

## Genocide and Indigenous Peoples in International Law

Bartolomé Clavero

1. Genocide as a concept, past and present.- 2. Neutralising the concept of genocide: I. In practice.- 3. Neutralising the concept of genocide: II. In theory.- 4. Genocide in international regulation.- 5. Genocide and the rights of indigenous peoples.

### 1. Genocide as a concept, past and present

Genocide is the worst crime possible, undoubtedly the most serious crime that can be committed under international law. It was in 1948 that criminal law truly began to emerge on an international level, and law governing the crime of genocide has been developing ever since. The 1998 Rome Statute of the International Criminal Court (hereinafter the Statute) testifies to the fact that this is the most serious of the crimes within its jurisdiction. It places *Genocide* first, followed by *Crimes against Humanity*, *War Crimes* and the *Crime of Aggression*. The crime of genocide is defined in Article 6 of the Statute in the following terms:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

This is a literal rendering of how it had already been defined fifty years earlier, in 1948, in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Convention). Since then, genocide has been described as a crime under international law. Good note should be taken of the terms<sup>1</sup>. *Killing* is one way of committing genocide. The crime can also be perpetrated: by means of *serious harm* not only to the *bodily* but also to the *mental* integrity of a human group; by *deliberately inflicting on them conditions of life* that risk *their destruction*; by imposing measures intended to prevent the group's reproduction, this being understood as both forced sterilisation and the *transfer* or abduction of the *group's children*. If the proven *intent* is to *destroy, in whole or in part, a national, ethnic, racial or religious group* by any of these means - not only by killing - then genocide, the most serious crime under international law, is being committed. It should be noted that the crucial element of intent does not necessarily refer to a murderous one, as an intention to bring about the disappearance of a group as such is sufficient. Genocide can still be perpetrated without any individual loss of life.

The definition of genocide in the Convention and the Statute derives from a draft instrument that described the concept in even more detail. In 1947, an already official

---

<sup>1</sup> The Convention and the Statute can be found on the websites of the Office of the UN High Commissioner for Human Rights (<http://www.ohchr.org>) and of the International Criminal Court (<http://www.icc-cpi.int>). The former has links to all human rights instruments herein referred to, including the Declaration on the Rights of Indigenous Peoples.

draft of the United Nations defined genocide as the intentional "destruction of racial, national, linguistic, religious or political groups", "with the purpose of destroying it in whole or in part or of preventing its preservation or development", either "causing the death of members of a group or injuring their health or physical integrity" or interfering with their biological reproduction or also "destroying the specific characteristics of the group" through the "transfer of children", the "exile of individuals representing the culture of a group", the "prohibition of the national language", the "destruction of books" or the "prohibition of new publications" that form the group's religious works or are printed in their language, or the "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". The initial paragraphs on destruction and physical harm include a number of noteworthy details<sup>2</sup>. The terms destruction and destroy are repeated, but not always (or even mostly) with reference to the elimination of human life. Genocide, that is, the intention and action of bringing about the disappearance of human groups, can be undertaken and committed, separately or concurrently, in many different ways.

Between the official draft and the final Convention, the description of genocide was summarised and some elements deleted, the most important from the outset being the removal of *political groups*, leaving *national, ethnic, racial or religious* groups plus, of course, those of a political nature that include some of these other characteristics. All reference to the perpetration of genocide by destroying or harming a group's cultural heritage, language for example, was also removed. As with political groups of national, ethnic, racial or religious significance, however, this cannot be taken to mean the complete exclusion of cultural elements as values whose destruction or harm might imply genocide. The final concept, as given in the Convention and the Statute, refers not only to *physical* but also to *mental* harm and this latter may, of course, be inflicted by policies that are destructive of - or harmful to - language and cultural heritage. Not even genocide through systematic exile, also deleted from the final definition, is completely excluded insofar as it may affect a group's "mental health" and bring about the intended disappearance of the group as such, and not necessarily as individuals. Think too, for example, of policies aimed at grabbing the land and stealing the resources of an indigenous people. If they take place with the aim of the group's destruction, in whole or in part, and they affect the "mental or physical health" of the group then, under the terms of the Convention, this is genocide.

The description given in the draft document offers a good basis from which to grasp the full scope of the definition of genocide in current international law, i.e., in the 1948 Convention and 1998 Statute, as well as to understand the fundamental reason why the prevention, prosecution and punishment of this crime became internationalised. Genocide is the *murder of members* of a *group* of *national, ethnic, racial or religious* character in order to bring about its disappearance, along with other actions with the same purpose of eliminating a human group with one of the said characteristics. Genocide may be mass murder but not all mass murders are genocide and genocide is not always - and may only be in exceptional circumstances - mass murder. The reason for internationalising the prevention, prosecution and punishment of genocide as a crime of the most serious gravity is thus not to avoid mass murder; there has to be some

---

<sup>2</sup> The draft can now be found in William A. Schabas, *Genocide in International Law: The Crime of Crimes*, New York, Cambridge University Press, 2000, first appendix. It can also be viewed on the website of *Prevent Genocide International*: <http://www.preventgenocide.org/law/convention/drafts>.

other reason. Where do you set the limit for the number of intentional murders that must be reached before *killing* becomes genocide, rather than serial murder of no international significance? Quite obviously, the very question has no meaning.

