

## CULTURAL GENOCIDE: LEGAL LABEL OR MOURNING METAPHOR?

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On 21 June 2012 in Saskatoon, Leona Bird testified before the Truth and Reconciliation Commission of Canada (TRC). She told the story of how at the age of six, she and her younger sister were forcibly separated from their family, and sent to a residential school in Prince Albert, Saskatchewan. These are her words:

And then we seen this army covered wagon truck, army truck outside the place. And as we were walking towards it, kids were herded into there like cattle, into the army truck. Then in the far distance I seen my mother with my little sister. I went running to her, and she says, “Leona,” she was crying, and I was so scared. I didn’t know what was going on, I didn’t know what was happening. My sister didn’t cry because she didn’t understand what we, we were, what’s gonna happen to us. Anyway, it was time for me and her to go, and she, when we got in that truck, she just held me, pinched me, and held me on my skirt. “Momma, Momma, Momma.” And then my mother couldn’t do nothing, she just stood there, weeping. And then I took my little sister, and tried to make her calm down, I just told, “We’re going bye-bye, we’re going somewhere for a little while.” Well, nobody told us how long we were gonna be gone. It’s just, like, we were gonna go into this big truck, and that’s how, that’s how it started.<sup>1</sup>

That is how it started, not only for Leona, but also for the 6,750 other survivors who testified before the TRC. That is also how it started for thou-

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<sup>1</sup> Truth and Reconciliation Commission of Canada, *The Survivors Speak*, vol 3 (Winnipeg: TRC, 2015) at 24–25.

sands of others who could not tell their stories, including the estimated 6,000 children who died in Canada’s residential schools.<sup>2</sup>

On 15 December 2015, after six exhausting years of hearings, the TRC released its final report, *Honouring the Truth, Reconciling for the Future*. The summary of the report distilled the essence of its findings in these words:

For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide.”<sup>3</sup>

Justice Murray Sinclair, Chair of the TRC, first used the words “cultural genocide” at a news conference in Ottawa on 2 June 2015.<sup>4</sup> It was greeted with rapturous applause by the audience—seemingly, a moment of rhetorical redemption for the long-suffering survivors. A few days earlier, Chief Justice Beverly McLachlin of the Supreme Court of Canada had also declared in a public lecture that the Indigenous peoples of Canada were victims of “cultural genocide.”<sup>5</sup> This was a marked departure from her usual judicial restraint, a conspicuous condemnation of what she referred to as “[t]he most glaring blemish on the Canadian historic record.”<sup>6</sup> Similarly, in an influential article published in 2012, Professors David MacDonald and Graham Hudson maintained that “terms like ‘cultural genocide’ ... convey the essence of what the [Indian Residential School] system was about: the attempted destruction of Aboriginal languages, religions and cultures in Canada.”<sup>7</sup>

The introduction of the concept of cultural genocide in public discourse has produced both acute controversy and extensive commentary. For in-

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<sup>2</sup> See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Winnipeg: TRC, 2015) at 25, 90–101 [*TRC Summary*]; John Paul Tasker, “Residential Schools Findings Point to ‘Cultural Genocide’”, Commission Chair Says”, *CBC News* (29 May 2015), online: <www.cbc.ca>.

<sup>3</sup> *TRC Summary*, *supra* note 2 at 1.

<sup>4</sup> For sample coverage, see e.g. Gloria Galloway & Bill Curry, “Residential Schools Amounted to ‘Cultural Genocide,’ Report Says”, *The Globe and Mail* (2 June 2015), online: <www.theglobeandmail.com>.

<sup>5</sup> See Sean Fine, “Chief Justice Says Canada Attempted ‘Cultural Genocide’ on Aboriginals”, *The Globe and Mail* (28 May 2015), online: <www.theglobeandmail.com>.

