaties on crimes against humanity, ethnic cleansing and possibly apartheid.

Despite the attempt by the Iranian government to force the Baha'i community into a cultural ghetto and create a state of cultural apartheid, the Baha'is in general have resisted the pressure upon them and have responded with resilience and a constructive outlook, attempting to bring together all progressive, non-political elements in their society to work for the betterment of all.

## Notes

- 1 Association of Religion Data Archives, World Religion Project: Global Religion Dataset, data for 2010, [www.thearda.com/Archive/Files/Downloads/WRPGLOBAL\\_DL2.asp](http://www.thearda.com/Archive/Files/Downloads/WRPGLOBAL_DL2.asp) and National Profiles, 2005 Update: Religion Indexes, Adherents and Other Data, [www.thearda.com/Archive/Files/Downloads/INTL2003\\_DL2.asp](http://www.thearda.com/Archive/Files/Downloads/INTL2003_DL2.asp) (accessed 21 September 2018).
- 2 Abbas Amanat, *Resurrection and Renewal: The Making of the Babi Movement in Iran, 1844–1850* (Ithaca: Cornell University Press, 1989). Peter Smith, *The Babi and Baha'i Religions: From Messianic Shi'ism to a World Religion* (Cambridge: University Press Cambridge, 1987), 5–56. Specifically about the violence in these Babi upheavals, see Moojan Momen, "Millennialism and Violence: The Attempted Assassination of Nasir al-Din Shah of Iran by the Babis in 1852", *Nova Religio: The Journal of Alternative and Emergent Religions*, 12, Issue 1 (August 2008), 57–82; Moojan Momen, "Millennialist Narrative and Apocalyptic Violence: The Case of the Babis of Iran", *Journal of the British Association for the Study of Religions*, 20 (2018), 1–18.
- 3 For example, the persecution in Yazd in 1903; see Moojan Momen, *The Babi and Baha'i Religions, 1844–1944: Some Contemporary Western Accounts* (Oxford: George Ronald, 1981), 373–404. The exact number of Baha'is killed in the Yazd pogrom of 1903 is uncertain. Baha'i histories record the killing of 81 adults, but this does not take into account the many deaths among the men, women and children who died as a result of being driven out into the desert in mid-summer with no provisions.
- 4 Michael Fischer and Mehdi Abedi, *Debating Muslims* (Madison, WI: University of Wisconsin Press, 1990), 48–54.

- 5 Shahrough Akhavi, *Religion and Politics in Contemporary Iran* (Albany NY: SUNY Press, 1980), 76–83.
- 6 Nazila Ghanea, *Human Rights, the UN and the Baha'is of Iran* (The Hague: Kluwer Law International, 2002); Margit Warburg, *Iranske Documenter: Forfølgelsen af baha'ierne i Iran* (Copenhagen: Rhodos, 1985).
- 7 Photograph of original document and translation in Baha'i International Community, *"Their Progress and Development are Blocked": The Economic Oppression of Iran's Baha'is* (New York: Baha'i International Community, 2015), 56–57. <https://iran.bahai-persecution.bic.org/archive/economic-oppression-irans-bahais> (accessed 11 June 2018).
- 8 Gregory H. Stanton, "The Eight Stages of Genocide", *Genocide Watch*. <http://genocidewatch.net/2013/03/14/the-8-stages-of-genocide> (accessed 10 April 2018). Stanton's stages have now been revised to ten: Gregory H. Stanton, "The Ten Stages of Genocide", *Genocide Watch*. <http://genocidewatch.org/genocide/tenstagesofgenocide.html> (accessed 10 April 2018). The extra two stages are "Discrimination" and "Persecution". In the rest of this chapter, it can be seen that the Baha'i community has gone through these two stages as well.
- 9 Sentinel Project, *Preliminary Assessment: The Threat of Genocide to the Baha'is of Iran*, (n.p., 15 May 2009), 1. <https://thesentinelproject.org/iran/> (accessed 10 October 2018).
- 10 Sentinel Project, *Preliminary Assessment*, 1; *Supplementary Report* (20 September 2010), 7.
- 11 Moojan Momen, "The Baha'i Community of Iran: A Case of 'Suspended Genocide'?" *Journal of Genocide Research*, 7 (2005), 221–241.
- 12 See Chapter 2 of this book and, for example, International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Krstić, Case No. IT-98–33-T (Yugoslavia Trial Chamber 2001), Judgment, paras. 574–580, esp. para. 580. [www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf](http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf) (accessed 16 April 2018).
- 13 Thomas Butcher, "A 'Synchronized Attack': On Raphael Lemkin's Holistic Conception of Genocide", *Journal of Genocide Studies*, 15, no. 3 (2013), 253–271.
- 14 See Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944).
- 15 Commission on Human Rights (United Nations), forty-ninth session. *Final Report on the Situation of Human Rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr. Reynaldo Galindo Pohl, Pursuant to Commission Resolution 1992/67 of 4 March 1992* (Document E/CN.4/1993/41, 28 January 1993), 55, paras. 310–311. [www.un.org/ga/search/view\\_doc.asp?symbol=E%2FCN.4%2F1993%2F41](http://www.un.org/ga/search/view_doc.asp?symbol=E%2FCN.4%2F1993%2F41) (accessed 8 October 2018).
- 16 Houchang E. Chehabi, "Anatomy of Prejudice: Reflections on Secular Anti-Baha'ism", in Dominic Brookshaw and Seena Fazel, eds., *The Baha'is of Iran: Socio-historical Studies* (London: Routledge, 2008), 184–199.
- 17 Moojan Momen, "Dolgorukov Memoirs", *Encyclopaedia Iranica*, vol. 7 (London, 1996), 477–478. [www.iranicaonline.org/articles/dolgorukov-memoirs](http://www.iranicaonline.org/articles/dolgorukov-memoirs) (accessed 15 April 2018).
- 18 Fereyduun Vahman, *Yik Sad va Shast Sal Mubarizih ba A'in-i Baha'i* (3rd printing, Spanga, Sweden: Baran, 2010), 267–268. See also Amanat, *Resurrection*, 439.
- 19 Muhammad Taqi Afnan, *Bigunahan* (London: privately published, 1378/1999), 51–240; Vahman, *Yik Sad va Shast Sal Mubarizih*, 203–218.
- 20 Ayatollah Sayyid 'Ali Khamene'i, "Faqihan dar barabar-i sakhtarshikanan". <http://farsi.khamenei.ir/others-dialog?id=17472> (accessed 8 April 2018).
- 21 'Ali Akbar Mas'udi Khumayni, *Khatirat-i Ayatullah Mas'udi Khumayni* (ed. Javad Imami, Tehran: Markaz-i Asnad-i Inqilab-i Islami, 1381/2002), 229–230; see also "Gushih-i-y az khuy-i hayvani-yi Baha'iyyat", *Raja News*. <http://rajanews.com/Detail.asp?id=50762>; "Jalasih-yi shabanih-yi Baha'iyān dar Bagh-i Uvaysi-yi

