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The American University in Cairo

School of Global Affairs and Public Policy

**THE CASE FOR CULTURAL GENOCIDE:
THE FORMULATION OF A WORKING DEFINITION**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Tye Neasha Tavaras

May 2011

The American University in Cairo
School of Global Affairs and Public Policy
Department of Law

THE CASE FOR CULTURAL GENOCIDE:
THE FORMULATION OF A WORKING DEFINITION

Tye Neasha Tavaras

Supervised by Professor Thomas Skouteris

ABSTRACT

The Genocide Convention is hailed as a great protection mechanism and the one document that will prevent future destruction of groups. This convention however, has a variety of shortcomings that fail to protect groups outside of attempted physical destruction. An article criminalizing cultural genocide is a devastating omission and this paper seeks to create a working legal definition to be used a framework for creating an article or convention to provide such criminalization. Beginning with an analysis of the drafting of the Genocide Convention with particular attention paid to the importance of culture in the foundation of the convention as well as the debate surrounding the inclusion of cultural genocide in the final draft. The arguments used to prevent the inclusion of cultural genocide into the final draft provide insight into the fears of states and also provided the foundation of the argument for the necessity of the criminalization of cultural genocide. The second section analyzes the intersection of culture, law, and genocide. Defining culture as an abstraction is difficult and has to be broken down into components of culture, which can provide clear legal standards for cultural rights protection and the criminalization of cultural genocide. An analysis of current cultural protection mechanisms provides an understanding of the dominant viewpoint of culture in the international community. Furthermore, this viewpoint provided a majority accepted definition of cultural components requiring protection that was used to frame a definition of cultural genocide. The final section explicates the necessity of a definition of cultural genocide. The remnants of cultural genocide in the Genocide Convention seen in the prohibition of the forced transfer of children, demonstrates the importance of preventing loses of culture. Furthermore, the definition of cultural genocide is framed by the existing definition of genocide, and uses the combination *actus reus* and *dolus specialis* in its determination. Similar to genocide, the final definition of cultural genocide requires the intent to destroy a group as the distinguishing factor between genocidal acts and human rights violations.

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I. Genocide and Law

This chapter analyzes the history and drafting of the Genocide Convention; specifically addressing the formulation of the definition of genocide and the debate surrounding the inclusion of cultural genocide. Furthermore, this section addresses the controversy surrounding the inclusion of cultural genocide and its implications on human rights protections.

The necessity for a definition of genocide and the prosecution of the crime stems from the individual's right to life, which was then expanded to a group's right to exist.¹ The nature of this crime is so extreme and so grave that it required a law and a punishment post Nuremberg,

The origins of the convention show that it was the intention of the United Nations to condemn and punish genocide as a 'crime under international law' involving the denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to the moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.²

The Convention was not the first document that stated that Genocide was a crime; it was preceded by a resolution from the General Assembly of the United Nations.³ However, the Genocide Convention was pivotal in defining and narrowing the concept. The term genocide comes from the work of Raphael Lemkin which was used as a basis for the formulation of the definition of genocide during the drafting of the Genocide Convention.⁴ Lemkin had a multifaceted approach to genocide and sought to express the various means of genocide in eight different ways: political, social, cultural, economic,

¹WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 7 (2d ed. 2009). ("The prohibition of genocide is closely related to the right to life, one of the fundamental human rights as defined in international declarations and conventions.") [*hereinafter* SCHABAS], *See also, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] *ICJ Reports* 16,p. 23. Quoted in *Legality of the Threat or use of Nuclear Weapons (Advisory Opinion)*, [1996] *ICJ Reports* 226, para. 31.

² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] *ICJ Reports* 16,p. 23. Quoted in *Legality of the Threat or use of Nuclear Weapons (Advisory Opinion)*, [1996] *ICJ Reports* 226, para. 31.

³ SCHABAS, *supra* note 1, at 5.

⁴RAPHAEL LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace (1944), *See Generally* WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2d ed. 2009).

biological, physical, religious, and moral.⁵ Analyzing the general definition created by Lemkin, his definition is incredibly broad, considering a plethora of acts to be genocide including, ". . . nonlethal acts that undermined the liberty, dignity, and personal security of member of a group . . . [as long as] they contributed to weakening the viability of the group."⁶ Furthermore, Lemkin specified that genocide should be criminalized regardless of whether it was committed during peace or war.⁷ The broadness of Lemkin's definition allowed the majority of groups to be protected from all means of destruction, even non-violent ones. The spirit of Lemkin's work was supposed to be present in the finalized convention, however, state interests and negotiations led to a stricter definition.

Prior to the creation of the Genocide Convention, The General Assembly draft resolution was adopted unanimously on December 11, 1946 and stated that genocide was a crime and requested the Economic and Social Council (ECOSOC) prepare a convention draft.⁸ The General Assembly resolution gave a general definition of genocide and it is from this resolution that sparked the creation of the draft a convention.⁹ The General Assembly resolution labeled genocide as an international crime and defined it generally as the "denial of the right of existence of entire human groups."¹⁰ Furthermore, the resolution states that the destruction of a group, in whole or in part, "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."¹¹ The text of this particular resolution states that the focus should be on

⁵ MATTHEW LIPPMAN, THE DRAFTING OF THE 1948 CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 3 B.U. INT'L L. J. 1,2 (1985) ("Political: The destruction of local democratic institutions and the imposition of German rule; Social: The destruction of indigenous social patterns and the imposition of German law, language, culture, and the deportation of intellectuals; Cultural: the destruction of national libraries, museums, galleries and educational institutions and the introduction and propagation of German culture; Economic: The impoverishment of the local, non-German population and the transfer of economic resources to the local, German population; Biological: The limitation of the birthrate of the local, non-German population in contrast to the encouragement of births among the local, German population; Physical: the debilitation and annihilation of the national population; Religious: the destruction of local religious organizations, shrines and monuments; and Moral: the encouragement of moral debasement and depravity in occupied territories.").

⁶WARD CHURCHILL, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT'L L. 3, 11 (2000).

⁷ Sonali B. Shah, Note, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L REV. 351, 354 (2002).

⁸ U.N. GAOR, Resolution 96(I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946).

⁹SCHABAS, *supra* note 1, at 53.

¹⁰ U.N. GAOR, Resolution 96(I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946).

¹¹*Id.*

the intent to destroy the group in its entirety; this intent can be found in the phrase “denial of the right of existence of entire human groups”.¹² The text focusing on entire groups and their contributions to society demonstrates that genocide has a twofold impact; first, the crime is heinous due to the loss of life and secondly, the crime is grave due to the loss of cultural contributions. The portion of the resolution that focuses on the cultural contributions has often been used as the basis for the argument that the General Assembly acknowledges cultural genocide.¹³ Furthermore, Resolution 96 (I) states that these crimes occur when the following groups have been destroyed: “racial, religious, political and other groups”.¹⁴ It is evident from final text, which does not include political or other groups, that the spirit of this particular resolution has had limited impact upon the final definition of genocide.

A. The Drafting of the Convention

The General Assembly resolution 96(I) recommended that the Economic and Social Council (ECOSOC) to study and draft a convention. After research, in 1947, ECOSOC turned over the drafting to the Secretary-General, whose draft stated that convention served "to prevent the destruction of racial, national, linguistic, religious or political groups of human beings."¹⁵ The Secretary-General hired Raphael Lemkin as a consultant for the creation of the first draft of the Convention.¹⁶ The Secretariat Draft mentioned three types of genocide; physical, biological, and cultural, which directly reflected Lemkin's work.¹⁷ After reviewing the draft and receiving comments, the General Assembly passed Resolution 180 (II) which gave the order to ECOSOC to begin drafting the text of the convention.¹⁸ Lemkin's work on the draft was then submitted to an

¹² U.N. GAOR, Resolution 96 (I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946).

¹³ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Fifth Meeting: Lake Success, New York Tuesday, 8 April 1948 at 2pm*, U.N. Doc. E/AC.25/SR.5, reprinted in HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 726 (2008) (the comments of Mr. Perez-Perozo from Venezuela used the U.N.G.A. Resolution 96 (I) to form the basis of his arguments that protection from cultural genocide was necessary as it resulted in the loss of great contributions)

¹⁴ U.N. GAOR, Resolution 96 (I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946).

¹⁵ Secretariat Draft of Genocide Convention, UN Doc. E/447, 17.

¹⁶ Ward Churchill, *supra* note 6, at 13.

¹⁷ SCHABAS, *supra* note 1, at 61.

¹⁸ SCHABAS, *supra* note 1, at 61.

ad hoc committee to rework the draft based on state concerns in 1948.¹⁹ Despite the passing of the resolution, some states were still opposed not only to cultural genocide, but to the idea of a Genocide Convention in its entirety. States were very particular about the contents of the Convention because it would put their actions under intense scrutiny and possibly make them accountable for genocide.²⁰ After the draft went to the ad hoc committee, the ideas espoused in General Assembly Resolution 96(I) and the work of Raphael Lemkin became less important than state interests.

The drafting of the Convention reveals the political motivations of states and their fear of potentially being held accountable for their actions after the Convention entered into force. In the drafting meetings it was proposed that the Committee use three forms of genocide; physical, biological, and cultural.²¹ The original definition included all of these aspects of genocide and had a detailed list of acts that constituted genocide including, but not limited to: segregation of the sexes, obstacles to marriage, forced transfer of children, forced exile, prohibiting the use of national language, and destruction of historic and religious monuments.²² The concept of cultural genocide was originally accepted as part and parcel of the Genocide Convention. During the beginning of the drafting of the Convention, the idea of destroying a group was not restricted to physical means. Despite US objections to the inclusion of cultural genocide, Article III, which was the intended article concerned with cultural genocide, was accepted into the draft by a six to one vote.²³ The later vote against the inclusion of cultural genocide is not surprising

¹⁹ Ward Churchill, *supra* note 16.

²⁰ JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 102 (2008) (“ . . . if political groups were included in the convention, it would call into question Stalin’s politically motivated purges of the *kulaks* (the petty bourgeois) during the forced collectivizations of agriculture in the late 1920’s and early 1930’s.”).

²¹ SCHABAS, *supra* note 18, See also Florian Jessberger, *The Definitions And The Elements of The Crime of Genocide*, in THE UN GENOCIDE CONVENTION: A COMMENTARY, (Paola Gaeta ed. 2009).

²² U.N. GA, Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 124 (2008).

²³ JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 123 (2008) (“ Article 3 of the proposed convention defined ‘cultural’ genocide as destroying the language, religion or culture of groups by prohibiting the use of a language in daily intercourse or in schools or publications and demolishing or preventing the use of schools, libraries, historical monuments or places of worship belonging to a particular group. . . . Despite the vehement opposition of the United States to the inclusion of ‘cultural’ genocide in the convention, this article was adopted by six votes to one.”).

due to the historical context of the creation of the Genocide Convention, which explains why states were hesitant to support or even adamantly against certain aspects of the definition. During the drafting of the convention, the USSR had already eliminated opposition through their political purges and thusly they posited that the inclusion of political groups would expand the definition of genocide too greatly.²⁴

The cultural genocide amendment was one of the most controversial during the drafting. It is important to note the historical context of the states involved in creating the draft in order to highlight the underlying reasons as to why they would be opposed to inclusion of cultural genocide. During the drafting of the Genocide Convention, cultural genocide was originally included as a provision, as based on the work of Lemkin.²⁵ The Secretariats draft originally defined cultural genocide as,

. . . the destruction of the specific character of the targeted group(s) through destruction or expropriation of its means of economic perpetuation; prohibition or curtailment of its language; suppression of its religious, social or political practices; destruction or denial of access to its religious or other sites, shrines or institutions; destruction or denial of use and access to objects of sacred or sociocultural significance, forced dislocation; expulsion or dispersal of its members; forced transfer or remove of its children, or any other means.²⁶

This definition of cultural genocide is rather expansive and thusly many states were adamantly opposed including the United States, for fear of being prosecuted for genocidal acts they may have committed.²⁷ Once the drafting of the convention was passed to ECOSOC, the debate continued as many voiced their disapproval of the inclusion of cultural genocide. ECOSOC defined cultural genocide as destruction by brutal means [sic] the specific characteristics of a group.”²⁸ The reason for including

²⁴ WARD CHURCHILL, *supra* note 6, at 14.

²⁵ SCHABAS, *supra* note 18.

²⁶ WARD CHURCHILL, *supra* note 6, at 3.

²⁷ JOHN COOPER, *supra* note 23.

²⁸ ECOSOC, *Draft Convent on The Crime of Genocide: Comments on the Draft Convention* 234.3, U.N.Doc. E/447 (26 June 1947), *reprinted in Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 234-236 (2008).

cultural genocide was that cultural diversity was essential and if a group lost its distinguishing characteristics, then it failed to exist as a distinct group.²⁹

B. Debating the inclusion of Cultural Genocide

Genocide is an exceptional crime, one that is particularly horrifying and barbaric.³⁰ The nature of the crime of genocide requires international criminalization as it impacts not only the specific group harmed but humanity as a whole.³¹ Expanding the definition of genocide was quite controversial as it was argued that genocide was such a special crime that it would decrease the impact if every act were considered genocide.³² This is quite understandable given the historical context of the creation of the convention and the need to prevent future occurrences of such a grave act. The Genocide Convention is a huge step forward in the protection of individual and group existence; however, it is still insufficient in that it leaves a huge gap in protecting group integrity. In regards to cultural genocide, the only remnant of this idea is the criminalization of the forced transfer of children.³³ The destruction of a distinct group is harmful to humanity as a whole and this destruction can be achieved through physical and non-physical means. The use of non-physical means was understood and considered in the drafting of the Convention through the initial inclusion of an article on cultural genocide.

The potential inclusion of cultural genocide caused numerous debates during the drafting. The arguments posited by many states often appear hypocritical and unfounded,

²⁹ *Id* (“ Such a group’s right to existence was justified not only from the moral point of view, but also from the point of view of the value of the contribution made by such a group to civilization generally. If the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations”).

³⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] *I.C.J. Reports* 16, p.23, found in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] *ICJ Reports* 229, para. 31.

³¹ David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 *CHI. J. INT’L L.* 303,309 (2006-2007), see also Nina H.B. Jorgensen, *The Definition of Genocide: Joining the dots in the light of recent practice*, 1 *INT’L CRIM. L. REV.* 285,287 (2001).

³² ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Fifth Meeting: Lake Success, New York Tuesday, 8 April 1948 at 2pm*, U.N. Doc. E/AC.25/SR.5, reprinted in HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 727 (2008).

