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Study on international criminal law and the judicial defence of indigenous peoples' rights

Submitted by the Special Rapporteur

Summary

At its ninth session, the Permanent Forum decided to appoint one of its members, Bartolomé Clavero Salvador, as a Special Rapporteur to conduct a study on international criminal law and the judicial defence of indigenous peoples' rights, to be submitted to the Forum at its tenth session.

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I. Introduction

1. At its ninth session, held in 2010, the Permanent Forum on Indigenous Issues decided to appoint one of its members, Bartolomé Clavero, as a Special Rapporteur to conduct a study on “international criminal law and the judicial defence of indigenous peoples’ rights”.¹ The Declaration on the Rights of Indigenous Peoples states that “indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide (...)” (art. 7.2). This specific mention of genocide against indigenous peoples was necessary because these peoples, as peoples, have been deprived of international criminal protection of even the most basic of their rights. This study is an assessment of the scope of this provision.

2. The current body of international criminal law has its origins in the adoption in late 1948, almost simultaneously with the Universal Declaration of Human Rights, of the Convention on the Prevention and Punishment of the Crime of Genocide. The Declaration and Convention may be said to constitute the core instruments of international human rights law that the United Nations has recognized and promoted since its establishment. However, the Declaration and the Convention are not complementary norms because they do not concern the same type of rights. The Convention on the Prevention and Punishment of the Crime of Genocide does not provide international criminal protection of the rights set forth in the Universal Declaration of Human Rights except, implicitly, through another right that is collective in nature: the right to existence and, it should be added, to the dignity of any “national, ethnical, racial or religious group”. It was recommended that States should protect the human rights proclaimed in the Declaration by criminalizing the relevant offences and making it possible to prosecute them.

3. As stated above, this study of “international criminal law and the judicial defence of indigenous peoples’ rights” seeks to examine the new crime of genocide against indigenous peoples in light of the Declaration on the Rights of Indigenous Peoples. It purports to identify the factors that have made it difficult to provide such international criminal protection and to consider the current options. It will therefore be necessary to review the history of the issue before arriving at the present and looking to the future.

II. The Genocide Convention and indigenous peoples

4. It is natural to refer to an indigenous people as a national, ethnic, racial or even, in some cases, religious group; this means that its right to live with dignity ought to have been recognized and protected by, and on the basis of, the Genocide Convention. In practice, however, this has not been the case. We must first consider the reasons for this exclusion.

5. Indigenous peoples were clearly included in the official draft of the Genocide Convention, submitted by the Office of the Secretary-General of the United Nations, since the draft referred to potential attacks on the culture of groups which corresponded objectively to habitual State policy towards these peoples. Brazil objected, arguing that this would allow “minorities” to oppose policies necessary to

¹ E/C.19/2010/15, para. 144.

State-building and to the equality of a State's citizens. New Zealand, South Africa and Canada agreed with Brazil. The American States and the European States that were current or former colonial powers, such as Great Britain, France and Belgium, also supported Brazil's position. They demanded the inclusion in the Convention of a "colonial clause" that allowed the metropolis to decide whether or not to extend its provisions to its colonies, or to decide to do so with modifications. This led to the virtual disappearance of the provision in question from the final text of the Convention, and therefore to the subsequent establishment of a separate form of genocide: cultural genocide.²

6. The Convention's only remaining reference to cultural genocide or, more generally, genocide through means that do not directly involve violence, concerns extremely serious assimilation policies, such as "causing serious bodily or mental harm to members of the group" or "forcibly transferring children of the group to another group". In any event, the definition of genocide includes not only "killing members of the group" in order to "bring about its physical destruction in whole or in part", but also non-violent acts committed with the intent to destroy in whole or in part a group which, under the definition contained in article 2 of the Convention, could well constitute an indigenous people.³ However, Brazil expressed the then generally held United Nations position that an indigenous people was a minority that would one day blend into the general population of the State, ceasing to exist as a people. It was considered that only the deliberate, physical destruction of an indigenous people in whole or in part would constitute genocide.