- Qum". [www.broujerdi.ir/index.php/260-2016-03-26-04-19-40](http://www.broujerdi.ir/index.php/260-2016-03-26-04-19-40) and over 20 blogs (all accessed 8 April 2018).
- 22 "Maḥal Rabīth-yi Jinsi ba Dukhtaran bih Shart-i Baha'i Shudan", *Serat News*. [www.seratnews.com/fa/news/196541](http://www.seratnews.com/fa/news/196541) (accessed 9 April 2018); "Su Istifadih-yi Firqih-yi Baha'iyyat az Jadhhabiyat-i Jinsi", *Iranmaz*. [www.irannaz.com/news\\_detail\\_11140.html](http://www.irannaz.com/news_detail_11140.html) (accessed 9 April 2018).
  - 23 Position stated by Khomeini both before he became Iran's leader: James Cockcroft, "Iran's Khomeini", *Seven Days*, 3, no. 1 (23 February 1979), 20; and after: Ruhullah Khomeini, *Sahifah-yi Nur*, Vol. 17 (Tehran: Vizarat-i Irshad-i Islami, 1985), 267; see also Eliz Sansarian, *Religious Minorities in Iran* (Cambridge: Cambridge University Press, 2000), 116; statement of Ayatullah Āmulī Lārījānī, head of Iran's judiciary, see "Āmulī Lārījānī: Bahā'iyyat dīn nīst", *Entekhab*. [www.entekhab.ir/fa/news/269230](http://www.entekhab.ir/fa/news/269230) (accessed 10 April 2018); statement of Mansur Haqiqatpur, Deputy Head of the Iranian Parliamentary Commission on National Security, "Bahā'iyyat aqaliyyat-i dīnī nīst", *ICANA (Islamic Consultative Assembly News Agency)*. [www.icana.ir/Fa/News/286516](http://www.icana.ir/Fa/News/286516) (accessed 10 April 2018).
  - 24 This accusation became prevalent in 2010, after Muhammad Javad Larijani, Secretary-General of the High Council for Human Rights in Iran, said this at the United Nations Human Rights Council in Geneva. See Ḥamid Ṣaburi, "Azar-i Baha'iyan bar mabna-yi 'sanariyaw-yi kalt'", *Gooya*. <http://news.gooya.com/politics/archives/2010/09/110319.php> (accessed 10 April 2018).
  - 25 Baha'i International Community, "Their Progress", 13.
  - 26 Michael Fischer, *Iran: From Religious Dispute to Revolution* (Cambridge, MA: Harvard University Press, 1980), 187.
  - 27 See for example *National and Provincial Statistics of the First National Census of Iran (November 1956. Vol. 2: Social and Economic Characteristics of the Inhabitants for Iran and the Census Provinces)* (Tehran: Ministry of Interior, June 1962), 146–161.
  - 28 See, for example, the Baha'is listed in Abbas Milani, *Eminent Persians: Men and Women Who Made Modern Iran, 1941–1979* (2 vols., Syracuse, NY: Syracuse University Press, 2008).
  - 29 The partial list of eminent Iranians educated at the Baha'i Tarbiyat school in Tehran in Soli Shahvar, *The Forgotten Schools: The Baha'is and Modern Education in Iran, 1899–1934* (London: I.B. Tauris, 2010), 179–182, must be regarded as a just a preliminary assessment. There are several others who should be added, such as Gholam Hussein Ebtehaj, Abolhassan Ebtehaj, and Dr Ghassem Ghani. That these individuals attended a Baha'i school is usually concealed in their biographies published in Iran.
  - 30 Vahman, *Yik Sad*, 481–487.
  - 31 Summarized in Baha'i International Community, *The Baha'i Question: Cultural Cleansing in Iran* (New York: Baha'i International Community, 2008), 13–14. <https://iranbahaipersecution.bic.org/archive/bahai-question-cultural-cleansing-iran> (accessed 11 June 2018).
  - 32 United Nations Office on Genocide Prevention and the Responsibility to Protect, "Ethnic Cleansing". [www.un.org/en/genocideprevention/ethnic-cleansing.html](http://www.un.org/en/genocideprevention/ethnic-cleansing.html) (accessed 16 April 2018).
  - 33 "Baha'is of Kata Threatened with Looting Unless They Convert to Islam", *Ayandagan* newspaper, 8 May 1979 (translated at <https://iranbahaipersecution.bic.org/archive/bahais-kata-threatened-looting-unless-they-convert-islam>, accessed 16 June 2018); Moojan Momen, "Social and Economic Development in an Iranian Village: The Baha'i Community of Saysan", *Baha'i Studies Review* 15, no. 1 (2009), 67–81; Moojan Momen, "Tārīkhchīh-yi Jāmi'ih-yi Bahā'ī dar Rustā-yi Māhfurūzak, Māzandarān", *Payām-i Bahā'ī* 352 (March 2009), 33–37, 59; 353 (April 2009), 33–36, 43.
  - 34 Shahvar, *Forgotten Schools*, 15–20.

- 35 Shahvar, *Forgotten Schools*, 60–130, 147–178; Momen, Moojan. “Baha’i Schools in Iran”, in Dominic P. Brookshaw and Seena B. Fazel, eds., *The Baha’is of Iran: Socio-cultural Studies* (London: Routledge, 2008), 94–122.
- 36 *The Baha’i World, Vol. 15: 1968–1973* (Haifa: Universal House of Justice, 1976), 248.
- 37 Calculated from figures given for 7–39-year-old females in the 1355 (1976) census in *Sālnāmih Āmārī: Sāl-i 1364* (Tehran: Markaz-i Āmār-i Īran, 1364 AHS/1985), 108. The same figures can be found in *Iran Statistical Year-Book 1377, March 1998–March 1999* (Tehran: Statistical Centre of Iran, 2000), 601.
- 38 The Baha’i Institute for Higher Education, see <http://bihe.org> (accessed 11 June 2018).
- 39 Baha’i International Community, *The Baha’i Question Revisited: Persecution and Resilience in Iran* (New York: Baha’i International Community, 2016). <https://iran.bahai-persecution.bic.org/archive/bahai-question-revisited-persecution-and-resilience-iran> (accessed 11 June 2018), 34.
- 40 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1976, p. 245, Article 2. <https://treaties.un.org/doc/Publication/UNTS/Volume%201015/volume-1015-I-14861-English.pdf> (accessed 28 June 2018).
- 41 See for example definitions at *Oxford Living Dictionary* (<https://en.oxforddictionaries.com/definition/apartheid>, accessed 11 June 2018); *Merriam Webster Dictionary* ([www.merriam-webster.com/dictionary/apartheid](http://www.merriam-webster.com/dictionary/apartheid), accessed 11 June 2018).
- 42 See International Convention on the Suppression and Punishment of the Crime of Apartheid.
- 43 Natasha Schmidt “The Cost of Discrimination”, *Iranwire*, 27 May 2016. <https://iranwire.com/en/features/5334>; and the film “The Cost of Discrimination”. <https://vimeo.com/229149319> (accessed 19 April 2018).
- 44 Baha’i International Community, *The Baha’i Question*, 29.
- 45 For example, see the widely reported meeting between Fa’izih Rafsanjani (daughter of former president Hashemi-Rafsanjani and herself a political activist) and her Baha’i former fellow-prisoner Fariba Kamalabadi; Saeed Kamali Dehghan, “Rafsanjani Daughter Criticised for Meeting Leader of Banned Minority”. [www.theguardian.com/world/2016/may/17/rafsanjani-daughter-criticised-meeting-leader-banned-sect-iran](http://www.theguardian.com/world/2016/may/17/rafsanjani-daughter-criticised-meeting-leader-banned-sect-iran) (accessed 28 June 2018); also a letter of support by a political prisoner, Khalid Khardani, “Namih-yi Khalid Khardani bih bahanih-yi hashtumin salgard-i rahbaran-i Baha’i”. [www.bazdasht.com/index3.php?code=3307](http://www.bazdasht.com/index3.php?code=3307) (accessed 28 June 2016).
- 46 Michael Karlberg, “Constructive Resilience: The Baha’i Response to Oppression”, *Peace and Change* 35, no. 2 (April 2010), 222–257.
- 47 Sentiments publically expressed at the United Nations Commission on the Status of Women, New York, March 2018, by a prominent Iranian social activist, whose identity is concealed to protect him/her.
- 48 Some examples from among a growing number of such messages include: “Belief Cannot Be a Basis for Legal Offence or Religious Sin”, five Iranian religious scholars have called for tolerance and freedom for the Baha’is (<http://zeitoons.com/9157>, accessed 27 June 2018; translation: <http://iranpresswatch.org/post/14709>, accessed 27 June 2018); Sadegh Zibakalam (professor of political science at the University of Tehran), “What Ms. Faezeh Hashemi Did Was the Right Thing to Do from Every Perspective”. [www.facebook.com/SadeghZibakalam/photos/a.10150270890319767.350779.81004004766/10154368519129767/?type=3&theatre](http://www.facebook.com/SadeghZibakalam/photos/a.10150270890319767.350779.81004004766/10154368519129767/?type=3&theatre) (accessed 28 June 2018), partial translation at <http://iranpresswatch.org/post/14685> (accessed 28 June 2018); Khardani, “Namih-yi Khalid Khardani”.
- 49 Little has been written in academic literature about this change in the Baha’i community. Among the few papers on this is the following about the impact of this change on the Baha’i community in China: David Palmer, “From ‘Congregations’ to ‘Small Group Community Building’: Localizing the Bahá’i Faith in Hong Kong, Taiwan, and Mainland China”, *Chinese Sociological Review* 45, no. 2 (Winter 2012–2013), 78–98.



- 50 Amnesty International, "Iran UA 25/08 – Possible Prisoners of Conscience/Fear of Torture or Ill-Treatment", Index number: MDE 13/017/2008. [www.amnesty.org/download/Documents/56000/mde130172008eng.pdf](http://www.amnesty.org/download/Documents/56000/mde130172008eng.pdf) (accessed 16 April 2018).
- 51 See Chapter 2 of this book and, for example, International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Krstic, Case No. IT-98-33-T (Yugoslavia Trial Chamber 2001), Judgment, paras. 574–580, esp. para. 580. [www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf](http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf) (accessed 16 April 2018). See also Thomas Butcher, "A 'Synchronized Attack': On Raphael Lemkin's Holistic Conception of Genocide", *Journal of Genocide Studies* 15, no. 3 (2013), 253–271.
- 52 Draft Convention on the Crime of Genocide, [https://digitallibrary.un.org/record/611058/files/E\\_447-EN.pdf](https://digitallibrary.un.org/record/611058/files/E_447-EN.pdf), 6–7 (accessed 27 September 2018).
- 53 United Nations Office on Genocide Prevention and the Responsibility to Protect, "Crimes against Humanity". [www.un.org/en/genocideprevention/crimes-against-humanity.html](http://www.un.org/en/genocideprevention/crimes-against-humanity.html) (accessed 16 April 2018). See also the general discussion of this point in Chapter 3 of this book.
- 54 Rome Statute of the International Criminal Court, article 7, p. 3. [www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf](http://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf) (accessed 19 November 2018).
- 55 For example the United Nations Declaration on the Rights of Indigenous Peoples condemns many actions that are analogous to those taken against the Baha'is in Iran; [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (accessed 27 September 2018).
- 56 Iran Tribunal, "Prosecutor v. Islamic Republic of Iran". Judgment, 5 February 2013. [www.irantribunal.com/images/PDF/Iran%20Tribunal%20Judgment.pdf](http://www.irantribunal.com/images/PDF/Iran%20Tribunal%20Judgment.pdf) (accessed 17 April 2018).