³³ William H. Schabas, *Genocide In International Law*, 176 (Cambridge Univ. Press UK 2000) (2000).

especially when combined with their support for human rights protections.³⁴ Although the atrocities of the Holocaust guided the creation of the definition of genocide, political interests also played a role in shaping the outcome of the drafting. States were afraid that any acts that they perpetrated within their own territory could be a crime under the new convention.³⁵ The dissent of some states was hypocritical as they supported the criminalization of physical genocide since they had recently committed atrocities,

Such statements contained no small element of hypocrisy coming as they did from a country [America] which had barely completed a century-long and continent-wide serious of unabashedly exterminationist campaigns against American Indian peoples- being at the time in the midst of a concerted drive to eradicate their cultural residues through a formal policy of compulsory assimilation- was still wrapping up a similarly annihilatory operation in the Philippines which had resulted in the slaughter of as many as a million native "Moros," and was busily emulsifying the previously vibrant indigenous society of its newly-acquired Hawaiian territory.³⁶

While many different fears were voiced, a common fear was that cultural genocide made the Convention too broad, states would refuse to ratify it, destroying the tool that nations created to protect minority groups.³⁷ The idea was to make a minimally invasive convention that would have universal appeal so as to ensure ratification; the work of the drafting committee would be useless if it failed to produce a document that would be binding on states. Furthermore, a broad definition of genocide would go beyond the parameters of U.N.G.A. Resolution 96(I) and a stricter definition would be easier to agree on and would make the Convention more effective.³⁸ The blurring of the legal brightline

³⁴ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Third Meeting: Lake Success, New York Tuesday, 6 April 1948, at 2pm*, U.N. Doc. E/AC.25/SR.3 (13 April 1948), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 699 (2008).

³⁵ Sonali B. Shah, *supra* note 7, at 355 ("The United States and the Soviet Union were opposed to provisions which each anticipated might be used to criticize their own conduct. The Genocide Convention was drafted at a time when Stalin and his regime had already begun their purges targeting political and social groups. This, the political forces in effect at the time of the drafting of the Convention contributed to the formulation of a conservative definition of genocide.").

³⁶ Ward Churchill, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT'L. L. 3, 9 (2000).

³⁷ JOHN COOPER, *supra* note 23.

³⁸ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Fifth Meeting: Lake Success, New York Tuesday, 8 April 1948 at 2pm*, U.N. Doc. E/AC.25/SR.5, reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 727 (2008) ("The CHAIRMAN warned the Committee against an excessively wide extension of the concept of genocide, which might possibly exceed the framework traced by the General Assembly. The fact which initiated the General

for genocide would mean an inadequate criminalization of the crime; therefore, it was argued that a strict definition was required.³⁹ This particular argument is interesting as it rests on the assumption that legal texts are black and white and have no room for interpretation. The request for a clearer brightline is understandable insofar as the work is done to create a clearer legal text that provides better distinction between what is and is not considered genocide. Not only that, but the text that was created as the final definition of genocide is also less than clear and has been interpreted in different ways, for example the International Criminal for Rwanda has expanded the definition of genocide to include rape.⁴⁰ The foundation of the argument that cultural genocide laws were too vague essentially masked the fear that those particular laws could be interpreted in such a way that holds powerful states accountable for their wrongdoings. Furthermore, when acts are compared to the Holocaust in terms of gravity, it is unclear as to what the threshold would be to reach a Holocaust like crime. Furthermore, the easiest way to compare suspected genocidal acts to the Holocaust would be the amount of destruction, a body count, which is not evident in the definition of genocide itself or in the *travaux preparatoires*. This would also defeat the purpose of the Genocide Convention in and of itself as the Convention seeks to prevent another Holocaust like crime. Requiring a suspected genocide to be similar to the Holocaust based on any arbitrary qualities fails to prevent a Holocaust like act. It is illogical to attempt to prevent an act through a law

Assembly resolution had been to the systematic massacre of Jews by the Nazi authorities during the course of the last year. Were the Committee to attempt to cover too wide a field in the preparation of a draft convention for example, in attempting to define cultural genocide- however reprehensible that crime might be- it might well run the risk of finding that some States would refuse to ratify the convention. . . .”

³⁹ Peter Quayle, *Unimaginable Evil: The Legislative Limitations of the Genocide Convention*, 5 INT’L CRIM. L. REV. 364,365 (2005) (“Lippman notes the contemporaneous warning that “strict definition ‘must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely. . . .’ . . . international law must be ‘built on a rational and logical basis . . . each idea must be properly defined and not overlap each other.’”).

⁴⁰ Frank Chalk, ‘Genocide in the 20th Century’ *Definitions of Genocide and Their Implications for Prediction and Prevention*, 4 HOLOCAUST & GENOCIDE STUD. 149,151 (1989), see also UNGA, *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide . . .*, 7 Sept. 1999, A/54/315 S/1999/943 available at <http://69.94.11.53/ENGLISH/annualreports/a54/9925571e.htm> (“The Trial Chamber held that rape, which it defined as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive”, and sexual assault constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such. It found that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.”).

when that law requires that the suspect act be similar to that which you are attempting to prevent.

The second argument that appeared often was the cultural genocide was not “as bad” as physical genocide. The acts of physical genocide are barbarous and therefore needed to be denounced.⁴¹ While the idea of mass murder is difficult to imagine and cope with, it does not mean that murder should be the only crime made illegal. The argument is illogical on both the international and the national level. When looking to international law, there are numerous crimes that are prosecuted that do not involve murder. For example, War Crimes consisting of violations of humanitarian law include not only unnecessary killing, but also non murderous crimes such as pillaging and unnecessary destruction of property.⁴² An examination of national law further undermines this argument as various crimes ranging from murder to petty theft are punished under domestic laws.⁴³ The idea that only grave mass murder should be made illegal is not only unsound but defeats the entire purpose of human rights protections which aims safeguard all rights of people, not simply the right to life.⁴⁴ The failure of the international community to protect cultural rights and cultural existence is not only disappointing but rather hypocritical when examining the other rights that have been enumerated and supported by various nations. An idealist view of rights protection and the criminalization process would state that the most heinous acts are criminalized and all people’s rights are

⁴¹ United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General* at § 5 ¶ 7-8, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 372 (2008).

⁴² See *Generally Geneva Conventions*, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135 available at <http://www.icrc.org/ihl.nsf/TOPICS?OpenView>.

⁴³ WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 8 (2d ed. 2009) (“ States ensure the protection of the right to live of individuals within their jurisdiction by such measures as the prohibition of murder in criminal law.”).

⁴⁴ See *Generally Universal Declaration of Human Rights*, G.A. res. 217A(III), U.N. Doc A/810 at 71 (1948) [*hereinafter* UDHR]; *International Covenant on Civil and Political Rights*, G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc.A/6316(1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [*hereinafter* ICCPR]; *International Covenant on Economic, Social, and Cultural Rights*, G.A. res. 2200A(XXI), 21 U.N. GAOR Supp.(No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (*hereinafter* ICESCR) (this declaration expounds the need to protect all rights ranging from the right to life to the right to participate in cultural life. The focus of this declaration is not simply on the right to life. This can also be demonstrated in the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, which particularly espouse the rights of people beyond the right the life.).

protected. In reality, the Genocide Convention was drafted by states which focus on self interest and the result is not guaranteed to protect the rights of all individuals. This is where the debate about the state of Genocide Convention is absolutely necessary insofar as it allows the pin pointing of failures and creates a space for a dialogue which can direct the changes necessary to make the convention more effective.

Although the reasoning during the drafting debates is more nuanced and complex than political interest, states were also influenced by their own self interest. Due to the evidence of self interest, their commitment to various human rights protections is illogical when analyzed against states refusal to include cultural genocide in the Genocide Convention. The rights enumerated in various international treaties and declarations including the Universal Declaration of Human Rights, the ICCPR, and ICESCR show a commitment by States to the protection of rights beyond the right to life.⁴⁵ In order for these rights to be protected, it takes not only a declaration asking states to protect those rights, but also a means of punishing those who violate those essential rights and laws as can be seen in prosecutions for genocide, crimes against humanity, and war crimes. It is evident by the international prosecution of these crimes that a simple declaration that asks states to protect rights is not sufficient to ensure their protection.

It was also argued that cultural genocide dealt with human rights and should therefore be handled in minority rights treaties or declarations. A major proponent of this argument was the United States, who stated that due to the gravity of creating a new crime of genocide, only barbarous acts should be considered and those acts considered to be cultural genocide should be dealt with in human rights treaties.⁴⁶ France also, agreed

⁴⁵ Universal Declaration of Human Rights, G.A. res. 217A(III), U.N. Doc A/810 at 71 (1948)(*hereinafter* UDHR), *see also* International Covenant on Civil and Political Rights, G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc.A/6316(1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A(XXI), 21 U.N. GAOR Supp.(No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (in the UDHR look generally to the following articles: 13, 16, 18, 19, 26, and 27. These articles spell out the rights to freedom of movement, marriage, freedom of thought and religion, freedom of opinion and expression, and the rights to education and the freedom to participate in cultural life respectively).

⁴⁶ United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General* at § 5 ¶ 7-8, U.N. Doc. A/401 (27 September 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 372 (2008), *See Also* Barry Sautman, *Cultural*

with the United States that cultural genocide should be included in minority protection and posited that including “cultural genocide invites the risk of political interference in the domestic affairs of States.”⁴⁷ Agreeing with the United States and France, Poland and India stated that cultural genocide is a minority rights issue and that its inclusion in the convention would decrease its efficacy.⁴⁸ The major pitfall of this argument is that it fails to take into account the importance of a means of punishment to ensure compliance with human rights doctrine.

Although many states wanted to include cultural genocide, other states saw it as a sign that they could be open to prosecution because of their assimilation policies.⁴⁹ New Zealand even argued that the United Nations could be charged with genocide because the Trusteeship Council stated that “the now existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants.”⁵⁰ The inclusion of the cultural genocide article would greatly inhibit state practices as they often valued assimilation in order to create a cohesive nation. Venezuela argued that states may want to use an official language in the schools and that might be considered cultural genocide

Genocide in International Context, in CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES 1,5, (Barry Sautman ed., Palgrave Macmillan 2006).

⁴⁷ United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General*, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 383 (2008) (“Mr. Rudzinski (Poland). . . said that cultural genocide was closely related to the problem of the protection of minorities. His country would willingly sign and ratify any convention aimed at the protection of minority groups, but this idea should not be enclosed in a proper convention on genocide. That was essentially a political question which would give rise to great difficulties and as its practical result, it could decrease considerably the number of adherences to the proposed Convention. The idea of cultural genocide would therefore be more suitably placed either in a convention on minorities or human rights or even in a separate convention.”), See Also UNGA, *Sixth Committee to the Genocide Convention: Sixty Fourth Meeting* October 1 1948, U.N. Doc. A/C.6/SR.64, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1304 (2008). See Also UNGA, *Sixth Committee to the Genocide Convention: Sixty Fifth Meeting* 2 October 1948, U.N. Doc. A/C.6/SR.65, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1321 (2008).

⁴⁸ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Third Meeting: Lake Success, New York Tuesday, 6 April 1948, at 2pm*, U.N. Doc. E/AC.25/SR.3 (13 April 1948), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 699 (2008).

⁴⁹ SCHABAS, *supra* note 1, at 212 (“It was clear that the issue had hit a nerve with several countries who were conscious of problems with their own policies towards minority groups, specifically indigenous people and immigrants. Sweden noted that the fact that it had converted Lapps to Christianity might law it open to accusations of cultural genocide).

⁵⁰ U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 83rd mtg. at 195, U.N. Doc. A/C.6/SR.83 (Reid, New Zealand) (Referring to UN Doc. A/603, concerning Tanganyika).

unless there was a stricter definition.⁵¹ The representative from Brazil furthered the arguments against cultural genocide provisions by arguing that new states should not protect minority groups that may oppose assimilation efforts.⁵² The representative of Egypt preferred a narrower definition of genocide as he “. . . expressed the fear that the concept of cultural genocide might hamper a reasonable policy of assimilation which no State aiming at national unity could be expected to renounce.”⁵³ The most significant reason that states’ refused to include an article on cultural genocide was to protect themselves from potential prosecution; knowing that some of their policies constituted cultural genocide.⁵⁴ All of these states exhibited a fear that their assimilationist practices would put them at risk for prosecution for cultural genocide. The states, however, did not take into account that the purpose of creating definitions of physical and cultural genocide was to prevent the destruction of a group.⁵⁵ Furthermore, the *dolus specialis* component of genocide creates a threshold so that not every possible state or individual action can be labeled a genocidal act.⁵⁶

Even when it was posited that cultural genocide should be in a separate convention condemning the crime, the proposal was never considered seriously; it is

⁵¹ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Fourteenth Meeting: Lake Success, New York Tuesday, 21 April 1948 at 2: 15 pm*, U.N. Doc. E/AC.25/SR.14, reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 887 (2008).

⁵² U.N.G.A., *Sixth Committee to the Genocide Convention: Sixty Third Meeting* 30 September 1948, U.N. Doc. A/C.6/SR.63, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1292 (2008).

⁵³ UNGA, *Sixth Committee to the Genocide Convention: Sixty Third Meeting* 30 September 1948, U.N. Doc. A/C.6/SR.63, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1293 (2008).

⁵⁴ WARD CHURCHILL, *supra* note 6, at 9 (“Such statements contained no small element of hypocrisy coming as they did from a country [America] which had barely completed a century-long and continent-wide series of unabashedly exterminationist campaigns against American Indian peoples- being at the time in the midst of a concerted drive to eradicate their cultural residues through a formal policy of compulsory assimilation- was still wrapping up a similarly annihilatory operation in the Philippines which had resulted in the slaughter of as many as a million native “Moros,” and was busily emulsifying the previously vibrant indigenous society of its newly-acquired Hawaiian territory.)

⁵⁵ ECOSOC, *Draft Convent on The Crime of Genocide: Comments on the Draft Convention* 234.3, U.N.Doc. E/447 (26 June 1947), reprinted in *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 234-236 (2008).

⁵⁶ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187, found in WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 261 (2d ed. 2009). See also *Prosecutor v. Akayesu* (Case No. ICTR -96-4-T), Judgment, 2 September 1998, paras. 497 and 516.

evident that states did not consider cultural genocide important enough to include in the Convention or even in a separate convention.⁵⁷ Furthermore, states suggested different scenarios in which minor actions taken by governments could be seen as cultural genocide without addressing the seriousness of cultural genocide and the requirement of the intent to destroy a group. States did not analyze the act of cultural genocide parallel to the physical genocide in terms of the *dolus specialis*, special intent.⁵⁸ Both cultural genocide and physical genocide are characterized by that special intent which means that in order for an act to be considered genocide outside of the specific acts committed, it must also be proven that there is an ‘intent to destroy [a group], in whole or in part . . .’.⁵⁹

C. The Genocide Convention

After much debate, the article on cultural genocide was not included in the Genocide Convention by a six to one vote.⁶⁰ Despite the defeat of the article on cultural genocide, this did not erase remnants of cultural genocide from the convention. The offensive act of forcible transfer of children was considered cultural genocide and, "The provision is enigmatic because the drafters clearly rejected the concept of cultural genocide."⁶¹ The inclusion of the forcible transfer children is a problematic component of the Genocide Convention because it does not indicate any physical harm, the damage done is cultural.⁶² Even if the possibility exists that the group of children can be characterized based on the other groups protected in the Convention, the damage done is

⁵⁷ UNGA, *Sixth Committee to the Genocide Convention: Sixty Sixth Meeting* 4 October 1948, U.N. Doc. A/C.6/SR.66, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1324 (2008) (“Mr. Abdoh (Iran) . . . To include cultural genocide would be to go far beyond the aims of the convention. It was certainly necessary to protect the spiritual and cultural activities of an ethnic group, but the Iranian delegation advocated the adoption of a supplementary convention subject.”).

