You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings

Bonnie St. Charles*

Abstract

Genocide is a sensitive topic. While the Genocide Convention is traditionally understood, especially in the popular imagination, to prohibit mass killings, its provisions prohibit a far broader array of conduct. While killings of Indigenous peoples have thus frequently been considered to fall within the bounds of the Genocide Convention, crimes against culture—like the taking of ancestral or sacred Indigenous lands—have been considered outside of its bounds. While many of these takings continue to occur today, Indigenous loss of land has been consistent throughout history. This Comment argues that cultural genocide, both as a means and as an end, are properly included within the terms of the Genocide Convention. This Comment further argues that the doctrine of continuing violations, which allows tribunals to exercise jurisdiction over failures to investigate and remediate violations of the Convention, including violations that occurred before a state's ratification of the Convention, may provide recourse for pre- and post-Convention wrongs committed against Indigenous peoples.

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* J.D. Candidate at the University of Chicago Law School, Class of 2021. The author would like to thank Professor Tom Ginsburg for his valuable guidance, as well as her editors, friends, and the CJIL Board for their thoughtful and thorough insights.

I. INTRODUCTION

From the American Trail of Tears to the Amazonian wildfires set by ranchers and miners in 2019, Indigenous peoples[1] have consistently endured the taking of their ancestral homelands, either by force or fraud. The U.N. addressed this problem—purportedly, at least—in the 2007 Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] The UNDRIP has fallen far short of its potential, though, due to both the lack of a compelling enforcement mechanism and non-adoption by key nations, such as the U.S., Canada, Australia, and New Zealand. Countries have struggled to develop a global consensus on the best mechanism for the protection of Indigenous peoples' rights, and Indigenous groups continue to lose control and ownership of their territories as a result. This type of harm is likely to continue without intervention in, and resolution of, concerns about sovereignty and states' potential legal exposure under international law.

The word "genocide" has serious baggage, and for good reason. The word conjures up images of the gas chambers and extermination camps of the Holocaust and the bloody conflict and mass murders in Srebrenica. The International Convention on the Prevention and Punishment of the Crime of Genocide[3] (hereinafter the "Genocide Convention" or "the Convention"), however, has the potential—and, in certain cases, already has been used—to cover far more, and far different, acts than those traditionally considered to be genocide.

While cultural genocide is typically considered outside the scope of the Convention, this Comment argues that it, in fact, does fall within the bounds of the Convention. Developments in the West indicate that a broader interpretation of the Convention may be gaining support. For example, in Canada, a national commission investigating the missing and murdered Indigenous women (MMIW) crisis concluded that Canada had perpetrated, and continues to perpetrate, genocide against Indigenous women and girls by failing to protect them from cultural violence and discrimination.[4] Furthermore, Article 2(b) of the

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1 In this Comment, Indigenous peoples refers to tribal groups, while Indigenous people refers to the individuals who form Indigenous peoples.

2 G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

3 Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9. 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

4 Ian Austen & Dan Bilefsky, *Canadian Inquiry Calls Killings of Indigenous Women Genocide*, N. Y. TIMES (June 3, 2019), http://perma.cc/4CWF-LB6X. Additionally, courts in the U.S. have been moving towards a broader understanding of genocide. *See, for example*, Simon v. Hungary, 812 F.3d 127, 142–43 (D.C. Cir. 2016) (dealing with the taking of Holocaust-era cultural property, noting that

> [i]t is undisputed that genocide itself is a violation of international law. The question then becomes whether the takings of property described in the complaint bear a sufficient connection to genocide that they amount to takings

Convention, which prohibits the infliction of serious physical or mental harm on any group, is receiving renewed scholarly attention.[5] Redress for Indigenous cultural extermination and destruction, however, generally remains severely limited by both overly-narrow readings of the Convention and a lack of political willpower to protect Indigenous groups.

The Genocide Convention can be used to protect against forms of cultural extermination, including the taking of Indigenous lands. The Convention's text, its broader purpose, and the expanding doctrine of continuing violations so dictate. This Comment will begin in Section II by covering the history and purpose of the Convention, as well as the historical interpretation and prosecution of crimes under Article 2(b) and Article 2(e), which prevent forcible removal of children from their families. Section III will then dive into an analysis of cultural genocide, arguing that the plain text of the Convention as well as its intent and purpose dictate that cultural genocide is prosecutable under Article 2. Section IV will briefly explain the history of international Indigenous land conflicts and identify ongoing issues in Indigenous territorial sovereignty and, further, the harm that the taking of Indigenous lands inflicts. It additionally will argue that Indigenous land takings may be a form of genocide, and that the doctrine of continuing violations permits prosecuting takings before and after the ratification of the Convention.

II. THE CRIME OF GENOCIDE

This Section traces the 1948 Genocide Convention's history and discusses Article 2 of the Convention to lay the groundwork for a later discussion of cultural genocide.

A. Raphael Lemkin and the Birth of "Genocide"

In the post-World War II era, the Allied powers sought assurances that history would not repeat itself.[6] Raphael Lemkin, a Polish-Jewish lawyer from that era, is considered the first to argue that genocide—a term he coined—should be a crime under international law.[7] Lemkin recognized the growing consensus that minority groups deserved protection from majority groups; however, minority

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> 'in violation of international law.' We hold that they do. In our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide.*

(internal citations omitted)).

5 Genocide Convention, *supra* note 3, at art. 2(b).

6 Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L COMP. L. 415, 423 (1998).

7 *Id.*

groups often lacked the capacity to protect themselves against existential assaults.[8] Lemkin believed that the previous framework contained within the Hague Peace Conventions of 1899 and 1907—the first international instruments concerning war and disarmament[9]—was too weak to meaningfully protect these minority groups.[10] Working closely with Franklin Delano Roosevelt, then-President of the U.S., Lemkin began forming the conceptual link between genocide and the nascent conception of "crimes against humanity."[11]

Lemkin's conception of genocide was twofold. First, there needed to be the destruction of the group, representing the negative action of genocide. The act is negative in that it is destructive rather than constructive or reconstructive. Second, there needed to be forced adoption of the majoritarian culture, a positive action.[12]

The Nuremburg Tribunal addressed genocide for the first time, although the word genocide was mentioned only "in a single paragraph of the indictment," and the judgment itself made no mention of genocide.[13] Ultimately, the Tribunal determined that any crime against humanity—for example, genocide—must be connected to a war crime in order to sustain an adverse judgment.[14] The jurisdiction of the Nuremberg Tribunal was later extended to cover peacetime extermination efforts in the *Einsatzgruppen* case, prosecuted by the U.S. under Control Council Law No. 10 411.[15] The *Einsatzgruppen* judgment codified crimes against humanity and grounded them in the "principles of justice common to all civilized States which reflected the inherent rights of humanity."[16] This held individuals responsible for crimes against humanity at all times, not just in connection with war crimes.[17] The *Einsatzgruppen* judgment was the first to convict defendants of genocide, and consequently it extended international jurisdiction over that particular crime, although at the time genocide was primarily viewed as a type of aggravated murder.[18] As the Genocide Convention was developed, it

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8 *Id.* at 424.

9 *See generally* NOBUO HAYASHI, THE ROLE AND IMPORTANCE OF THE HAGUE CONFERENCES: A HISTORICAL PERSPECTIVE (2017), http://perma.cc/MK4B-8YFH.

10 Lippman*, supra* note 6, at 424.

11 *Id.* at 425.

12 Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29.2 EUR. J. INT'L L. 373, 378 (2018).

13 Lippman, *supra* note 6, at 426, 428.

14 *Id.* at 429–30.

15 See United States v. Ohlendorf*,* Case No. 9, Trials of War Criminals (Nuremburg Military Trib. II-A, Oct., 1956–Apr., 1948), http://perma.cc/274B-489S; Lippman, *supra* note 6, at 435.

16 Lippman, *supra* note 6, at 436.

17 *Id.* at 437.

18 *Id.* at 438–39.

built on these principles that the Nuremberg Tribunal applied in these war crimes cases.

B. The 1948 Genocide Convention

The Genocide Convention was adopted in 1948, just after the Nuremburg Tribunal, influenced by the wreckage of Nazism and the nascent Cold War.[19] As of 2019, 115 states have ratified the Convention. Despite widespread ratification, the Convention did not prevent genocidal acts from occurring in the twentieth century, as evidenced in both Yugoslavia and Rwanda. The Convention makes genocide—a term derived from the Greek "genos," meaning tribe or ethnicity—a crime under international law and proscribes certain enumerated acts.[20] Genocide is a crime during both peacetime and wartime and states have an obligation "to prevent and to punish" it.[21] Article 2 of the Convention defines the prohibited as:

> any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
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> (a) Killing members of the group;
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> (b) Causing serious bodily or mental harm to members of the group;
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> (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.[22]

For each prohibited act, the Convention requires a finding of specific intent. While the above acts are the only ones explicitly prohibited by the Convention, Article 3 also establishes liability for acts other than direct genocide, such as conspiracy, incitement, and attempt. These crimes have been prosecuted in the Yugoslavian context.[23] These prohibitions are intended to protect members of a group *qua* group, and not merely individuals who may belong to a protected group.[24]

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19 *Id.* at 452.

20 Phillip Perlman, *The Genocide Convention*, 30 NEB. L. REV. 1, 3 (1950).

21 Genocide Convention, *supra* note 3, at art. 1.

22 *Id.* at art. 2.

23 *See generally* Prosecutor v. Karadžić, Case No. IT-95-5/18-T (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

24 *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 521 (Sept. 2, 1998) ("[T]he victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.").