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## **Section three**

# **JUSTICE AND RESTITUTION**



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# 11 Ontological redress

## The natural and the material in transformative justice for “cultural” genocide

*Andrew Woolford*

### Introduction

In this chapter, I explore the limits of the concepts of cultural genocide and restorative justice for redressing the ontological destruction experienced by Indigenous peoples under North American settler colonialism. Focusing on forced assimilation through Canadian residential schools as a technique of ontological destruction, I argue that to view these harms as simply cultural is to ignore their material dimensions. The cultural cannot be so easily separated from the physical and the biological, especially within Indigenous societies. Moreover, the language of cultural genocide and restorative justice tends to sponsor redress responses that fail to address the material and the natural as necessary components of any vision of transformative justice for settler colonialism.

### Cultural genocide(?) in Canada

On the first page of *Honouring the Past, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, the Commission (hereafter TRC) refers not just to Indian Residential Schools, but also the broader history of Canadian policy toward Indigenous peoples as “cultural genocide.”<sup>1</sup> One week prior to the Summary Report’s release, Supreme Court Chief Justice Beverley McLachlin spoke of Canada’s history of attempted “cultural genocide” when she delivered the fourth annual Pluralism Lecture of the Global Centre for Pluralism, making her the highest-ranking Canadian official to use the term while in office. One year earlier, former Prime Minister Paul Martin likewise referred to residential schools as “cultural genocide.”<sup>2</sup> These public statements by prominent Canadians added to more widespread use of the genocide concept (and not just “cultural genocide”) by residential school Survivors, activists, journalists, and scholars.<sup>3</sup>

The residential school system was part of Canada’s broader strategy of aggressively assimilating Indigenous peoples. These schools were supplemented by ongoing land dispossession, restrictions on Indigenous movement, legal tools regulating Indigenous lives in their near entirety (e.g. The Indian Act of 1876), prohibitions against Indigenous cultural practices, and laws preventing Indigenous

nations from seeking legal counsel in pursuit of their territorial rights, among other wrongs. Assimilative education had long been a strategy used in North America, tracing back to seventeenth-century missionary societies that entered Indigenous territories alongside traders and explorers. But residential schools were not used as a systematic approach to Indigenous assimilation until the late 1800s, following Nicholas Flood Davin's 1879 journey to study Indigenous education in the United States. In his report to John A. Macdonald's Conservative government, Davin applauded US efforts to concentrate Indigenous peoples on reservations, divide communal territory into individually-owned parcels of land, and prepare Indigenous children for citizenship through industrial education. Davin believed industrial boarding schools were superior to day schools, where each day after school children returned to their homes and were under the "influence of the wigwam."<sup>4</sup> However, he did not feel Canada could operate a government-run system comparable to that of the United States. Because of the dispersed nature of Canada's Indigenous population, Davin believed it better that the government partner with missionary societies already located in these regions to administer the schools.

From this time, until the last Canadian residential school closed in 1996, 150,000 children attended assimilative boarding schools, often spending 10 months a year or more, from as young as 4 or 5 years of age to as old as 18 or 19.<sup>5</sup> While in residence, these young people were prevented from speaking Indigenous languages and taught to despise their Indigenous identities. The schools were spaces of horrifying physical and sexual violence, where children often spent half of their days in lessons and the other half working to offset the costs of their education (and to make profits for the churches). Conditions at the schools were defined by poor nutrition, insufficient clothing, inadequate medical care, as well as crowding and poor ventilation.<sup>6</sup> Thus, the schools were often deadly environments. The TRC estimates that at minimum 6000 children perished while attending residential schools.<sup>7</sup> Many others left the schools with a feeling of detachment and loss, unable to fit the white world into which they were to be assimilated, but also unable to return to their communities since they no longer felt connected to their cultures. Entire generations of Indigenous children went without the experience of familial socialization, cultural education, and a sense of community attachment. The reverberations of this experience continue today, with high levels of physical and sexual violence, substance abuse, health and mental health challenges, and other indicators of marginalization persisting within many Indigenous communities and connected to cycles of violence that began in the residential schools.<sup>8</sup>

Usage of the genocide concept, and the language of cultural genocide in particular, to describe Canadian residential schools has led McGill law professor and former Legal Advisor to the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia Payam Akhavan to describe the term as a "mourning metaphor" rather than legal label.<sup>9</sup> Akhavan argues that the crimes committed by Canada are better described legally as crimes against humanity (i.e. persecution) than genocide. The problem with the term "cultural genocide," as he sees it, is that it has no legal meaning. Genocide law, as it has



been posited and interpreted, does not provide recourse for claims of cultural destruction. According to this argument, even section IIe of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948, hereafter UNGC), which refers to “forcibly transferring children of the group to another group,” is an imperfect mechanism for achieving justice for residential schools. This clause is what remains of the section on “cultural genocide” that was included in earlier drafts of the UNGC such as the 1947 Secretariat Draft, though some such as the UN International Law Commission reframe it as a form of biological destruction preventing group reproduction rather than as a cultural technique of genocide. However, there is little jurisprudence testing its application.<sup>10</sup> In addition, Akhavan questions whether the required *dolus specialis*, or specific intent, exists in the case of residential schools, given that the transfer of children was, in his view, carried out more to transform Indigenous cultural practices than to eliminate them as groups:

In the case of biological destruction, children are permanently separated from a group, with the intention to destroy the group’s capacity to physically reproduce itself. In the case of cultural destruction, however, children are separated from a group temporarily or for a prolonged period with the intention to “destroy” the group’s cultural identity rather than its reproductive capacity. This is the exact case of residential schools.<sup>11</sup>

The problem here is that Akhavan appears to have not dug too deeply into the residential school policy record. The conceit of cultural change for Indigenous peoples masked a deeper concern with the so-called “Indian problem,” which viewed Indigenous peoples as obstacles to Canadian land acquisition and the consolidation of the Dominion from sea to sea.<sup>12</sup> Cultural change was understood as a means to group elimination, with the goal that Indigenous peoples would be “merged and lost” within settler Canadian society and therefore no longer a threat or impediment.<sup>13</sup> Moreover, his analysis stops at the point of colonial law. Though he does recognize that Canada is defined by a legal pluralism that includes Indigenous notions of law and justice,<sup>14</sup> he does not follow through with respect to what this might mean for our notion of genocide and its division into biological, cultural, and physical types. Akhavan is somewhat attuned to Indigenous understandings of their cultures as inseparable from their broader and diverse understandings of their collective being, but he does not elaborate much on this insight. It is a point he covers simply to note that residential school Survivors are less concerned with legal taxonomy than they are with marking and naming their feelings of loss: a “song of bereavement” that we all must heed.<sup>15</sup> Stopping here, the challenge to colonial law, and the promise of rethinking genocide law through an Indigenous-inclusive legal pluralism, is left unaddressed. The rigid separation in genocide law between the physical, biological, and cultural is allowed to stand as is. But this modern typological contrivance reflects a distinctly European cosmology,<sup>16</sup> protecting mostly those groups willing to divide their world as such. What is lost in the categorical separation between the

physical, biological, and cultural is their deep intersections within Indigenous ontologies.<sup>17</sup>

For this reason, I find it more useful to speak of ontological genocide, or ontological destruction, since what is at stake in any assault intended to eliminate a group is a networked set of actions that target the ontological foundations of group life – the forms of being and becoming by which a collectivity maintains its existence.<sup>18</sup> The drive to categorize types of genocide, or the forms of *actus reus* that comprise the act of genocide, therefore often exacts epistemological violence upon targeted groups, since the distinctions elicit forms of categorization that impose a way of knowing and seeing the world that is not consistent with that of the targeted group. For example, were one to retroactively examine the targeting of bison by the American military in the early to mid-nineteenth century, the division between cultural, biological, and physical techniques would provide as much obfuscation as clarity. In an effort to deprive Indigenous groups on the plains their commissary, the US military invited sportsmen to participate in the bison hunt.<sup>19</sup> As well, members of the military themselves participated in the carnage at the direction of their superior officers.<sup>20</sup> The devastation of a primary source of food, clothing, and work had catastrophic consequences for plains peoples. But this assault on the physical reproduction of plains Indigenous nations cannot be separated from the cultural effects of bison slaughter. Bison, as kin and “older brothers,”<sup>21</sup> were themselves both a people in their own right and considered relations of the peoples of the plains. Bison were simultaneously a material and symbolic co-constituent of Indigenous groups in this region.