⁵⁸ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187, found in WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 261 (2d ed. 2009). See also *Prosecutor v. Akayesu* (Case No. ICTR -96-4-T), Judgment, 2 September 1998, paras. 497 and 516.

⁵⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (hereinafter Genocide Convention).

⁶⁰ JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 123 (2008).

⁶¹ SCHABAS, *supra* note 1 at 201.

⁶² SCHABAS, *supra* note 1, at 206 (“Presumably, when children are transferred from one group to another, their cultural identity may be lost. They will be raised within another group, speaking its language, participating in its culture, and practicing its religion”).

not necessarily physical, which directly contradicts the argument states made stressing the importance of physical damage to genocide.⁶³ Furthermore, in order to be considered genocide, the forced transfer of the children must be accompanied by the intent to destroy a particular group; this particular group may differ from the perpetrators based on ethnicity, religion, race, or nationality, which are all components of defining a distinct cultural group.⁶⁴

With cultural genocide excluded from the final draft, the negotiations resulted in the following text that defines genocide:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (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.⁶⁵

The text of the convention protects four groups: national, ethnical, racial, and religious. The definition of genocide poses some major problems when it comes to protecting minorities and indigenous groups around the world. There are certain aspects of the convention that are antiquated and simply missing, which allows perpetrators to get away with massive violations. The first problem is in the list of protected groups. The convention protects racial groups, although it has currently been accepted that 'race' does

⁶³ UNGA, *Sixth Committee to the Genocide Convention: Eighty Second Meeting* 23 October 1948, U.N. Doc. A/C.6/SR.82, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1495 (2008), see also WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 203 (2d ed. 2009).

⁶⁴ Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention Article 2(E)*, HARV. INT'L L.J. 61,93(2001), see also *Summary record of the Fourteenth Meeting of the Ad Hoc Committee on Genocide*, U.N. ESCOR, 6th Sess., 14th mtg., at 13, U.N. Doc. E/AC.25/Sr.14 91948; James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Law*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 64,67 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010); Sally Holt, *Family, Private Life, and Cultural Rights*, in *UNIVERSAL MINORITY RIGHTS* 203,204 (Marc Weller ed., 2007).

⁶⁵ Genocide Convention, *supra* note 59, at Art. II.

not exist as a scientific concept.⁶⁶ The concept of race at the time of the drafting of the convention was broad and incorporated ethnicity as well, however in recent years, scientists and law makers have moved away from using race as a term to distinguish between groups.⁶⁷ Another problem is that the convention leaves out cultural groups, which means that groups of people with shared values, languages, and customs which may need an increased protection, particularly in Latin America and Africa.⁶⁸ Not only are the protected groups limited, but the entire definition is limited in scope which means that there are a number of situations that seem to be genocide but do not fit the definition provided.⁶⁹ The fact that certain groups are not protected based on distinctions such as disability, sexual orientation, political orientation, or gender, would allow their destruction to potentially go unpunished to the fullest extent, "[i]t would be reprehensible if the world would not condemn massive slaughter of members of a group . . . simply because of a preordained idea of what types of groups are qualified for coverage under the [Genocide] Convention."⁷⁰

The Genocide Convention also fails to criminalize the destruction of all possible groups by leaving out political and social groups. This prevents the condemnation of all acts that had the intent to destroy a group, for example the removal of Soviet civilians and the murder of homosexuals during the holocaust.⁷¹ The fact that so many groups are left outside of the scope of the convention means that they will have to turn to their respective national courts or tribunals for justice. However the crimes would not have the stigma of genocide attached to it.⁷² The problem with seeking justice at a national level is that if the genocidal plan is widespread, systematic and being perpetrated by the

⁶⁶Antonio Cassese, *Taking Stock Of The Genocide Convention and Looking Ahead* 534, in THE UN GENOCIDE CONVENTION: A COMMENTARY, (Paola Gaeta ed. 2009), *See generally* Janet E. Helms & Regine M. Talleyrand, *Race is not ethnicity*, 52(11) *American Psychologist* 1246 (Nov. 1997).

⁶⁷ WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 142-143 (2d ed. 2009).

⁶⁸ Antonio Cassese, *supra* note 66.

⁶⁹ Freda Kabatsi, *Defining or Diverting Genocide: changing the comportment of genocide*, 5 *INT'L CRIM. L. REV.* 387, 391 (2005).

⁷⁰ THOMAS W. SIMON, *Defining Genocide*, 15 *WIS. INT'L L.J.* 243, 247 (1996-1997).

⁷¹ Frank Chalk, *Definitions of Genocide and Their Implications for Prediction and Prevention*, 4 *Holocaust & Genocide Stud.* 149, 151 (1989).

⁷² Sonali B. Shah, Note, *The oversight of the last great international institution of the twentieth century: the international criminal court's definition of genocide*, 16 *EMORY INT'L. REV.* 351, 380 (2002).

government, then no legal recourse exists on a local level. These problems demonstrate the necessity for major changes within the Genocide Convention and the interpretation of genocide to ensure protection for groups. Furthermore, the lack of an inclusive definition of genocide means that more time is spent deciding whether something is technically genocide in instances where situations are dire.⁷³ This means that courts are unable to make a decision about the genocidal nature of a situation, which can slow state action,

The limited legal meaning of genocide has been stretched by some courts to better fit its rhetorical use. The consequence is a complex and uncertain law-Darfur burned and bled whilst a legal determination of genocide was awaited. The Genocide Convention describes with sufficient precision a single historical event, an unimaginable, unrepeatable evil. But, in its modern application, the Genocide Convention kills more people than it protects or prosecutes.⁷⁴

The Genocide Convention paralyzes the international community and allows individuals to go unpunished and allows crimes to continue which is antithetical to the entire idea of a Genocide Convention. The uncertainty of genocide law prevents the international community from labeling acts genocidal which limits the ability of the international community to hold states and specific individuals accountable for their actions. The lack of cohesive case law defining this crime and the fact that it leaves so many groups unprotected requires a revamping of the convention and of the definition of genocide in its entirety. The preceding reasons demonstrate the need to change the genocide convention in many aspects. The Convention is currently not sufficient to adequately protect many people from the currently defined genocidal acts as well as acts categorized as cultural genocide.

⁷³ Frank Chalk, *'Genocide in the 20th Century' Definitions of Genocide and Their Implications for Prediction and Prevention*, 4 HOLOCAUST & GENOCIDE STUD. 149,151 (1989)(“ As David Hawk has noted, ‘The absence of “political groups” from the coverage of the Genocide Convention has unfortunately had the effect of diverting discussion from what to do to deter or remedy a concrete situation of mass killings into a debilitating, confusing debate over the question of whether a situation is “legally” genocide.’ Many international human rights activists would agree with him. IT was the exclusion of political groups the definition of genocide in the Convention which led the International Commission of Jurists to rule that neither the killings in Equatorial Guinea Under Macais nor Pakistan’s murders of members of the Awami League and the educated elite in Bangladesh were genocide. In the case of the Hindu dead, regarded as victims of genocide by the ICJ, Pakistani officials had declared that they were not killed as members of a religious group, but as ‘enemies of the state’.”).

⁷⁴Peter Quayle, *Unimaginable Evil: The Legislative Limitations of the Genocide Convention*, 5 Int'l Crim. L. Rev. 364,363 (2005).

The lack of a provision for cultural genocide is surprising due to the fact that the States voted to include forced transfer of children as act to be included in the final convention. The inclusion of forced transfer as a crime is puzzling due to the fact that it goes directly against major statements that the Convention should be focused on physical destruction. First, forced transfer results directly in a loss of culture immediately.⁷⁵ Children that are removed from their homes will be acculturated in a completely different environment and will lose ties to their language, religion, and entire cultural identity.⁷⁶ Furthermore, forced transfer does not directly lead to physical harm.⁷⁷ The Representative from Venezuela concluded that including the forced transfer of children as an act of genocide,

. . . the Committee implicitly recognized that a group could be destroyed although the individual members of it continue to live normally without having suffered physical harm. Sub-paragraph 5 of article II had been adopted because 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. Such transfer might be made from a group with a low standard of civilization and living in conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such a case there would be no question of mass murder, mutilation, or torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.⁷⁸

⁷⁵ William H. Schabas, *Genocide In International Law*, 176 (Cambridge Univ. Press UK 2000).

⁷⁶ *Id.*

⁷⁷ UNGA, *Sixth Committee to the Genocide Convention: Eighty Second Meeting* 23 October 1948, U.N. Doc. A/C.6/SR.82, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1495 (2008), See Also UNGA, *Sixth Committee to the Genocide Convention: Eighty Second Meeting* 23 October 1948, U.N. Doc. A/C.6/SR.82, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1497 (2008).

⁷⁸ UNGA, *Sixth Committee to the Genocide Convention: Eighty Third Meeting* 25 October 1948, U.N. Doc. A/C.6/SR.83, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1504 (2008).

The inclusion of forced transfer of children counters the argument that the acts included in the convention must directly cause physical harm.⁷⁹ This also demonstrates that states understood the importance of culture but were unable to weigh that against protection from prosecution based on their own practices. The fact that states could have been prosecuted for their own actions based on the proposed article of cultural genocide does not necessitate that it should not be criminalized. States have an irrational fear of prosecution as cultural genocide is distinct from assimilation and would only be aimed at drastic measures taken to destroy a group.⁸⁰ Cultural genocide laws would not inhibit assimilation practices in so far as they are not an attempt to destroy a group; this is found in the special intent component of genocide.⁸¹ States that fear the criminalization of assimilation policies have not grasped the difference between that and cultural genocide, which is the intent to exterminate a groups' existence.⁸²

The drafting of the Genocide Convention resulted in a legal text that is insufficient to protect groups from physical and non-physical forms of destruction. Analyzing the history of the Convention and the negotiations made during the drafting of the final text, it becomes evident that state interest played a significantly larger role in determining the definition of genocide than did the promise to protect groups from multiple forms of destruction. The beginning of the Genocide Convention, in General

⁷⁹ See Generally United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General* at § 5 ¶¶ 7-8, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 372 (2008), See Also Barry Sautman, *Cultural Genocide in International Context*, in *CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES* 1,5, (Barry Sautman ed., Palgrave Macmillan 2006).

⁸⁰ Barry Sautman, *Cultural Genocide in International Context*, in *CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES* 1,5 (Barry Sautman ed., Palgrave Macmillan 2006) (“It was contended that forced assimilation did not constitute the crime of genocide and could be dealt with through a system for the protection of minority rights. Rafael Lemkin favored a cultural genocide clause because it would protect groups that could not continue to exist without the “spiritual and moral unity” provided by their culture. He added however that a ban on cultural genocide must not be directed against policies designed to assimilate a group into a larger society, but only against “drastic methods, used to aid in the rapid and complete disappearance of the cultural, moral, and religious life of a groups human beings.”).

⁸¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187, found in WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 261 (2d ed. 2009). See also *Prosecutor v. Akayesu* (Case No. ICTR -96-4-T), Judgment, 2 September 1998, paras. 497 and 516.

⁸² Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: forty-five year late*, 8 *TEMPLE INT. COM. LAW J.* 77,84 (1994).

Assembly Resolution 96(I) demonstrates and international consensus about the nature of genocide and the importance of protecting not only the lives of group members, but their cultural contributions as well.⁸³ Furthermore, the remnants of cultural genocide left in the Convention via the criminalization of the forced transfer of children, demonstrates the importance of protecting culture and a group's existence as a distinct entity. This analysis creates the impetus to define and criminalize cultural genocide; as destroying a group's distinct characteristics destroys the group in its entirety. As long as cultural genocide remains an act without a punishment, the international community jeopardizes not only a group's existence, but the foundation of the human rights framework, that promises rights protections for all humans.

⁸³ U.N. GAOR, Resolution 96 (I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946).

II. Culture, Law and Genocide

This section seeks to analyze the relation between culture, law and genocide. The importance of culture has been demonstrated throughout the drafting of the Genocide Convention. However, this chapter seeks to define culture in a way that can provide clear legal standards for the creation of a definition of cultural genocide.

The drafting of the Genocide Convention demonstrates the complexity of state relationships and the power of state self interest.. The importance of culture is found not only in the General Assembly resolution, but also in the words of the states that were proponents of the article on cultural genocide.⁸⁴ The importance of culture as an aspect of human uniqueness and its importance to social groups is evident; the loss of culture means that a group ceases to exist as a distinct group.⁸⁵ Kurt Mundorff expounds upon this idea:

A group is comprised of its individuals, but also of its history, traditions, the relation between the group members, and the relationship with other groups, etc. Even without moving into what can be described as cultural genocide it can certainly be argued that a group is destroyed already when its components, besides the physical lives of the group members, are eliminated.⁸⁶

This idea is central make to the formation of the concept of genocide, which requires that we understand culture as a component of ‘groups’ listed in the Genocide Convention. These groups cannot be distinguished if there are not characteristics that make them different from surrounding peoples. In the creation of the Genocide Convention, this can be seen in the work of Raphael Lemkin, who emphasized that physical and cultural existence are one in the same insofar as “ an attack on [a group’s] physical existence is also an attack on its cultural existence , and vice versa.”⁸⁷

⁸⁴ See U.N. GAOR, Resolution 96(I), 1st sess., 55th plen. mtg., U.N. Doc. A/C.6/86 (Dec. 11, 1946)., see also UNGA, *Sixth Committee to the Genocide Convention: Eighty Third Meeting 25 October 1948*, U.N. Doc. A/C.6/SR.83, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1502 (2008).

⁸⁵ William H. Schabas, *Genocide In International Law* 66 (Cambridge Univ. Press UK 2000) (2000).

⁸⁶ Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention Article 2(E)*, HARV. INT’L. L.J. 61,93(2009).

⁸⁷ Damien Short, *Cultural genocide and indigenous peoples: a sociological approach*, 14 INT. J. HUM. RGTS. 833, 839 (2010) (“Lemkin thought national collectivities had an inherent right to exist just like the sovereign individual. He also thought that a nation posses a biological life and an interrelated and interdependent cultural life such that an attack on its physic existence is also an attack on its cultural existence, and vice versa. Lemkin clearly appreciated that cultural vitality was essential to group health and

The importance of culture to the existence of a group, whether ethnical, national, religious, etc., brings about the creation of cultural rights on a national and international level.⁸⁸ It is this combination of rights that ensures the ability of people to be *different* publicly and privately - that protects the existence of minority groups and allows them to shape their cultural identity.⁸⁹ Understanding that these rights are essential is not simply enough to create the impetus to criminalizing cultural genocide. Culture shapes our world view, our view of human rights, our reasons for protecting human rights, and our fear of differing cultures.⁹⁰ It is therefore necessary to understand what culture is and its components in order to reshape our thinking on cultural genocide and analyze the reasons as to why it was not included in the Genocide Convention.