<sup>6</sup> *Ibid.*

<sup>7</sup> David B MacDonald & Graham Hudson, “The Genocide Question and Indian Residential Schools in Canada” (2012) 45:2 *Can J Political Science* 427 at 430.

stance, in 2013, the Canadian Museum of Human Rights refused to qualify historical rights abuses against Indigenous peoples as “genocide”; this refusal gave rise to accusations that it was “sanitizing the true history of Canada’s shameful treatment of First Nations.”<sup>8</sup> By contrast, in the same year, a Canadian lawyer complained that

[A]boriginal elites who engage in this relentless blame game should reconsider the wisdom and efficacy of constantly accusing their fellow Canadians of racism and genocide. These are false and insulting accusations and they inhibit reconciliation, rather than promoting it.<sup>9</sup>

The introduction of the concept of cultural genocide in public discourse has produced acute controversy. Amid this controversy, the question is whether cultural genocide has a legal meaning, and if not, why these words carry so much power. It may be assumed that the residential school survivors assembled in Ottawa that day were not applauding because of the concern that legal experts may have for precise terminology. Why, then, should such legal concepts and intellectual abstractions matter to those suffering from intimate grief and irredeemable loss? When we speak of legal pluralism, does it extend to how juridical terms are experienced emotionally in particular contexts and traditions? In short, in regard to Canada’s Indigenous peoples, is cultural genocide a legal label or a mourning metaphor?

## I. Physical Versus Cultural Genocide

The celebration among the audience in Ottawa on hearing the word “genocide” reminded me of a similar incident in Guatemala City some years earlier. In 1998, while serving as a UN prosecutor at The Hague, I was dispatched as a legal expert to assist the UN Historical Clarification Commission for Guatemala, an inquiry into the atrocities committed during the Guatemalan Civil War in the 1980s. The Chair of the Commission was Professor Christian Tomuschat, a renowned scholar of international law from Germany. He had asked me to determine whether the military operations against the Mayan Indigenous population in the Ixil region qualified as genocide. These attacks were part of the so-called “anti-communist” campaign of the right-wing military regime of President Efraín Ríos Montt. The testimony of the survivors was simply shocking. There were massacres of entire villages, in which not even women, chil-

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<sup>8</sup> *TRC Summary*, *supra* note 2 at 250.

<sup>9</sup> Peter Best, “Today’s Canadians Can’t Fix All Past Wrongs”, Opinion Letter, *The Sudbury Star* (24 July 2013), online: <[www.thesudburystar.com](http://www.thesudburystar.com)>, cited in John Borrow, “Residential Schools, Respect, and Responsibilities for Past Harms” (2014) 64:4 UTLJ 486 at 490.

dren, or the elderly were spared. The killings were often accompanied by horrendous acts of rape and torture. These acts were part of a wider scorched earth policy, involving the systematic bombing and burning of villages and the deliberate destruction of food supplies, to eradicate the Mayan population.<sup>10</sup> The Commission described these crimes as “an aggressive racist component of extreme cruelty that led to the extermination en masse” of Indigenous populations.<sup>11</sup>

On 25 February 1999, the Commission delivered its final report, *Memory of Silence*. Among its conclusions was the finding that Guatemalan armed forces, “within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people.”<sup>12</sup> As with Ottawa in 2015, hearing the term “genocide” elicited a rapturous applause among the long-suffering survivors—yet another testament to the power of this word.

Unlike the situation in Canada, however, the UN Commission in Guatemala had invoked the term “genocide” in a strictly legal sense. The extermination campaigns in Guatemala fit squarely within the recognized definition of genocide under international law, whereas the forcible transfer of children in Canadian residential schools gave rise to ambiguity. In what appears to be an implicit recognition of the difference between legal and non-legal uses of the term, the TRC emphasized the distinction between physical and cultural genocide as follows:

*Physical genocide* is the mass killing of the members of a targeted group, and *biological genocide* is the destruction of the group’s reproductive capacity. *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.<sup>13</sup>

The TRC did not invoke any legal sources in using the term “cultural genocide”, and did not purport to make a legal conclusion—with one brief ex-

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<sup>10</sup> See Guatemala, Commission for Historical Clarification, *Guatemala: Memory of Silence: Tz’inil Na’tab’al: Report of the Commission for Historical Clarification, Conclusions and Recommendations* (Guatemala: The Commission, 1999) at 23–24.

<sup>11</sup> *Ibid* at 34.

<sup>12</sup> *Ibid* at 41.

<sup>13</sup> *TRC Summary*, *supra* note 2 at 1 [emphasis in original].

ception, as I shall explain shortly. Indeed, the vast majority of commentary suggests that this term was adopted because of its moral and political weight.