The admixture of culture with the biological and the physical worlds can be understood not just through Indigenous knowledges. Giorgio Agamben, for example, uses the ancient Greek distinction between the *Zoe* and the *Bios*, between natural life and political life, to shed light upon contemporary biopolitics.<sup>22</sup> Building from the work of Michel Foucault, who describes biopolitics as the power to “make live and let die” to better understand how human life itself becomes an object of governance in modern times,<sup>23</sup> Agamben is most interested in how the defining characteristics of the modern state – for him, its ability to declare the state of exception – produces conditions in which politics is implicated in determining what it means to live. Even those who are physically removed from the *polis*, the *homo sacer*, who can be killed but not sacrificed, are never fully outside the law or the *polis*. Despite their exclusion, they are included, as their exceptional status makes them essential to the very definition of the polity. They may be reduced to a form of “bare life” and stripped of all human accoutrements, as was done in the Nazi death camps, but this is a politicized form of natural life, rather than a return to *Zoe* itself.<sup>24</sup> The state of natural life remains inaccessible as it is bound up in the political.

In a related vein, in his seminal essay, *We Have Never Been Modern*, Bruno Latour argues that despite modern attempts to purify nature from culture through what he calls the modern constitution, our world is beset with hybrids of nature and culture, such as climate change, which signals quite clearly the intersection of our various human worlds with our environment. Carbon emissions, and other

causes of climate change, are not solely natural phenomena. They are the products of human processes, which include the ways in which specific human associations constitute and are constituted through their relations with a natural world. Given the different relationships associations, or groups, have with their natural worlds, Latour suggests that we do not have a singular and objective nature that exists alongside the various cultures that inhabit it. Instead, each cultural association has a nature, and thus these multiple natures are forever entwined with their cultures.<sup>25</sup>

The point of this brief theoretical excursion is, in part, to argue that there is no hard separation between the culture and the physical and biological. The material aspects of life that we define as physical and biological are enmeshed with the frames provided by our cultures, just as these cultures are co-constituted by our relations with our material world. The delicate balance of these entwined forms is the ontological basis for the ongoing work of becoming (and reproducing) a group. To put this in more concrete terms by applying it to the forcible transfer of children from one group to another, such an act can only through great effort be conceived as singularly cultural. Whether or not the children are eventually able to return to their home communities and families, there are material consequences of the various assimilative pressures to which they are subject: language loss; disconnection from territory; alienation from family and kin networks; forced objectification of flora and fauna; absence from story cycles and rituals, and so on. These Indigenous practices are not targeted through residential schools because they are simply seen as the habits of a backward culture. They are targeted because they are the bases of Indigenous connection to the land, and the land is the primary stake of settler colonial genocide.<sup>26</sup> Moreover, none of them are wholly in and of themselves cultural. They are each intersections of biology, culture, and the physicality of life. They represent not just a store of knowledges of and practices related to a world. They make the material world through interactions between the human and the other-than-human.

Settler colonial nations such as the US and Canada played a self-interested role in having cultural genocide removed from the UNGC. In support, other national representatives agreed that: (1) physical and cultural genocide were too different to combine under the same law; (2) cultural genocide was or would be covered by other legal protections (such as those concerning minority rights to be included in the UN Declaration of Human Rights that was being negotiated at the same time); and (3) the article on cultural genocide was too vague to be of any legal practicality. Mr. Federspiel, from Denmark, raised two of these objections in his remarks: “it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.”<sup>27</sup> However, it is not enough to mourn the removal of cultural genocide from the UNGC. Nor can we simply retreat to Lemkin’s more capacious understanding of cultural destruction. For the most part, these definitions also exhibited an epistemological violence that severed the cultural from the material. Whether focused on the forcible transfer of children, exile of cultural leaders, prohibition of language, or destruction of books and historical

monuments, as cultural genocide was understood in the 1947 *Draft Convention* prepared by the UN Secretariat,<sup>28</sup> the cultural is a vessel for the “idea” of the group rather than its physical existence. Article 7 of the Working Group on Indigenous Persons’ first Draft on the Rights of Indigenous Peoples, is less categorical. It reads:

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

- a Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- d Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- e Any form of propaganda directed against them.<sup>29</sup>

Unfortunately, this article was not adopted as several states, such as the US, argued that terms such as cultural genocide and ethnocide were unclear and lacked clear legal meaning in international law.<sup>30</sup> Though it retains the language of cultural genocide, it does so in a manner that incorporates the material foundations of cultural life, namely through clause 7(b) on dispossession. Had it made it into the UN Declaration on the Rights of Indigenous Peoples, it would have represented a slight movement toward the prohibition of ontological destruction and creation of mechanisms for its redress. But, as will be argued in the final section of this chapter, even this would not have been enough to bring us toward a transformative justice for settler colonial wrongs. But before we can address this point, it is necessary to discuss the limitations of restorative justice and reconciliatory mechanisms as they are currently used to redress ontological destruction.

### **Restorative justice, affirmative redress, and the politics of recognition in Canada**

Restorative justice is a global movement that has its origins in North American efforts to build a community-based justice to steal conflict back from the state.<sup>31</sup> Some argue it is a justice idea that has a more ancient lineage, harkening back to traditions such as the Code of Hammurabi (1754 BCE) and Laws of Ethelbert of Kent (approximately 600 CE). It is even cited as taking inspiration from North American Indigenous justice practices, such as circle-based community dialogues.<sup>32</sup> In its contemporary form, restorative justice refers to justice procedures that seek to involve the offender, victim, their families, and community members

in resolving the harms caused by crime.<sup>33</sup> However, in practice, restorative justice is an adaptive technique that is shaped to the contours of the particular conflict, as well as its time and place.<sup>34</sup> Some have extended the term to also describe some of the practices of so-called transitional justice, such as truth and reconciliation commissions.<sup>35</sup>

Critics of restorative justice have pointed out how it is not the “alternative” to formal justice that its proponents suggest. Restorative justice borrows the language and resources of the criminal justice system, leading it to mimic and reproduce the logic of this system in crucial ways, such as when it accepts unproblematically the language of victim and offender.<sup>36</sup> Moreover, restorative justice is often used to siphon off troublesome (e.g. low risk and low priority) cases from the criminal justice system to allow the latter to better perform its punitive work.<sup>37</sup> In this manner, it is often parasitic upon and reproduces dominant modes of justice. The same is often true in forms of restorative justice in societies recovering from mass violence. For example, some have noted how the South African Truth and Reconciliation Commission (SATRC) opted to focus on a legally-delimited set of individualized harms, “gross human rights violations,” excluding from its remit other wrongs. This resulted, for example, in marginalization of economic injustices from consideration.<sup>38</sup> As well, the SATRC framed past wrongs in distinctly legal terms to the extent that they did not consider acts that were legal under Apartheid, which, as Richard Wilson notes, “created a false distinction between the normative aspects of a racialized and authoritarian order (deemed to be outside the mandate) and illegal forms of violent physical coercion, when the latter implied the former.”<sup>39</sup> In short, whether in a criminal or transitional context, restorative justice often does not prove to be a deeply transformative movement.

Another line of criticism, following from the above discussion of ontological destruction, has to do with the overlap between restorative justice and a politics of recognition. In situations of contested sovereignty, such as exist between Indigenous nations and settler colonial states, the tendency of restorative justice in transitional societies to center the state as the primary actor, both as perpetrator and agent of healing, allows the state to direct the restorative justice process toward its own ends.<sup>40</sup> The state is asked to recognize a previously despised Other, but often does so in a manner that seeks to better fit the Other into the dominant society. Compensation may be offered, and an apology given, but this is often done with the aim of helping former victims heal and better integrate into the dominant society. Mainstream legal, political, and economic conditions are rarely called into question; instead, the restorative process seeks to restore the status quo, yet now with more inclusion of cultural differences. This often amounts to little more than a strategy of “affirmative redress,”<sup>41</sup> that fails to tackle the deeper inequalities that define the historical experiences of the previously despised group. Moreover, as Dene social theorist Glen Coulthard argues, for Indigenous peoples in settler colonial societies, this rendition of the politics of recognition places Indigenous nations in the position of supplicant to the settler state, and to settler colonial society more broadly, as these nations are

required to seek recognition from a dominant Other that makes no move to ameliorate its usurpation of Indigenous territory.<sup>42</sup> The politics of recognition thereby maintains the privileged position of non-Indigenous Canadians by placing them as the ones with the power to honour, respect, and acknowledge Indigenous existence.