7. This extremely limited definition of genocide in the case of indigenous peoples was applied in theory, but rarely in practice. At the time of the Convention's entry into force in 1951, the difficulty of applying it was recognized. For example, a civil rights group immediately submitted to the United Nations the case of the intentional partial destruction of the African American group in the United States but received no response whatsoever.⁴ Obvious problems arose, such as the fact that the United States had yet to ratify the Convention precisely because of issues such as the question of impunity for crimes of racial violence against African Americans;⁵ it was also pointed out that, under the Convention, only States were entitled to submit complaints of genocide against other States to the United Nations, and particularly to the International Court of Justice as the international court with jurisdiction under the Convention (arts. 8 and 9).

8. In the case of persistent, overt colonialism, the Convention did not initially apply to protection of the indigenous peoples in question; owing to the

² William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge, Cambridge University Press, 2000), pp. 184-185; see also Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden, Martinus Nijhoff, 2008), pp. 2070-2071.

³ Article 2 reads: "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".

⁴ Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief for a Crime of the United States Government against the Negro People* (1951) (New York, International Publishers, 1970).

⁵ Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham, Duke University Press, 1991).

aforementioned colonial clause, its application was limited to the metropolitan territory of the States that ratified it. A subsequent communication from such a State to the Secretary-General of the United Nations was needed in order for the Convention to “extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible” (art. 12). The Genocide Convention was developed in the context of treaty law that excluded colonies from States’ international commitments; for this reason, it was necessary for the Universal Declaration of Human Rights to include a specific provision to the contrary (art. 2).⁶

9. This significant exclusion of colonies from the Genocide Convention was not applicable to indigenous peoples living within the borders of a State, but there was a potential for contamination; this made the Convention even less effective in respect of all indigenous peoples. And there were other issues that might affect them; in practice, once Brazil’s position had been adopted and indigenous peoples had been excluded from the context of international law, not even cases involving the deliberate partial physical destruction of such peoples were considered acts of genocide in the context of the United Nations and no State was prepared to submit such cases to the International Court of Justice.⁷ In any event, the procedural issue was not the only one. Since the overtly colonial era and even today, at least in regions such as the Americas, genocide against indigenous peoples has been literally invisible.⁸

10. In light of the clear inability of the international definition of genocide to protect indigenous peoples, other concepts capable of discrediting policies that seek their destruction as peoples began to spread. Since the 1970s, the concept of “ethnocide” has gained currency, replacing “cultural genocide” and with the same meaning, with “genocide” referring only to physical genocide. This has created a new problem without resolving any of the old ones. Ethnocide as a category does not provide a basis for the international judicial defence of indigenous peoples. In international law, genocide, which does have that potential, has a meaning under the Convention which is far broader than physical destruction and which is lost with the new concept of ethnocide.⁹

11. The same may be said of subsequent, more recent, proposals made in an effort to render the international definition of genocide applicable to the protection of indigenous peoples, including the proposal to establish a specific category of

⁶ Article 2 reads: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

⁷ On the best-known case, see Alejandro Parellada and Maria de Lourdes Beldi, eds., *Los Aché de Paraguay: Discusión de un Genocidio* (Buenos Aires, International Work Group for Indigenous Affairs (IWGIA)), 2008.

⁸ Bartolomé Clavero, *Genocidio y Justicia: La Destrucción de las Indias Ayer y Hoy* (Madrid, Marcial Pons, 2002); Elazar Barkan, Genocides of Indigenous Peoples, in Robert Gellately and Ben Kiernan, eds., *The Specter of Genocide: Mass Murder in Historical Perspective* (New York, Cambridge University Press, 2003), pp. 117-139; and Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco, City Lights, 2004), particularly with respect to the category of genocide, pp. 3-12.

⁹ Robert Jaulin, *La paix blanche. Introduction a l’ethnocide* (Paris, Seuil, 1970) and *Le livre blanc de l’ethnocide en Amérique* (Paris, Fayard, 1972).

“indigenocide”, yet another category that is totally ineffective under international criminal law.¹⁰ For legal purposes, and for the more specific purposes of the international criminal protection of indigenous peoples, the important thing is not that there should be a plethora of categories that identify and classify the various forms of attack on a national, ethnic, racial or religious group; the question is whether such attacks correspond to the offences that are defined under international law so that they can be prosecuted before a court in defence of the affected group.