It is not difficult to ascertain the fundamental reason if you look at the concept itself. The right that is being legally protected is that of the group's existence or, put another way, the human right to form part of that group. This is a right that does not appear as such in the Universal Declaration of Human Rights, adopted in 1948 alongside the Convention, but its motivation can clearly be found there. Human actions, bloody or not, that pursue - and may achieve - the elimination, in whole or in part, of a national, ethnic, racial or religious group, constitute genocide. This and no other is the reason why the concept is a broad one, and in no way limited to the physical elimination of a group's members. And this is why the crime is so serious and thus of international relevance.

## **2. Neutralising the concept of genocide: I. In practice**

At this point we need to stop a moment and, in contrast, consider something that has not yet been said but which must certainly have crossed readers' minds. If the concept of genocide as described is genuine, that literally stated in current international law, then why is it usually considered in far more restrictive terms? Why do we use the word genocide only when it relates to mass murder and, sometimes, without even referring to the fact that it is aimed at the destruction of a human group? Why is it that policies that are harmful to languages and other cultural dimensions of particular human groups are not considered genocide, even though they may be clearly aimed at bringing about the disappearance of the group as such? You only have to look at the policies that are often still applied to indigenous peoples. Why is it that only mass murder is considered as genocide and not other ways of destroying the group's structure or reducing it to a number of individuals with no common links? How is it that policies of land grabbing and resource taking, which severely affect the very survival of indigenous peoples, are not considered genocide?

The identification of genocide with killing can no longer be considered the exclusive domain of a vague, erratic or insufficiently informed opinion. It is common currency in the world of journalism and is, of course, the position given by those involved in politics. In the now abundant literature on the history and sociology of genocide, it is this restricted idea that prevails. In accredited dictionaries, genocide is synonymous with mass murder. Even amongst jurists, including those who administer justice through the international courts and tribunals, this is the prevalent position. This is the situation although, of course, there are always exceptions<sup>3</sup>.

International alarm bells ring at the news of spilt blood. The term genocide does not get mentioned if there are no deaths or if there are only a few dead bodies or disappeared people in danger. Policies that harm indigenous cultures and ways of life, that put the group's very survival at risk, may be challenged and discussed in the field of political debate but they are not accused of something so serious as the crime of genocide. The same can be said of any other State, Church or corporate policies or projects that attack the social fabric of national, ethnic or religious groups, putting their very survival and reproduction at risk. There is, apparently, no genocide without mass

---

<sup>3</sup> For a well-known case see, Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*, San Francisco, City Lights, 2004, pp. 3-12.

murder. A build-up of bodies is the only reason for international intervention in the field of criminal law. Herein lies the overriding concept of genocide.

And yet it can clearly be seen that the concept is quite different in international legal instruments. One only has to read the definition of genocide in the Convention and in the Statute carefully to note this. Why then is the accepted concept a far more restricted one, identifying genocide plainly and simply with murder? A number of essential issues must be borne in mind when explaining such an apparently inexplicable situation. This relates to the Convention's lack of effectiveness as an international regulation for more than forty years. In the first place, it was of no practical value internationally in relation to the genocides that occurred up until the 1990s. The reasons for this failure offer some explanation as to why genocide ended up being so narrowly conceived. How should the Convention have been applied at international level, and why was it not applied at this level for so long?

In order to hear cases relating to genocide, the 1948 Convention provided for the future establishment of an International Criminal Court, and yet this did not come into effect until the 1998 Statute. As long as this provision was not put into practice, the Convention could only be enforced at international level when one State's responsibility was denounced by another to the International Court of Justice, an inter-State jurisdiction with no competence to rule on individuals' responsibilities, however genocidal their actions may be. The Convention and the Statute are multilateral treaties, which means that their mechanisms are only applicable to those States that ratify them and, unless there are further stipulations, only amongst them. It was not possible to substantiate international authority over the criminal responsibility of individuals in relation to murder until the 1990s. Prior to establishing the International Criminal Court, the Special Tribunals for Yugoslavia, from 1993 on, and Rwanda, from 1994 on, were already applying the Convention to their respective cases, but it was not occurring in any more general way<sup>4</sup>.

And what about States' responsibility for genocide? This could and can only be demanded through the International Court of Justice, the inter-State jurisdiction. For years, no State had any interest in presenting a case against another for genocide. The first came in the 1990s, when Bosnia-Herzegovina initiated a case against the Former Republic of Yugoslavia (Serbia and Montenegro at that time). The Court finally issued its decision in 2007, rejecting the charge of genocide against the latter. In the first place, only the notion of this crime as mass murder was considered. Secondly, and consequently, proof was required of genocidal intent, proof that there was an actual State policy of physical extermination. This specific intent or *dolus specialis* is therefore required when establishing whether mass murder has been committed, which is virtually impossible to prove. With such a level of identification between the crime of genocide and that of intentional murder, not even proof of cultural or economic policies undertaken against the group or people in question and harmful to them can be used as proof of criminal intent, despite the fact that these should be considered genocide in themselves, and often form a breeding ground for possible future mass murders<sup>5</sup>.