The current human rights doctrine is based in a worldview perpetuated by powerful states, the arguable lack of sensitivity to other cultures comes from a one-sided view of the world.⁹¹ The West, in particular has had the leading role in developing the

as such, cultural destruction will almost inevitably produce dire physical consequences- which is especially true of indigenous peoples.”).

⁸⁸ Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,204 (Marc Weller ed., 2007).

⁸⁹ Sally Holt, *supra* note 88 at 203 (“The right to be different not only in private, but to have that difference recognized and accounted for in public policy and legislation, is important particularly for persons belonging to minorities in terms of the maintenance and development of their own cultural identity.”).

⁹⁰ See DAN SPERBER, EXPLAINING CULTURE: A NATURALISTIC APPROACH 1 (1996); Gerald Weiss, *A Scientific Concept of Culture*, 75 AM ANTHROPOLOGICAL 1376, (1973); Jacinta O’Hagan, *Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing the World Order*, in REFRAMING THE INTERNATIONAL: LAW CULTURE, POLITICS 187-88, 198-210 (Richard Falk, Lester Edwin, J. Ruiz & R.B. Walker eds., 2002) *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 24,29 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010); Jacinta O’Hagan, *Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing the World Order*, in REFRAMING THE INTERNATIONAL: LAW CULTURE, POLITICS 187-88, 198-210 (Richard Falk, Lester Edwin, J. Ruiz & R.B. Walker eds., 2002) *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 24,34 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010); ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 7 (2007)

(these sources demonstrate not only the importance of culture, but also the impact that culture has on various viewpoints. Culture shapes our worldview and that certain cultures, particular the West , has had a profound impact on the development of the human rights framework . Furthermore, our cultural upbringing impacts our view of other cultures which can result in xenophobia).

⁹¹ Jacinta O’Hagan, *Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing the World Order*, in REFRAMING THE INTERNATIONAL: LAW CULTURE, POLITICS 187-88, 198-210 (Richard Falk, Lester Edwin, J. Ruiz & R.B. Walker eds., 2002) *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 24,32-33 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

current human rights regime.⁹² This view creates a cultural upbringing that tends to focus on the individual rather than the community and can also be seen in the way that these human rights are protected internationally.⁹³ It is this view of human rights along with the rise of xenophobia which requires the protection of culture and cultural rights as to ensure the survival of distinct viewpoints, rich practices, and differing opinions.⁹⁴ It is for these reasons that this section seeks to understand the components of culture, its relation to law, and its place in genocide law.

A. Culture Defined

In seeking to create a cultural genocide law, one must begin with understanding culture. It is essential to understand what culture is and its components in order to create laws that protect such an abstract concept. The difficulty of cultural rights is in the definition of culture which constantly changes.⁹⁵ This concept is not fully defined in international law nor is there a standard definition in anthropology. The concept of culture in anthropology differs across the spectrum, with definitions of culture ranging from morals and values to entire societal institutions.⁹⁶ Some anthropologists believe culture is exclusively learned while other champion genetic influences.⁹⁷ Some anthropologists argue that culture is exclusively ideas while others contend that culture consists of ideas and their associated activities.⁹⁸ These arguments within the

⁹² Jacinta O'Hagan, *Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing the World Order*, in REFRAMING THE INTERNATIONAL: LAW CULTURE, POLITICS 187-88, 198-210 (Richard Falk, Lester Edwin, J. Ruiz & R.B. Walker eds., 2002) reprinted in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 24,34 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

⁹³ Jacinta O'Hagan, *supra* note 91 at 34 ("However, those who seek to cultivate a more cooperative and egalitarian cultural world order might read these instances of humanitarian intervention with some skepticism. As noted above, while there is a large measure of agreement on the principle of the existence of human rights, there is less consensus on the interpretation and application of these principles. For instance, as noted above, there is a sense that while Western norms and values have an important contribution to make to the universal principles of human rights, the West's interpretations privilege some values over other. Furthermore, the West itself has been selective and inconsistent in its application of these principles, thus undermining the sense of a genuine evaluation of common norms and values. In particular, there is a concern that humanitarian intervention tends to be pursued when it serves the best interests of the most powerful.").

⁹⁴ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 7 (2007).

⁹⁵ ELSA STAMATOPOULOU, *supra* note 94 at 5.

⁹⁶ MARVIN HARRIS, THEORIES OF CULTURE IN POSTMODERN TIMES 19 (1999).

⁹⁷ *Id.*

⁹⁸ MARVIN HARRIS, *supra* note 96.

anthropological community demonstrate the vagueness of the concept of culture. The lack of a standard definition of culture not only makes it harder to understand, but also lends credence to the view of culture as an intellectual abstraction,

Despite the fact that we talk of culture as something “real”, as something that exists “out there”, culture is, in fact, an intellectual construct used for describing (and explaining) a complex cluster of human behaviors, ideas, emotions, and artifacts.⁹⁹

Starting from the idea that culture in its broad sense is an abstraction necessitates that we extrapolate from this concept, the components that allow people to see, experience, identify with, and intellectualize culture.

Despite a cohesive understanding of the specifics of culture, there is agreement on the basics of culture and how it manifests itself in groups.¹⁰⁰ Broadly culture can be defined as a way of life, as patterns of living that controls social interactions.¹⁰¹ This way of life has its basis in ideas that are transmitted between people: this is the way the culture spreads and eventually guides an entire group of people.¹⁰² These ideas influence things such as religion, food, writing, art, music, and customs of marriage and relationships.¹⁰³ The combination of these things creates a complex whole that include all beliefs, artifacts, and “products of human activity as determined by these habits.”¹⁰⁴ This view of culture is used as it provides an understanding of the way in which cultural habits permeate a group. Furthermore, this understanding of culture provides a basic foundation for the exploration of culture as it relates to groups and the creation of cultural law and genocide law.

⁹⁹ Robert Borofsky, *Studying “Culture Scientifically is an Oxymoron*, in EXPLAINING CULTURE SCIENTIFICALLY 275,281 (Melissa J. Brown ed., 2008).

¹⁰⁰ MARVIN HARRIS, *supra* note 96, *see also* DAN SPERBER, EXPLAINING CULTURE: A NATURALISTIC APPROACH 1 (1996).

¹⁰¹ L. Damen, *Culture Learning: The Fifth Dimension of the Language Classroom*, (1989) Reading, MA: Addison-Wesley.

¹⁰² DAN SPERBER, EXPLAINING CULTURE: A NATURALISTIC APPROACH 1 (1996).

¹⁰³ *Id.*

¹⁰⁴ Clyde Kluckhohn & William H. Kelly, *The Concept of Culture*, in THE SCIENCE OF MAN IN THE WORLD CRISIS 78-106, (Ralph Linton ed., 1980), *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 100,103 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

It also recognized that culture is not stagnate and not all in culture is shared.¹⁰⁵ Many members in a community do not necessarily agree about every single practice within a particular culture; however the overarching ideals tend to be passed on because they help perpetuate the way of life of the group.¹⁰⁶ The impact of the inconsistency of culture is that although there are general ideas and practices that permeate a specific group and that distinguish them from another distinct group; *culture* is fluid and constantly changing or evolving. Culture is also not consistent within a particular cultural group itself, as certain aspects of culture may not be evident in every member of that particular group. The lack of the constant existence of culture in every member of a group lends itself to the idea that culture abstract and difficult to define. The impact of this is that the intellectual abstraction of culture is not something on which law can be based as it is fluid and inconsistent. Therefore, law can be based, not on the idea of culture, but rather cultural components that are more tangible and easily understood; thereby creating the possibility of clear legal brightlines and standards.

Law has to outline the components of culture in order to create a legal framework in which to protect culture. Creating laws that simply say to protect culture provides no clear roadmap for international or state action. Furthermore, the vagueness of the abstraction that is simply “culture” allows for states to interpret it differently, which does not result in a universal and equal protection of rights for all. For example, one of the most conspicuous aspects of culture is language. Language and culture are linked and interdependent insofar as languages define the social group and the language depends on the perpetuation of the group’s way of life and continuation of the culture for survival.¹⁰⁷

¹⁰⁵ Richard A. Shweder, *Culture: Contemporary Views*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 3151,3157 (Neil Smelser & Paul Bates eds., 2001), *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 130,130 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹⁰⁶ *Id.*

¹⁰⁷ Stephen May, *Language and Culture*, in LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE 132-35 (2008), *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 915,917 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010) (“Language and culture are also linked symbolically; that is that they come to stand for, or symbolically represent, the particular ethnic and/or national collectivities that speak them. Accordingly, the fortunes of languages are inexorably bound up with those of their speakers. Languages do not rise or fall simply on their own linguistic merits - indeed, it has long been accepted that all languages are potentially equivalent in linguistic terms. Rather, the social and political circumstances of those who speak

The importance of language is seen in the way that language shapes our world view and explains the world around us.¹⁰⁸ This means that groups with different languages are likely to have different outlooks.¹⁰⁹ The example of language provides a framework with which law can evaluate language in order to protect it. Law must seek tangible aspects that are essential when distinguishing between groups and that are essential to the existence and integrity of a specific group. This allows laws to be created that specifically detail the necessary actions states should take in order to protect cultural components and thus culture as an ideal.

B. Culture and Law

In the previous chapter, the details of the negotiations during the drafting of the Genocide Convention highlight the particular arguments that were used to keep the cultural genocide article out of the final draft. One of those arguments contended that cultural genocide should be relegated to the realm of human rights, in particular minority rights.¹¹⁰ Although cultural genocide was not criminalized in the Genocide Convention, existing cultural protection exists in the form of human rights treaties and agreements. These existing cultural protections provide the framework for the international understanding of cultural rights. In the realm of international law, the priority is not with understanding the abstraction that is the idea of culture. Unlike in anthropology,

a particular language will have a significant impact on the subsequent symbolic and communicative status attached to that language.”).

¹⁰⁸ Stephen May, *supra* note 107, at 916.

¹⁰⁹ *Id.*

¹¹⁰ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Third Meeting: Lake Success, New York Tuesday, 6 April 1948, at 2pm*, U.N. Doc. E/AC.25/SR.3 (13 April 1948), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 699 (2008); See also United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General* at § 5 ¶ 7-8, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 372 (2008), See Also Barry Sautman, *Cultural Genocide in International Context*, in *CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES* 1,5, (Barry Sautman ed., Palgrave Macmillan 2006); See also United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General*, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 383 (2008).; See Also UNGA, *Sixth Committee to the Genocide Convention: Sixty Fourth Meeting* October 1 1948, U.N. Doc. A/C.6/SR.64, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 1304 (2008). See Also UNGA, *Sixth Committee to the Genocide Convention: Sixty Fifth Meeting* 2 October 1948, U.N. Doc. A/C.6/SR.65.

understanding culture in a legal framework requires that we focus on the components of culture,

[sic] it is not necessary to define the concept of ‘culture’ itself, it is necessary, at least in general terms, to identify the components of ‘culture’ or ‘cultural life’ as protected by the standards in order to delineate their content and associated state obligations.¹¹¹

International instruments need to provide clear standards to which states can adhere. In order to provide these clear standards, the human rights framework should not use the vague construct of culture. The impact of this is that cultural law in the human rights framework tends to protect cultural components and is characterized by a more characteristic-focused approach to culture rather than the exploratory view of culture held by anthropologists.

There are many definitions of culture in international law; however, within the framework of the United Nations, there are essentially three levels at which cultural rights are examined.¹¹² The first is the level is the material aspects of culture including artifacts; the second level includes the artistic and scientific creations of a particular culture; and finally,

Culture in its anthropological sense, i.e. *culture as a way of life* or, in UNESCO’s words, the “set of distinctive spiritual, material, intellectual and emotional features of society or a social group”; it encompasses “in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs”. In this system-oriented understanding of culture, the individual is seen as a product of a cultural system.¹¹³

This functional view of culture is essential due to the fact that the international community cannot “protect” every single aspect of culture as forces outside of the natural change in culture, such as globalization, can have a profound impact on the integrity of a specific culture. In the instance of culture law has to differentiate between essential and non-essential rights in order to determine which aspects need to be protected.¹¹⁴ The

¹¹¹ Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,220 (Marc Weller ed., 2007).

¹¹² ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 108 (2007).

¹¹³ *Id.*, see also Asbjorn Eide, *Cultural Rights as Individual Human Rights*, Economic Social and Cultural Rights: A Textbook, (A.Eide, C.Krause, A. Rosas eds) (1995).

¹¹⁴ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 113 (2007) (“It is an additional challenge in the definition of cultural rights to capture aspects of human life that are of fundamental character so as to warrant their elevation to human rights, in other words not to trivialize cultural human rights. The anthropologists have defines culture as “a way of life”. The difficulty is where to draw the line

concept of culture is extremely complex and definitions vary, and the list of components of culture can be infinite, therefore law must look to the “essential” components of culture in order to create a clear legal standard that is enforceable and effective. This view of culture is the dominant view in the international legal perspective of culture. This view of culture creates rights that protect specific features of a culture, those that strongly contribute to the cultural identity of a group, such as language.¹¹⁵

1. UNESCO and Culture Defined

The key organization in protection culture is the United Nations Educational, Scientific and Cultural Organization (UNESCO). UNESCO is the promoter of international diversity, and, therefore, its research and programs are extremely influential in the creation of laws protecting culture. UNESCO defines culture in many different ways according to different qualities. These include intangible culture, cultural patrimony, cultural heritage, cultural content, and cultural expressions; all of which provide the framework for the creation of cultural law.¹¹⁶ The framework begins with cultural heritage, the overarching broad concept that includes all manifestations of a particular culture which have been inherited.¹¹⁷ Next, intangible cultural heritage, UNESCO defines this as the “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces” belonging to a specific

between the essential and the non-essential in order to call it a human right, a cultural right worthy of promotion, protection, and fulfillment on the part of the state. Here the issue of time and location is crucial. What is essential for people in one geographical area is not so for people in other areas of the same country for that matter, or what was essential yesterday may not be so tomorrow. The issue of degree is also important, i.e. what degree of presence of certain circumstances or what degree of their absence is “essential” so as to be called a “human right”.”).

¹¹⁵ Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,220 - 221 (Marc Weller ed., 2007).

¹¹⁶ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Law*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 64,67-68 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010), *see also* UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *Adopted* Oct. 17, 2003, UNECO Doc. Misc/2003/CLT/CHI14, *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 614,614 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹¹⁷ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Heritage Law Introduction*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 206,206 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010)

culture.¹¹⁸ UNESCO states that these are passed throughout generations, and this is what provides or creates the sense of cultural identity.¹¹⁹ This overarching idea of intangible cultural heritage is one part of what makes the group distinct.