The Convention's enforcement mechanisms vary. Originally, the Convention permitted states to prosecute the crime of genocide within their own borders, and no international body exercised subject matter jurisdiction.[25] Article IX allowed the International Court of Justice (ICJ) to determine whether a state was compliant with the Convention, or even whether a state was responsible for genocide.[26] No sanctions could be imposed, however, unless a state committed genocide outside of its own territory.[27] Scholarship in the latter half of the twentieth century has argued that, because genocide falls under *jus cogens*, it is already subject to universal jurisdiction.[28] A *jus cogens* norm is a principle of international customary law—that is, it does not necessarily need to be embodied in a binding instrument to be enforceable—from which there may be no deviation.[29] There is no statute of limitations for genocide after the entry into force of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in 1970.[30]

As of 2019, the Convention has a few enforcement mechanisms, the foremost currently resting in the International Criminal Court (ICC), although the ICC is not mentioned in the Convention itself. Originally, the Convention authorized states to prosecute the crime of genocide in national courts or through a state-to-state mechanism. Article VI of the Convention notes that persons "shall be tried by a competent tribunal of the State in the territory of which the act was committed."[31] This mechanism was "unrealistic from the start," as it is rare that genocide is "committed without the participation or complicity of the state."[32] Several states, including the U.S. and France, lobbied against universal

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25 Lippman, *supra* note 6, at 461.

26 Genocide Convention, *supra* note 3, at art. 9.

27 Lippman, *supra* note 6, at 463.

28 *Id.* at 467 (citing Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away with It*, 11 MICH. J. INT'L L. 10, 10 n.1 (1989)).

29 There exists no comprehensive list of *jus cogens* norms; however, genocide has long been considered a paradigmatic example of such a norm. For example, in 2019, the International Law Commission recognized in a draft document that genocide was a binding peremptory norm. *See* Int'l Law Comm'n, Chapter V of the Rep. on the Work of the Seventy-First Session, U.N. Doc. A/74/10, at 147 (Aug. 9, 2019).

30 G.A. Res. 2391 (XXIII), Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, at art. 1 (Nov. 26, 1968).

31 Genocide Convention, *supra* note 3, at art. 6.

32 Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 232 (1995).

jurisdiction[33] over the crime of genocide.[34] No extant international tribunal possessed jurisdiction over state actors when the Convention was drafted,[35] but the ICC has filled the role of an "international penal tribunal," which was contemplated in Article VI.[36] Article IX of the Convention permits the ICJ to determine state compliance with the Convention, or, alternatively, to determine whether a state was responsible for genocide.[37] The adoption of the Rome Statute of the International Criminal Court[38] created a permanent international body vested with the ability to impose meaningful criminal sanctions.[39] The U.N. has temporarily convened tribunals to handle territory-specific matters, consistent with the language of Article VIII of the Convention.[40] The U.N. Security Council, too, can issue binding decisions.[41]

Additionally, states have a legal obligation to prevent genocide. This obligation is in addition to their obligation not to commit genocide and derives from Article 1 of the Convention, which contains the words "to prevent."[42] An interpretation of the Convention under the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention"), which requires treaty interpretation be "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,"[43] reveals that states must take "reasonable measures" to prevent genocide.[44] Furthermore, the duty to prevent genocide is unique among international duties, because it exists "irrespective of territory or a specific link to the State in question—each and every State party to the [Genocide Convention] is addressed and charged with

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33 Universal jurisdiction allows courts to prosecute individuals, regardless of their nationalities or the location of the act, for crimes against humanity, on the basis that these crimes harm the international community as a whole. *See* Rep. of the. Sixth Comm. on Its Sixty-Fourth Session, U.N. Doc. A/64/452 (Nov. 13, 2009).

34 Akhavan*, supra* note 32, at 233.

35 Lippman, *supra* note 6, at 461.

36 Akhavan, *supra* note 32, at 235.

37 Genocide Convention, *supra* note 3, at art. 9.

38 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544.

39 Björn Schiffbauer, *The Duty to Prevent Genocide Under International Law: Naming and Shaming as a Measure of Prevention*, 12.3 GENOCIDE STUD. & PREVENTION: AN INT'L J. 83 (2018).

40 *See, for example*, S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/Res/827 (May 25, 1993); *see also* Akhavan, *supra* note 32, at 237.

41 Marko Divac Öberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the I.C.J.*, 16 EUR. J. INT'L L. 879, 884 (2005).

42 *See* Genocide Convention, *supra* note 3, at art. 1.

43 Schiffbauer, *supra* note 39, at 84–5.

44 *Id.* at 85 (citing Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 162 (Feb. 26)).

prevention."[45] It has been argued by several scholars that the duty to prevent genocide rises to an *erga omnes* obligation,[46] or an obligation that states owe to the international community in its entirety, regardless of its ratification of any international instrument.[47]

C. The Intent Requirement

Pursuant to the Convention's text, a finding of genocide requires a finding of specific intent,[48] but tribunals unevenly apply the specific intent requirement. Some have required direct evidence of specific intent, while others have inferred it from the totality of the circumstances, focusing on the political and social context.[49] For example, American actions in Vietnam potentially exposed the U.S. to genocide liability; however, scholars broadly argued that there could not be any liability without evidence of specific intent. This was in spite of the fact that "American decision-makers certainly realized that their terror tactics entailed a substantial likelihood of decimating large numbers of Vietnamese and shattering civil society" and despite the view that the intent requirement was "contrary to the traditionally broad conceptualization of the requisite standards of criminal intent and popular notions of equity and justice."[50]

Proving specific intent may be a challenge for Indigenous peoples. In cases where parties cannot prove specific intent, Indigenous peoples may face continued violence from those who seek to access and exploit the natural resources on Indigenous land.[51] For example, between 1962 and 1976, Paraguayan authorities killed 50 percent of the Aché population because they wanted possession of the Aché's valuable land.[52] International condemnation was swift;

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45 *Id.* at 86.

46 *See id.*; *see also* Stephen J. Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, 46 MCGILL L. J. 187, 193 (2000).

47 Ardit Memiti & Bekim Nuhija, *The Concept of* Erga Omnes *Obligations in International Law*, 14 NEW BALKAN POL. 31 (2013).

48 Specific intent crimes require "the state to prove that the defendant intended to achieve some additional consequence." Eric Johnson, *Understanding General and Specific Intent: Eight Things I Know For Sure*, 13 OHIO ST. J. CRIM. L. 521, 525 (2016). In contrast, a general intent offense occurs when "it is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily, and his purpose in pursuing that conduct is not an element of a crime." *Id.* at 530.

49 Milena Sterio, *The Karadzic Genocide Conviction: Inferences, Intent and the Necessity to Redefine Genocide*, 31 EMORY INT'L L. REV. 271, 275 (2017).

50 Lippman, *supra* note 6, at 480.

51 *Id.*

52 *Id.* at 481.

however, no genocide prosecution appeared, perhaps in part due to the fact that Paraguay claimed that there was no criminal intent to destroy the Aché.[53]

Nevertheless, there appears to be movement away from a strict specific intent requirement. In 1992, the Commission of Experts on Yugoslavia issued a final report addressing the intent requirement, claiming that "[intent] may be inferred from sufficient facts. In certain cases, there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct."[54]

A similar commission established for Rwanda also addressed the intent requirement. In Rwanda, the Hutu parties claimed that action taken by the Tutsis was motivated by political animus rather than any racial or ethnic features.[55] The report issued by the Rwandan experts determined that a single, destructive intent is not required; instead, multiple motives may coexist, so long as one motive is genocidal in nature.[56] The ICJ, too, has noted that "'attacks on the cultural and religious property and symbols of the targeted groups' when conducted in tandem with 'physical' or 'biological' attacks, 'may legitimately be considered as evidence of an intent to destroy the group.'"[57] There is no additional motive requirement.[58] The move toward a looser, inferential intent requirement could have important consequences for marginalized or targeted groups across the globe. Important to the Indigenous context, too, is the fact that benevolent motives do not excuse the destruction of a group in whole or in part.[59]

D. Article 2(b) of the Convention and the Definition of "Mental Harm"

Article 2(b) of the Convention prohibits causing "serious bodily or mental harm to members of the group." The Chinese insisted the provision be included, asserting that the Japanese were distributing opium to "debauch[e]" the minds of

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53 *Id.*

54 *Id.* at 489 (citing Final Rep. of the Comm'n of Experts Established Pursuant to S. C. Res. 780, ¶ 97, U.N. Doc. S/1994/674 (May 27, 1994)).

55 Lippman, *supra* note 6, at 491.

56 *Id.*

57 Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Analysis of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L. J. 61, 103 (2009) (citing Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. Rep. 43, ¶ 344 (Feb. 26)).

58 Mundorff, *supra* note 57, at 103–04.

59 *See id.* at 119–20.