By contrast, the TRC's reference to physical and biological genocide is an apparent reference to the legal definition contained in article II of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>14</sup> (*Genocide Convention*). This definition has withstood the test of time, as demonstrated by the fact that it has been included verbatim in article 6 of the *Statute of the International Criminal Court (ICC Statute)*, adopted at the Rome Diplomatic Conference on 17 July 1998.<sup>15</sup> The *travaux préparatoires* indicate that proposals to expand its scope were rejected in favour of the "authoritative definition ... which was widely accepted by States and had been characterized as reflecting customary law by the International Court of Justice."<sup>16</sup>

On 2 September 1998, just a few weeks after the *ICC Statute* was adopted, the International Criminal Tribunal for Rwanda (ICTR) delivered its historic judgment in *Prosecutor v. Jean-Paul Akayesu*<sup>17</sup> (*Akayesu*). This judgment affirmed that, beyond treaty law, the article II definition is also "undeniably considered part of customary international law."<sup>18</sup> Since then, the jurisprudence of the ICTR, together with the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the In-

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<sup>14</sup> 9 December 1948, 78 UNTS 277, art II (entered into force 12 January 1951) [*Genocide Convention*]. "Genocide" is defined in article II of the *Genocide Convention* as 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.

<sup>15</sup> See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 6 (entered into force 1 July 2002) [*ICC Statute*].

<sup>16</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UNGAOR, 50th Sess, Supp No 22, UN Doc A/50/22 (1995) at para 60.

<sup>17</sup> ICTR-96-4-T, Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictr.org> [*Akayesu*].

<sup>18</sup> *Ibid* at para 495. See also *Prosecutor v Alfred Musema*, ICTR-96-13-T, Judgment and Sentence (27 January 2000) at para 151 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictr.org>; *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Judgment and Sentence (6 December 1999) at para 46 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictr.org>.

ternational Criminal Court (ICC), and the International Court of Justice (ICJ), has elaborated and clarified the scope of genocide under international law.

In understanding the significance of cultural genocide, it is important to bear in mind the relationship between the crime of genocide and the separate category of crimes against humanity. In particular, widespread or systematic attacks against civilian populations, which do not constitute genocide, do not necessarily fall into a normative black hole; they may still qualify as a crime against humanity.<sup>19</sup> The origin and concept behind this broader category demonstrates that what the TRC referred to as cultural genocide in a non-legal sense could constitute persecution in the legal sense. Crimes against humanity emerged with the adoption of the *Charter of the International Military Tribunal*<sup>20</sup> (*Nuremberg Charter*) at Nuremberg in 1945. It was necessary because the category of war crimes, as then defined, only applied to victims who were foreign nationals, belonging to States at war with Germany. It did not protect victims of Nazi persecutions in the Axis countries, including the Jewish populations of Germany, Austria, Hungary, Romania, and Slovakia. It was therefore necessary to address this jurisdictional lacuna by including a new category that would criminalize atrocities against civilian populations irrespective of nationality; it was, at the time, a revolutionary concept and an unprecedented infringement on State sovereignty that presaged the adoption of the *Universal Declaration of Human Rights*<sup>21</sup> in 1948. Prior to these instruments, international law did not impose constraints on a State's treatment of its own population.

In his 1944 book, *Axis Rule in Occupied Europe*, the Polish jurist Raphaël Lemkin had introduced the term “genocide” to describe Nazi Germany's racial demographic policies. He wrote that, beyond physical extermination,

genocide does not necessarily mean the immediate destruction of a nation ... [but] is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.<sup>22</sup>

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<sup>19</sup> See *ICC Statute*, *supra* note 15, art 7.

<sup>20</sup> Annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945).

<sup>21</sup> GA Res 217A (III), UNGAOR, 3<sup>rd</sup> Sess, Supp No 13, UN Doc A/810 (1948) 71.

<sup>22</sup> Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944) at 79.