Although the Convention's ratification process does not provide for reservations or interpretations that could exempt States from particular obligations or reduce the

---

<sup>4</sup> There is ample information available on these tribunals and their respective statutes, including their own websites: <http://www.un.org/icty>; <http://www.un.org/ictt>

<sup>5</sup> For the decision in question, see <http://www.icj-cij.org/cijwww/cdecisions.htm>.

scope of their treaty responsibilities, the truth is these do occur, although some States object to them<sup>6</sup>. One highly significant example is that of the United States. It did not ratify the Convention until 1988, and then made reservations and interpretations that included the following: "That the term *intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such* appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II" and "that the term *mental harm* in article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques"<sup>7</sup>.

*Intent* therefore has to be *specific intent*, and this was not to be limited only to the case of the United States, as the position has become prevalent. As we have seen, this same specification, which is not found in the Convention, has subsequently been used by the International Court of Justice to make it virtually impossible to condemn a State for genocide. And, by limiting the mental harm that can constitute genocide, there is a tendency to prevent cultural genocide from being considered as such, along with the genocide that may be committed through policies of land grabbing and resource taking. The United States' reservation on intent is in fact proof that the Convention actually says something different, otherwise there would have been no need to specify this. Today, there would be no need.

On the other hand, no reference is made by the reservations to paragraph e) of the definition, on the *transfer of children*, perhaps because the United States failed to recognise that it was seriously in violation of the Convention. Nor is there any reference to the issue that was of most significance in the United States' delayed ratification, although it had a strong impact on the efforts to limit mental harm. I am talking of the racist policies and practices implemented against the Afro-American population, to the point of serial lynchings on the part of some US states - with open federal collusion - current until at least the 1960s. These would also be considered genocide under the terms of the Convention<sup>8</sup>.

Again, note the dates. It was precisely after 1988, in the early 1990s, that the much delayed implementation of the Convention finally began, implementation of a Convention understood not in accordance with its true meaning but in line with the interpretation or understanding of the US ratification, without any other State having had to expressly agree to this, just as if the international instrument itself described intent and mental harm in this manner<sup>9</sup>. But not even the world's largest superpower can

---

<sup>6</sup> For ratifications, reservations and interpretations see: <http://www2.ohchr.org/english/bodies/ratification/1.htm>.

<sup>7</sup> Lawrence J. LeBlanc, *The United States and the Genocide Convention*, Durham, Duke University Press, 1991.

<sup>8</sup> Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief for a Crime of the United States Government against the Negro People* (1951, just after the Convention), New York, International Publishers, 1970; W. CHURCHILL, *Kill the Indian, Save the Man*, op. cit.; Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955*, Cambridge, Cambridge University Press, 2003.

<sup>9</sup> In failed attempts to activate the Convention during the 1980s, consideration was given within the United Nations to the scope of the concepts of cultural genocide, ethnocide and ecocide: José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, 1981-1983, chapter 15, para. 136 (now published on the Internet by the Permanent Forum on Indigenous Issues <http://www.un.org/esa/socdev/unpfii/en/spdaip.html>); Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, part II, section B.3

impose its understanding of a multilateral instrument singlehandedly. Even the United Nations has been firmly advocating this extremely strict notion of genocide as an international crime since the 1990s. I will return to the United Nations later.

### 3. Neutralisation of the concept of genocide: II. In theory

The concept of genocide as a crime could not have been steered in such a direction or degraded in such a manner simply by a State's ratification or a Court's interpretation. During the long years in which the Convention lacked any effect, in the face of both the unworkability of its very category of genocide and proven, recurrent perpetrations of genocide through the unleashing of sustained policies of this genocidal nature in the cultural and economic fields, there were notable developments in the international literature, not in the legal sphere as such although it had a significant impact on law. This literature came, above all, from anthropology, and focused on *ethnocide*, this being understood as genocide committed against indigenous peoples, not necessarily - or even primarily - by means of their physical elimination.

As the Convention is a Treaty between States, it has been those peoples who do not enjoy the protection of their own State, or are unable to rely on the protection of another State with a similar language, culture or religion that have had the most difficulty in gaining visibility as victims of genocidal policies or actions. The Convention even had a rather euphemistic exemption clause that left it up to States as to whether their ratification extended to their corresponding colonies or not (Article XII: "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"). Since the decolonisation of the 1960s, it has largely been indigenous peoples that have ended up invisible from the crippled perspective of the Convention.

So, anthropology came on the scene in the 1970s, shedding light on genocidal actions and policies against indigenous peoples<sup>10</sup>. Hence the term *ethnocide*, that is, the genocide of indigenous peoples from within a much wider understanding, ranging from cultural to physical genocide. *Ethnocide* and *genocide* were originally synonymous. Not long before the Convention, a Polish jurist living as a refugee in the US, coined them as such, as equivalent terms for the broader concept<sup>11</sup>. International law came to use the term *genocide*, leaving to one side that of *ethnocide*.