Such “restoration” thus fails to tackle the ontological destruction that is at the root of settler colonial genocide. In the context of Indigenous Canada, the assemblage of territory, language, story, relations, and other group-sustaining foundations are not restored to a position of strength whereby they can provide renewed opportunities for Indigenous group formation. Instead, justice is divided into a series of symbolic and superficial material forms of redress. For the former, in Canada, this would include former Prime Minister Stephen Harper’s apology on 11 June 2008, which was delivered in the House of Commons. In the apology, Harper states, “The government now recognizes that the consequences of the Indian residential school policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.”<sup>43</sup> In so doing, his apology exceeds the recognition provided by previous government statements of address, though in a manner that remains committed to the vision of Canada as a single and unified nation rather than a plural entity defined by multiple sovereignties.<sup>44</sup>

This apology, though not part of the official Indian Residential School Settlement Agreement (IRSSA), was crucial to building good faith cooperation to move ahead with the agreement.<sup>45</sup> The IRSSA is a legal settlement designed to bring to an end a number of lawsuits and class actions claims made by Survivors of residential schools against the Canadian government and the religious denominations (Catholic, Anglican, Presbyterian, and Methodist) that administered the schools. For years prior to the IRSSA, the Canadian government had sought a means to expedite the settlement process. Likewise, the Assembly of First Nations, a national umbrella body representing those Indigenous groups defined as Indian or First Nations under the Canadian constitution, sought a solution that would provide immediate relief and resources to those who were locked in a lengthy legal battle. A deal was reached 8 May 2006 and approved in 2007 by the nine courts under whose jurisdiction legal claims had been made. The deal was based upon recommendations from the Assembly of First Nations.<sup>46</sup> The IRSSA featured several components. First, it provided at least \$1.9 billion dollars for common experience payments [CEP], which were payments allotted to any individual having attended a residential school, regardless of whether or not they suffered violence within the school. This included a base of \$10,000 for the first year and \$3000 for every year thereafter. Second, the settlement featured an Independent Assessment Process (IAP) for those who had suffered sexual or serious physical abuses, or serious psychological trauma as a result of abuse. Amounts from this process ranged between \$5000 and \$275,000, or more if a loss of income could be demonstrated. These amounts were determined through a point system, which involved an itemization of the types of harm suffered while in a residential school. Finally, collective reparations were also made,



adding another \$125 million to the Aboriginal Healing Foundation and setting aside \$60 million for a Truth and Reconciliation Commission and a further \$20 million for community commemorative projects.<sup>47</sup>

Without taking away what compensation and symbolic address might mean to an individual Survivor of Canada's Indian residential school system, these redress measures do not move beyond symbolic forms. Even the compensation is largely symbolic, since it obviously cannot ameliorate the levels of harm experienced by Survivors. More to the point of this chapter, though, the measures also fail to grapple with the ontological destruction perpetrated by Canadian settler colonialism. The key sources of Indigenous collective becoming – namely, territory, language, kin, other-than-human relations, and story – the very things that were targeted through the compulsory transfer of Indigenous children to assimilative schools, are barely registered in the IRSSA.

### **Transformative justice and ontological destruction**

In their article, “Decolonization is not a Metaphor,” Eve Tuck and K. Wayne Yang argue that calls to decolonize settler colonial contexts often occur in a metaphorical register. In its many usages, such as “decolonizing education” or “decolonizing methods”, the word decolonization is frequently appropriated in a manner that secures rather than challenges the settler social order.<sup>48</sup> Through such language, an easier pathway to reconciling the past is imagined; in particular, this is a path on which one need not grapple with the material reality of transformative redress. In the words of Tuck and Yang, the deeper project of reconciliation must reckon with the fact that:

[w]ithin settler colonialism, the most important concern is land/water/air/subterranean earth (land, for shorthand, in this article.) Land is what is most valuable, contested, required. This is both because the settlers make Indigenous land their new home and source of capital, and also because the disruption of Indigenous relationships to land represents a profound epistemic, ontological, cosmological violence. This violence is not temporally contained in the arrival of the settler but is reasserted each day of occupation.<sup>49</sup>

Despite this indelible core, settler colonialism presents unique challenges for transformative justice. As Tuck and Yang attest, settler colonialism often intersects with other colonial projects, such as a biopolitical internal colonialism, which seeks to manage groups within the broader population through a variety of unevenly applied strategies that include criminalization and segregation, and exploitative colonialism, which extracts the wealth and knowledges of the world in order to enhance the power of the colonizer.<sup>50</sup> The simultaneity of these modes of domination makes it challenging to decolonize in a settler colonial context, since the needs of the various peoples subjected to these intersecting colonial controls will not necessarily overlap in a neat and straightforward manner.



For Tuck and Yang, metaphorical approaches to decolonization address this morass with empty symbolic gestures that do not scratch the surface of settler colonial domination. They argue that

decolonization in the settler colonial context must involve the repatriation of land simultaneous to the recognition of how land and relations to land have always already been differently understood and enacted; that is, all of the land, and not just symbolically. This is precisely why decolonization is necessarily unsettling, especially across lines of solidarity.<sup>51</sup>

Because dispossession is the core of settler colonialism, societies that are primarily settler colonial in their orientation must first address this material fact. This fact will unsettle those who are settlers, but it may even prove difficult to those who have been brought or travelled to settler societies through enslavement or forced migration. The latter groups, now acclimatized to settler property regimes, also must grapple with this fundamental criterion of decolonization.

The challenge posed by Tuck and Yang, particularly for a social justice-oriented settler scholar like myself, is that they shut down most pathways to settler colonial innocence that would allow me to propose an integrative or compromise solution to the injustices of ontological destruction that have beset and continue to beset a nation such as Canada. Like Glen Coulthard,<sup>52</sup> they see the “demetaphorization” of decolonization, a justice that moves beyond symbolic and performative gestures, as being won by Indigenous peoples rather than given by settlers. And this effort requires, at its core, the unsettling/deoccupation of land.<sup>53</sup> Without attention to the material basis of attempted ontological destruction of Indigenous peoples in North America, efforts at “restorative justice,” repair, or reconciliation risk simply revalorizing a set of economic, property, and cultural relations that are at the heart of this very destruction.

My goal in this chapter is not, however, simply to affirm Tuck and Yang’s vision of justice, but rather to demonstrate how narrow notions of “cultural genocide” that hold to a rigid separation from the physical and the biological risk excluding such justice outcomes before the struggle for redress has really begun. Whatever form a transformative justice in North America will take (and it is not for me to prescribe this justice as an individual as it will arrive through an agonistic and dialogical process), we will need to contend with the material nature of what is often portrayed as cultural genocide. Decolonization that only seeks to change patterns of thought and sponsor symbolic redress will not provide circumstances whereby Indigenous ontologies, including relations with land, water, animals, air, and plants, regain the conditions necessary for their ongoing, decolonized existence.

This is to say that cultural genocide and restorative justice are not neutral categories. They are frames through which we seek to categorize the nature of harm and the potential routes toward justice. Each carry baggage that potentially limits the transformation possible when we seek to right the wrongs of the past and present. Coded into these notions is the idea that forced assimilation, as a means

of Indigenous dispossession, is simply cultural, and can be redressed through moves toward greater cultural respect; that is, they set the course for fostering memory, paying symbolic compensation, articulating a new national truth, and working to prevent the recurrence of this “past,” but they leave the land and its relations outside the frame.

## Conclusion

Cultural genocide is rarely ever singularly cultural. When the cultural techniques of destruction, such as forced assimilation through residential schools, sever relationships between Indigenous children and their families, territories, language, and other-than-human relations, they also strike at the very material existence of the group. This is an ontological destruction that targets the complex intersections of nature and culture that make possible ongoing processes of group becoming. To name this as cultural genocide, and then to seek to repair it through restorative justice or reconciliation, is to miss this larger point. In fact, the naming threatens a form of epistemological violence, as it imposes a way of seeing the world, as well as a pathway to redress, that fails to listen to what Indigenous scholars and leaders are telling us.