It was not until the adoption of the *Genocide Convention* in 1948 that this new concept was formally recognized as a distinct international crime. Nonetheless, it had already emerged as a species of crimes against humanity under the *Nuremberg Charter*.<sup>23</sup> In the ICTY *Prosecutor v. Zoran Kupreškić*<sup>24</sup> case, presided by the renowned Judge Antonio Cassese of Italy, the Trial Chamber emphasized that

persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics.<sup>25</sup>

Beyond the intent to discriminate, the judgment explained the difference between persecution and genocide as follows:

While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.<sup>26</sup>

Therefore, in discussing cultural genocide, it is important to bear in mind that what does not qualify as genocide may still qualify as the closely related crime against humanity of persecution. In this regard, article 7(2)(g) of the *ICC Statute* defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>27</sup> Surely, the case could be made that the residential school policy for Indigenous children amounts to the “deprivation of fundamental rights ... by reason of the identity of the group.”<sup>28</sup> This policy thus falls within the ambit of the crime of persecution.

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<sup>23</sup> *Supra* note 19, art 6(c).

<sup>24</sup> IT-95-16-T, Judgment (14 January 2000) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <[www.icty.org](http://www.icty.org)>.

<sup>25</sup> *Ibid* at para 636.

<sup>26</sup> *Ibid*.

<sup>27</sup> *ICC Statute*, *supra* note 15, art 7(2)(g).

<sup>28</sup> *Ibid*.

A crime against humanity is not a trivial offence. Why then the insistence on using the term “cultural genocide”? Let us first consider how the residential school policy relates to the strict legal definition of genocide. The process leading to the adoption of the *Genocide Convention* began with the adoption of Resolution 96(I) by the UN General Assembly on 11 December 1946. The text of this resolution provided as follows:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.<sup>29</sup>

Genocide was thus conceived as a crime in which the victim was an “entire human grou[p]”.<sup>30</sup> When the *Draft Convention on the Crime of Genocide (Draft Convention)* was prepared by the UN Secretariat on 26 June 1947, it included three categories of genocide: “physical”, “biological”, and “cultural”.<sup>31</sup> By the time the final text of the *Genocide Convention* was adopted by the UN General Assembly on 9 December 1948, physical and biological genocide were retained, but cultural genocide was deleted, with one possible exception, as I shall explain below. But what is most important is to appreciate that genocide is a crime against groups—in particular, against a “national, ethnical, racial or religious group, as such.”<sup>32</sup> The question of its specific expression as physical, biological or cultural genocide is thus secondary to the intention to destroy a group. International jurisprudence confirms that the distinguishing feature of genocide is the mental element in the *chapeau* of article II; namely, the requirement that certain prohibited acts be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>33</sup> This *mens rea* has been qualitatively categorized as a specific intent or *dolus specialis*, this being the most exacting mental element in criminal law.<sup>34</sup> The *actus reus* or material element of genocide is set forth in the five prohibited acts enumerated under paragraphs (a) to (e) of article II. These acts, however, cannot qualify as genocide unless the requisite *mens*

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<sup>29</sup> *The Crime of Genocide*, GA Res 96(I), UNGAOR, 1st sess, 55th Mtg, UN Doc A/Res/96(I) (1946) 188 at 188–89.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Draft Convention on the Crime of Genocide*, UNESCOR, UN Doc E/447 (1947), reprinted in Hiram Abtahi & Philippa Webb, eds, *The Genocide Convention: The Travaux Préparatoires* (Leiden: Martinus Nijhoff, 2008) vol 1, 209 at 232–36 [*Draft Convention*].

<sup>32</sup> *Genocide Convention*, *supra* note 14, art II.

<sup>33</sup> *Ibid.*

<sup>34</sup> See *Akayesu*, *supra* note 17 at para 498.



*rea* is established.<sup>35</sup> By way of example, “[i]t is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.”<sup>36</sup>

With regard to the *actus reus* or material elements, it is important to note that the prohibited acts enumerated in paragraphs (a) to (e) of article II also contain a *mens rea* element, in addition to the *dolus specialis* requirement in the *chapeau* of the definition. For instance, “[k]illing members of the group” in paragraph (a) refers to “intentional but not necessarily premeditated murder.”<sup>37</sup> The intention to destroy a group must thus be accompanied by the intention to commit murder. In this regard, genocide, like crimes against humanity, is a complex crime, which requires both a primary and secondary *mens rea*; the first mental element defines the context within which an act is committed, whereas the second mental element defines the prohibited act by which the crime is committed. It is the scale and gravity of the context that is paramount in qualifying the underlying act as genocide rather than as an ordinary crime.