Chinese citizens.[60] The proposal was controversial from the outset.[61] The delegate from the U.K. clarified that the draft text, which included a provision regarding physical harm, would cover narcotic abuse to the extent of its physical manifestation.[62] An amendment including the mental harm language eventually passed by a vote of fourteen to ten among the contracting parties.[63]

While some scholars argue that the legislative history indicates that "mental harm" was intended to be cabined to narcotics use, no consensus currently exists on whether that is a correct understanding of the legislative history of Article 2(b). There is evidence that the Chinese delegates "emphasized the need to create a Convention of 'universal scope' . . . [that] cover[s] harms of the 'type' they faced during World War II."[64]

Mental harm, however, goes undefined in the Convention itself, as well as in treaty law more broadly.[65] Article 2(b) also differs from other provisions of the Convention in that:

> the *actus reus* of serious bodily or mental harm is not a discrete or individual act . . . [r]ather, it encompasses a category of acts, namely *any* act causing the predicate level of harm ('serious'), including those neither stipulated nor discussed in the legislative history and those deliberately excluded by the Convention's framers.[66]

The inclusion of both types of harm, mental and physical, indicates that there is an appreciable difference between the two because "[r]equiring mental harm to manifest physically would render meaningless its very inclusion since it would be covered by the protection against bodily harm."[67] The International Criminal Tribunal for the Former Yugoslavia (ICTY) applied this approach in the case of

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60 Stephen Gorove, *The Problem of "Mental Harm" in the Genocide Convention*, 1951 WASH. U. L. Q. 174, 176 (1951). The Chinese were especially concerned about the distribution of Japanese opium in China. The Japanese were producing large amounts of opium during this time and had been distributing it in China in order to weaken or kill the population, according to the Chinese delegates to the Convention. *See id.*

61 The original Chinese amendment read, "impairing the physical integrity or mental capacity of members of the group," or "impairing the health of members of the group." *See id.* (citing Karim Azkoul (Rapporteur of the Ad Hoc Committee on Genocide), *Report of the Ad Hoc Committee on Genocide*, 13, 15, U.N. Doc. E/794 (May 24, 1948)).

62 *Id.* at 178.

63 *Id.* at 179.

64 Nema Milaninia, *Understanding Serious Bodily or Mental Harm as an Act of Genocide*, 51 VAND. J. TRANSNAT'L L. 1381, 1390 (2018) (citing U.N. GAOR, 6th Comm., 81st mtg., U.N. Doc. A/C.6/SR.81 (Oct. 22, 1948)).

65 *Id.* at 1381.

66 *Id.* at 1383–84.

67 *Id.* at 1393.

Prosecutor v. Blagojević.[68] The tribunal concluded that "individuals who had survived the mass executions around Srebrenica were subjected to acts causing serious mental harm," even though the court made no findings of physical indicators or symptoms of this harm.[69] Therefore, based on the Convention's text, serious mental harm does not require any physical manifestation of trauma.

Conflicting jurisprudence exists on the threshold for seriousness as well. The ICTY[70] addressed the threshold question in the case of *Prosecutor v. Tolimir*,[71] holding that serious mental harm is harm that is lasting.[72] The ICTY went on to note that the harm "must go beyond temporary unhappiness, embarrassment or humiliation and inflict grave and long term disadvantage."[73] Furthermore, the Tribunal established that the seriousness threshold is determined on a case-by-case basis. Thus, individual acts cannot be always categorized as causing serious mental harm.[74] Despite the individualized determinations, international jurisprudence provides guideposts for where the threshold for serious harm lies. Importantly, the ICTY has also applied serious mental harm to situations that did not involve the survival of a massacre. In *Prosecutor v. Krasjišnik*, for example, the Tribunal noted that forcible displacement would qualify as serious mental harm.[75]

Tribunals apply an objective test for serious mental harm, rather than a subjective one.[76] The tribunals that have encountered mental harm determinations do not conduct a specific impact analysis, and instead rely on a determination that harm is likely to be lasting and serious, regardless of the specific evidence offered.[77] The harm need not be "irremediable" to reach the level of seriousness required by the Convention as interpreted by the ICTY.[78] The International Law Commission, however, has recommended that the word "serious" be interpreted

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68 Blogojević and Jokić, Case No. IT-02-60, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

69 Milaninia, *supra* note 64, at 1393–94 (citing Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 647 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

70 Although ICTY is not binding on the ICC, the ICC does look to international law in cases where it lacks its own jurisprudence, including tribunals. *See* Rome Statute, *supra* note 38, at art. 21.

71 Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

72 Milaninia, *supra* note 64, at 1396.

73 *Tolimir*, Case No. IT-05-88/2-A at ¶ 201–02.

74 Milaninia, *supra* note 64, at 1396, n. 67–69.

75 *See* Prosecutor v. Krasjišnik, Case No. IT-00-39-T, Judgment, ¶ 862 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); *id.* at 1395, n. 75.

76 Milaninia, *supra* note 64, at 1411.

77 *Id.*

78 *Id.*

as "contributing to the destruction" of a group, and that lasting harm, if it does not so contribute, should not qualify for coverage under the Convention.[79]

Parties to the Convention have also sought to limit the definition of mental harm. The U.S., for example, ratified the Convention[80] with the understanding that mental harm should be restricted to the "permanent impairment of mental faculties through drugs, torture, or similar techniques."[81] This contradicts both the purpose and intention of the Convention, as well as the plain meaning of the words "mental harm." Other countries have criticized the U.S. for the understanding,[82] but its application has not yet been tested in any international tribunal.[83]

Consequently, while there is not a universal approach to evaluating serious mental harm, some tribunals currently apply a threshold determination that does not require evidence of physical harm, but instead focuses on the lasting nature of the harm. Furthermore, instead of inquiring into the specific circumstances or placement of individuals, some tribunals, notably the ICTY, have conducted an objective inquiry, abstracting away from any certain individual.

III. CULTURAL GENOCIDE IS GENOCIDE UNDER THE CONVENTION

This Section analyzes the purpose of the Convention, the plain text of Article 2(b), and the inclusion of Articles 2(d) and 2(e) to argue that cultural genocide is within the bounds of the Convention. This Section also explores the history of the term "cultural genocide" and its interaction with, and ultimate exclusion from, the 1948 Genocide Convention. Cultural genocide, as used in this Comment, denotes the destruction of "both tangible . . . and intangible . . . structures."[84] Cultural genocide, though, simply indicates a different set of means to achieve the destruction of the group—means not typically associated with the "crime of crimes," such as acts *not* constituting mass killings or targeted executions.

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79 *Id.* at 1405.

80 The U.S. failed to ratify the Convention for forty years. While President Truman ensured that the U.S. was the first nation to sign the Convention, the U.S. Senate refused to ratify the Convention until 1986. *See* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 507–08 (2008).

81 Lippman, *supra* note 6, at 483.

82 *See*, for example, Paust, *supra* note 28; *see also* Maria Frankowska, *The U.S. Should Withdraw Its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal*, 12 MICH. J. INT'L L. 141 (1990).

83 Although outside of the scope of this Comment, it is possible that the U.S.'s understanding would be of little importance in an actual prosecution of the Genocide Convention, due to the fact that the non-commission of genocide is *egres omnes*.

84 *See* Bilsky & Klagsbrun, *supra* note 12, at 374.

There is a continuing tension between what is referred to as "ethnic cleansing" and "the crime of genocide." The ICJ noted in *Bosnia and Herzegovina v. Serbia and Montenegro*[85] that "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from that area" is not genocide, but rather a form of "ethnic-cleansing."[86] Genocide can only occur with the destruction, in whole or in part, of a group. This, however, has interesting implications for Indigenous populations, whose identities are defined by access and relationship to ancestral homelands. After the atrocities committed in Yugoslavia and the lack of resultant genocide convictions, the Commission of Experts convened thereafter claimed that many of the committed acts should have been covered by the Convention and "dictated that the Treaty should be liberally interpreted to encompass existing, as well as evolving methods of genocide."[87] The Commission further noted that genocide may be, but is not necessarily, a single act, and that collections of actions should be "considered in their entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose."[88]

A. Legislative History and Drafting

The early drafts of the Convention contemplated cultural genocide as part and parcel of the enterprise of protecting minority groups from a variety of potential harms. While the language explicitly prohibiting cultural genocide was not ultimately included in the Convention, the language was nonetheless drafted broadly enough for protection against cultural genocide to be included. This is consistent with the purpose of the Convention.

One of the earliest drafts of the Convention included language prohibiting destruction of the specific characteristics of a group through:

> (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

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85 Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. 43, ¶ 190 (Feb. 26).

86 William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2.2 GENOCIDE STUD. & PREVENTION: AN INT'L J. 101, 109 (2007). While the Commission's work is not legally binding, it was convened pursuant to a request by the U.N. Security Council, and spent more than two years studying the Yugoslavian conflict. *See* U.N. Secretary-General, *Letter to the President of the Security Council*, 1, U.N. Doc. S/1994/674 (May 27, 1994).

87 Lippman, *supra* note 6, at 489.

88 *Id.* (citing Final Rep. of the Comm'n of Experts Established Pursuant to S.C. Res., *supra* note 54, at ¶ 94).

> uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.[89]

This language was not ultimately included in the Convention, despite efforts by Lemkin and the adoption of General Assembly Resolution 96 (I),[90] which identified both culture and physical existence as worthy of protection under international law.[91] The draft provision would have—assuming a straightforward, textual interpretation, and, further, the will to prosecute—prevented cultural genocide and enabled the prosecution of cultural erasure of Indigenous peoples. Another draft provision of the Convention recognized that "genocide inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed."[92]

Scholars offer several purported reasons that such a wide-ranging provision protecting culture was omitted. The first is a relatively dubious claim of imprecision.[93] American President Truman expressed concern that a provision prohibiting cultural genocide muddies the line between permissible and impermissible behavior.[94] The U.S., however, likely also worried about its own legal exposure under a cultural genocide provision, especially one that could be read to prohibit assimilation of minorities into American culture.[95] While the concept of cultural genocide may be broad, it is not inarticulable, as it is articulated well in the draft texts.