---

(available at <http://www.preventgenocide.org/prevent/UNdocs/whitaker>, the website of *Prevent Genocide International*).

<sup>10</sup> Robert Jaulin, *La paix blanche. Introduction a l'ethnocide*, Paris: Seuil, 1970, and *Le livre blanc de l'ethnocide en Amérique*, Paris, Fayard, 1972. The publications of the Copenhagen-based International Work Group for Indigenous Affairs (IWGIA) are of clear relevance in this regard: Alicia Barbarás and Miguel Bartolomé, *Hydraulic Development and Ethnocide: The Mazatec and Chinotec People of Oaxaca, Mexico*, 1975; Norman E. Whitten Jr., *Ecuadorian Ethnocide and Indigenous Ethnogenesis: Amazonian Resurgence Amidst Andean Colonialism*, 1976; Jacques Lizot, *The Yanomami in the Face of Ethnocide*, 1976; Ticio ESCOBAR, *Ethnocide: Mission Accomplished?*, 1989.

<sup>11</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944; reprint, Clark, Lawbook Exchange, 2005, p. 79-95; John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, New York, Palgrave MacMillan, 2008.

The term ethnocide was to be decisively revitalised a couple of decades later in order to fill the gaps left not only by the Convention itself but also by the restricted way in which it was now being interpreted. As the concept of genocide became ever more reduced, so the term ethnocide extended its range. Everything that seemed to be the former but was not considered as such in law now became known as ethnocide. Its use spread. From anthropology it spread to historiography and to political science. Only the stricter legal doctrine resisted. Here, genocide was the restricted genocide and anything similar did not merit a description that might also sound like an international crime.

Strict legal doctrine thus limits the concept along the lines we have seen. According to this, genocide relates only to policies and actions aimed at physical elimination with a proven intent to violently destroy, in whole or in part, a national, ethnic or religious group. Not all legal doctrine today defends this extremely limited approach but it is now the general feature, with the support moreover of the International Court of Justice's case law. And the way in which the Convention has been applied since the 1990s, apart from averting some particular atrocities, has also reinforced this legal interpretation of the description of genocide, the main impulse for which, as has already been seen, came from the US ratification. The predominant legal doctrine has proved to be most helpful in this perverse regard<sup>12</sup>.

In order to understand this effect, one must recall the circumstances in which the Convention was drawn up, in the wake of the downfall the greatest and most directly genocidal movement in history, Nazism. The methods of committing genocide that were given in the official 1947 draft in actual fact described the Nazis' racist policies in relation to the Jews, Gypsies, Slavs and others. If we were to take this out of its context, however, we would see that it describes not only policies that were defeated in a World War but also others that were being committed by the victors, in the African colonies or with regard to indigenous peoples in the Americas. In any case, the initial concept was much wider, and mass murder formed just one of the elements and methods of genocide. Its links with Nazism continued to weigh heavily on it, however, becoming ever greater. And this has affected the concept of genocide.

Throughout the 1950s and 60s, Nazi criminality began to be identified not by the whole gamut of the Nazis' racist policies but simply by means of one component, the systematic annihilation of Jews, Slavs, Poles, Gypsies, Africans, homosexuals, the mentally and physically disabled, Germans included of course, and this became known as the Holocaust<sup>13</sup>. With this, genocide began to be identified separately from genocidal policies. Then it was not everything described in the Convention but rather mass murder, intentionally and systematically organised with the aim of eliminating a human group, having recourse to the State's power in this regard. The Nazi Holocaust had a

---

<sup>12</sup> The most influential study adopts the most restricted concept: William Schabas' *Genocide in International Law*, op. cit., also published in German: *Genozid im Völkerrecht*, Hamburg, Hamburger Edition, 2003. For better direction see, in contrast: John Quigley, *The Genocide Convention: An International Law Analysis*, Burlington, Ashgate, 2006.

<sup>13</sup> Michael Zimmermann, *Verfolgt, Vertrieben, Vernichtet. Die Nationalsozialistische Vernichtungspolitik gegen Sinti und Roma*, Essen, Klartext, 1989; Michael Berenbaum (ed.), *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis*, New York, New York University Press, 1990; Clarence Lusane, *Hitler's Black Victims: The Historical Experiences of Afro-Germans, European Blacks, Africans, and African Americans in the Nazi Era*, New York, Routledge, 2003; Suzanne E. Evans, *Forgotten Crimes: The Holocaust and People with Disabilities*, Chicago, Ivan R. Dee, 2004.

strong impact on this change of vision. It was taken not as an exceptional case<sup>14</sup> but as an illustration of the concept of genocide, making it little less than unique in its kind.