12. The recent tendency to define as “ethnic cleansing” policies that could prove to be genocidal under the definition of “genocide” established in international law has been a way of escaping responsibility, and even of fostering impunity. “Ethnic cleansing” may be the ideal term for journalistic and even scientific purposes because of its emotional content, but its ineffectiveness makes it a poor choice in the field of law. The same may be said of “ethnocide” and “cultural genocide” as fully separate terms distinct from “genocide” as defined in criminal law.¹¹ Use of one or both of these expressions is frequently a way of circumventing the legal effects of use of the word “genocide” even in the face of the evidence.¹²

13. Within the United Nations, in taking into account the existence and dignity of indigenous peoples and developing international criminal law on the basis of the Genocide Convention, the term “ethnocide” has been used to mean cultural genocide: the type of genocide that is excluded from the definition of genocide as such, the genocide that is actually defined in international law and does not exclude the most serious forms of cultural genocide.¹³ In taking the development of international criminal law into account, the Statute of the International Criminal Court, the relevant court in such matters, did not add new forms of genocide to the definition set out in the Convention; it followed a different path that also poses problems.

III. The Statute of the International Criminal Court and indigenous peoples

14. The Statute of the International Criminal Court, which entered into force in 2002, literally reproduces the definition of genocide contained in the Convention without rewording, changes or updates of any kind. Article 6 of the Statute is an exact replica of article 2 of the Convention, except, of course, for replacing the initial “In the present Convention” with “For the purpose of this Statute”. The drafters of the Statute did not take the opportunity to reincorporate into the criminal

¹⁰ Raymond Evans, “Crime without a Name: Colonialism and the Case for ‘Indigenocide’”, in A. Dirk Moses, ed., *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York, Berghahn Books, 2008), pp. 133-147.

¹¹ Benjamin Lieberman, “‘Ethnic Cleansing’ versus Genocide”, in Donald Bloxham and A. D. Moses, eds., *The Oxford Handbook of Genocide Studies* (Oxford and New York, Oxford University Press, 2010), pp. 42-60.

¹² Bartolomé Clavero, *Genocide or Ethnocide, 1922-2007: How to Make, Unmake and Remake Law with Words* (Milan, Giuffrè Editore, 2008); see, in particular, chapter VIII.4, “Behind Chutzpah: Indigenous Peoples and Practical Denial”.

¹³ José Martínez Cobo, *Estudio del Problema de la Discriminación contra las Poblaciones Indígenas, 1981-1983*, chapter 15 (E/CN.4/Sub.2/1983/21/Add.3), para. 136; Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (E/CN.4/Sub.2/1985/6), part II, section B.3; and Erica Irene A. Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples* (E/CN.4/Sub.2/1993/28), para. 3.

definition of genocide the text that had been included in the original draft but omitted from the final Convention or to better identify protected groups, such as indigenous peoples, or protected rights, such as their right to exist as peoples, the right to their own culture or the right to their own land and its vital resources. Nonetheless, the new statutory and jurisdictional context of the old crime of genocide — which still has the same definition — introduces new elements that may be useful for the international protection of indigenous peoples and their rights.

15. Above all, for practical procedural purposes, in international law genocide is no longer considered an exclusive matter between States which only States can formally denounce and for which only States can be held criminally responsible. The Convention itself already envisaged the possibility that individuals could be held responsible, but it gave States the exclusive jurisdiction to determine such responsibility. Under the Convention, “public officials or private individuals” may be tried for genocide “by a competent tribunal of the State in the territory of which the act was committed” or “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”; this refers to State officials and to the International Court of Justice. The International Criminal Court, which can prosecute individuals, was established more than half a century later. Given the extreme difficulty of proving the criminal liability of a State’s leaders before the International Court of Justice — a task that is all the more difficult for indigenous peoples, as we have seen — it is encouraging that individuals as such, including public officials, can be prosecuted by the International Criminal Court for crimes established in international law.

16. Under the Statute of the International Criminal Court, genocide is no longer the only relevant crime defined in international law. Pursuant to article 7, paragraph 1, of the Statute, the targeted killing or forced disappearance of, for example, indigenous leaders; forced displacement or other seizure of a people’s territory or vital resources; collective imprisonment or confinement; denial of the right of participation as peoples; inhuman actions or policies which cause them suffering without necessarily resulting in permanent physical or mental harm, including, of course, sexual assault, could be considered international crimes or true crimes against humanity.¹⁴ In essence, any type of “widespread or systematic attack” on an indigenous people, regardless of the perpetrator, could constitute a crime against humanity and, as such, could now be reported to or prosecuted by the International Criminal Court, without the need for a formal complaint.