A more plausible explanation may be the perceived imbalance in the severity of harms.[96] Massacres are extremely severe in comparison to many acts that could be construed as cultural erasure. Further, related explanations suggest that the contracting parties thought that cultural genocide should be dealt with in human rights law, or in a separate instrument dedicated solely to cultural genocide.[97] In 1985, the addition of cultural genocide to the Genocide Convention was recommended by the U.N. Subcommission on the Prevention and Protection of

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89 Kristina Hon, Comment, *Bringing Cultural Genocide in by the Back Door: Victim Participation at the ICC*, 43 SETON HALL L. REV. 359, 366 (2013) (quoting U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (June 26, 1947)).

90 "The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns . . . whether the crime is committed on religious, racial, political or *any other grounds* . . ." G.A. Res. 96 (I), at 189 (Jan. 31, 1947) (emphasis added).

91 Lippman, *supra* note 6, at 457.

92 U.N. Secretary-General, *supra* note 89, at 5.

93 Hon, *supra* note 89, at 368.

94 Brendan V. Fletcher, *Indigenous Peoples and the Law*, 17 INT'L L. STUDENTS ASS'N Q. 68, 68 (2008).

95 *Id.*

96 Hon, *supra* note 89, at 368–69.

97 *Id.* at 369.

Minorities, but no progress was made thereafter.[98] Neither human rights law nor any binding separate instrument, though, have produced a body of law relating to cultural genocide, and cultural genocide remains largely non-prosecutable under international criminal treaty law as a result.[99]

B. Textual Interpretation of the Article 2(b)

The text of Article 2(b) of the Convention terms includes acts of cultural genocide, so long as they result in the destruction, "in whole or in part," of the protected group. The Vienna Convention dictates that treaties "be interpreted in good faith in accordance with their ordinary meaning," except in cases where meaning is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable."[100] While critics may point to the legislative and drafting history of the Convention, the Vienna Convention tends towards textualism. The Vienna Convention dictates that the interpreter need first start "with the text . . . before moving from the text, if need be."[101] After looking to the text, an interpreter should look to the context—structure and other provisions of the piece being interpreted—and then the object and purpose of the instrument.[102]

Article 2(b) prohibits "[c]ausing serious bodily or mental harm to members of the group."[103] While Section III.D addresses the meaning(s) of "serious" and "mental harm," there is no absurdity in reading Article 2(b) to include the types of mental harms that cultural genocide produces. The destruction of, and forcible removal from, a culture is serious under a common-sense understanding of the word. Mental harm, too, would include a variety of injuries inflicted upon peoples severed from their cultural moorings.

The text of the Genocide Convention is clear, and the Vienna Convention therefore supports this interpretation. If the mental harm is serious in nature, the act is prohibited under the Convention. Furthermore, as noted in Section III.D, the inclusion of "bodily" and "mental" as separate pieces of Article 2(b) indicates that the two do not need to be concurrent in order for an act to be prohibited under the plain meaning of the Article. The inclusion of the word "or" in between, instead of "and" further supports this proposition. Thus, even looking past the text itself, the other provisions of the Convention indicate that cultural genocide is included.

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98 Fletcher, *supra* note 94, at 69.

99 *Id.*

100 Vienna Convention on the Law of Treaties art. 31(1), 32(a)–(b), May 23, 1969, 1155 U.N.T.S. 331.

101 Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History*, 107 AM. J. INT'L L. 780, 782 (2013).

102 *Id.*

103 Genocide Convention, *supra* note 3, at art. 2(b).

As indicated by the drafting history of the Convention, the Sixth Committee vigorously debated the inclusion of cultural genocide. While the Sixth Committee ultimately excluded explicit provisions dealing with cultural genocide, it nonetheless drafted Article 2(b) broadly enough to cover some actions of cultural extermination—only those serious enough to lead to the destruction of the group in whole or in part. This naturally excludes lesser forms of assimilation that cannot contribute to the destruction of a group and thus alleviates some concerns about an overbroad interpretation of cultural genocide.

Furthermore, the inclusion of cultural genocide is by no means absurd. The Convention was designed to protect peoples *qua* peoples. Protecting minorities from majoritarian destruction or domination is consistent with this goal. The proposition that it is absurd to read the Convention as protecting anything other than physical destruction is, in fact, contradicted by the text of the Convention itself.

Even if the ultimate destruction must be physical or biological in nature—consistent with the intent of the drafters—a textual interpretation still supports the inclusion of cultural genocide. The destruction or removal of cultural markers can trigger the long-term nonviability of a cultural group.[104] As noted in the Article 2(e) context,[105] assimilation or benevolent intentions are no excuse for prohibited acts. It could further lead to inter-marriage between group members and the population at large, ultimately resulting in the end of the group "as such." Therefore, the end result of cultural genocide is always intended to be physical or biological in nature. By assimilating group members into the broader population, the goal is to make them part of the broader population. This leads to physical, as well as cultural, destruction of a group.

C. Articles 2(d) and 2(e)

Should the Convention's text be determined to be ambiguous, under the Vienna Convention, the next interpretive step includes the additional provisions and articles of the instrument.[106] Articles 2(d) and 2(e) of the Convention are instructive in considering cultural genocide as a prohibited activity. Article 2(e) prevents the forcible transfer of children from their culture and families to those outside of the protected group.[107] The forcible transfer provisions lurked in the background of the Convention for nearly fifty years before springing to

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104 *See id.*

105 *See id.*

106 Mortenson, *supra* note 101, at 782.

107 Genocide Convention, *supra* note 3, at art. 2(e) ("Forcibly transferring children of the group to another group.").

centerstage in 1997.[108] Forcible removal of Indigenous children from their families occurred in many Western nations, including Australia, the U.S., and Canada, and did not truly end until the 1970s.[109] While the cultural genocide provisions were, for the most part, not explicitly included within the Convention, Article 2(e) is a notable exception. A Venezuelan diplomat, influential in the Sixth Committee's drafting process, said:

> the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. . . . [The children] would indeed enjoy an existence which was materially much better . . . yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.[110]

Article 2(e) encountered little opposition, even from countries who had residential school programs for Indigenous children.[111] Both Australia and the U.S. thought that residential schools were beneficial to Indigenous peoples, and this may partially serve as an explanation for why they did not consider their own legal liability under the Convention.[112]

Article 2(e), like Article 2(b), contains no exception for benevolent intent—so long as the requisite intent to destroy is present and a prohibited act took place, there may be a colorable allegation of genocide.[113] The Convention likewise contains no exception for assimilative projects. Assimilation, on its own, is unlikely to constitute genocide, and there is some evidence that Lemkin himself was not entirely opposed to assimilative efforts by colonial countries.[114] An interpretation that included such exceptions and excused the programs of

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108 Mundorff, *supra* note 57, at 63.

109 *Id.*

110 *Id.* at 83; *see also id.* at 111 n.284 ("[W]hile opposed in principle to the inclusion of cultural genocide, the U.S. delegation 'had nevertheless made an exception in the special case of the forced transfer of children.'").

111 *Id.* at 111.

> It is curious that several parties involved in drafting the Genocide Convention clearly understood forcible child transfers to be genocidal, but apparently failed to realize that their own longstanding practices might violate Article 2(e). For instance, the U.S., which rallied parties against the cultural genocide provisions, lobbied for including forcible child transfers without seeming to realize that this provision might implicate its American Indian residential school program.

112 *Id.* at 119–20.

113 The jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda indicate that the scope of the Convention may extend beyond the bounds of the five prohibited acts. *See* Section IV.C.

114 Mundorff, *supra* note 57, at 122.

Australia, the U.S., and Canada, however, would be inconsistent with the Vienna Convention's dictates.[115] The programs in these nations relied on forcible transfer of groups, with the intention to "[k]ill the Indian, save the man."[116] Sir Paul Hasluck, the engineer of the residential school program, clearly stated that "tribal culture will be destroyed."[117] Recently, Canada issued an apology and accepted responsibility for its genocide of First Nations peoples through its operation of its residential school program.[118]

Article 2(e) concerns culture, and this interpretation is supported by the inclusion of Article 2(d) in the Convention. Article 2(d) prohibits "[i]mposing measures intended to prevent births within the group."[119] Preventing births within a group indicates that physical destruction through forced sterilization, or halting the continuation of a racial or ethnic bloodline through other means, is indeed an act of genocide. Article 2(e), however, prevents the taking of children from their families *after* birth. If the Convention were solely concerned with matters of physical destruction, Article 2(e) would be superfluous, and Article 2(d) would cover the physical destruction of a group. Article 2(e), thus, can only be about culture.

Furthermore, Article 2(e) contains no provision prohibiting the killing of children after removal, because this act is prohibited under Article 2(a).[120] Therefore, physical killing of children and population nonviability through lack of births are both already included within the Convention. Article 2(e), then, must be about preventing the wholesale destruction of a group, not by physically destroying the group, but by preventing the transmission of cultural knowledge between generations. Forcible transfer prohibits placing group members outside of their groups in order to prevent them from obtaining and perpetuating cultural markers, and to assimilate them into the dominant society, rendering them at least culturally indistinguishable from the majority population at large. The inclusion of Article 2(e) was a deliberate drafting choice, and therefore, the drafting committees understood that cultural genocide would be—at least in some form—impermissible under international law.

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115 *Id.* at 124.

116 *Id.* at 120.

117 *Id.* at 124.