A part of this intangible heritage is the cultural patrimony of a group. Cultural patrimony is defined as that which is so fundamental to a group that it is inalienable from it.¹²⁰ Cultural patrimony, as with intangible cultural heritage, includes artifacts as well as folklore and language.¹²¹ Also distinct from these aspects are the ideas of cultural content and cultural expression. UNESCO adopted a Convention on the Protection and Promotion of Diversity of Cultural Expression in which it defines the difference between the two.¹²² Cultural content deals specifically with symbolism and artistic aspects that express culture, whereas cultural expressions are those that come from the creativity of people or groups that have cultural content, for example cultural content consists of the values and symbolism of a society, whereas a cultural expression would be music, poetry or theater of that particular society.¹²³ This heavily detailed view of culture allows UNESCO to provide clear guidelines as to what should be protected and what actions should take in order to fulfill their obligations. Furthermore, these definitions provide the framework of cultural law, as the previous definitions determine the relationship between groups as culture; cultural law refers specifically to the interaction between culture and the law.¹²⁴

A delicate balance is needed in order to combine the need for clear legal standards with the abstract nature of culture. Therefore, culture needs to be broken down into components that law can protect, as the term ‘culture’ is too vague to protect as a whole. This is seen in the work of UNESCO, which strives to protect culture as a whole, but

¹¹⁸ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *Adopted Oct. 17, 2003*, UNESCO Doc. Misc/2003/CLT/CHI14, *reprinted in rprinted in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 614,614 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹¹⁹ *Id.*

¹²⁰ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Material- Protection and Cooperation*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 252,297 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹²¹ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 120, at 297 .

¹²² James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 118, at 67-68.

¹²³ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 122.

¹²⁴ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 118, at 64.

breaks the idea of culture down into protectable components. For example, UNESCO lists the items considered cultural heritage and they include, but are not limited to: monuments, architectural works, inscriptions, cave dwellings, buildings, and archeological sites.¹²⁵ In order for UNESCO to adequately protect culture it has to draft conventions that created clear legal standards. In an effort to protect culture in its entirety, UNESCO created a definition of cultural heritage that would list protectable components.

2. Cultural Protection Obligations in Treaties

Culture and law are inseparable because “ law embodies culture and formalizes its norms, law promotes, protects, conditions, and limits cultural attributes and expressions, law harmonizes cross-cultural differences , . . . culture reinforces legal rules, [and] culture conditions [sic] the adoption, interpretation, and vitality of legal rules.”¹²⁶ The symbiotic nature between culture and law demonstrates generally that the two cannot exist without each other. It is the changes in law and changes in culture that allow for the creation of new rules and new norms that can provide human rights protections. Cultural law has its beginnings in The Hague Conferences in which regulations were codified that protected cultural heritage in times of war.¹²⁷ The formation of this law throughout modern times created international instruments that speak of culture in terms of rights; rights which are guaranteed regardless of the person and has been construed to provide protection of culture for all groups including indigenous peoples.¹²⁸ These rights can be interpreted in a way that creates a myriad of protections and rights including rights to traditional activities, rights to live in reserves.¹²⁹ Furthermore, the rights in cultural law can be extrapolated to create positive legal obligations to ensure that people of different cultures not only have cultural freedom, but also have the ability to participate in decisions that affect them.¹³⁰

¹²⁵ UNESCO Convention Concerning The Protection of the World Cultural and Natural Heritage, *Adopted* 16 Nov. 1972, UNESCO Doc. 17 C/18 *available at* <http://whc.unesco.org/en/conventiontext/>.

¹²⁶ UNESCO Convention Concerning The Protection of the World Cultural and Natural Heritage, *Adopted* 16 Nov. 1972, UNESCO Doc. 17 C/18 *available at* <http://whc.unesco.org/en/conventiontext/>.

¹²⁷ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 113, at 68.

¹²⁸ *Id.*

¹²⁹ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln *supra* note 113, at 67.

¹³⁰ *Id.*

The international framework that protects culture consists of conventions and agreements that create state obligations. The evolution of cultural law begins with the earliest agreements – the Roerich Pact in 1935 and the Hague Conventions.¹³¹ The Roerich Pact focused on the protection of monument in the Western Hemisphere and the Hague Conventions provided protections for cultural heritage in times of armed conflict.¹³² The Hague conventions protect against seizure, pillage, and damage to cultural heritage. However they did not provide protection in peaceful times and the Roerich Pact did not provide a universal standard of protection.¹³³ The lack of a universal standard of protection and value of cultural heritage gave birth to the expansion of the cultural protection regime. There are many treaties that protect cultural heritage, including, but not limited to: the UNESCO Convention Concerning the Protection of the World Cultural and natural Heritage, the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expression, and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. These conventions create the foundation from which lawmakers can understand culture, can manage state obligations, and can help shape the framework of a definition of cultural genocide. The definition of cultural genocide, in order to be accepted, should be couched in an accepted precedent of the international concept of culture and cultural protections. This ensures that states will be more willing to embrace the criminalization of cultural genocide as they are already bound to protect culture in a similar fashion through other agreements.

The analysis of the current cultural protection regime begins with the Declaration of the Principles of International Cultural Cooperation. This declaration from UNESCO is the cornerstone of cultural heritage protection. The declaration states first and foremost that the “wide diffusion of culture and the education of humanity for justice and liberty

¹³¹ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Heritage Law- An Introduction*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 206,248-249 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹³² *Id.*

¹³³ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Material- Protection and Cooperation*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 252,289 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

and peace are indispensable to the dignity of man.”¹³⁴ Immediately this makes culture and inalienable right as it is essential to the existence of human and human dignity.

Furthermore, Article 1 states that every culture has a value that must be preserved and that every person has the right to develop their culture.¹³⁵ Secondly, this declaration states that the existence of different cultures and the dissemination of ideas across cultures “. . . is essential to creative activity, [and] the pursuit of truth.”¹³⁶ The impact of this declaration is three- fold: first, it creates an undeniable link between the progression of man and the protection of culture; secondly, it demonstrates the importance of different viewpoints in order to facilitate intellectual growth; and finally, it creates an impetus for international coordination and in the protection and preservation of cultural heritage.

Despite the importance of the declaration in framing the international view of cultural protection, it lacks a strong enforcement mechanism and does not create clear state obligations. The lack of an enforcement mechanism is a recurring theme in the treaties concerning cultural heritage. The lack of a punishment for acting contrary to state obligations or even acting to destroy a particular culture means that states have no reason to actively protect cultural heritage. This makes the criminalization of cultural genocide even more important as it provides the essential enforcement mechanism that cannot be provided by conventions and declarations. This is especially important as the link between man and culture necessitates protection and specifically requires laws that can be enforced. The lack of an enforcement mechanism evident in cultural protection conventions can be mitigated by a definition of cultural genocide that would provide individual criminal responsibility and more state accountability for cultural destruction.

Another convention that is important to the cultural protection regime is The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer Ownership of Cultural Property, and it has a more practical purpose. Similar to the International Cultural Co-operational Declaration, this convention espouses the importance of international cooperation for the protection of cultural heritage. However,

¹³⁴ Declaration of the Principle of International Cultural Co-operation, *adopted* by the UNESCO General Conference, 14th sess., Paris, 4 November 1966, UNESCO’s Standard – Setting Instruments, IV.C. (1994) [*hereinafter* International Cultural Co-operation Declaration].

¹³⁵ International Cultural Co-operation Declaration, *supra* note 129, at art. 1.

¹³⁶ International Cultural Co-operation Declaration, *supra* note 129, at art. 7.

practically it created “multilateral control over the movement of cultural property” and it specifies specific aspects of cultural and archaeological importance that ought to be protected by states in cooperation.¹³⁷ The impact of this convention is not simply regulations on the transfer of cultural heritage; this creates clear state obligations in protecting and maintaining its own cultural heritage as well as the heritage of other states.¹³⁸ Furthermore, it also gives a detailed list of specific natural and man-made artifacts and expressions of culture, archaeology, and natural history that need to be protected. This list can serve as a starting point to determine what aspects of culture should be protected in a law criminalizing cultural genocide and can and will be instrumental in forming the *actus reus* of the crime. Once again however, there is no article that lays out the roadmap for states that have violated their obligations. There are no guidelines for punishment, outside of normal state to state means that would punish violators, or what should be done to protect the endangered aspects of culture from further damage.

Another convention that provides a deeper understanding of the cultural heritage protection regime is the Convention for the Protection of the World Cultural and Natural Heritage. This convention created the World Heritage list and the parties to the Convention agree to maintain these sites of valuable cultural heritage and create plans for sustainable tourism.¹³⁹ This convention is especially important as it explains the threat to cultural heritage and the importance of maintaining these aspects of cultural heritage for future generations. In particular, the convention takes into consideration,

¹³⁷ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Material- Protection and Cooperation*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 252,289-290 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010), *See Also* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *adopted* by the UNESCO General Conference, 16 sess., Paris, 14 November 1970, *available at* <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130> (*hereinafter* Convention on the Transfer of Cultural Heritage).

¹³⁸ *See generally* Convention on the Transfer of Cultural Heritage, *adopted* by the UNESCO General Conference, 16 sess., Paris, 14 November 1970, *available at* <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130>.

¹³⁹ The Convention for the Protection of the World Cultural and Natural Heritage, *adopted* by the UNESCO General Conference, 17th sess., Paris, 16 November 1972, *available at* <http://whc.unesco.org/archive/convention-en.pdf>, *see also* James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Material- Protection and Cooperation*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 252,290 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

“[sic] the existing international conventions, recommendations, and resolutions concerning cultural and natural property demonstrate the importance for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong.”¹⁴⁰

This convention requires states to create legislation to maintain and protect their cultural heritage sites nationally.¹⁴¹ Furthermore, this convention requires international cooperation in the protection of cultural heritage by creating a committee that would provide assistance as needed by states for cultural heritage protection.¹⁴² This requirement for international intervention or assistance in order to protect culture is important for two reasons: first, it puts the responsibility of the protection of cultural heritage on all states, and secondly, it elevates the impact of cultural destruction from a group level or national level to an international level. This elevation means that the loss of culture has an impact on the entire world. It is not simply an affront to a specific group, but it is a crime against all of humanity. This elevation is similar to the elevation of genocide insofar as states recognize that the barbarity of the crime does not just impact the group targeted, but it impacts the entire world.

Another important document is the UNESCO Universal Declaration on Cultural Diversity. Even though this is not a binding convention it explains the importance of cultural diversity and its impact on the world as a whole.¹⁴³ This declaration states that respect for cultural diversity aids in the guarantee of international peace and that cultural pluralism is essential to the democratic framework.¹⁴⁴ What is arguably most important in regards to cultural genocide is the analysis in the declaration that makes human rights and

¹⁴⁰ The Convention for the Protection of the World Cultural and Natural Heritage, *adopted* by the UNESCO General Conference, 17th sess., Paris, 16 November 1972, *available at* <http://whc.unesco.org/archive/convention-en.pdf>.

¹⁴¹ The Convention for the Protection of the World Cultural and Natural Heritage, *adopted* by the UNESCO General Conference, 17th sess., Paris, 16 November 1972, *available at* <http://whc.unesco.org/archive/convention-en.pdf>.

¹⁴² The Convention for the Protection of the World Cultural and Natural Heritage art. 13(1), *adopted* by the UNESCO General Conference, 17th sess., Paris, 16 November 1972, *available at* <http://whc.unesco.org/archive/convention-en.pdf>.

¹⁴³ UNESCO Universal Declaration on Cultural Diversity, Nov. 2, 2001, UNESCO Doc. 31C/Res25, Annex 1 (2001).

¹⁴⁴ UNESCO Universal Declaration on Cultural Diversity, *supra* note 143, at art. 2.

cultural rights indivisible.¹⁴⁵ This declaration states that cultural protections are also a commitment to human rights and furthermore, cultural rights are an important component of human rights in general.¹⁴⁶ In failing to protect cultural rights, one is also failing to protect human rights and vice versa. Another important document is the Convention on the Protection and Promotion of the Diversity of Cultural Expression. As a recent convention, it draws upon the spirit of previous conventions on the protection of cultural heritage and explains the value and importance of culture and culture expressions to the free flow of ideas and exchange of knowledge.¹⁴⁷ This convention seeks to protect all cultures and “the free flow of diverse ideas, words, and images.”¹⁴⁸ Particularly striking is Article 4 which reads,

“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”¹⁴⁹

This article removes the idea of law from the necessity of promoting cultural rights; the protection of cultural rights is no longer something states are legally obligated to do, but it is also something they are ethically and morally obligated to do.

3. Cultural Protection as a Duty

This ethical and moral obligation exists independent of the legal obligation; however it is the ethical obligation that gives rise to the legal one. Despite opposition from states about the protection of cultural rights and downright denial for the criminalization of cultural genocide, states are ethically obligated to protect cultural rights. The sphere of cultural rights protection consists not only of international organizations such as UNESCO, but also exists within the human rights framework and requires states to take specific positive actions in order to ensure the promotion and protection of those rights. Similar to the right to life, individuals also have the right to

¹⁴⁵ UNESCO Universal Declaration on Cultural Diversity, *supra* note 143, at art.4-5.

¹⁴⁶ UNESCO Universal Declaration on Cultural Diversity, *supra* note 143, at art.4-5.

¹⁴⁷ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Material- Protection and Cooperation*, in *CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS* 252,292 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹⁴⁸ *Id.*

¹⁴⁹ UNESCO Universal Declaration on Cultural Diversity, *supra* note 143, at art 4.

participate in cultural life.¹⁵⁰ Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the right to take part in cultural life; it also “indicates the importance of the principle of participation in the enjoyment of cultural rights. This encompasses both the right to have access to a cultural life and to participate in that cultural life.”¹⁵¹

The Committee on Economic, Social and Cultural rights explains the importance of cultural rights by stating that the ability to participate in cultural life is interdependent on other rights enshrined in the ICESCR.¹⁵² This also imposes on states two obligations in order to ensure its protection: it requires abstention, meaning non-interference in cultural practices and the exchange of cultural goods, as well as positive actions to ensure access to and preservation of cultural heritage.¹⁵³ In terms of accountability, the Committee on Economic, Social, and Cultural states that alleged violations will be investigated and that the results will be publicized.¹⁵⁴ This particular convention does not allow individual complaints, so there is no option for the individual to claim a violation directly to the committee. The lack of an individual complaint mechanism prevents states from being held fully accountable for all violations; it also denies individual victims access to justice as they are forced to see ‘local’ solutions for their rights violations.

Furthermore, if we look to other conventions that allow individual complaints, such as the International Covenant on Civil and Political Rights, if the committee concludes that your rights have been violated a state has three months to show it has remedied the situation and the examples offered include granting compensation or release

¹⁵⁰ Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,221 (Marc Weller ed., 2007).

¹⁵¹ *Id.*

¹⁵² Committee on Economic, Social and Cultural Rights, *General Comment No 21* para. 2, 43rd sess., 2-20 November 2009, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (*hereinafter* ICESCR General Comment No. 21).

¹⁵³ ICESCR General Comment No. 21, *supra* note 147, at 6.

¹⁵⁴ ICESCR General Comment No. 21, *supra* note 147, at 6 (“The strategies and policies adopted by States parties should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of article 15, paragraph 1 (a), identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims.”).

from detention.¹⁵⁵ Once again, international conventions fail to offer a real remedy that would be effective in curbing the destruction of culture. Furthermore, a remedy of compensation would fail to equate to the loss of cultural diversity. The payment of compensation is retroactive and would not be able to replace the major aspects of a culture that have been effectively destroyed, depending on whether a culture was destroyed partly or in its entirety.