If there was no intensive and industrial-scale murder with a proven intent to wipe a people as specific as the Jews off the face of a continent then there was not, consequently, any genocide. Thus denying that there may have been equal determination to bring about their disappearance, the Nazis' attempts to destroy other peoples such as the Gypsies would not, in contrast, merit the qualification of genocide<sup>15</sup>. Genocide then only would be what came to be known as the Shoah, the Nazi massacre of six million Jews, full stop, and only anything that might be comparable to this in the future<sup>16</sup>. Posthumously, Nazism lent its support to a conceptual development that offered cover and gave impunity to other genocides. The very concept, understood in such a way, proves to be absolutely ineffective for legal purposes, except in bringing Nazi leaders to justice in relation to the Holocaust.

The value of anthropology can thus be seen in the way it counteracts such a great deviation of legal thinking. Given the refusal to consider genocidal acts and policies as true genocide, particularly when the victims are indigenous, the description of ethnocide takes on all its value in terms of academic study, and huge strength in terms of political denunciation. It could be said that ethnocide is the genocide of the poor, the genocide that the international powers, and even the United Nations itself, refuses to see. A noteworthy example? There are so many and all are worthy of note. In the Americas, from Alaska to Patagonia, genocidal policies towards indigenous peoples have been common practice, first among the European colonialists and, later, among independent States. If it were not for the revival of the term ethnocide, they would have remained invisible, and unthinkable in European and Euro-American perception, although not of course among the indigenous peoples<sup>17</sup>. But the story does not finish here with this "happy" ending for the genocidal States. This dissociation of concepts, on the one hand, genocide and, on the other, ethnocide, was to have far less fortunate effects.

As the concept of ethnocide has transcended anthropology and found a place in the field of political - and, more generally, social - science, it has been put to other uses, primarily as an alibi for ineffectiveness. If, for example, genocidal policies that seriously harm and even destroy entire peoples end up being termed ethnocide then it is not genocide, which means that it is not a crime and does not have to be prosecuted or punished; it can be discussed in political terms but not addressed in criminal terms. Cast your mind back over the historiography of the European presence in America and Africa, for example, and you will easily see retroactive exoneration justified in this way. Ethnocide also serves to exonerate States with racist policies at the moment, as long as

---

<sup>14</sup> Raul Hilberg, *The Destruction of the European Jews* (1961), revised, New Haven, Yale University Press, 2003; Saul Friedlander, *The Years of Extermination: Nazi Germany and the Jews, 1939-1945*, Nueva York, HarperCollins, 2007.

<sup>15</sup> Günter Lewy, *The Nazi Persecution of the Gypsies*, New York, Oxford University Press, 2000; and this is not the only genocide that he denies because of the unique nature of the Shoah, that is the Nazi Holocaust only as regards the Jews: *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide*, Salt Lake City, University of Utah Press, 2005.

<sup>16</sup> Zev Garber, *Shoah: The Paradigmatic Genocide. Essays in Exegesis and Eisegesis*, Lanham, University Press of America, 1994; Victor Jeleniewski Seidler, *Shadows of the Shoah: Jewish Identity and Belonging*, Oxford, Berg, 2000.

<sup>17</sup> See in this regard my work: *Genocidio y Justicia: La Destrucción de las Indias Ayer y Hoy*, Madrid, Marcial Pons, 2002.

they are discreet. In the 1990s, there was a turn of the screw. *Ethnic cleansing* began to be used as a euphemism to describe genocidal policies in Europe on the part of the former Yugoslavia, thus circumventing the international obligation to prosecute the crime by applying the Convention at the initiative of the States that had ratified it, as was already the case of the United States. The perpetrators of genocide began to use the euphemism: *Etničko čišćenje*, in Serbo-Croat. Or rather re-use, as the phrase is of Nazi origin: *Säuberungsaktion*, which was already the German euphemism for genocidal policies. Nazism was continuing to offer its evil services posthumously<sup>18</sup>.

Although the distinction between genocide and ethnocide was useful to begin with, it ended up doing the cause a disservice. And the harmful effects became worse as this distinction opened up a path to a whole range of terms and concepts for policies and actions that actually quite simply should be termed genocide, suggesting that they were no such thing: culturecide, ecocide, linguicide, classicide, urbicide, politicide, eliticide, homicide (sic, the second “o” being an “o” instead of an “i”), genericide, indigenocide, patrimonicide, libricide, etc, etc. Culturecide is now the most common neologistic sleight of hand with which to avoid the term genocide<sup>19</sup>. What may seem, to the social sciences, like a rich array of descriptive concepts and analytical categories is in fact, to legal doctrine, a whole arsenal of ways in which to grant impunity to genocide, by simply - not always deliberately and sometimes even unconsciously - using another name that comes so easily to hand. Words can cover up actions and even, sometimes, a bad conscience. And they are important in law because, by qualifying or disqualifying, words themselves have effects<sup>20</sup>.