118 Canadian Prime Minister Stephen Harper issued an apology in 2008 to survivors of the residential schooling systems. *See Government apologizes for residential schools in 2008*, CBC ARCHIVES (June 25, 2018), http://perma.cc/UW7U-V35H. Canadian Prime Minister Justin Trudeau apologized again in 2018 in response to allegations that Prime Minister Harper's apology was not robust enough. *See* Catherine McIntyre, *Read Justin Trudeau's apology to residential school survivors in Newfoundland*, MACLEANS (Nov. 24, 2017), http://perma.cc/5RAK-ZRZ3.

119 Genocide Convention, *supra* note 3, at art. 2(d).

120 *See id.* at art. 2(a).

Under the American legal canon of interpretation *expressio unius est exclusio alterius*, critics may argue that the inclusion of Article 2(e) only serves to bolster the claim that cultural genocide was meant to be outside the bounds of Article 2(b). This, however, is inconsistent with the reading dictated by the Vienna Convention. The plain meaning of each clause indicates that cultural genocide is included within both Article 2(b) and Article 2(e). The meanings of the two clauses, taken together, produce no absurdity. They indicate that destruction of cultural markers to the point where the group ceases to exist may be sufficient to sustain a colorable allegation of genocide.

D. Intent and Purpose

The Vienna Convention also dictates that the intent and purpose of the instrument are relevant to interpretation. The U.N. adopted the Genocide Convention against the backdrop of a burgeoning movement towards self-determination of peoples, as well as the horrors committed against the Jews and other racial, ethnic, and religious minorities during the Holocaust. It purportedly showed real dedication to the protection of peoples from destruction, and to "liberate mankind from . . . an odious scourge."[121] It is undeniable that one purpose of the Convention is to prevent extermination by killing; however, the text and the legislative history of the Convention indicate that it is designed to protect minority groups from far more than killing. Further, given the establishment of the ICC and international prosecution of the crime of genocide, the Convention should stop states from committing such atrocities against their populations. The Convention itself identifies a positive duty to prevent the crime of genocide, and states party, by failing to prevent the taking of Indigenous land, would be contravening their positive obligation of prevention under the text and purpose of the Convention.[122]

Tribunals can, and should, utilize the Convention to proscribe acts of cultural genocide as paths to true, genocidal destruction, and can ground their decisions as consistent with the intent and purpose of the Convention. In *Blagojević*, the Trial Chamber found that forcible deportations amounted to genocide because "the physical or biological destruction of a group is not necessarily the death of the group members."[123] In *Akayesu*, the Trial Chamber also acknowledged that "rape . . . achieves genocidal results through cultural processes" and that cultural factors play a "crucial role" in maintaining cultural

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121 *Id.* at pmbl.

122 *See generally* Schiffbauer, *supra* note 39.

123 Mundorff, *supra* note 57, at 114 (citing Blogojević and Jokić, Case No. IT-02-60, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005)).

structures that ensure long-term viability of a vulnerable group.[124] In both cases, the tribunals could have cabined genocide to the specifically prohibited acts in Article 2,[125] but instead expanded prohibited acts to include forcible deportation and rape insofar as they constitute genocide due to cultural impacts.

While tribunals may not opt to consider cultural genocide as a crime in itself under the Genocide Convention, cultural genocide still has an important probative function in proving the specific intent of actors. In cases where cultural destruction has occurred alongside one of the enumerated prohibited acts, the targeted destruction of cultural markers may evidence intent to destroy a group. Kurt Mundorff notes that cultural destruction, even through the lens of coercive or forced assimilation, "centers on hostility to the targeted group's continued existence as a 'separate and distinct entity . . .' [and] seeks to eliminate the group's distinctive characteristics as the group is absorbed into another group."[126] If this hostility manifests in cultural destruction—for example, refusing to permit a group to speak their language, or destroying sacred spaces—and is conducted in connection with a larger effort comprised of a prohibited act, an inference of specific intent may be easily made.

E. The Doctrine of Continuing Violations

Generally, acts that contravene an international convention, but were committed before the passage of the instrument, are non-prosecutable.[127] This is consistent with the Vienna Convention:

> Unless a different intention appears from a treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.[128]

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124 *Id.* at 115 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 521 (Sept. 2, 1998).

125 The prohibited acts are as follows:

> (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.

See Genocide Convention, *supra* note 3, at art. 2.

126 Mundorff, *supra* note 57, at 124.

127 *See generally* Loukis G. Loucaides, *The Concept of "Continuing" Violations of Human Rights* in THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED ESSAYS (Martinus Nijhoff Publishers 2007).

128 William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J. L. & PUB. POL'Y 36, 38 (2010).

The Genocide Convention contains no intention of retroactivity, and thus seems to only apply to actions taken after 1951.[129] This may not completely preclude prosecution of genocide committed before 1951, though, due to the obligation to investigate and punish genocide, as well as the traditional assumption that "atrocity crime" treaties do possess retroactive force.[130] This is due in part to the idea that the prohibition on genocide is an international *jus cogens* norm, and therefore needs no binding instrument to be considered prohibited at all times.[131] Furthermore, at the Convention's conception, there were three international treaties dealing with atrocity crimes with, at a minimum, "implicit retroactive application": the Treaty of Versailles, the Treaty of Sèvres, and the Charter of the International Military Tribunal.[132]

There is another path towards prosecution of acts that occurred before the passage of the 1948 Convention, though, and it begins with the doctrine of continuous or continuing violations. The doctrine of continuous violations was created in the Inter-American Court of Human Rights in the 1970s as the Inter-American Court was dealing with missing persons cases, and has been further recognized by working groups at the U.N.[133] The Court held that it could exert jurisdiction over these missing person claims

> even if th[e] act had begun before its *ratione temporis* jurisdiction came into effect. The reasoning is that a disappearance could be described as a continuing violation up to the time when the circumstances of the disappeared person were discovered . . . . The rationale lies in the idea that the defendant state in such cases is responsible for a failure to discharge its obligation[s] . . . a failure that is an autonomous and on-going breach of its

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129 *See id.* at 38–39.

130 *See id.* at 41; *see also id.* at 41–42 for a discussion of other treaties prohibiting "atrocity crimes" which have applied retroactively.

131 *Id.* at 39.

132 *Id.* at 41.

133 Frédéric Mégret, *The Notion of 'Continuous Violations,' Expropriated Armenian Properties, and the European Court of Human Rights*, 14 INT'L CRIM. L. REV. 317, 319 (2014); *see also* U.N.H.R. Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearances as a Contiguous Crime*, ¶ 39 U.N. Doc. A/HRC/16/48, (Jan. 26, 2011)

> Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force . . . gives the institution the competence and jurisdiction to consider the act . . . as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument . . . .

Id. The same working group also recognized that reservations preventing the application of the doctrine of continuous violations should be "interpreted so as not to create an obstacle" to liability. *Id.*

> human rights obligations, regardless of the timing of the triggering occurrence.[134]

Important to the analysis of whether an international crime is amenable to the application of the doctrine of continuous violations is whether the triggering event has produced long-lasting and continuing, adverse effects.[135] The Inter-American Court of Human Rights has been especially aggressive in utilizing the continuing violations doctrine but has recognized that not all violations of international law are continuous in nature. For example, in *Alfonso Martín del Campo-Dodd v. Mexico*, the Court determined that torture is not a continuous violation, because "[e]ach act of torture is consummated or terminated within itself."[136] Jeffrey Hall has noted that, for the Inter-American Court, "the decisive issue . . . is whether the state stands in an ongoing relationship with the [victim] such that if the state changed its behavior, the violation would effectively cease."[137]

The Inter-American Court often hears land rights cases, and it generally reaches outcomes favoring Indigenous groups. While the American Convention on Human Rights[138] is the applicable instrument for most of these cases, the Court's jurisprudence still points towards a strengthening of Indigenous rights—one that it could use in applying the Genocide Convention.

In *Moiwana Community v. Suriname*,[139] the Court embraced communal rights to property.[140] The Court noted that the N'djuka people had an "all-encompassing relationship to their communal lands . . . their traditional occupancy . . . should suffice to obtain [s]tate recognition of their ownership."[141] In *Sawhoyamaxa*, the

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134 *Id.* at 318–19. In the foundational case explaining the continuing violations doctrine, *Blake v. Guatemala*, the court recognized that the murder of an American journalist, committed by the Guatemalan military, occurred before the court had proper temporal jurisdiction. Due to "subsequent acts [which implied] complicity in, and concealment of, Mr. Blake's arrest and murder," that occurred after Guatemala acceded to the court's jurisdiction, the Court asserted jurisdiction over the murder itself. *See* Jeffrey B. Hall, *Just a Matter of Time? Expanding the Temporal Jurisdiction of the Inter-American Court to Address Cold War Wrongs*, 14(4) LAW & BUS. REV. AM. 679, 685 (2008).

135 Mégret, *supra* note 133, at 319.

136 Hall, *supra* note 134, at 687.

137 *Id.* at 687–88.

138 Specifically, Article 21 of the American Convention is applied to property claims. Article 21 establishes the right to property, including "the right to the use and enjoyment," and property may not be appropriated by the government without just compensation. *See* American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

139 Moiwana Comm. v. Surin, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 124 (June 15, 2005).

140 Tom Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 145 (2013).

141 *Id.* at 145 (citing *Moiwana*, Inter-Am. Ct. H.R. (ser. C), No. 124); *see also* Xákmok Kásek Indigenous Comm. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C)., No.