## Notes

- 1 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), 1.
- 2 Cited in Sean Fine, “Chief Justice Says Canada Attempted ‘Cultural Genocide’ on Aboriginals,” *Globe and Mail*, 28 May 2015, [www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article/24688854](http://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article/24688854) (accessed 19 May 2018).
- 3 Please note, in keeping with the conventions of the Truth and Reconciliation Commission of Canada, the words “Survivor” and “Indigenous” are capitalized in this chapter. For further discussion of genocide in Canada see, among others, Zia Akhtar, “Canadian Genocide and Official Culpability,” *International Criminal Law Review* 10 (2010), 111–135; Katherine Bischooping and Natalie Fingerhut, “Border Lines: Indigenous Peoples in Genocide Studies,” *Canadian Review of Sociology and Anthropology* 33, no. 4 (1996), 481–506; Roland Chrisjohn and Sherri Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience* (Penticton, BC: Theytus Books, 1997); Ward Churchill, *Kill the Indian, Save the Man* (San Francisco: City Lights, 2004); Robert Davis and Mark Zannis, *The Genocide Machine in Canada: The Pacification of the North* (Montreal: Black Rose Books, 1973); Agnes Grant, *No End of Grief: Residential Schools in Canada* (Winnipeg: Pemmican Publications, 1996); David B. MacDonald and Graham Hudson, “The Genocide Question and Indian Residential Schools in Canada,” *Canadian Journal of Political Science* 45, no. 2 (2012), 427–449; Sam McKegey, *Magic Weapons: Aboriginal Writers Remaking Community after Residential School* (Winnipeg: University of Manitoba Press, 2007); Dean Neu and Richard Therrien, *Accounting for Genocide: Canada’s Bureaucratic Assault on Aboriginal People* (Black Point, NS: Fernwood Publishing, 2003); Pamala Palmater, *Beyond Blood: Rethinking Indigenous Identity and Belonging* (Saskatoon: Purich Publishing, 2011); Andrew Woolford, “Ontological Destruction:

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- 4 Nicholas Flood Davin, *Report on Industrial Schools for Indians and Half Breeds* (Ottawa: Government of Canada, 14 March 1879), 1.
  - 5 For a general overview, see J.R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996).
  - 6 *Ibid.*, 151–182.
  - 7 Chief Commissioner Murray Sinclair quoted in Daniel Schwartz, “Truth and Reconciliation Commission by the Numbers,” *CBC News*, 2 June 2015, [www.cbc.ca/news/indigenous/truth-and-reconciliation-commission-by-the-numbers-1.3096185](http://www.cbc.ca/news/indigenous/truth-and-reconciliation-commission-by-the-numbers-1.3096185) (accessed 30 July 2018).
  - 8 In general, see Miller, *Shingwauk’s Vision*; John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg, MB: University of Manitoba Press, 1999); Woolford, *This Benevolent Experiment*.
  - 9 Payam Akhavan, “Cultural Genocide: Legal Label or Mourning Metaphor?” *McGill Law Journal* 62, no. 1 (2016), 243–270.
  - 10 *Ibid.*
  - 11 *Ibid.*, 263.
  - 12 Woolford, *This Benevolent Experiment*, Chapter 3.
  - 13 Davin, *Report on Industrial Schools*, 11.
  - 14 See John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education,” *McGill Law Journal/Revue de droit de McGill* 61, no. 4 (2016), 795–846.
  - 15 Akhavan, “Cultural Genocide,” 270.
  - 16 Bruno Latour, *We Have Never Been Modern* (Cambridge: Harvard University Press, 1991), 13.
  - 17 Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 13; Leanne Simpson, *Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring, 2011), Chapter 2.
  - 18 For an earlier version of this argument, see Woolford, “Ontological Destruction.”
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  - 21 Winona Laduke, *All Our Relations: Native Struggles for Land and Life* (Cambridge: South End, 1999), 154.
  - 22 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998), 9.
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  - 24 Agamben, *Homo Sacer*.
  - 25 Latour, *We Have Never Been Modern*.
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  - 28 See discussion in Abtahi and Webb, *The Genocide Convention*, 1–640.

- 29 Annexed to the Report of the Working Group on Indigenous Populations on its Eleventh Session, UNCHROR, 45th Sess, Annex 1, Agenda Item 14, UN Doc E/CN.4/Sub.2/1993/29 (1993).
- 30 For a fuller discussion of this issue, see Jeff Benvenuto, *From Cultural Genocide to Cultural Integrity: Indigenous Rights and the Co-Optation of International Norms*, Unpublished Dissertation, Rutgers University, 2018.
- 31 Nils Christie, "Conflicts as Property," *British Journal of Criminology* 17, no. 1 (1977), 1–15.
- 32 See Elmar Weitekamp, "The History of Restorative Justice," in *A Restorative Justice Reader*, ed. Gerry Johnstone (Cullompton: Willan, 2003), 75–102.
- 33 Tony Marshall, *Restorative Justice: An Overview* (London: Home Office, Research Development and Statistics Directorate, 1999), 5.
- 34 See, in general, Andrew Woolford, *The Politics of Restorative Justice: A Critical Introduction* (Winnipeg and Halifax: Fernwood, 2008).
- 35 Desmond Tutu, *No Future Without Forgiveness* (New York: Image, Doubleday, 1999), 55.
- 36 George Pavlich, *Governing Paradoxes of Restorative Justice* (London: Routledge/GlassHouse Press, 2005), Chapter 1.
- 37 Andrew Woolford and R.S. Ratner, "Nomadic Justice: Restorative Justice on the Margins of Law," *Social Justice* 30 (2003), 177–194.
- 38 See, for example, Patrick Bond, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (London: Pluto Press, 2000); Mahmood Mamdani, "The Truth According to the TRC," in *The Politics of Memory: Truth, Healing, and Social Justice*, eds. Ifi Amadiume and Abdullahi An-Na'im (London: Zed Books, 2000), 176–183; Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16, no. 2 (2002), 91–108.
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# Index

Page numbers in **bold** denote tables.

- Aalberts, Tanja 53  
Abdullah, Daud 9, 227–245  
Abed, Mohammed 132  
Aboriginal people *see* Australia  
accumulation: by dispossession 145, 148, 149, 158; primary accumulation 144–145  
Adams, David Wallace 105  
Additional Protocols to the Geneva Convention 72–73  
Agamben, Giorgio 272  
Akhavan, Payam 99, 100, 270–271  
Al Barghouti, Omar Saleh 236  
Al Sakakini, Khalil 236  
Algeria 56–57  
Altman, Jon 156, 157, 158  
Amit, Gish 236, 237  
Amnesty International 157  
Anderson, Kjell 8, 179–204  
Anderson, Pat 151  
anthropology 22, 23, 25–26, 28, 35, 37  
apartheid 255, 275  
Arndt, Ernst Moritz 35  
Assembly of First Nations 276  
assimilation 26–27, 49–50, 51, 54, 56, 103, 127–128, 152–153, 185, 189, 278–279  
Assyrians 214–217  
Australia 8, 140–178; Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976 150; Aboriginal people, use of, as labour 145–147; Aboriginal societies, impact of colonialism 144; Aboriginal Treaty Committee (ATC) 147; Australian Indigenous Doctors' Association (AIDA) 153; continuing process of genocide 141; cultural genocide and the politics of recognition 147–150; eco-genocidal destructive production, mode of 141–150; ecocide and extreme energy 158–165; employment opportunities for Aboriginal people 159–160; health of Aboriginals 153; Indigenous Advancement Strategy (IAS) 157–158; the Intervention (Northern Territory National Emergency Response Act 2007) 150–154; *Little Children are Sacred* report 151–152; Lock the Gate Alliance 162; native title rights 147–150, 159–160, 161; ongoing capitalist genocides and ecocides 165–166; outstations movement 155–157; penal settlement 142, 143; Prescribed Area People's Alliance (PAPA) 152–153; reconfiguring the Intervention 154–155; Remote Service Delivery agreement 156; Royal Commission into Aboriginal Deaths in Custody 166; settler capitalism 143–144; settler colonial expansionist land grabs 144–145; "Stronger Futures" policy document 154–155; uranium mining 153–154; urbanisation and cultural genocide 155–158; Working Future initiative 156  
Azambuja de Almeida, Fernando Augusto 127  
Babeuf, François-Noël 28  
Bachman, Jeffrey S. 1–18, 45–61, 97–117  
Baha'i community, Iran 9, 246–266, 249–256; apartheid 255; Baha'i faith 246; Baha'i Institute for Higher Education (BIHE) 254–255; black