All this has led to the crime of genocide being strictly limited only to mass and intentional murder, along the lines of the Nazi Holocaust but without the background context of all the Nazis’ racist policies. The concept has deteriorated to such a point that the victims themselves, just for desiring the génocidaires’ disappearance, may be deemed the true perpetrators of genocide. Allow me to give one particularly flagrant example. On the basis of the concept that genocide is the planned intention to violently eliminate a human group, one reputable scholar considers the indigenous peoples of America to be guilty of genocide insofar as they have wanted - and sometimes attempted - to eliminate or remove people of European origin, while these latter might have committed ethnocide but never genocide, as they would have never intended to eliminate the indigenous presence in such a way. A praiseworthy analyst of Nazism and dedicated therapist of its victims backs this retaliation up: the indigenous peoples of the Americas are charged with genocide against their colonisers, past or present. And this

---

<sup>18</sup> Mirko Grmek, Marc Gjidara and Neven ŠIMAC (eds.), *Le Nettoyage Ethnique. Documents historiques sur une idéologie serbe*, Fayard, Paris, 1993.

<sup>19</sup> James V. Fenelon, *Culturicide, Resistance, and Survival of the Lakota (Sioux Nation)*, New York, Garland, 1998, pp. 25-82; Thomas D. Hall, *Ethnic Conflict as a Global Social Problem*, in George Ritzer (ed.), *Handbook of Social Problems: A Comparative International Perspective*, London, Sage, 2004, pp. 139-155. To avoid the description of genocide, both culturecide and ethnocide are used in the most progressive circles: T. D. Hall, *Frontiers, Ethnogenesis, and World-System: Rethinking the Theories*, in the collective volume edited by himself, *A World-Systems Reader: New Perspectives on Gender, Urbanism, Cultures, Indigenous Peoples, and Ecology*, Lanham, Rowman and Littlefield, 2000, pp. 237-270.

<sup>20</sup> See in this regard my work *Genocide or Ethnocide, 1933-2007: How to Make, Unmake and Remake Law with Words*, to be published by Giuffrè in 2009.

comes from the persuading mouth of academic science, not the shaking fist of genocidal propaganda<sup>21</sup>.

#### 4. Genocide in international regulation

Between the Convention and the Statute, the United Nations has developed a significant body of law on genocide. The main instruments in this regard, given their more general nature, are the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1973 Declaration of Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity<sup>22</sup>. More recently, the 2007 Declaration on the Rights of Indigenous Peoples is also relevant, and I will therefore later also look at its effects in terms of the concept and prosecution of genocide internationally.

Of the crimes to which "No statutory limitation shall apply [...], irrespective of the date of their commission", Article 1 of the 1968 Convention includes "the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed". This provision is quite clear: regardless of the time that has lapsed, those responsible for genocide can be prosecuted. Any interpretation would only serve to confuse the issue. Its scope, however, is not crystal clear if we consider both the literal context of the regulation itself and the most implicit of its assumptions. An interpretation is, in the end, advisable. Hence the first question to be asked is this: is "the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" included, as a "crime against humanity", among "war crimes"?

This is of course not what the 1968 Convention says but it is an understanding that has been proposed and even nurtured. If to this we add the now prevailing identification of genocide with mass murder equivalent to the cruelty and extent of the Nazi Holocaust, it is not so unexpected that the common understanding of this instrument was and remains that of believing it to be aimed at prosecuting war criminals, most particularly in relation to genocide, as if genocide could not take place in peacetime or even through benevolence. Could the transfer of children between groups not take place through love and not war, constituting genocide according to the 1948 Convention? No-one in the United Nations seems to recall this, in 1968 or subsequently<sup>23</sup>. The 1973 Principles do not mention genocide but include it in

---

<sup>21</sup> Nicholas A. Robins, *Genocide and Millennialism in Upper Peru: The Great Rebellion of 1780-1782*, Westport, Praeger, 2002, and *Native Insurgencies and Genocidal Impulse in the Americas*, Bloomington, Indiana University Press, 2005. Israel W. Charny, endorsing this, wrote the prologue to the first volume (I prefer not to consider the possibility that he is imagining Israel and Palestine to be the parties in this distorted picture of European settlers and indigenous peoples).

<sup>22</sup> On the aforementioned website of the UN Office of the High Commissioner for Human Rights (<http://www.ohchr.org>), the link on "Human Rights Instruments" gives the option of "War Crimes and Crimes against Humanity, including Genocide", where it lists three instruments: the Convention on Genocide plus these two. Note that the entry for *War Crimes* clearly restricts the concept of genocide simply to the bloody form of the crime. Website last checked for this paper: June 2008.

<sup>23</sup> Besides W. CHURCHILL, *Kill the Indian, Save the Man*, op. cit., Roland D. CHRISJOHN and Sherri L. Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada*, Penticton, Theytus, 1997; Dirk Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, New York, Berghahn, 2004; Tim Giago (Nanwica

accordance with the 1968 Convention. They attempt to commit the States to "the detection, arrest, extradition and punishment" of those guilty of international crimes, of which only the Nazi Holocaust was understood as genocide right up until the Special Tribunals were established for Yugoslavia and Rwanda and, finally, the International Criminal Court was established, as already mentioned.