The TRC’s reference to physical genocide only mentions “the mass killing” of a group.<sup>38</sup> There are, however, two other acts that also qualify as physical genocide under article II of the *Genocide Convention*. In regard to the second prohibited act, paragraph (b) refers to “[c]ausing serious bodily or mental harm to members of the group.”<sup>39</sup> In the *Prosecutor v. Sylvestre Gacumbitsi* case, the ICTR held that

[s]erious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable. Similarly, serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.<sup>40</sup>

In regard to the third prohibited act that also qualifies as physical genocide, paragraph (c) enumerates “[d]eliberately inflicting on the group con-

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<sup>35</sup> See *Prosecutor v. Clément Kayishema*, ICTR-95-1-T, Judgment (21 May 1999) at para 91 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictor.org>.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Prosecutor v. Clément Kayishema*, ICTR-95-1-A, Judgment (Reasons) (1 June 2001) at para 151 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <www.ictor.org>, interpreting *Genocide Convention*, *supra* note 14, art II(a).

<sup>38</sup> *TRC Summary*, *supra* note 2 at 1.

<sup>39</sup> *Genocide Convention*, *supra* note 14, art II(b).

<sup>40</sup> *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-T, Judgment (17 June 2004) at para 291 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictor.org> [footnotes omitted].

ditions of life calculated to bring about its ... destruction.”<sup>41</sup> The *Akayesu* case opined by way of *obiter dicta* that paragraph (c) “should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”<sup>42</sup> This concept of slow death, it concluded, encompasses acts such as “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>43</sup>

Therefore, it is the three prohibited acts contained in paragraphs (a) to (c)—namely, “killing”, “serious ... harm”, and “conditions of life”—that are collectively referred to as physical genocide. The fourth act, “[i]mposing measures intended to prevent births within the group” under paragraph (d) is referred to as biological genocide.<sup>44</sup> The *Akayesu* case stated *obiter dicta* that this category should include acts such as “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”<sup>45</sup> Thus, in referring to physical and biological genocide, the TRC was referring to paragraphs (a) to (d) of article II of the *Genocide Convention*.

The case could be made that certain elements of these prohibited acts apply to Canada’s Indigenous peoples. For instance, some have argued that causing serious mental harm to residential school children qualifies as physical genocide.<sup>46</sup> Others have maintained that the forced sterilization of Indigenous women in the 1960s and 1970s constitutes biological genocide.<sup>47</sup> Of course, irrespective of how inhumane the acts may be, it must be established that they were committed with the requisite *dolus specialis*. With regard to cultural genocide, however, what appears most relevant is the fifth and last prohibited act under article II, paragraph (e): “[f]orcibly transferring children of the group to another group.”<sup>48</sup> Indeed, the only reference to a legal definition of genocide by the TRC, which appears in passing in an inconspicuous part of the summary of the final report, is the following:

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<sup>41</sup> *Genocide Convention*, *supra* note 14, art II(c).

<sup>42</sup> *Akayesu*, *supra* note 17 at para 505.

<sup>43</sup> *Ibid* at para 506.

<sup>44</sup> *Genocide Convention*, *supra* note 14, art II(d).

<sup>45</sup> *Akayesu*, *supra* note 17 at para 507.

<sup>46</sup> See MacDonald & Hudson, *supra* note 7 at 435.

<sup>47</sup> See generally Karen Stote, *An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women* (Halifax: Fernwood Publishing, 2015).

<sup>48</sup> *Genocide Convention*, *supra* note 14, art II(e).

It is difficult to understand why the forced assimilation of children through removal from their families and communities—to be placed with people of another race for the purpose of destroying the race and culture from which the children come—can be deemed an act of genocide under Article 2(e) of the UN’s Convention on Genocide, but is not a civil wrong.<sup>49</sup>

What, then, is the origin of this provision, and does it qualify as cultural genocide in a legal sense?