¹⁴ Article 7 states: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

17. Another major new element is the fact that, unlike the International Court of Justice, the International Criminal Court has a Prosecutor's Office that can act *proprio motu*. Article 15, paragraphs 1 and 2, of the Statute state that: "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court". For the purpose of prosecuting crimes defined under international law, the International Criminal Court can take a proactive stance whereas the International Court of Justice has very little flexibility in that regard.

18. In States which have ratified the Statute of the International Criminal Court, or which have accepted its jurisdiction for a specific case and have not conducted the relevant investigation and trial, indigenous peoples or human rights organizations may provide information concerning signs or evidence of genocide or crimes against humanity directly to the Prosecutor's Office so that it can investigate the matter. Such information may, of course, include mention of the alleged perpetrators — private individuals or, as stated in the Genocide Convention, "public officials or private individuals" — all considered in their individual capacity, as is most appropriate for the determination of criminal liability; or it may simply state the facts, leaving it to the Prosecutor's Office to identify the alleged perpetrators. The information may also concern alleged acts that constitute not only genocide, but also crimes against humanity — crimes the very definition of which seems to describe policies and actions that are still routinely applied against indigenous peoples throughout the world.

19. It is often considered that crimes against humanity, like genocide, were already covered by international customary law and that the prevention and prosecution of those crimes has now been secured with the establishment of the International Criminal Court.¹⁵ That may be so, but it has done nothing to protect indigenous peoples and their fundamental rights as peoples. Indeed, the partial application of customary international criminal law after the Second World War, prior to the adoption of the Genocide Convention, had shown that custom was not a good source of, and did not guarantee equality under, criminal law. Now that statutory international criminal law has been established for crimes other than genocide, along with a corresponding court, there can be no justification or explanation for not providing effective international criminal protection of the fundamental rights of indigenous peoples as peoples.

IV. The Declaration on the Rights of Indigenous Peoples and international crimes

20. The draft declaration on the rights of indigenous peoples, prepared by the Working Group on Indigenous Populations and submitted to the Commission on Human Rights in 1994, included the aforementioned provision on genocide:

¹⁵ M. Cherif Bassiouni, ed., *International Criminal Law*, vol. I, *Sources, Subjects and Contents* (Leiden, Martinus Nijhoff, 2008).

(“Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide”), as well as another provision that had been omitted from the final version in 2007: “Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide”. This was one of the few changes made to the text of the draft declaration as it moved from the Working Group to the General Assembly,¹⁶ and it is this that interests us. What was really lost with the deletion of the second provision? What remains of the meaning and scope of the first and only reference to genocide in the context of current international criminal law in general and the Declaration on the Rights of Indigenous Peoples in particular?

21. The provision that was ultimately deleted had a clear purpose. In the case of the Genocide Convention, with its aforementioned limitations, the goal was to criminalize genocide committed through policies that were fundamentally harmful to indigenous cultures. In the case of the Statute of the International Criminal Court, the goal was to include — albeit in different words — crimes against humanity not covered by the existing definition of genocide. In practice, words such as “ethnocide” and “cultural genocide”, which are not reflected in international criminal law, might have been replaced by the expression “crimes against humanity”, used in the Statute of the International Criminal Court. However, they were simply deleted without being replaced, the clear intention being to weaken the international criminal protection afforded to indigenous peoples, as peoples, along with their rights. The question, then, is whether that goal was achieved.

22. The Statute of the International Criminal Court maintained the language of the Genocide Convention for all purposes pertaining specifically to the Court, including that of identifying subjects whose existence and dignity are protected — namely, any “national, ethnical, racial or religious group” — even though the word “group” as a collective subject is not enshrined in international human rights law. The Declaration on the Rights of Indigenous Peoples corrected this shortcoming; a collective subject whose fundamental rights must be protected internationally, including through international criminal law, is an indigenous people. The International Criminal Court, beginning with the Prosecutor’s Office, must pay particular attention to this identification when considering the purposes and in the context of criminal protection of the existence and dignity of indigenous peoples, as peoples, in accordance with the Declaration.