Neither the prior Conventions nor the 1973 Principles consider a highly sensitive issue: that of the rights of victims, as if the issue of international crimes in general and genocide in particular began and finished in relations between those States involved. This issue has been subsequently introduced into international human rights law. In 1985 came a Declaration on the Fundamental Principles of Justice for Victims of Crimes and Abuses of Power and, in 2005, an updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, envisaging the rights of victims and expressly mentioning genocide. The fundamental right is that of reparation. The regulatory context itself must never be overlooked. These are crimes for which no time limitation applies. Those who descend from victims may also continue to be victims. Criminal responsibility cannot be inherited from one generation to another, it is individual, but political and economic responsibility can be passed down. The descendants of victims have outstanding rights in relation to the descendants of those who committed genocidal policies and actions and can benefit from them and transmit that benefit to their descendants. If the responsibility for previous genocides is the State's then the responsibility is all the clearer, as is the right to reparation<sup>24</sup>.

The difficulty lies in the restricted concept of genocide, which is not the concept as given in the Convention but the one that has ended up being prevalent and widely accepted, as if it were given in it, within current political and international circles. In 2004, the UN Secretary General appointed a Special Advisor on the Prevention of Genocide, on the assumption that this related not only to the Holocaust but also to a series of atrocities perpetrated over the previous decade in the former Yugoslavia and in Rwanda. Here genocide is only envisaged as the mass spillage of blood and does not cover, for example, State policies that are harmful to indigenous languages or cultures or those which, State-sponsored or otherwise, snatch the land and steal the resources of these peoples. Genocide is murder, full stop, as if the other sections of the Convention that define this crime have been completely obliterated from treaties and other instruments, from memory no less<sup>25</sup>.

In 2005, still within the United Nations, a highly symptomatic intervention of the Committee on the Elimination of Racial Discrimination occurred, as this committee has been developing a serious concern for the rights of minorities, in fact not covered by

---

Kciji), *Children Left Behind: The Dark Legacy of the Indian Mission Boarding School*, Santa Fe, Clear Light, 2006.

<sup>24</sup> Roy L. Brooks (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York, New York University Press, 1999; Elazar Barkan, *Genocides of Indigenous Peoples*, in Robert Gellately and B. Kiernan (eds.), *The Specter of Genocide: Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, pp. 117-139; J. Angelo Corlett, *Reparations to Native Americans?*, in Aleksandar Jokic (ed.), *War Crimes and Collective Wrongdoing: A Reader*, Oxford, Blackwell, 2001, pp. 236-269.

<sup>25</sup> For a symptomatic critique of the duties of the Special Advisor on the Prevention of Genocide, the Argentine lawyer Juan E. Méndez, see: David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, in *Chicago Journal of International Law*, 7-1, 2006, pp. 303-320.

the Convention on the Elimination of all Forms of Racial Discrimination. The Committee issued a Declaration on the Prevention of Genocide on the basis of clear evidence that this could be fostered and caused by discriminatory policies and practices against entire groups and particularly "indigenous communities". A follow-up lists indicators of the threat of genocide among which appear "policies of forced removal of children belonging to ethnic minorities with the purpose of complete assimilation"<sup>26</sup>.

At no time does the Committee seem to realize that this reason for alarm in particular and these discriminatory policies in general could already, in themselves, constitute genocide according to the Convention and, now, also according to the Statute of the International Criminal Court. Terminology does not help. To talk of "ethnic minorities" as encompassing indigenous peoples does not help this body take responsibility for the indigenous peoples<sup>27</sup>.

## 5. Genocide and the rights of indigenous peoples

I have already mentioned that genocide is also referred to in the Declaration on the Rights of Indigenous Peoples (hereinafter simply the Declaration). In the Article on the right to indigenous own culture and way of life, the draft completed in 1994 by a group of experts together with indigenous representatives referred to "cultural ethnocide or genocide" as worthy of being described as an international crime. Despite being in accordance with the original concept in international law, this still encountered strong opposition from the non-indigenous parties involved, starting with the chair of the group itself, the Greek jurist Erika-Irene Daes<sup>28</sup>. The reference was removed before it reached the final phase, between the Human Rights Council and the UN General Assembly in 2006 and 2007.

It is, in any case, important that the right to indigenous own way of life is maintained without any amendment in the final text: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" (Article 8.1). Here, finally, we find the human right of a people to their own culture, which does not appear in the Universal Declaration of Human Rights. It is formulated and strengthened in this instrument because, as had already been implicit since 1966 in the International Human Rights Covenants, both on Civil and Political

---

<sup>26</sup> Up-to-date news can now be obtained on the work of the Committee on the Elimination of Racial Discrimination via the Internet: <http://www2.ohchr.org/english/bodies/cerd/index.htm>.

<sup>27</sup> As I have already referred to the website of the High Commissioner for Human Rights where its main instruments can be found, I shall also observe that one section comprises those relating to "Rights of Indigenous Peoples and Minorities", including among them the International Labour Organization's Indigenous and Tribal Peoples' Convention of 1989, which does not relate to human rights per se but did act temporarily as such while the Declaration was being delayed, and which in addition denies them rights as peoples. After the Declaration, this Convention reverted to what it had always been, a multilateral Treaty offering guarantees to the indigenous party with some rights language, without ending in an actual proposal of rights: Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime, 1919-1989*, New York, Oxford University Press, 2005.