With conventions lacking individual complaint mechanisms, requiring compensation, or a promise of compensation or attempts to redress a violation, they lack a strong enforcement mechanism. However, what these conventions do provide are descriptions of the obligations states have in the regime of cultural rights. An understanding of these obligations serves as the foundation for the reasons that cultural genocide should be criminalized. Specifically, in the cultural rights regime, there are three distinct components of state obligation,

Three elements of obligation with regard to the right to take part in cultural life can be identified: recognition, protection, and promotion of cultural identity. At the most basic level, the state has an obligation to recognize (if not endorse) the existence of different cultures, and ensure the right of individuals to take part in that cultural life and the components of that right. This may require more than a policy of non-interference and inaction. If the entitlement is to be meaningful as a human right, then it is not enough merely to refrain from hindering the enjoyment of cultural rights by persons belonging to minorities.¹⁵⁶

These components of obligation create a space in which cultural expression is not only protected but maximized. The existence of these obligations to protect cultural heritage demonstrate the importance of cultural diversity to the human experience. There is no significant difference in state obligations between the protection of culture and the criminalization of culture genocide. The difference however, is in the international recognition of crime, but also in the different enforcement mechanisms. In the current regime that is convention based, states simply have to prove that they are attempting to remedy the situation, whereas the criminalization of cultural genocide would provide a

¹⁵⁵ Office of the United Nations Commissioner for Human Rights, *Procedure for complaints by individuals under human rights treaties*, available at <http://www2.ohchr.org/english/bodies/petitions/individual.htm#ccpr>.

¹⁵⁶ Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,223 (Marc Weller ed., 2007).

legal remedy and punishment for those who attempt to destroy a culture ‘in whole or in part’.¹⁵⁷

C. Culture and Genocide

In the previous chapter, the creation of the Genocide Convention was chronicled and analyzed. The process by which the Genocide Convention was created ultimately resulted in the deletion of the cultural genocide article from the final draft.¹⁵⁸ The result of this deletion is that cultural protections have been relocated to the realm of human rights protections. However, very little attention is paid to cultural rights outside of the work of UNESCO, and within UNESCO there are no major enforcement mechanisms.¹⁵⁹ Although the work of UNESCO and other organizations have been very successful in the protection of aspects of cultural heritage, it still lacks the major enforcement mechanisms to punish states that attempt to destroy particular cultures or cultural components. While cultural genocide was being debated in the committees drafting the Genocide Convention, the Universal Declaration of Human Rights was also being drafted, and, therefore, was supposed to address aspects of cultural genocide and provide for that protection where the Genocide Convention would not.¹⁶⁰

There are many acts which destroy a groups’ culture that can give rise to the destruction of the group itself. For example, one of the key components of culture is language and history has shown that linguistic pluralism can be seen as a threat to

¹⁵⁷ Convention of the Prevention and Punishment of Genocide art 2. , 78 U.N.T.S 277, *entered into force* Jan.12, 1951.

¹⁵⁸ JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 123 (2008) (“Article 3 of the proposed convention defined ‘cultural’ genocide as destroying the language, religion or culture of groups by prohibiting the use of a language in daily intercourse or in schools or publications and demolishing or preventing the use of schools, libraries, historical monuments or places of worship belonging to a particular group. . . . Despite the vehement opposition of the United States to the inclusion of ‘cultural’ genocide in the convention, this article was adopted by six votes to one.”).

¹⁵⁹ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 1 (2007).

¹⁶⁰ ELSA STAMATOPOULOU, *supra* note 155, at 11 (“This discussion was in turn connected with the fierce controversy a stow ether the Convention on the Prevention and Punishment of the Crime of Genocide which was being prepared simultaneously to the Universal declaration, should also address “cultural” genocide besides physical or biological genocide.”).

society, assimilation and ultimately homogenization.¹⁶¹ During times of war, leaders often persecute those who are culturally, linguistically related to the enemy of that time.

¹⁶² Linguistic pluralism is often feared,

Individuals and societies often feel threatened by linguistic pluralism. The confusion of other languages is therefore often viewed not simply as a problem but also as an actual danger to society. . . In modern times members of minority groups who continue to speak their first languages may be viewed in more secular terms as a threat to the larger community of a magnitude that requires political or legal response. During time of war or other national emergency, in particular, leaders sometimes attack particular foreign languages because of the symbolic identities of those languages with enemies.¹⁶³

In the United States, there was an Anti-German movement during World War I.¹⁶⁴ This is not the only instance of persecution based on culture and would not amount to cultural genocide, but it demonstrates a pattern of attempts at cultural suppression and destruction which requires stronger protections for cultural components.¹⁶⁵ Another instance in which culture can be destroyed is through education, particularly state controlled public education.¹⁶⁶ Public education can shape history in such a way that it excludes parts that it deems inappropriate or even reinforce negative stereotypes about cultures and emphasize their supposed inferiority in order to get rid of the culture completely.¹⁶⁷ For example, in New Zealand, Maori children were physically beaten for speaking their language at school until the 1950's.¹⁶⁸ Although, this only represents a single practice in a single country, it demonstrates the enormous power of a state to infiltrate all aspects of life in order to get rid of a culture it deems inappropriate or inferior.

¹⁶¹ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Language and Linguistic Expression*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 915,958 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹⁶² *Id.*

¹⁶³ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *supra* note 137.

¹⁶⁴ Paul Finkelman, *The War on German Language and Culture, 1917-1925*, in CONFRONTATION AND COOPERATION: GERMANY AND THE UNITED STATES IN THE ERA OF WORLD WAR I, 1900-1924, at 177-196, *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 958,958 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

¹⁶⁵ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Language and Linguistic Expression*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 915,958 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010) (in specific regards to Anti-German sentiment in the United States during World War I).

¹⁶⁶ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 192 (2007).

¹⁶⁷ *Id.*

¹⁶⁸ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 192 (2007).

Furthermore, in 1997 the Australian Human Rights and Equal Opportunity Commission determined that the forcible transfer of Aboriginal children to non-indigenous institutions and families constituted a form of cultural genocide.¹⁶⁹ The government took legal guardianship of all Aboriginal children and removed them from their homes in order to assimilate them into European culture and society.¹⁷⁰ Similar to genocide, the lack of a large number of cases that can be defined as cultural genocide does not exclude it from being labeled a crime. Whether or not a crime is prevalent should not dictate whether or not it is criminalized, whether or not a crime is committed once or a million times, it is a violation of rights and should be punished, especially when dealing with something as grave as the attempted destruction of a cultural group. There is a void in international law that allows the destruction of cultures to go unpunished; the criminalization of cultural genocide can provide the necessary state accountability to ensure rights protection.

¹⁶⁹ Robert van Krieken, *The 'Stolen Generations' and Cultural Genocide*, 6 CHILDHOOD 3 297, 297 (1999).

¹⁷⁰ *Id.*

III. Defining Cultural Genocide

This section analyzes the necessity of a definition of cultural genocide. The definition of cultural genocide that is created draws inspiration from the work of Raphael Lemkin, the drafting of the Genocide Convention, and anthropological and legal views of culture.

A. The Necessity of a Definition

The problems with the current definition of Genocide require that the international community makes changes in order to protect minority groups. The importance of culture to our existence is even noted by the drafting committee,

The cultural bond was one of the most factors among those which united a national group and that was so true that it was possible to wipe out a human group, as such, by destroying its cultural heritage, while allowing the individual members of a group to survive. The physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime.¹⁷¹

Culture is an integral part of our lives and it is one of the major ways that groups are distinguished. To deny this essential component of diversity is to be complicit in the destruction of people's customs, values, religions, and ways of life. The current definition of genocide is shaped by politics and self-interest and the resulting document is one that is good at gaining signatories but insufficient at saving lives.¹⁷² The inclusion of the forcible transfer of children as an offensive act demonstrates that cultural and physical genocide are inextricably linked.¹⁷³

The convention itself and the preparatory works demonstrate the importance of culture. This is also true in the application of the law, as trial chambers have also explained the importance of culture and the link between cultural and physical destruction. In the Kristic decision, the court found that the Serb forced knew that

¹⁷¹ *Summary record of the Fourteenth Meeting of the Ad Hoc Committee on Genocide*, U.N. ESCOR, 6th Sess., 14th mtg., at 13, U.N. Doc. E/AC.25/Sr.14 91948).

¹⁷² Sonali B. Shah, Note, *The oversight of the last great international institution of the twentieth century: the international criminal court's definition of genocide*, 16 EMORY INT'L. REV. 351, 351 (2002).

¹⁷³ KURT MUNDORFF, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L.J. 61, 93(2009) (" The existence of any ethnic, religious, racial, or national group depends of the ability of that group to acculturate its children.").

missing generations of men would impact the survival of a patriarchal society.¹⁷⁴ By recognizing the patriarchal make up of society, the tribunal recognized how culture affects a group's existence.¹⁷⁵ Specifically, attacking leadership does not physically destroy the group immediately but rather, "[the perpetrator intends] to weaken the group culturally, thereby facilitating its ultimate destruction."¹⁷⁶ This idea is also presented in the Blagojevic decision when the Trial Chamber notes,

[T]he physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group.¹⁷⁷

The Trial Chamber was analyzing the situation surround forced deportations and found that even though acts don't necessarily cause death, they can be genocide when conducted with the intent to destroy the group as a 'separate and distinct entity'.¹⁷⁸

The varying expansions of the current definition in different courts, demonstrates the need to reinterpret the definition of genocide.¹⁷⁹ The result is distinct crimes that can be applied universally to all instances of genocide without having to be re-interpreted to convict perpetrators of crimes that may not be specified in the current convention. Although some states fear an 'expansion' of the definition of genocide, a restrictive approach to defining genocide fails to account for differences between current genocides and The Holocaust. The Holocaust was important part of the drafting of the Genocide Convention, however included in the purpose of the Genocide Convention was the

¹⁷⁴ KURT MUNDORFF, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L.J. 61, 61(2009).

¹⁷⁵ *Id.*

¹⁷⁶ KURT MUNDORFF, *supra* note 174.

¹⁷⁷ *Prosecutor v. Blagojevic*, in KURT MUNDORFF, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L.J. 61, 93 (2009) ("A group is comprised of its individuals, but also of its history, traditions, the relation between the group members, and the relationship with other groups, etc. Even without moving into what can be described as cultural genocide it can certainly be argued that a group is destroyed already when its components, besides the physical lives of the group members, are eliminated.").

¹⁷⁸ *Id.*

¹⁷⁹ See generally *Prosecutor v. Blagojevic*, in KURT MUNDORFF, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L.J. 61, 93 (2009) (specifically on interpretations of the definition of genocide that are not necessarily evident in the text itself.).

prevention of future genocides. The current definition of cultural genocide is insufficient insofar as it fails to protect groups from non-physical means of destruction. The fear of expanding the definition of genocide and losing the impact of the term is negated by the fact that both physical and cultural genocide are the same insofar as they seek the destruction of a group 'in whole or in part.'¹⁸⁰ Genocide whether physical or cultural is a persecutory crime, where victims are targeted because of their membership in a distinct group that the perpetrator wishes to destroy.¹⁸¹ The Genocide Convention was created in an environment where states wanted to condemn the acts of Nazi Germany while creating a definition that would prevent future acts.¹⁸² The political nature surrounding the creation of the Genocide Convention resulted in a definition reminiscent of the atrocities that occurred in Nazi Germany but failed to provide protection to all groups from destruction. Restricting the definition to acts that are similar to the Holocaust requires answering extremely difficult questions and setting arbitrary brightlines. The idea of destroying a distinct group as stated during the drafting is a 'supreme crime against humanity',¹⁸³ and this requires the criminalization of the non-physical form of that destruction.

The reasons for excluding cultural genocide from the Genocide Convention included putting the protection of culture in the sphere of human rights, however pushing cultural genocide into the realm of "human rights issues" fails to provide an accountability mechanism that would ensure justice is served.¹⁸⁴ A simple look at the accountability mechanisms in human rights treaties demonstrates the lack of a sufficient punishment especially when dealing with such grave crimes. Firstly, the international

¹⁸⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (*hereinafter* Genocide Convention).

¹⁸¹ Nina H.B. Jorgensen, *The Definition of Genocide: Joining the dots in the light of recent practice*, 1 INT'L CRIM. L. REV 285,290 (2001).

¹⁸² Sonali B. Shah, Note, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L. REV. 351, 354 (2002).

¹⁸³ Nina H.B. Jorgensen, *The Definition of Genocide: Joining the dots in the light of recent practice*, 1 INT'L CRIM. L. REV 285,287 (2001).

¹⁸⁴ See Generally United Nations, *Draft Convention of Genocide: Communications Received by the Secretary-General* at § 5 ¶¶ 7-8, U.N. Doc. A/401 (27 September 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 372 (2008), See Also Barry Sautman, *Cultural Genocide in International Context*, in *CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES* 1,5 (Barry Sautman ed., Palgrave Macmillan 2006).

system is solely based on state cooperation, states will only agree to minimal restrictions on their sovereignty.¹⁸⁵ Ratifying a treaty expresses consent to be bound to that treaty and the result is an international system that works on good will and treaties end up lacking the necessary “teeth” to ensure strict enforcement.¹⁸⁶ The implementation, or lack thereof, of these treaties is a concern,

Implementation is a key problem in making the system of international protection of human rights effective, and it has proved difficult and troublesome. The jurisdiction of international courts depends upon the consent of the states involved, and few states have given such consent with respect to disputes involving human rights. . . . Consequently, international human rights law like all international law, must rely heavily on voluntary compliance by states, buttressed by such moral and other influence other countries prepared to exert.¹⁸⁷

The necessity for state cooperation means that human rights treaties are unable to do much besides provide advice or make recommendations. The creation of international criminal courts and tribunals establishes the possibility for holding individuals responsible for the actions they take instead of simply making a written recommendation to a state. These human rights treaties which are supposed to guarantee compliance once they have been ratified have few means to ensure that states fulfill their obligations.

The enforcement mechanisms vary throughout international forums and there are spaces for interstate and individual complaints.¹⁸⁸ In relation to specific human rights treaties, enforcement mechanisms are very similar. The International Covenant on Civil and Political Rights, it allows individuals to submit complaints to the Human Rights Committee, and that ability comes through the optional protocol, not the original

¹⁸⁵ Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3,9 (Hurst Hannum ed., 2 ed. 1992) (“Unlike individual sovereign states, the community of nations has no international legislature empowered to enact laws that are directly binding on all countries. (Resolutions adopted by the UN General Assembly are only recommendations and do not legally bind its members.) Instead, states establish legally binding obligations among themselves in other ways, principally by expressing consenting to an by ratifying a treaty or other international agreement or through wide acceptance in state practice as a rule of binding customary international law.”).

¹⁸⁶ *Id.*

¹⁸⁷ Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3,11 - 12 (Hurst Hannum ed., 2 ed. 1992).