- Baha'i community *continued*  
 propaganda and disinformation about the faith 250–252; community institutions, elimination of 253–254; community life, disruption of 255–256; cultural genocide after 1979 249–256; economic and cultural methods adopted 249–250; educational exclusion 254–255; erasure from history 252; ethnic cleansing 254; forcible adoption of government religious ideology 256; holy places, destruction of 252–253; international law, failure to act against cultural genocide 257–259; Iran Tribunal 258–259; persecutions 1844–1979 247; persecutions since the 1979 Islamic revolution 247–249; reactions to practices of cultural genocide 256–257; Sentinel Project report 248–249
- Barta, Tony 140–141
- Bauer, Otto 30
- Bauer, Yehuda 2, 3
- Belarus 50
- Benedict, Ruth 23–24, 37; *Patterns of Culture* 26, 38
- Benvenuto, Jeff 10, 108–109
- Bevan, Robert 208
- biopolitics 272
- Boas, Franz 26
- Braithwaite, John 190
- Brand, Antonio 125, 127
- Brazil 7–8, 118–139; Figueiredo Report 121–123; FUNAI 124; Guarani Kaiowá 124–131, 132–133; Indian Protection Service (SPI) 121–123, 124, 127, 128; indigenous rights subject to government politics 124; monopoly of power over indigenous labour 121; ongoing genocide 131–133; Portuguese settlers and Brazilian natives 120; settler colonial genocide of indigenous peoples 118–120; Truth Commission 123–124
- Burck, Jan 164
- Bureau of Indian Affairs 104, 109–10n5
- Burger, Julian 4, 55
- Canada: affirmative redress, restorative justice and the politics of recognition 274–277; common experience payments (CEP) 276; and cultural genocide 269–274; *Honouring the Past, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* 269; Independent Assessment Process (IAP) 276; Indian Residential Schools 269–271, 273, 276–277; transformative justice and ontological destruction 277–279
- Carasik, Lauren 7, 97–117
- Carneiro da Cunha, Manuela 119
- Chalk, Frank 3
- Chamberlain, Kevin 228, 233
- Charny, Israel 3
- children 24, 66; Aboriginal children 157; Brazil 132; Convention on the Rights of the Child 152; Indian Residential Schools, Canada 269–271, 273, 276–277; Native Americans, compulsory transfer to schools 97, 103–107, 112n58; sexual abuse 151; West Papua 189–190
- China 62
- Churchill, Ward 103
- climate change 164–165, 272–273
- cold genocides 8, 179, 179–204; food security 189; genocidal intent 189–192; genocide and West Papua 187–192; hot and cold genocides compared 193–196, **194**; Indonesian policies in West Papua 179, 182–187, 196; Operation Clean Sweep 188; primitivism and progress 180–182, 190; transmigration 184–185; West Papuan population decline 188
- Collier, John 107
- Colman, Rosa 125
- colonialism 29, 50, 180–182; clause in the Genocide Convention 51–53; decolonization 277–278; Figueiredo Report (Brazil) 121–123; genocide and settler colonialism 118–139; Guarani Kaiowá (Brazil) 124–131; indigenous rights subject to government politics 124; monopoly of power over indigenous labour 121; ongoing genocide in Brazil 131–133; Portuguese settlers and Brazilian natives 120; protecting the interests of colonial powers 53–57; replacement of native society with settler institutions 101–107; settler colonial expansionist land grabs 144–145; settler colonial genocide of indigenous peoples in Brazil 118–120; settler colonialism 97–98, 143–144, 277–278; *situation coloniale* 145–147; Truth Commission (Brazil) 123–124

- Committee on the Elimination of all Forms of Racial Discrimination (CERD) 150
- Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 72
- Convention for the Protection of the World Cultural and Natural Heritage 1972 67–68
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 67
- Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 6, 11, 21–22, 38, 65–66, 99, 100, 101, 112n58, 179, 180, 228; Article 2(c) 188–189; Article 2(e) 189, 271; Article I.3, 257–258; Article III 258; Article XII (colonial clause) 5, 51–53, 54–55; cultural genocide, exclusion of 1–2, 45–61, 66–67, 100, 273–274; drafting process, overview of 45–46; failure to punish those responsible for destroying Palestinian cultural heritage 240; group destruction 191, 192; protecting the interests of colonial powers 53–57
- Coulthard, Glen 149, 275, 278
- Cox, John 102
- crimes: *Application of the Genocide Convention* case 72; criminal trials for genocide 65; hate crimes 180; against humanity 74–75, 258, 270–271; *Prosecutor v. Al Mahdi* 73–74; supremacy crimes 180; war crimes 71–74, 75
- Crook, Martin 8, 140–178
- cultural genocide 227–245; after World War II 64–67; Canada 269–274; concept of culture in cultural genocide 22–27; controversies in the study of 10–12; current status under international law 62–91; definitions of 2–5, 47, 98–99, 228; and indigenous peoples 98–107; of the Iranian Baha'is after 1979 249–256; in Iraq 207–226; issues of recognition 4, 9–12; Lemkin's use of the term 21–22, 34, 35; as a multidimensional process 101; omission from the Genocide Convention 1–2, 45–61, 66–67, 100, 273–274; opponents to the idea of 3; in Palestine 227–245; and the politics of recognition 147–150; through urbanisation 155–158; and violence 12
- cultural heritage 8–9, 56, 57, 62, 63, 67–68, 72–73, 76, 127, 228; Assyrians 214–217; destruction of 207–208, 210–211, 213, 232–235; Islamic State (IS) and cultural genocide in Iraq 211–217; Islamic State (IS), rise and ideology of 209–211; Israeli destruction of Palestinian culture beyond Palestine 237–239; memory and identity 208–209; theft of archives and libraries 235–237, 238; vandalising Palestinian institutions 230–232; Yezidis 212–214
- culture: definitions of 23–24, 25–26; and genocide 35–39; and physical survival 191; usage of the term 24–25
- Curcio, Andrea 107
- Dalai Lama 62
- Davidson, Lawrence 5, 6–7, 228
- Davin, Nicholas Flood 270
- Davis, Robert 56, 100, 101
- Dayan, Mosche 229–230
- Declaration on the Rights of Indigenous Peoples 1994 68, 152, 153
- Denmark 49, 66
- Diamond, Jarred 163, 164–165
- Dodson, Patrick 157
- domestic law 63–64
- Donnedieu de Vabres, Henri 46, 47
- Draft Code of Crimes against the Peace and Security of Mankind 1954 74–75
- ecocide 158–165
- education 24, 27, 62, 65, 112n58, 132, 189, 254–255; Indian Residential Schools, Canada 269–271, 273, 276–277; schools for US Native Americans 103–107
- el-Farra, Muhammad 56–57
- Elmslie, Jim 186–187
- energy production 158–165
- ethnic cleansing 120, 140, 228, 236, 254
- ethnocide 3, 11, 27, 55, 68, 103, 189
- European Convention on Human Rights 69
- European Cultural Convention 69
- European Journal of International Law* 24
- Evans, Raymond 99
- family of mind concept 29, 36, 37
- Farrar, Frederic 181
- Fichte, Johann Gottlieb 35
- Fontaine, Theodore 97
- Foucault, Michel 145, 272
- France 48, 49–50, 54; and Algeria 56–57

- Frazer, James 36  
 Free Papua Movement (OPM) 186  
 Freeman, Martin 149  
 Frichner, Tonya Gonnella 106
- Geertz, Clifford 26  
 Geneva Convention 72–73, 231, 241  
 genocide: as a colonial practice 29; as a crime 71–75; and culture 35–39; as the destruction of nations and groups 27–32, 131–133, 141; development of the term 21–22, 27–28, 31, 99–100, 118–119, 227, 249; genocide-ecocide nexus 8; intent 189–192, 238; Lemkin's theories 32–35; and settler colonialism 118–139; as a type of conflict 29  
 Germany 29, 65; and genocide 32, 180  
 Gigoux, Carlos 149  
 Global Nuclear Energy Partnership (GLEP) 153  
 Gramsci, Antonio 149  
 group destruction 32–35, 191, 195, 196  
 Guarani Kaiowá 7–8, 124–131, 132–133; confinement process 127–128; continuing violence against 129–131; forest people 125–126; intensive colonial occupation 126–127; suicides 128–129
- Haas, Amira 231  
 Hague Convention 1964 Second Protocol 73  
 Hague Convention for the Protection of Cultural Property 1954 231–232, 235, 236, 240–241  
 hate 180, 194  
 Herder, Johann Gottfried von 35, 36  
 Hernawan, Budi 188  
 Herzl, Theodore 229, 239–240  
 Higgins, Polly 162–163  
 Hinton, Alexander Laban 108–109  
 Hobbes, Thomas 24  
 holocaust 2, 36, 65, 97, 179, 180, 187, 193, 194  
 Hon, Kristina 54, 100  
 Horowitz, Irving 3  
 hot genocides 193–196, **194**  
 human rights 38, 152, 249; modern treaty regimes and international human rights law 67–71; specialized treaties on cultural protection 67–69  
 hybridisation 146  
 identity 4, 30, 36, 76, 100, 208–209  
 Indian Residential Schools Settlement Association (Canada) 276, 277  
 indigenous peoples 55, 68, 118–139; affirmative redress, restorative justice and the politics of recognition in Canada 274–277; bison slaughter, effects of 272; Canada 269–274; and colonial genocide 180–182; compulsory transfer of native children to schools 103–107, 112n58, 269–271, 273, 276–277; continuing threats to 107–109; destroying indigenous cultures in the United States 97–117; Figueiredo Report (Brazil) 121–123; forced removals 102, 191, 255; genocide and West Papua 187–192; Guarani Kaiowá (Brazil) 124–131, 132–133; indigenocide 99; indigenous rights subject to government politics 124; languages 104, 185, 215–216, 238–239; monopoly of power over indigenous labour 121; ongoing genocide in Brazil 131–133; Portuguese settlers and Brazilian natives 120; primitivism and progress 180–182, 190; replacement of native society with settler institutions 101–107; settler colonial genocide of indigenous peoples in Brazil 118–120; settler colonialism 97–98; transformative justice and ontological destruction 277–279; use of, as labour 121, 122, 126, 127, 145–147; West Papua, historical context 8, 182–187; *see also* Australia  
 Indonesia 11; and genocide in West Papua 187–192; Operation Clean Sweep 188; policies in West Papua 179, 182–187, 196  
 International Commission of Enquiry into the Violations of International Law by Israel 237–238  
 International Committee of the Red Cross (ICRC) 236  
 International Convention on the Elimination of All Forms of Racial Discrimination 152  
 International Covenant on Civil and Political Rights 70  
 International Covenant on Economic, Social and Cultural Rights (ICESCR) 69, 70  
 international law 6, 99, 152, 235, 236; crimes against humanity 74–75, 258, 270–271; criminal trials for genocide