Inter-American Court recognized that "traditional possession . . . has equivalent effects to those of state-granted full property title."[142] This same case established that "the community maintains a right to (re)claim its territory" if the land has cultural importance and a "cultural injury" has occurred.[143] Lastly, in *Sarayaku*, the Court established the right to cultural identity as a "fundamental right . . . [that] should be respected in a multicultural, pluralistic and democratic society."[144]

The doctrine of continuing violations was further extended in *Moiwana*. In *Moiwana*, the Court held Suriname liable for the killing and forced displacement of a Maroon tribe, even though the displacement occurred a year before Suriname submitted to the jurisdiction of the court.[145] The lands taken from the Moiwana Community were considered their ancestral homelands, although the tribe was originally comprised of the descendants of runaway slaves.[146] In the decision, the Court recognized that dispossession of Indigenous lands "deprive[s] the group of one of the fundamental elements of [the group's] identity"[147] and that Indigenous groups' survival

> depends upon their right to their lands, this right may be said to arise directly from their status as [I]ndigenous or tribal people. Such status is without temporal limitation; it can be neither created nor destroyed by the state. As a result, the violation of rights inherent to that status may be deemed to arise continuously.[148]

Suriname, despite knowledge of the events, failed to bring the perpetrators of the displacement and violence to justice.[149]

To exercise jurisdiction in *Moiwana*, the Court recognized that failure to investigate or provide effective recourse for human rights violations, *even prior* to the ratification of a treaty, is its own form of continuing violation.[150] While the actual killing of Moiwana community members was outside the jurisdiction of the Court because Suriname did not accede to its jurisdiction until after the massacre,

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214, ¶ 281 (Aug. 24, 2010) (stating that land is "fundamental and unbreakable for [the community's] human and cultural survival . . . [and] is not just any piece of real estate").

142 *Id.* at 148 (quoting Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 146, ¶ 120 (Mar. 29, 2009)).

143 *Id.* at 149.

144 Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C), No. 245, ¶ 217 (Jun. 27, 2012).

145 Hall*, supra* note 134, at 688.

146 *Id.* at 689.

147 *Id.*

148 *Id.*

149 Tom Antkowiak, *Moiwana Village v. Suriname: A Portal into Recent Jurisprudential Developments of the Inter-American Court of Human Rights*, 25 BERKELEY J. INT'L L. 268, 272–73 (2007).

150 Hall, *supra* note 134, at 691.

the Court exercised jurisdiction over "the State's fulfillment of its obligation to investigate those occurrences" from Suriname's ratification of the American Convention onwards.[151] The Court "essentially held that a State is obligated to investigate and prosecute all violations of human rights, even if that violation happened before the ratification of the Convention."[152] The idea motivating the doctrine is "failure to investigate a past violation . . . [is] an ongoing failure [that] violates victims' Convention-protected right to judicial protection."[153]

The doctrine of continuing violations presents a potential pathway forward for prosecution of land takings, whether accompanied by physical violence or not. The doctrine could straightforwardly be applied in the Article 2(e) context against the U.S., Australia, and Canada, which operated mandatory residential school systems both before and after the ratification of the Genocide Convention.

The Genocide Convention, while differing from the American Convention in many respects, seems to contain a "positive obligation to investigate and prosecute genocide" and "State practice probably confirms such an interpretation of the Convention."[154] Coupled with a reading of the Convention under the Vienna standards, it, too, could be applied to Indigenous land takings. This would enable tribunals to reach back to the date of ratification, or even before, to provide potential redress for victims. The remedy for these procedural violations may differ by tribunal but would nonetheless bring attention to the actions being committed.[155]

IV. INDIGENOUS LAND TAKINGS ARE ACTIONABLE AS GENOCIDE

Increased international attention on Indigenous issues is pressuring countries to reform their Indigenous policies. As of 2019, though, Indigenous land rights are still not adequately prioritized and protected. One of the primary reasons for this is the inadequacy of current enforcement mechanisms. This Section will begin with a discussion of current enforcement mechanisms' failures and will provide examples of contemporary land takings. This Section will then argue that, because cultural genocide is—and should be—a legally cognizable harm, Indigenous peoples may have a claim under the Genocide Convention.

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151 Antkowiak, *supra* note 149, at 278.

152 Pablo A. Ormachea, *Moiwana Village: The Inter-American Court and the Continuing Violation Doctrine*, 19 HARV. HUM. RTS. J. 283, 284 (2006).

153 *Id.* at 285.

154 Schabas, *supra* note 128, at 41 ("A large number of States have incorporated the crime of genocide within their own national legislation, often giving their legislation retroactive effect. Yet it does not seem to be State practice to limit this retroactive effect to events subsequent to entry into force of the Convention.").

155 *See generally* Antkowiak, *supra* note 149.

Indigenous peoples stand to benefit immensely from this type of enforcement mechanism. Lastly, through the doctrine of continuing violations, this Section will argue that Indigenous peoples are entitled to redress for harms committed both before and after a state's ratification of the Convention. This Section is primarily intended to provide information to ground a potential solution, rather than to argue that each of these takings could meet all of the requirements of the Genocide Convention.

A. Defining Indigeneity

Indigeneity has been difficult to define due to the variance across the world's 370 million Indigenous people.[156] These variances produce an inability to collapse all Indigenous groups into one cohesive mass for definitional purposes under international law. One widely used definition of Indigenous peoples is the one put forth by U.N. Special Rapporteur Martinez Cobo in a report on discrimination against Indigenous peoples:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[157]

The defining feature of Indigeneity is a group's presence in a region "before [other] settlers moved in as a result of conquest, occupation, colonization, etc."[158] Other important determinative factors for Indigeneity are whether the group considers itself "different from other groups, whether it shares a common ancestry with the occupants of a given territory prior to its conquest by another group or series of groups, whether it tends to reside in a particular geographic area, and whether it shares a language, culture, and history."[159] The Cobo definition of Indigenous peoples reflects the experience of peoples in North and South America, Russia, and the Arctic, where colonial powers displaced and

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156 U.N. Educational, Scientific, and Cultural Organization, *Indigenous Peoples and UNESCO*, U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (2017), http://perma.cc/2XE3-A9DN.

157 José Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Population, Chapter XXII: Proposals and Recommendations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

158 Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 423 (2009) (internal citation omitted).

159 *Id.* at 423–24.

dominated Indigenous peoples.[160] The experiences of Indigenous groups in Asia and Africa, though, differ in kind due to the absence of "large-scale Western settler colonialism."[161] Consequently, while there can be no single, referential definition of Indigeneity, the factors outlined above provide a framework for evaluating whether a group is Indigenous.

B. Shrinking Indigenous Land Holdings

Indigenous peoples have faced the taking of their lands throughout history, largely due to colonialism and increased settlement in previously remote areas. The problem, unfortunately, has not abated in the modern era. Costa Rica provided a modern account of this process in correspondence with Cobo, the Special Rapporteur:

> At present indigenous persons are facing their greatest problems as a result of the invasion of lands which they traditionally regarded as their own. . . . [T]hey feel harassed and at a disadvantage in the presence of "non-indigenous" persons; this causes them so many problems that they migrate to other, more remote areas . . . which, in point of fact, are ceasing to be [remote] due to the rapid development the country is undergoing.[162]

This story has been repeated across history and continues to take place today.[163]

Despite centuries of existential threats, Indigenous issues did not begin to garner international attention at the U.N. until the late twentieth century.[164] Prior to U.N. involvement, the International Labour Organisation (ILO) recognized the importance of studying and affirming Indigenous rights as workers' rights.[165] In 1957, the ILO adopted the first international convention targeting Indigenous populations: the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Convention No. 107.[166] Convention No. 107 was ratified by twenty-

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160 Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, at 6, U.N. Doc ST/ESA/328 (Sept. 8, 2009) [hereinafter SOWIP].

161 *Id.*

162 José Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations, Chapter XVII: Land*, ¶ 18, U.N. Doc. E./CN.4/Sub.2/1983/21/Add.4 (1983).

163 *See* James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur on the Rights of Indigenous Peoples,* ¶ 58, U.N. Doc. A/HRC/21/47 (2012) (Indigenous land rights are "entirely unprotected.").

164 SOWIP, *supra* note 160, at 2.

165 The ILO operates development initiatives in a variety of countries to help create work opportunities and advocate for fair labor. *See* ILO, *Development Cooperation*, http://perma.cc/SEV5-JD27.

166 ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND U.N. STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 49 (2007).

seven states and required the compilation of yearly reports on the status of Indigenous populations within states' borders.[167] ILO No. 107 was state-centric, and solicited little input from the Indigenous peoples who supposedly were benefitting from the provisions.[168] Critically, ILO No. 107 contained exceptions to the prohibition on removing Indigenous peoples from their lands.[169]

These exceptions to the removal prohibition, found within Article 12 of ILO No. 107, apply in situations implicating "interests of national security, national economic development or indigenous health."[170] Unfortunately, these exceptions are three of the oft-cited reasons for Indigenous groups' removal from their territories.[171] Consequently, ILO No. 107 is not a sufficiently strong enforcement mechanism against land takings.

In 1989, the ILO adopted Convention No. 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries.[172] The ILO almost entirely excluded Indigenous peoples from the drafting process, and the Convention has not been frequently used by Indigenous peoples as a result.[173] This is despite Convention No. 169's strong land protections, regarded as the strongest land rights protections of any existing Indigenous rights instrument.[174] Article 14 of ILO No. 169 requires states to recognize "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy."[175] The inclusion of the word possession, though, has produced ambiguity and permitted governments to recognize limited Indigenous title—occupancy title, for example, as has been recognized historically in the U.S.[176] —rather than full title in fee simple.