23. The rights which must be protected, including through criminal law, are set out in the Declaration itself. They have not disappeared simply because the references to ethnocide and cultural genocide, which envisaged such protection, have been eliminated. The Declaration mentions not only “the collective right to live in freedom, peace and security as distinct peoples” and not to be subjected to genocide (article 7, paragraph 2), but also, replacing the words “ethnocide” and “cultural genocide”, “the right not to be subjected to forced assimilation or destruction of their culture” (article 8, paragraph 1). Although it might be argued that this right is

¹⁶ Asbjørn Eide, “The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples”, and Erica Irene A. Daes, “The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples”, in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, International Working Group for Indigenous Affairs, 2009), pp. 32-46 and 48-76.

not protected by the definition of genocide, it will, in any event, be protected by the addition of the already established crimes against humanity. In any event, proper interpretation of the Declaration on the Rights of Indigenous Peoples, read together with the Statute of the International Criminal Court, suggests that the most relevant right for the existence and dignity of indigenous peoples, as peoples, is the enjoyment of explicit protection under international criminal law, and, therefore by the International Criminal Court.

24. No norm should be interpreted in isolation from the set of legislation of which it is a part or into which it has been incorporated. This is worth noting for all matters related to the Declaration on the Rights of Indigenous Peoples, which is an instrument of international human rights law. Declaratory or treaty human rights norms are not usually concerned with the criminal protection of indigenous peoples and their rights. The fact that genocide is mentioned in the Declaration on the Rights of Indigenous Peoples constitutes an exception to common practice, but that exception in no way affects the criminal protection of such rights. Under the Statute of the International Criminal Court, the Declaration cannot be understood as excluding or reducing international criminal protection of the fundamental rights of indigenous peoples against policies or actions that might lead to genocide or to any crime against humanity.

25. Article 42 of the Declaration on the Rights of Indigenous Peoples states: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”. This article is, above all, binding on all international bodies, agencies and entities of the United Nations system.¹⁷ The International Criminal Court cannot circumvent this obligation, weakening or delaying the necessary international criminal protection of the fundamental rights of indigenous peoples as peoples.

26. On the other hand, in light of the normative value which article 42 attaches to the Declaration and of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, and Serious Violations of International Humanitarian Law approved by the General Assembly in 2005, the United Nations has an obligation to establish bodies or mechanisms for redressing serious human rights violations, such as those of which indigenous peoples had been victims prior to the development of international criminal law treaties and statutes.¹⁸

V. Conclusions

27. The Declaration on the Rights of Indigenous Peoples and the Statute of the International Criminal Court have opened many avenues for criminal protection of the rights of indigenous peoples under international law. These

¹⁷ E/C.19/2009/14, annex.

¹⁸ Federico Lenzerini, ed., *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford, Oxford University Press, 2008), which takes into consideration both the Declaration and the Principles; and Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, Colorado, Fulcrum, 2010), especially chapter 14, “Was Genocide Legal?”

are still unexplored avenues, owing primarily to the persistence in international criminal law of a position established in the past, especially under the Convention for the Prevention and Punishment of the Crime of Genocide, whereby indigenous peoples do not qualify for criminal protection. In theory, they were afforded such protection under the Genocide Convention but in practice, such protection was not provided. This explains the need for the Declaration to refer to the right of indigenous peoples not to be subjected to “any act of genocide”.

28. The Declaration on the Rights of Indigenous Peoples calls for a change in perspective: the fundamental right of indigenous peoples to existence and dignity can and must be protected against the still-common policies and actions by any type of agent — not only State agents — which constitute virtual genocide or crimes against humanity. The International Criminal Court is the court with competence in cases concerning such crimes — of which indigenous peoples continue to be victims — and involving States parties to the Statute of the Court. Its Prosecutor’s Office must also act *proprio motu* in the most egregious cases.

29. In any event, and especially for matters that lie beyond the jurisdiction of the International Criminal Court, under article 42 of the Declaration, the United Nations is under the obligation to establish mechanisms to redress any serious violation of the rights of indigenous peoples and to provide reparation for those that have been committed.