- 65; cultural genocide after World War II 64–67; cultural genocide, current status of 62–91; failure to act against cultural genocide 257–259; human rights treaties 69–71; limitations 76; modern international criminal law 71–75; specialized treaties on cultural protection 67–69; war crimes 71–74, 75
- Iran *see* Baha'i community, Iran
- Iraq 8–9, 207–226; Assyrians 214–217; Islamic State (IS) and cultural genocide in Iraq 211–217; Islamic State (IS), rise and ideology of 209–211; Yezidis 212–214
- Irvin-Erickson, Douglas 5–6, 21–44, 48
- Islamic State (IS) 8–9, 72, 207–208; and cultural genocide in Iraq 211–217; rise and ideology of 209–211
- Israel 9, 230–232; actions against Palestinians 228–230; as a belligerent occupying power 240–241; destroying Palestinian culture beyond Palestine 237–239; destruction of Islamic cemeteries 234–235; Palestinian cultural property, destruction of 232–235; theft of archives and libraries 235–237, 238; vandalising Palestinian institutions 230–232; West Bank security wall 233–234
- Jackson, Erwin 164
- Jews 32–35, 65, 194; *see also* Israel
- Johnston, Barbara Rose 165
- Jonassohn, Kurt 3
- Jones, Adam 3, 9–10, 98; *Genocide: A Comprehensive Introduction* 2
- Krieken, Robert van 4
- Kuper, Leo 56–57
- Laird, Phil 164
- Lane-Fox Pitt Rivers, Augustus 120
- languages 104, 185, 215–216, 238–239
- Las Casas, Bartolomeo de 119–120
- Latour, Bruno, *We have Never Been Modern* 272–273
- Lawrence, Bonita 109
- Leander, Anna 53
- Lemkin, Raphaël 1, 3, 5–6, 8–9, 10, 13–14n15, 21–44, 45, 46, 47–48, 76, 101, 119, 145, 157, 180; *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 27, 30, 32–35, 227; concept of culture in cultural genocide 22–27, 64–65; culture and genocide 35–39; development of the term genocide 21–22, 27–28, 31, 99–100, 118–119, 227, 249; genocide as the destruction of nations and groups 27–32, 131–133, 141; on group destruction 32–35; *Introduction to the Study of Genocide* 31–32, 36, 37; nations, theory of 29–31; views on the “death” of a culture 21
- Lévi-Strauss, Claude 26
- Lewis, Norman 119, 121
- Lippman, Matthew 101
- Lloyd, Christopher 146
- logic of elimination 142, 144, 148
- Lopes, Elizeu 125, 130, 133
- Ludwig, Friedrich 35
- Macoun, Alissa 98
- Maher, Damian 163–164
- Mako, Shamiran 55, 56, 102
- Malinowski, Bronislaw 23–24, 36
- Malko, Helen 8–9, 207–226
- Martins, Pedro 129
- Marx, Karl 144
- mass killings 34, 102–103, 188, 195, 216–217
- Melson, Robert 2–3
- memory 208–209
- Momen, Moojan 9, 246–266
- morality 34, 35
- Morris, Benny 120
- Moses, A. Dirk 23, 30, 36, 38, 101
- Naccache, Genna 7–8, 118–139
- Ñandeva, Rosalino Ortiz Guarani 128–129
- nationalism and nations 27–32, 35, 36
- Native Americans 7, 50, 55, 63; bison slaughter, effects of 272; children, compulsory transfer to schools 97, 103–107, 112n58; continuing threats to 107–109; Court of Indian Offenses 103; forced removal of Cherokees 102; languages, elimination of 104; survival of 99; treatment of 101–103; *Worcester v. Georgia* 102; Yuki population, mass murder of 102–103
- Nazism 65; and genocide 32–35
- Nersessian, David 4, 6, 62–91, 98, 100
- Netherlands 49
- Neves, E.M.R. 119
- Noisecat, Julian 99, 108
- Novic, Elisa 5, 45

- ontological destruction/genocide 272, 274–275, 276; and transformative justice 277–279
- Pakistan 49, 51
- Palestine 9, 227–245; Al Walaja 233–234; cemetery destruction 234–235; cultural bareness 228–230; cultural property, destruction of 232–235; erasing Arab place names 229–230; Israeli destruction of Palestinian culture beyond Palestine 237–239; Nakba 228, 230, 237, 239; Plan D 227–228; theft of archives and libraries 235–237, 238; vandalising Palestinian institutions 230–232; West Bank security wall 233–234
- Palestinian Liberation Organisation (PLO) 237
- Pella, Vespasian 46, 47
- Peristerakis, Julia 2, 3
- political economy of genocide 140–178; capital accumulation and labour productivity 142–143; cultural genocide and the politics of recognition 147–150; eco-genocidal destructive production, mode of 141–150; ecocide and extreme energy 158–165; the Intervention (Northern Territory National Emergency Response Act 2007) 150–154, 156; ongoing capitalist genocides and ecocides 165–166; primary accumulation 144–145; reconfiguring the Intervention 154–155; settler capitalism 143; *situation coloniale* 145–147; urbanisation and cultural genocide 155–158
- politicide 11, 33
- Powell, Christopher 2, 3, 53
- propaganda 250–252
- religion 34, 62, 64–65, 189; ethno-religious cleansing 210; *see also* Baha’i community, Iran; cultural heritage
- Renner, Karl 30
- restorative justice 269–284; affirmative redress, restorative justice and the politics of recognition in Canada 274–277; Canada and cultural genocide 269–274; transformative justice and ontological destruction 277–279
- Ribeiro, Darcy 119
- Samson, Colin 149
- Sartre, Jean-Paul 55
- Sautman, Barry 26–27
- Schaller, Dominik 27, 145
- Scott, Geoff 160
- Security Council 75, 235
- self-determination 69, 107–108, 147, 153, 166, 169–70n55, 185
- Shaw, Martin 22, 28, 31, 37
- Short, Damien 4–5, 8, 109, 119, 131, 140–178
- South African Truth and Reconciliation Commission (SATRC) 275
- sovereignty 33, 54, 98, 107–108, 142, 148, 152, 182, 275
- Soviet Union 50, 51, 52–53
- Stanton, Gregory 248
- Strakosch, Elizabeth 98
- Straus, Scott 2, 3
- suicides 128–129
- supersessionism 192
- supremacy 180, 194
- Thorpe, Bill 99
- Thorpe, Bob 146–147
- Tibet 62
- Tinker, George 4, 104
- torture 188
- transformative justice 277–279
- transmigration 184–185
- Trenation, Heinrich von 35
- Trigger, David 159, 160
- Trump, Donald 108
- Truth and Reconciliation Commission of Canada 269, 277
- Tuck, Eve 277–278
- Turki, Fawaz, *The Disinherited* 239
- Turner, Vic 26
- Ukraine 50, 52, 53
- Üngör, Uğur Ümit 186
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 67
- United Kingdom 50, 51, 52–53, 54–55
- United Nations Educational, Scientific and Cultural Organization (UNESCO) 64, 73, 235–236
- United Nations Genocide Convention (UNGC) *see* Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)
- United States 48–49, 50–51, 54, 55; bison slaughter 272; compulsory transfer of native children to schools 103–107, 112n58; continuing threats to Native

- Americans 107–109; destroying indigenous cultures in the United States 97–117; forced removal of Cherokees 102; genocide, interpretation of the concept 21–22; replacement of native society with settler institutions 101–107; settler colonialism 97–98; *Worcester v. Georgia* 102; Yuki population, mass murder of 102–103
- Universal Declaration of Human Rights (UDHR) 69
- urbanisation 155–158
- Viner, Ian 154–155
- Völkermord* 27–28
- Waller, James 103
- Weitz, Yosef 229
- West Papua *see* cold genocides
- White, Kyle 108
- Wild, Rex 151
- Williams, Gloria 160
- Wilson, Richard 275
- Wolfe, Patrick 11, 98, 119, 140, 141, 143–144
- Woolford, Andrew 9, 10, 98, 105, 108–109, 269–284
- Working Group on Indigenous Persons, first Draft on the Rights of Indigenous Peoples 274
- Yang, K. Wayne 277–278
- Yezidis 212–214
- Zangwill, Israel 229
- Zannis, Mark 56, 100, 101





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