<sup>28</sup> Jeff Corntassel, *Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade, 1995-2004*, in *Human Rights Quarterly*, 29, 2007, pp. 137-166, particularly p. 143. In fact, the chair of the group that prepared the draft Declaration carefully avoids use of the term genocide, even when referring to the passage in which it is included, preferring thus to use ethnocide, not as an equivalent but as a substitute: E.I. Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*; UN Document E/CN.4/Sub.2/1993/28, para. 3. See now Erica-Irene A. Daes, *Indigenous Peoples - Keepers of our Past - Custodians of our Future*, Copenhagen, IWGIA, 2008.

Rights and on Economic, Social and Cultural Rights, the right of a people to their culture is a fundamental expression of self-determination. The first articles of both Covenants, in their first paragraph, along with the third article of the Declaration, make the same statement:

All peoples (Indigenous peoples) have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The statement is precisely the same (now "Indigenous peoples", as if they had been previously excluded from "All peoples"). Both first articles in the Covenants and that in the Declaration set the foundations for a collective right that is necessary for individual rights themselves. Because of this, regarding criminal offences and in relation to indigenous peoples, genocide can now be defined as any attack on political, economic, social or cultural self-determination with the intent to destroy a people, in whole or in part. Look back at the text of the Convention after considering the scope of self-determination for all the rights included in the Declaration and you will see both the regulatory coverage and the substantive logic of the definition, a coverage and a logic that have not been lost by removing the reference to "cultural ethnocide or genocide" from the final text of the Declaration<sup>29</sup>.

In explicit terms, the concept of genocide that is finally envisaged in the Declaration is in line with (although not completely) the more restrictive concept, with significant recollections of the section on children (Article 7: "1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group"). However, in the light of the Convention, the Declaration cannot be taken to mean that the possibility of cultural or other forms of genocide other than mass murder are ruled out, as they are all crimes that can be prosecuted under international law. These articles, the third, seventh and eighth of the Declaration, have to be interpreted in the light not only of the Convention but also of the whole body of international human rights instruments to which both texts belong and which, in regulatory terms, have never restricted the concept of genocide.

Easily said, not so easily done. Despite what is stated, this interpretation ends up swimming against the tide of the current trend within all bodies, both political and jurisdictional, of the United Nations itself. All of them, except one: the Permanent Forum on Indigenous Issues. The recommendations on indigenous languages in its 2008 session, the first session following approval of the Declaration, highlight an issue of relevance: "Policies of assimilation that lead to the destruction of languages have often been considered a form of ethnocide or linguistic genocide". And this is stated with the clear backing of a study that is to be found among the documents of this session and whose authors include one of the indigenous members of the Forum, Lars Anders-Baer:

---

<sup>29</sup> For further consideration of these arguments, please refer to my work *Genocide and Ethnocide, 1933-2007: How to Make, Unmake and Remake Law with Words*, Chapter VIII: "Crimes, Words, and Rights".

"Forms of education of children as crimes against humanity?"<sup>30</sup>. This explains how policies of *subtractive education* of children constitute "international crimes, including genocide, within the meaning of the United Nations' 1948 Convention on the Prevention and Punishment of the Crime of Genocide". The minutes of the full sessions of the Forum at which this issue were discussed are published on the website of the Economic and Social Committee under the following heading: "Permanent Forum speakers say violation of linguistic rights [amount to] *cultural genocide*"<sup>31</sup>. Hardly surprising, given that indigenous voices belong to and speak at this Forum.

If the actual term genocide remains a limited concept, then the possibility of being able to qualify it in order to revive its meaning must remain. The Permanent Forum on Indigenous Issues bears witness to the fact that the scope of the crime of genocide remains an open issue within the United Nations itself and that it therefore must also be so on an international scale, despite all signs to the contrary. This does not, of course, mean that indigenous representatives have only to approach the international bodies with demands for recognition of and reparation for genocides that have been not only physical but also cultural or economic. It simply means that the possibility is still open.

In accordance with the Statute itself (Article 11.1), the International Criminal Court has jurisdiction only over crimes committed since it came into force, although this does not mean that only policies and actions of physical genocide can now be denounced before it as neither the Convention nor the Statute itself restrict the nature of the crime in this way, and nor does it mean that complaints of previous genocides cannot be substantiated before any of the other many political and jurisdictional bodies that abound in the international field. And those that are to come as a consequence of the Declaration on the Rights of Indigenous Peoples. Genocide lawsuits are never subject to a time limitation. Not for any kind of genocide.

---

<sup>30</sup> <http://daccessdds.un.org/doc/undoc/gen/N08/235/54/pdf/N0823554.pdf?OpenElement>, which can be accessed via the Forum website: [http://www.un.org/esa/socdev/unpfii/en/session\\_seventh.html](http://www.un.org/esa/socdev/unpfii/en/session_seventh.html).

<sup>31</sup> <http://www.un.org/News/briefings/docs/2008/hr4948.doc.htm>.