## II. Transfer of Children as Cultural Genocide?

In order to better appreciate whether article II(e) encompasses cultural genocide, it is instructive to consider the attempted resurrection, and ultimate rejection, of this concept in the drafting history of the UN *Declaration on the Rights of Indigenous Peoples*<sup>50</sup> (*Declaration*). In fact, I began my UN human rights career in 1988 as a student intern with the UN Working Group on Indigenous Populations, which was entrusted with the ambitious task of drafting the *Declaration*. It was still in its early stages, having only been established in 1982, and its meetings attracted an unprecedented gathering of Indigenous peoples from every corner of the world, providing an opportunity to define their unique concerns and priorities. It was in this light, after a decade of deliberations, that the central controversy surrounding the name of the working group itself emerged. The Indigenous participants wanted to be called “peoples” rather than “populations”, but State delegates feared that by equating them with other peoples under colonial domination, they would become beneficiaries of the right to self-determination under international law, up to and including statehood. By the 1990s, the semantic controversy shifted to cultural genocide. Article 7 of the working group’s first *Draft Declaration on the Rights of Indigenous Peoples*<sup>51</sup> (*Draft Declaration*) in 1993 attempted to introduce the terms “ethnocide” and “cultural genocide”, indicating their obvious relevance to the global experience of Indigenous peoples. In particular, article 7 provided that

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

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<sup>49</sup> *TRC Summary*, *supra* note 2 at 258.

<sup>50</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007) [*Declaration on the Rights of Indigenous Peoples*].

<sup>51</sup> Annexed to the *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UNCHROR, 45th Sess, Annex 1, Agenda Item 14, UN Doc E/CN.4/Sub.2/1993/29 (1993) [*Draft Declaration*].

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.<sup>52</sup>

Had article 7 been adopted, it could have reintroduced an even broader concept of cultural genocide than that proposed in the 1947 *Draft Convention*. Although UN declarations are generally considered in international law terminology as hortatory “soft law”, they have the potential to “crystalize” into “hard” customary law if they reflect State practice and *opinio juris*. Although UN General Assembly resolutions are mere recommendations under article 10 of the *UN Charter*,<sup>53</sup> the ICJ has confirmed that, in appropriate circumstances, they “may be taken to reflect customary international law.”<sup>54</sup> Draft article 7, therefore, was an opportunity to transform cultural genocide from what Professor Ronald Niezen calls “a ‘wannabe’ concept”<sup>55</sup> into a binding norm of international law. In this hypothetical context, the TRC’s use of that term would have assumed a very different dimension.

The far-reaching potential of the *Declaration* was not lost on Canada, especially because “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.”<sup>56</sup> When, after twenty-five years of deliberations, the *Declaration* was finally adopted by the UN General Assembly in 2007 by an overwhelming majority of 143 votes in favour, Canada was one of four States voting against.<sup>57</sup> In view of public outcry, in 2010 the government

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<sup>52</sup> *Ibid*, art 7.

<sup>53</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 10 (entered into force 24 October 1945).

<sup>54</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at para 195.

<sup>55</sup> Ronald Niezen, “Templates and Exclusions: The Making of Cultural Genocide in Canada’s Truth and Reconciliation Commission on Indian Residential Schools” (2015) at 7 [unpublished, on file with author].

<sup>56</sup> *Bouzari v Iran* (2004), 71 OR (3d) 675 at para 65, 243 DLR (4th) 406 (CA).

<sup>57</sup> See United Nations, Press Release, GA/10612, “General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ Towards Human Rights for All,

of Prime Minister Stephen Harper finally relented and endorsed the *Declaration*, but subject to an important qualification. In a carefully worded statement of understanding, the government noted:

Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.<sup>58</sup>

This statement was clearly intended to pre-empt a situation in which the *Declaration* could be invoked against Canada as customary law based on silence or acquiescence, including before Canadian courts. The government of Prime Minister Justin Trudeau changed course. The Minister of Indigenous and Northern Affairs, Carolyn Bennett, announced in May 2016 that Canada had become “a full supporter of the Declaration, without qualification.”<sup>59</sup> However, she referred to this policy as “breathing life into Section 35 of Canada’s Constitution, which provides a full box of rights for Indigenous peoples,” leaving some ambiguity as to whether, in light of an equal “nation-to-nation relationship,” the *Declaration* is a potential source of rights under international law beyond what is already recognized by Canadian law.<sup>60</sup>

For present purposes, however, it is sufficient to note that the proposed article on cultural genocide was rejected in the final draft of the *Declaration*. Instead, there is a single reference to genocide in article 7(2) as follows:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.<sup>61</sup>

Thus, the definition of genocide was not tampered with, and the broad category of cultural genocide was specifically rejected as a legal concept. Nonetheless, the forcible transfer of children as one of the prohibited acts

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Says President” (13 September 2007), online: UN Meetings Coverage & Press Releases <[www.un.org/en/unpress/](http://www.un.org/en/unpress/)>.