¹⁸⁸ Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3,13 (Hurst Hannum ed., 2 ed. 1992).

convention itself.¹⁸⁹ The Human Rights Committee after evaluating a claim, they offer their recommendations and they call upon states to take the necessary steps to ensure the observance of the ICCPR.¹⁹⁰ These steps can include ensuring that future violations don't occur or even compensation to the victims for any harms suffered.¹⁹¹ However, due to increasing pressure from victims, the Human Rights Committee adopted new measures that would require reports within 180 days from states that have been found to have violated the ICCPR as to what steps they have taken to comply with the recommendations of the Committee.¹⁹² This change seems to be important due to the fact a deadline of 180 days was now in place, however once those 180 days expired, there were no other actions that could be taken by the Committee. The problem with the efficacy of this mechanism, or the lack thereof, is that there is not any actual punishment for those who have violated the ICCPR, other than receiving a finger wagging from the Committee. Submitting a report to a Committee about steps taken does nothing to ensure that the grave violations of rights stop or that those who perpetrated said violations are held accountable.

Outside of various treaty mechanisms, the United Nations itself has specific enforcement mechanisms including the 1503 procedure and engaging a specific rapporteur to research and report on specific violations.¹⁹³ This however, still fails to provide individual accountability for the grave violations that occur during cultural genocide. Similarly to UNESCO, which serves as the major organization for the protection of culture, there is no individual accountability but rather a dependence on

¹⁸⁹ Sian Lewis-Anthony, *Treaty-based Procedures for Making Human Rights Complaints Within the UN System*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 41,41 (Hurst Hannum ed., 2 ed. 1992).

¹⁹⁰ Sian Lewis-Anthony, *supra* note 189, at 48 (“The Committee normally goes beyond merely stating its views as to whether there has been a violation; it will usually offer its opinion on the obligation of the state in light of the Committee’s findings. For example, it has called upon states to take immediate steps to ensure strict observance of the Covenant; to release a victim from detention and ensure that similar violations do not occur in the future; to commute a sentence of death imposed in circumstances in which there have been violations of the Covenant; and to provide a victim with effective remedies including compensation, for violations suffered.”).

¹⁹¹ *Id.*

¹⁹² Sian Lewis-Anthony, *supra* note 189, at 48.

¹⁹³ Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 41,48 (Hurst Hannum ed., 2 ed. 1992).

reporting.¹⁹⁴ UNESCO relies strongly on friendly settlement and does not have 'strong investigatory or oversight mechanism'.¹⁹⁵ The inability of UNESCO to prevent cultural genocide or even punish those who are active participants is a travesty. The importance of individual criminal responsibility is evident of international courts and tribunals, which demonstrate the need to hold people accountable for massive rights violations. The logical conclusion of the creation of the international courts and tribunals and their growing importance is that the international community feels that it is vital to hold individuals accountable for massive rights violations. With this as the foundation, it can also be applied to the concept of cultural genocide insofar as the result is a massive violation of rights that impacts not only the group targeted but all of humanity.

Furthermore, the definition of genocide poses some major problems when it comes to protecting minorities and indigenous groups around the world. There are certain aspects of the convention that are antiquated and simply missing that allows perpetrators to get away with massive violations. The first problem is in the list of protected groups. The convention protects racial groups, although it has currently been accepted that 'race' does not exist as a scientific concept.¹⁹⁶ Another problem is that the convention leaves out cultural groups, which means that groups of people with shared values, languages, and customs which may need an increased protection, particularly in Latin America and Africa.¹⁹⁷ Not only are the protected groups limited, but the entire definition is limited in scope which means that there are a number of situations that seem to be genocide but do not fit the definition provided.¹⁹⁸ The fact that certain groups are not protected would allow their destruction to potentially go unpunished to the fullest extent, "[i]t would reprehensible if the world would not condemn massive slaughter of members of a group . . . simply because of a preordained idea of what types of groups are qualified for

¹⁹⁴ Stephen P. Marks, *The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 86, 96 (Hurst Hannum ed., 2 ed. 1992).

¹⁹⁵ *Id.*

¹⁹⁶ Antonio Cassese, *Taking Stock Of The Genocide Convention and Looking Ahead* 534, in *THE UN GENOCIDE CONVENTION: A COMMENTARY*, (Paola Gaeta ed. 2009), *See generally* Janet E. Helms & Regine M. Talleyrand, *Race is not ethnicity*, 52(11) *American Psychologist* 1246 (Nov. 1997).

¹⁹⁷ Antonio Cassese, *supra* note 196.

¹⁹⁸ Freda Kabatsi, *Defining or Diverting Genocide: changing the comporment of genocide_5* INT'L CRIM. L. REV. 387, 391 (2005).

coverage under the [Genocide] Convention."¹⁹⁹ Not only that, the convention also leaves out political and social groups which does not allow for all actions to be condemned, specifically the removal of Soviet civilians and the murder of homosexuals during the holocaust.²⁰⁰ The fact that so many groups are left outside of the scope of the convention means that they will have to turn to their respective national courts or tribunals for justice, however the crimes would not have the stigma of genocide attached to it.²⁰¹ The problem with seeking justice at a national level is that if the genocidal plan is widespread and systematic and being perpetrated by the government, then no legal recourse exists on a local level.

The definition of genocide leaves the courts unable to make a decision about the genocidal nature of a situation, which chills state action,

The limited legal meaning of genocide has been stretched by some courts to better fit its rhetorical use. The consequence is a complex and uncertain law-Darfur burned and bled whilst a legal determination of genocide was awaited. The Genocide Convention describes with sufficient precision a single historical event, an unimaginable, unrepeatable evil. But, in its modern application, the Genocide Convention kills more people that it protects or prosecutes.²⁰²

The Genocide Convention stalls the international action and allows people to go unpunished and allows crimes to continue which is antithetical to the entire idea of a Genocide Convention. The lack of cohesive case law defining this crime and the fact that it leaves so many groups unprotected necessitates, in my view, a revamping of the convention and of the definition of genocide in its entirety. Looking at the convention from two different angles, the need for change exists and this is apparent in both the definition and the application of the law. The absence of cultural genocide from the Genocide Convention and the inability of human rights treaties to pick up the pieces left behind by the Convention leaves a gaping hole in international law and cultural rights

¹⁹⁹ THOMAS W. SIMON, *DEFINING GENOCIDE*, 15 WIS. INT'L L.J. 243, 247 (1996-1997).

²⁰⁰ Frank Chalk, *Definitions of Genocide and Their Implications for Prediction and Prevention*, 4 *Holocaust & Genocide Stud.* 149, 151 (1989).

²⁰¹ Sonali B. Shah, Note, *The oversight of the last great international institution of the twentieth century: the international criminal court's definition of genocide*, 16 *EMORY INT'L. REV.* 351, 380 (2002).

²⁰² Peter Quayle, *Unimaginable Evil: The Legislative Limitations of the Genocide Convention*, 5 *Int'l Crim. L. Rev.* 364,363 (2005).

protection. Not only has that, but the inherent problems in the current definition of genocide demonstrate the importance of legal flexibility in its use in applying the law to different violations.

The final problem is the Genocide Convention's focus on physical means of destruction. This focus necessitates a separate definition of cultural genocide instead of the addition of 'cultural groups' to the current definition. The lack of the criminalization of non-physical means of destructions leaves groups vulnerable to a type of destruction that is part and parcel of a physical genocide plan but can also exist separately from a physical genocidal plan. This protection would not be achieved by creating a new category of 'group' in the current definition of genocide. The difference between the current definition of genocide and the proposed definition of cultural genocide is in the *acta rea*, the criminalized acts. An addition of the category of 'cultural groups' to the current definition of genocide would fail to adequately address the non-physical means of destructions associated with cultural genocide. The roots of the differentiation in the *acta rea* of physical and cultural genocide can be seen not only in the work of Raphael Lemkin but also in the proposed definitions of cultural genocide in the drafting of the Genocide Convention.²⁰³ The definitions presented during the drafting of the Genocide Convention took into consideration the major differences between physical and cultural genocide in terms of the means of destruction. Therefore, a definition of cultural genocide necessitates a separate list of acts that includes non-physical means of destruction currently missing from the current definition of genocide, which focuses mainly on physical destruction. The importance of culture to the human experience

²⁰³ JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 91 (2008), *see also* Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, U.N. Doc. E/AC25/SR.14 (1948); U.N. GA, Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 124 (2008); ECOSOC, *Draft Convention The Crime of Genocide: Comments on the Draft Convention* 234.3, U.N.Doc. E/447 (26 June 1947), *reprinted in Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 234-236 (2008).

necessitates individual criminal responsibility especially when there is a systematic plan to destroy a group ‘in whole or in part’.²⁰⁴

B. Framing a Definition of Cultural Genocide

Understanding the complexities of the definition of genocide does not give us a starting point to frame a definition of cultural genocide. In order to frame a working definition of cultural genocide, an examination of culture needs to be undertaken. Culture can be broadly defined, ". . . learned and shared human patterns or models for living: day to day living patterns. These patterns and models pervade all aspects of human social interaction. Culture is mankind's primary adaptive mechanism."²⁰⁵ It can also be defined as "the material and ideological ways in which a group organizes, understands, and reproduces its life as a group."²⁰⁶ The important aspects of culture are language, religion, food, customs, and all are essential in defining a distinct group. In order to create a functioning definition of cultural genocide, it is necessary to understand the two parts of the term: culture and genocide. As stated in the previous chapter, culture, for legal purposes, needs to be moved from an intellectual abstraction to a definition characterized by components so that law can create a clear framework of protections. The second part of the term, genocide, is necessary to understand because the principles guiding this definition will be applied to the definition of cultural genocide. The reason for this is that the definition of genocide as found in the Genocide Convention is internationally accepted and applied as law. Furthermore, it provides understanding into the world of special intent that is required for findings of genocide. Since cultural genocide also deals with acts intending to destroy a group, the same special intent is required.

²⁰⁴ *Genocide Convention*, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

²⁰⁵ L. Damen, *Culture Learning: The Fifth Dimension of the Language Classroom*, (1989) Reading, MA: Addison-Wesley.

²⁰⁶ TOVE SKUTNALL-KANGAS, *LINGUISTIC GENOCIDE IN EDUCATION OR WORLDWIDE DIVERSITY AND HUMAN RIGHTS?* 116, (New Jersey:P Lawrence Erlbaum Associates) (2000).

An open definition of genocide is essentially “a form of one-sided mass killing in which a state or other authority intends to destroy a group.”²⁰⁷ This very basic definition of genocide clarifies the essence of genocide as a crime. The lynchpin of the entire concept of genocide which separates it from simple murder or extermination as a war crime is the specific intent to destroy a group. The definition of Genocide has two parts essentially; the *mens rea* and the *actus reus*,

The prosecution must prove specific material facts, but must also establish the accused’s criminal intent or ‘guilty mind’: *actus non facit reum nisi mens sit rea*. The definition of genocide in the 1948 Convention invites this analysis, because it rather neatly separates the two elements. The initial phrase or chapeau of article II addresses the *mens rea* of the crime of genocide, that is, the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such’. The five sub-paragraphs of article II list the criminal acts or *actus reus*. The distinction between *actus reus* and *mens rea* features in virtually all of the judgments of the international tribunals that concern charges of genocide. It has even been extended into the realm of State responsibility.²⁰⁸

Beginning with the *actus reus*, of genocide, the least controversial act was killing members of the group.²⁰⁹ Even though murder was the least controversial act included, there is no threshold on how much murder equals genocide; it is the combination of the act and the intent that can lead to a determination of genocide.²¹⁰ A higher number of killings may make the case for genocide easier but there is not a limit that must be reached before that determination is made, the impact of this is that even a small number of killings can be genocide; the important part of the act is the intent.²¹¹ The second act defined is ‘causing serious bodily or mental harm’; this comes from the Secretariat Draft which included the prohibition of biological experiments and it was France that decided that a more general view of bodily harm should be adopted.²¹² This has been expanded to include rape and sexual violence based on the interpretation of the ICTR, which ruled that “serious bodily or mental harm, without limiting itself thereto, to mean acts of

²⁰⁷ Frank Chalk, ‘Genocide in the 20th Century’ *Definitions of Genocide and Their Implications for Prediction and Prevention*, 4 HOLOCAUST & GENOCIDE STUD. 149,151 (1989).

²⁰⁸ WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 172 (2d ed. 2009).

²⁰⁹ WILLIAM H. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 157 (CAMBRIDGE UNIV. PRESS UK 2000) (2000) (*hereinafter* Schabas).

²¹⁰ SONALI B. SHAH, Note, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L. REV. 351, 357 (2002).

²¹¹ *Id* (In regards to the absence of a specific threshold).

²¹² SCHABAS, *supra* note 209, at 159.

torture, be they bodily or mental, inhumane or degrading treatment, persecution."²¹³ The third offense does not even require actual damage to be done, it simply requires that actions are taken that are calculated to bring about the destruction of the group.²¹⁴ The provision aids in demonstrating that the convention recognized that there are means to commit or attempt to commit genocide that does not involve murder. The fourth offensive act stems from the use of sterilization and castration practices in Nazi Germany and has even been expanded by the ICTR to include rape as well.²¹⁵ The final offensive act is the forcible transfer of children. This act is not similar to any of the previous acts as its impact is solely cultural because, "Presumably, when children are transferred from one group to another, their cultural identity may be lost. They will be raised within another group, speaking its language, participating in its culture, and practicing its religion."²¹⁶ Forced transfer of children was originally included as a part of the cultural genocide provision in the original drafts as the transfers results in an immediate loss of culture and not necessarily death or physical harm.²¹⁷

Genocide is characterized by intent and the *mens rea* of genocide has two components as defined in the Rome Statute Article 30; knowledge and intent.²¹⁸ The first part, knowledge "[m]eans awareness that a circumstance exists or a consequence will

²¹³ *Prosecutor v. Akayesu*, Case No. ICTR -86-4-T, Judgment, para.503 (Sept. 2, 1998).

²¹⁴ SCHABAS, *supra* note 209, at 167.

²¹⁵ SCHABAS, *supra* note 209, at 173, *See also Prosecutor v. Akayesu*, Case No. ICTR -86-4-T, Judgment, para.507 (Sept. 2, 1998) ("... the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriage. . . Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate; in the same way that members of a group can be led, through threats or trauma, not to procreate.").

²¹⁶ SCHABAS, *supra* note 209, at 176.

²¹⁷ William H. Schabas, *Genocide In International Law*, 176 (Cambridge Univ. Press UK 2000) (2000), *See also* U.N. GA, Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 124 (2008), *see also* WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 203 (2d ed. 2009) ("The Elements of Crimes of the International Criminal Court declare, in a footnote: 'The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such persons or another person, or by taking advantage of a coercive environment.'").