In 2007, Indigenous peoples made what appeared to be an international breakthrough. The U.N. voiced full-throated support for the rights of Indigenous peoples with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[177] The UNDRIP contains provisions protecting

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167 *Id.* at 49–50.

168 *Id.* at 51.

169 Int'l Labour Org. (ILO), Indigenous and Tribal Population Convention (No. 107), at art. 12 (1957) [hereinafter Convention No. 107].

170 XANTHAKI, *supra* note 166, at 63.

171 Convention No. 107, *supra* note 169, at art. 12.

172 *See generally* ILO, Indigenous and Tribal Peoples Convention (No. 169) (1989).

173 XANTHAKI, *supra* note 166, at 68, 81.

174 *Id.*

175 *Id.* at 82.

176 *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823), Cherokee Nation v. Georgia, 30 U.S. 1 (1831), Worcester v. Georgia, 31 U.S. 515 (1832); *see also* Tee-Hit-Ton v. U.S., 348 U.S. 272 (1955).

177 *See generally* Declaration on the Rights of Indigenous Peoples, *supra* note 2.

Indigenous peoples against the taking of their land. Specifically, Article 8(2)(b) directs states to provide effective enforcement mechanisms for "[a]ny action which has the aim or effect of dispossessing [Indigenous peoples] of their lands, territories or resources"; Article 10 prohibits forcible removal from territories without "free, prior and informed consent" of the groups; and Article 26 recognizes that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," as well as the right to "own, use, develop and control" these lands.[178] Despite receiving 144 votes in favor, the win was tainted by the failure of four nations—the U.S., New Zealand, Australia, and Canada—to vote in favor of the UNDRIP.[179] A partial explanation for these states' rejection of the UNDRIP is found in title holding structures. The U.S. operates a reservation system, in which the federal government holds land in trust for Indigenous peoples. A recognition that Indigenous peoples hold more than mere occupancy title would effectively destroy this system.[180] Moreover, the U.S. rejected "any possibility that this document is or can become international customary law."[181] Finally, the UNDRIP, much like similar international declarations, does not have an international enforcement mechanism to enforce Indigenous land sovereignty and sanction those who would infringe upon it.

While the UNDRIP lacks a firm enforcement mechanism, international courts may look to the document as a proxy for general principles regarding Indigenous rights. The Inter-American Court of Human Rights has occasionally quoted the UNDRIP, although it has not totally followed its mandates on Indigenous rights, such as in the case of *Awas Tingni v. Nicaragua*., discussed in Section II.C of this Comment.[182] Relatedly, the Inter-American Court has issued binding judgments prohibiting resource extraction in Indigenous homelands, and is the only international tribunal to have done so.[183] The Court's decision does not rely on the UNDRIP.[184] The lack of courts' reliance on the UNDRIP should not diminish the importance of the instrument as an international recognition of

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178 *Id.* at 10–11, 19.

179 Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1142 (2008).

180 *See* XANTHAKI, *supra* note 166, at 83.

181 S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), http://perma.cc/6MXH-UXCU.

182 Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L. J. 51, 54 (2009).

183 Antkowiak, *supra* note 140, at 120.

184 *See id* at 133, 144–45.

Indigenous rights. International recognition through the UNDRIP, though, has been largely ineffective in stopping land takings.

C. Contemporary Issues in Indigenous Land Taking

Despite growing international pressure for reform, land disputes remain prevalent across the globe, especially in resource-rich areas like the U.S. and Canada. And while the Inter-American Court of Human Rights may prove helpful to groups in the Americas, its reliance on the American Convention on Human Rights prevents it from being a worldwide enforcement mechanism.[185] Executive orders and decisions by the Inter-American Court may be advantageous in some instances, but have, for the most part, failed to stop these takings. Consequently, Indigenous groups need to look elsewhere to find effective and universal enforcement of their land rights. This subsection will address several recent land disputes involving nuclear waste, pipelines, and resource extraction.

The U.S. has long struggled with where to store nuclear waste, and in the early 2000s, decided to utilize a repository at Yucca Mountain, located in Nevada.[186] In 2002, the U.N. Committee on the Elimination of Racial Discrimination (CERD) condemned U.S. action towards the Western Shoshone Nation, whose territory largely overlaps with the American state of Nevada.[187] Despite international condemnation, including an adverse report from the Inter-American Commission on Human Rights in 2002,[188] the U.S. pushed forward with occupancy extinguishment for Yucca Mountain, its status as a sacred area for the Western Shoshone Nation notwithstanding.[189] In 2016, President Obama used a novel approach to protecting Indigenous land by declaring an area in Utah—sacred to the Navajo, Zuni, Hopi, Ute Indian, and Ute Mountain Ute tribes—a national monument, after receiving significant input from the tribes themselves.[190] While this solution worked temporarily, President Trump reversed much of Obama's efforts by shrinking the monument by eighty-five percent; litigation is ongoing as of December 2019.[191] Even if President Trump's actions are found

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185 *See id.* at 120–21.

186 Julie Ann Fischel, *The Western Shoshone Struggle: Opening Doors for Indigenous Rights*, 2 INTERCULTURAL HUM. RTS. L. REV. 41, 46 (2007).

187 *Id.*

188 *Id.* at 67.

189 *Id.* at 49.

190 *Bears Ears: America's First Truly Native American National Monument*, SOUTHERN UTAH WILDERNESS ALLIANCE, http://perma.cc/J29R-9H4L.

191 Rebecca Beitsch, *Trump's Plan for Development of Bears Ears Sparks Condemnation*, THE HILL (Jul. 26, 2019), http://perma.cc/E9PH-6TF3.

impermissible, the monument does not compensate the tribes for the fact that the original land was taken from the tribes.

Pipelines in the U.S. and Canada, too, have sparked recent controversy due to adverse impacts on Indigenous homelands. The Dakota Access Pipeline, intended to transport up to 570,000 barrels of crude oil per day from North Dakota to Illinois, was vehemently protested by the Standing Rock Sioux tribe.[192] The pipeline runs directly underneath the primary water source for the tribe and traverses a sacred burial ground, but does not touch formal reservation land.[193] Federal U.S. policy dictates that disputes of this nature be resolved through consultation with the tribes. Executive Order 13175 identifies some guidelines for tribal consultation before implementing federal plans; however, it created no substantive rights, no cause of action, and no uniform process for this consultation.[194] Executive Order 13007 likewise establishes that administrative agencies must "avoid adversely affecting the physical integrity of . . . sacred sites."[195] The Standing Rock Sioux, along with environmental nonprofit groups, unsuccessfully pursued litigation to stop the project.[196] President Trump ultimately approved the final permit for the project—a permit which President Obama had previously denied under intense pressure from environmental and Indigenous advocates—and the pipeline became operational in 2017.[197]

Similarly, the Keystone XL pipeline, which crosses the border between the U.S. and Canada, has come under fire from Indigenous groups. President Obama also withheld a permit for Keystone XL, only to be reversed by President Trump, again.[198] In 2017, representatives from the Indigenous Environmental Network announced that they would continue to camp along the proposed route of the pipeline in order to "assert [their] rights . . . to [their] water, [their] bodies, and [their] land."[199] Keystone, too, would not formally cross reservation land, leaving

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192 Justin Worland, *What to Know About the Dakota Access Pipelines Protests*, TIME (Oct. 26, 2016), http://perma.cc/NVE5-VDCF.

193 *Id.*

194 Walter H. Mengden IV, Comment, Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline, 41 AM. INDIAN L. REV. 441, 447 (2017).

195 *Id.* at 448.

196 Jeff Brady, *2 Years After Standing Rock Protests, Tension Remains but Business Booms*, NPR (Nov. 29, 2018), http://perma.cc/6GSD-PF2J.

197 Rebecca Hersher, *Army Approves Dakota Access Pipeline Route, Paving the Way for the Project's Completion*, NPR (Feb. 7, 2017), http://perma.cc/GR3C-GWC6.

198 Robinson Meyer, *What's Next for the Keystone XL Pipeline,* THE ATLANTIC (Mar. 27, 2017), http://perma.cc/P77Y-ZY9H.

199 *Id.*

Indigenous peoples without formal property rights to contest the pipeline.[200] Although avoiding reservation land, the pipeline still crosses culturally critical land. Nick Tilsen, a citizen of the Oglala Sioux Nation, notes that "[o]ur territory as Lakota, Dakota and Nakota people today is not defined by the colonial boundaries that have been created around us, but rather, where our people have existed in harmony with Mother Earth for generations."[201] The Trump administration continues to push ahead with these projects despite the public backlash and well-founded concerns of the Sioux.[202]

The U.S. is far from the only offender. In 1998, the Inter-American Court of Human Rights filed a complaint against Nicaragua for issuing logging permits inside the bounds of land belonging to the Awas Tingni people.[203] Logging and the destruction of Indigenous lands continues to be a live issue in South America. For example, wildfires are the latest flashpoint in a contentious relationship between Indigenous peoples and South American governments. In 2019, 75,000 wildfires demolished significant portions of the Amazonian rainforest, primarily in Brazil but also throughout South America more broadly.[204] In 2019, the Waorani people, who inhabit remote portions of the Ecuadorian Amazon, brought a case alleging that they were not adequately consulted and had not consented to the Ecuadorian government's plans to auction their land for oil and resource development.[205] A three-judge panel ruled in the Waorani's favor and prohibited the Ecuadorian government from auctioning the land.[206] Prior to the lawsuit, the Waorani and other Indigenous groups experienced threats and acts of violence by logging and oil proponents, who have an interest in the resource-rich territories. Similar lawsuits have also succeeded in Brazil, where a transfer of Indigenous land from the National Indigenous Affairs Agency to the agricultural agency was blocked.[207]

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200 Nick Tilsen, *South Dakota Can't Silence Our Protest Against the Keystone XL Pipeline*, ACLU (Apr. 17, 2019), http://perma.cc/DV7S-FZX8.