²¹⁸ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; art. 30, *see also* BARTOLOME' CLAVERO, *GENOCIDE OR ETHNOCIDE 1993-2007 : HOW TO MAKE, UNMAKE, AND REMAKE LAW WITH WORDS* 32 (2008).

occur in the ordinary course of events."²¹⁹ In this sense, knowledge simply means that the perpetrator was privy to information about the plan or common design, this does not mean that they have to have participated in designing or creating the plan.²²⁰ This should also not be confused with the idea that the perpetrator has to be aware that the act constitutes the crime of genocide itself, it requires only that the perpetrator is aware of the genocidal policy or plan.²²¹ Another way that knowledge can be proven is if the prosecution can prove 'willful blindness.'²²² This means that if there is no proof that a person knew of the exact plans, they could have sufficient knowledge of a genocidal act.²²³ The second aspect of *mens rea* is intent, *dolus specialis*. This means that the perpetrator means to engage in the specific act, however, in terms of genocide this also means that the prosecutor has to prove that this intent was genocidal; otherwise the act does not reach the threshold of genocide.²²⁴

C. Cultural Genocide Defined

With the understanding the culture and the current definition of genocide, the work of defining cultural genocide can now begin. The framing of cultural genocide must also take into account the purpose of a cultural genocide law in and of itself; it exists to punish drastic measures intended to destroy a group and does not deal with non forced assimilation. Even Raphael Lemkin specified that cultural genocide laws were

²¹⁹Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; art. 30, *see also* BARTOLOME' CLAVERO, GENOCIDE OR ETHNOCIDE 1993-2007 : HOW TO MAKE, UNMAKE, AND REMAKE LAW WITH WORDS 32 (2008).

²²⁰ SCHABAS, *supra* note 193, at 210.

²²¹ SCHABAS, *supra* note 193, at 211.

²²² GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART*, 159(London: Stevens & Sons Ltd. 2nd ed.) (1961) *See also* *Prosecutor v. Tadic*, Case No. IT-94-1-I, Trial Opinion para. 659 (Jul. 14, 1997) (*hereinafter* Tadic).

²²³Tadic, *supra* note 32 (" A subordinate is presumed to know the intentions of his superiors when he receives order to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group because he was not privy to all aspects of the comprehensive genocide plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious.").

²²⁴SCHABAS, *supra* note 193, at 214, *see also* THOMAS SIMON, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD 85 (2007).

aimed at drastic measures intending to destroy a group and not policies of assimilation that do not intend the complete disappearance of a group.²²⁵ Furthermore, cultural genocide acts can be a prelude to or appear in conjunction with physical genocide in which there is no doubt that there is intent to destroy a group.²²⁶ These laws against cultural genocide will not seek to prevent any form of cultural change as such changes are inevitable. These changes result from increasing contact between cultures and various changes cannot be prevented without complete isolation.²²⁷ Therefore, a working definition of cultural genocide should take into account these differences and require a level of special intent and specific *actus reus* that would prevent the abuse of the law.

The proposed change is a definition of cultural genocide that can either be added as an amendment to the Genocide Convention or used as the foundation for a separate convention on cultural genocide. The majority of the foundation of the current definition of genocide will remain the same especially the *mens rea*. The reason for keeping the *mens rea* the same for cultural genocide is to avoid a broad definition in which any potential action could be labeled cultural genocide. That would result in a destigmatization of the crime and therefore defeat the purpose of labeling the acts as genocide in the first place.

The place to begin formulating the definition is through the original definitions proposed by the drafting committee. The Secretariat Draft defined cultural genocide as the following,

. . . the destruction of the specific character of the targeted group(s) through destruction or expropriation of its means of economic perpetuation; prohibition or curtailment of its language; suppression of its religious, social or political practices; destruction or denial of

²²⁵ Barry Sautman, *Cultural Genocide in International Context*, in CULTURAL GENOCIDE AND ASIAN STATE PERIPHERIES 1,5 (Barry Sautman ed., Palgrave Macmillan 2006).

²²⁶ Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: forty-five year late*, 8 TEMPLE INT. COM. LAW J. 77,84 (1994), see also UNGA, *Sixth Committee to the Genocide Convention: Eighty Third Meeting* 25 October 1948, U.N. Doc. A/C.6/SR.83, reprinted in 2 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1503 (2008).

²²⁷ Damien Short, *Cultural genocide and indigenous peoples: a sociological approach*, 14 INT. J. HUM. RGTS. 833, 841 (2010).

access to its religious or other sites, shrines or institutions; destruction or denial of use and access to objects of sacred or sociocultural significance, forced dislocation; expulsion or dispersal of its members; forced transfer or remove of its children, or any other means.²²⁸

The problem with this definition begins with the destruction of economic perpetuation. There is no direct link between economic perpetuation and cultural boom. Secondly, destruction of economic perpetuation does not in and of itself destroy the culture. A working definition of cultural genocide should ensure that the acts have a direct link to the destruction of a culture; otherwise the door for abuse remains wide open. Furthermore, economic perpetuation is an extremely vague concept and would have incredibly varying definitions worldwide. The next problem is the curtailment of languages; this is where national assimilation policies will create tensions, pushback, and problems.. Most states have assimilation policies that include provisions which state that official language(s) are taught in all schools. This is where a working definition would define the difference between moderate assimilation policies and cultural genocide. There is a difference between having a national official language taught at school and imposing measures to prevent a group from using their language with the intent to destroy it. For example, in New Zealand, the Maori were punished for speaking their language in school and that can be seen as a genocidal act, whereas simply having the English as the language of instruction would not.²²⁹ The analysis of the new definition would also be sure to emphasize the *dolus specialis* that is required when determining genocide.

The next definition proposed was the draft committee during the Convention meetings. It read,

In this convention, genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial, or religious group on the grounds of national or racial origin or religious belief.

- (1) prohibiting the use of language of the group in daily intercourse or in schools, prohibiting the printing and circulation of publications in the language of the group;

²²⁸WARD CHURCHILL, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT'L L. 3,3 (2000).

²²⁹ ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW 192 (2007).

- (2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.²³⁰

Due to the limited nature of this draft, it is the product of several negotiations and is focused more on pleasing states than pressuring states to pursue an active plan of protecting minority groups. This definition does take a step in the right direction by stating that the intent is to destroy the language or culture which emphasizes *dolus specialis*. The second positive step with this definition is the use of "or" between "language" and "culture", which allows people who only target one aspect to still be prosecuted. However, what needs to be included is religion, because people within a single territory may have a similar language and culture, but a specific religion may be targeted for destruction. The use of the phrase "based on . . . religious belief" in the text does not have the same meaning. The current meaning of the text states that cultural genocide is perpetrated there is an attempt to destroy language or culture based on religious belief. That combination does not take into account situations where the only difference is religious belief. The language should be clearer in order to ensure a universal understanding of the acts that constitute cultural genocide.

Based on the previous drafts of a cultural genocide definition, the following is the best definition that can be used as a framework to shape a more refined definition of cultural genocide. This is by no means an exhaustive list of offensive acts that can qualify as cultural genocide and this definition is by no means a legal working definition.

In this Convention, the act of genocide can also mean any of the following acts, with the intent to destroy, in whole or in part, the language, culture, or religion, of a national, ethnical, racial or religious group, as such:

- (a) Prohibiting the use of language of the group in daily intercourse or schools.
- (b) Destroying or prohibiting access to religious sites
- (c) Prohibiting the printing and circulation of publications in the language of the group
- (d) Forced dislocation
- (e) Dispersal or expulsion of its members
- (f) Destroying or prohibiting access to libraries, museums, schools, historical monuments.²³¹

²³⁰ Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, *U.N. Doc. E/AC.25/SR.14* (1948).

This definition seeks a synthesis of the drafts of the definition of cultural genocide and the current definition of genocide. The reason for separating the various acts is to ensure that each offense can stand on its own as proof of cultural genocide. Just as in the current definition, a perpetrator must not commit every single offensive act in order to be liable for genocide. Secondly, offensive act (f) includes multiple acts because the destruction of one of those cultural objects would not have significant enough impact on the culture being targeted. The first five are separated because each act could lead to the destruction of the targeted culture.

Therefore, I propose a definition which draws inspiration from the current definition of genocide, the work of cultural experts, and the work of the drafting committee of the Genocide Convention, in order to synthesize all of these ideas into a working definition that can clearly provide a legal framework. The definition seeks to bring in the components of culture in way that allows the law to be efficiently applied with very little vagueness. The definition reads as it would in a convention;

Recognizing the importance and that the loss of cultural diversity harms all of humanity, and,

Being convinced that cultural genocide is a precursor to physical genocide and is a necessary component of crimes of genocide;

Cultural genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, religious, or linguistic group, as such:

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

²³¹ Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, *U.N. Doc. E/AC.25/SR.14* (1948).

(e) Forced dislocation.²³²

This definition is written from the perspective of a typical human rights treaty beginning with broad statements about the purpose of the treaty and the foundation for what is laid out within the text. I begin this particular definition explaining the importance of culture to create the understanding from the beginning that the loss of culture impacts all of humanity and not simply the targeted group. Secondly, the foundation is laid that genocide is part and parcel of physical genocide and thus demonstrating the gravity of cultural genocide and the necessity for punishment. The specific definition begins with the statement that any of the acts are considered cultural genocide, this is to emphasize that all of the acts do not have to happen simultaneously in order for a determination of cultural genocide to be made. Similar, to the current definition of genocide, perpetrators do not have to engage in all acts, although they may and most often do engage some or even all acts simultaneously. The next section of the definition details the intent, which is the same as the intent found in the definition of genocide in the Genocide Convention. The *dolus specialis* exists for the definition of cultural genocide as well because the crime aims to eradicate a group. Furthermore, this special intent creates a brightline for the determination of cultural genocide, so that only particularly grave crimes can be labeled as cultural genocide. This definition uses the same groups as the Genocide Convention because it covers a large spectrum of groups, thereby ensuring that vast amounts of groups are protected. I further add the category of ‘linguistic groups’ to cover cases in which groups may have very similar cultural practices but are differentiated based on

²³²See Generally *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (hereinafter *Genocide Convention*); Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, *U.N. Doc. E/AC.25/SR.14* (1948); Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, U.N. Doc. E/AC25/SR.14 (1948); U.N. GA, Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), reprinted in 1 HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 124 (2008); Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at lake Success, New York, from April 5 to 10 May 1948, 7 U.N. ESCOR Supp. (No.6) at 1, U.N. Doc. E/794 (1948).

language or dialect. This is especially important because language is one of the most essential components of culture and distinguishing groups.²³³ The specific acts listed are based on the components of culture, and cultural heritage protected by UNESCO.²³⁴ The acts listed seek to cover a broad range of possible violations that would have a direct impact on the cultural integrity of the group. The last two acts listed, forced exile, and forced dislocation are listed to cover acts in which cultural leaders are forced to separate from their group as means to destroy the connection and thus the culture. Forced dislocation is included because many groups, especially indigenous groups, have an important bond to the land and separating a group from its home can directly destroy way of life, artifacts and habits.²³⁵

²³³ James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Law*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 64,64 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010), *See Generally* Stephen May, *Language and Culture*, in LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE 132-35 (2008), *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 915 - 919 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

²³⁴ *See Generally* *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (*hereinafter* Genocide Convention); Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, *U.N. Doc. E/AC.25/SR.14* (1948); Ad hoc Committee on Genocide Summary Record of the 14th Meeting at 3, U.N. ESCOR, U.N. Doc. E/AC25/SR.14 (1948); U.N. GA, Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide* at art 1, U.N. Doc. A/AC.10/42/Rev.1 (12 June 1947), *reprinted in* 1 HIRAD ABTAHI & PHILIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 124 (2008); Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from April 5 to 10 May 1948, 7 U.N. ESCOR Supp. (No.6) at 1, U.N. Doc. E/794 (1948). *See also* (for culture) Sally Holt, *Family, Private Life, and Cultural Rights*, in UNIVERSAL MINORITY RIGHTS 203,204 (Marc Weller ed., 2007); Clyde Kluckhohn & William H. Kelly, *The Concept of Culture*, in THE SCIENCE OF MAN IN THE WORLD CRISIS 78-106, (Ralph Linton ed., 1980) ,*reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 100,103 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010); James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln, *Cultural Law*, in CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 64,67-68 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010), *see also* UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *Adopted* Oct. 17, 2003, UNECO Doc. Misc/2003/CLT/CHI14, *reprinted in* *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 614,614 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010); UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *Adopted* Oct. 17, 2003, UNECO Doc. Misc/2003/CLT/CHI14, *reprinted in* *reprinted in* CULTURAL LAW: INTERNATIONAL, COMPARATIVE AND INDIGENOUS 614,614 (James A.R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln eds., 2010).

²³⁵ *See Generally* *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No.169), 72 ILO Official Bull. 59, entered into force Sept. 5. 1991 ; *Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc A/RES/47/1 (2007).

This definition is not flawless and it will not fix all of the problems with the current definition of genocide nor close all gaps in cultural rights protection. Despite suffering from the same problems of vagueness as the current definition of genocide, a definition of cultural genocide faces another problem; that of distinguishing between an act of genocide and that of a human rights violation. Although internationally criminalized acts violate enumerated human rights, acts of cultural genocide have the potential to be confused with general rights violations. This fear is seen in the drafting of the Genocide Convention, when states argued that cultural genocide could be confused with state policies of assimilation.²³⁶ An act that violates a groups' cultural right is inherently discriminatory towards that group insofar as that group is targeted for a limitation of their cultural expressions. Some might argue that this would make it easier for every violation of a cultural right to be seen as cultural genocide. The possibility exists, however just as every denial of the right to life is not genocide; every violation of cultural rights is not genocide. Although a violation of a cultural right may be discriminatory and may coincide with the proposed *actus reus* of cultural genocide, this does not automatically mean that requirement of *dolus specialis*, special intent, has been met. For example, a state policy that requires that all public schools be taught in the official language may be seen as a violation of cultural rights; however that is different from a policy that persecutes a particular group in their private use of the language of their group. While, the first state policy attempts to create a uniformity of language in a nationwide school system, the second has a significantly higher likelihood of being attached to the intent to destroy that particular culture by exterminating its language. This requires similar discretion based on legal facts similar to that used when labeling an act as genocide. The same way in which every act claimed to be genocide is not labeled as such, every act that can be seen socially as cultural genocide, may not meet the legal requirements. This definition seeks to create a balance between legal pragmatism and the intricacies of cultural protection.

²³⁶ ECOSOC, *Ad Hoc Committee on Genocide Summary Record of the Fourteenth Meeting: Lake Success, New York Tuesday, 21 April 1948 at 2: 15 pm*, U.N. Doc. E/AC.25/SR.14, reprinted in HIRAD ABTAHI & PHILIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES* 887 (2008).

Culture as an essential part of each human and as the unique factor that distinguishes one group from another must be protected. This paper is not an exhaustive analysis of the concept of cultural genocide, nor does it provide a perfect working definition of cultural genocide. This serves as a framework from which the international community can gather ideas and information when drafting a new article that would protect minority and indigenous groups. It is important to begin reanalyzing problems with the prohibition of cultural genocide and reevaluating priorities in international law. The work of protecting groups began with the creation of the Genocide Convention and needs to be continued and expanded upon as groups are in danger of destruction through non-physical means. Genocide ". . . shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups."²³⁷ It is because of the importance and value of ethno/cultural diversity that the international community needs to end its obsession with body counts when it comes to determining genocide and get back to the root of the crime; the destruction of a unique and distinct human group.

²³⁷G.A. Res. 96(I), at 188-89, U.N. Doc. A/64/Add.1 (Jan 31,1947).