201 *Id.*

202 Kevin Orland, *Keystone XL Inches Forward With Work Planned for Next Month*, BLOOMBERG (Jan. 14, 2020), http://perma.cc/J454-AM3S.

203 S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. OF INT'L & COMP. L. 1, 2–3 (2002).

204 Jorge Barrera, *Amazon Wildfires as Part of 'Genocide' Facing Brazil's Indigenous Peoples, Advocate Says*, CBC NEWS (Aug. 23, 2019), http://perma.cc/BT6R-TK47.

205 Rachel Riederer, *An Uncommon Victory for an Indigenous Tribe in the Amazon*, THE NEW YORKER (May 15, 2019), http://perma.cc/N3WQ-5ZUA.

206 *Id.*

207 *Brazil Judge Blocks Transfer of Control of Indigenous Land*, AL JAZEERA (June 25, 2019), http://perma.cc/4KAT-C3C8.

Some activists on Twitter call the Amazonian wildfires, and Brazil's failure to prevent them or take appropriate remedial steps, an act of genocide against Brazil's Indigenous populations. A representative from the Baré Nation, from northwest Brazil, claims that the Brazilian government's support for increased mining and agricultural presences, including these groups' illegal logging activities, has resulted in both deforestation and violent attacks against, and forcible removal of, Indigenous populations.[208] In an open letter to the U.N., Indigenous groups in Bolivia and Brazil identified the ongoing wildfires as "physical and cultural genocide."[209] There has been documented deforestation on Indigenous lands in 2019, and there are allegations that many of the fires were set deliberately.[210]

As the above examples demonstrate, governments still are unable, or unwilling, to vindicate or respect the land rights, and the current remedies are insufficient. While the existing framework has failed to protect Indigenous peoples, the Genocide Convention may provide a path forward.

D. Land Takings as Cultural Erasure

While it is difficult to generalize across all Indigenous groups, most Indigenous peoples' cultural identities are deeply entwined with their relationship to their ancestral lands, as has been confirmed by numerous scholars and various international bodies.[211] Consequently, honoring Indigenous land rights is a critical step towards cultural preservation.[212] For example, as one Indigenous land rights group in Australia noted, noted "[t]he land is the basis for the creation stories, for religion, spirituality, art and culture . . . [and] for relationships between people and with earlier and future generations. . . . The loss of land, or damage to land, can cause immense hardship to indigenous peoples."[213] ILO No. 169 recognizes the important spiritual and cultural relationship between Indigenous peoples and their homelands, as well as the resulting responsibility that Indigenous peoples feel for these lands.[214] James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2011, likewise stated that Indigenous peoples' "ancestral

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208 Barrera, *supra* note 204.

209 Coordinator of Indigenous Organizations of the Amazon River Basin (COICA), *Open Letter of Indigenous Peoples: Declaration of Environmental and Humanitarian Emergency*, COICA (Aug. 22, 2019), http://perma.cc/DEZ5-P8ZA.

210 *Brazil: Risk of Bloodshed in the Amazon Unless Government Protects Indigenous Peoples from Illegal Land Seizures and Logging*, AMNESTY INT'L (May 7, 2019), http://perma.cc/93T3-3UYR.

211 SOWIP, *supra* note 160, at 53.

212 Wiessner, *supra* note 179, at 1145.

213 XANTHAKI, *supra* note 170, at 237.

214 ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. 1382 (June 27, 1989).

roots are embedded in the lands in which they live" or "in which they have lived."[215] The Inter-American Court, too, recognized that Indigenous land is essential to the "social, ancestral and spiritual essence" of these peoples, and further recognized that protecting these lands is important to cultural preservation.[216] Ancestral homelands provide critical infrastructure for transmission of Indigenous cultural knowledge from one generation to the next. The destruction of these lands, or the removal of groups from these traditional homelands, greatly inhibits the ability of Indigenous groups to preserve their cultures. Safeguarding Indigenous land is therefore equivalent to safeguarding Indigenous culture.

E. Indigenous Land Taking as a Potential Continuing Violation

There is a *jus cogens* norm to not commit—and further, to prevent—the international crime of genocide. The Inter-American Court's jurisprudence provides a good starting point for this type of analysis. While many genocidal acts against Indigenous peoples were committed prior to the 1948 adoption of the Genocide Convention, the prevailing view is that these actions were non-prosecutable under the reading of the Convention required by the Vienna Convention. While the Vienna Convention's tendency towards textualism has been discussed, there is another method to prosecute takings dating back to the 1948 Convention. This is important because many Indigenous groups have already suffered cultural severance from their lands due to past takings.[217] An extension of the doctrine of continuing violations, though, would put many of these takings inside the jurisdiction of international tribunals.

As discussed earlier, violations of Article 2(e) based on residential school programs would be prosecutable in the U.S., if not in Canada and Australia, as well. While both Canada and Australia have at least begun the process of reckoning with their past usage of residential schools,[218] none of these nations have engaged in any sort of systematic investigation and prosecution of those responsible for the residential school system. All of these nations, too, signed and ratified the Genocide Convention.[219] Therefore, following the framework that the

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215 Pasqualucci, *supra* note 182, at 56.

216 *Id.* at 57–58 (citing Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007)).

217 *See* Antkowiak, *supra* note 140, at 162.

218 *See, for example*, *Prime Minister Harper Offers Full Apology on Behalf of Canadians for the Indian Residential School System*, GOV'T OF CAN. (June 11, 2008), http://perma.cc/QQC7-7J4H; *see also Australian Apology to Native People Sets High Bar for Canada*, CBC NEWS (Feb. 14, 2008), http://perma.cc/9BLL-QNG2.

219 The U.S. ratified the Convention on Nov. 25, 1988, Canada ratified it on Sep. 3, 1952, and Australia ratified it on July 8, 1949. *See* U.N. Treaty Collection, *Convention on the Prevention and Punishment of the Crime of Genocide,* U.N., http://perma.cc/6YHV-7GXC.

Inter-American Court laid out in *Moiwana*, these violations would fall within the jurisdictional bounds of tribunals due to their continuing nature.

The same framework could be applied to Indigenous land takings, just as it was in *Moiwana*. Takings accompanied by physical violence—like the one at issue in *Moiwana* itself—could also be covered. These events would be prosecutable under the Genocide Convention even in the absence of a reading that includes cultural genocide within its terms. The ICJ has noted that violations of land rights, when in combination with a prohibited act, are relevant to determinations of genocide. Therefore, acts that are both physical and cultural—like the Paraguayan massacre of the Aché people, conducted in order to take their land and exploit it—would be prosecutable even if the acts occurred prior to the ratification date of the Genocide Convention. The Aché massacre occurred in the 1950s and 60s, before Paraguay ratified the Genocide Convention in 2001.[220]

Furthermore, to the extent that current land issues are related to ongoing failures to investigate or prosecute past genocidal actions—such as those implicated by residential schools—they, too, may be prosecutable under the doctrine of continuing violations. Application of the doctrine could render the ongoing issues in the Amazon, some of which allegedly involve violence, open to prosecution; likewise with pipeline disputes. Jurisdiction could possibly reach back as far as the original taking of the land from Indigenous populations. Consequently, any killing or forced removal or displacement could allow prosecutors to seek derivative recourse for Indigenous populations' land, while dissuading these types of takings and encouraging states to investigate and prosecute past harms to the extent possible.

V. CONCLUSION

This Comment proposes a textualist understanding of the Genocide Convention such that acts of cultural genocide are prosecutable under international law. This Comment endeavored to display the potential upsides of such an approach—protection of Indigenous land under the Convention's own terms.

The Genocide Convention is intended to protect minority groups who do not have the political clout or population size to protect themselves from destruction by a majoritarian group. Indigenous peoples have suffered immensely throughout history, from the colonial period's near-total destruction of Indigenous populations through disease and war, to the twentieth-century phenomenon of residential schooling programs, to current efforts to take and exploit historically Indigenous lands. Indigenous groups, despite winning recent

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220 Mark Munzel, *The Aché Indians: Genocide in Paraguay,* INT'L WORK GROUP FOR INDIGENOUS AFF., Jan. 1973, at 13–20.

victories with the UNDRIP, have little international redress when their rights are violated by majority groups. Using the Genocide Convention to prohibit land takings as a form of included cultural genocide, potentially through the doctrine of continuing violations, could provide the redress these populations deserve.

Furthermore, the application of the Genocide Convention to an act of cultural genocide would send a strong signal to all nations that destructive acts will no longer be tolerated by the international community. If Article 2(e) of the Convention had been utilized earlier in residential schooling programs' history, many Indigenous children would not have had their entire worldviews stripped away and erased. The inclusion of cultural genocide would signify concrete progress towards the recognition of minority rights and would be more than the lip-service these rights often receive. It is true that there are continuing acts of physical genocide across the globe, from Sudan to Myanmar. These acts, too, should be vigorously opposed and prosecuted by all signatories to the Genocide Convention. Including cultural genocide within the Convention would not take away or diminish the seriousness of these horrific crimes, but instead would provide an additional layer of protection, consistent with the text and the context of the Convention itself, to minority groups across the globe.