<sup>58</sup> Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010), online: Aboriginal Affairs and Northern Development Canada <[www.aadnc-aandc.gc.ca/](http://www.aadnc-aandc.gc.ca/)>.

<sup>59</sup> Indigenous and Northern Affairs Canada, News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (10 May 2016), online: Government of Canada <[news.gc.ca/](http://news.gc.ca/)>.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Declaration on the Rights of Indigenous Peoples*, *supra* note 50, art 7(2).

under article II(e) of the *Genocide Convention* was particularly emphasized, demonstrating its relevance to the global experience of Indigenous peoples, and leaving open the question of whether it qualifies as a specific form of cultural genocide. It should be pointed out, furthermore, that although the term “cultural genocide” was deleted, the enumerated acts under article 7 of the *Draft Declaration* were retained as a new article 8(1), which provides that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”<sup>62</sup> All that is missing from this provision is the label of cultural genocide.

Professors MacDonald and Hudson contend that this terminological distinction is consequential:

Cultural genocide is more accurate than “forcible assimilation,” because groups with clearly defined identities were targeted *as groups*, rather than as individuals. Cultural genocide is a moral descriptor anchored in a legal historical process and as such is a useful ground floor.<sup>63</sup>

Beyond cultural genocide as a broad “moral descriptor”, the only solid legal basis for its inclusion in international law remains article II(e) of the *Genocide Convention*, to which the TRC makes a single passing reference. There is very little jurisprudence on whether “transferring children” qualifies as cultural genocide in a legal sense.<sup>64</sup> In the *Akayesu* case, the ICTR stated *obiter dicta* that “as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”<sup>65</sup> It did not address the question of whether the forcible transfer of children constitutes cultural genocide. By contrast, in the *Prosecutor v. Momčilo Krajišnik (Krajišnik)* case, the ICTY Trial Chamber, also by way of *obiter dicta*, held that

[d]estruction”, as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group’s members, since the group (or part of it) can be destroyed in other ways, such as

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<sup>62</sup> *Ibid*, art 8(1). Also compare *ibid*, art 8 with *Draft Declaration*, *supra* note 51, art 7.

<sup>63</sup> MacDonald & Hudson, *supra* note 7 at 430–31 [emphasis in original].

<sup>64</sup> For a useful overview of article II(e) of the *Genocide Convention*, see generally Kurt Mundorff, “Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)” (2009) 50:1 Harv Intl LJ 61.

<sup>65</sup> *Akayesu*, *supra* note 17 at para 509.

by transferring children out of the group (or the part) or by severing the bonds among its members.<sup>66</sup>

By extending genocide beyond physical or biological destruction, the *Krajišnik* case appears to recognize cultural destruction. In doing so, however, it contradicts two significant authorities. The first is the UN International Law Commission (ILC). In its 1996 commentary on the *Draft Code of Crimes Against the Peace and Security of Mankind*,<sup>67</sup> the ILC expressed the view that genocide only encompasses physical and biological destruction:

As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word “destruction”, which must be taken only in its material sense, its physical or biological sense.<sup>68</sup>

The ILC thus concluded that

the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of “cultural genocide” contained in the two [earlier] drafts and simply listed acts which come within the category of “physical” or “biological” genocide. Subparagraphs (a) to (c) of the article list acts of “physical genocide”, while subparagraphs (d) and (e) list acts of “biological genocide”.<sup>69</sup>

In other words, the ILC defined the forced transfer of children under article II(e) as biological rather than as cultural genocide.<sup>70</sup>

The second authority, which is even more persuasive than the ILC, is ICJ jurisprudence. In particular, in the *Case Concerning the Application*

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<sup>66</sup> *Prosecutor v Momčilo Krajišnik*, IT-00-39-T, Judgment (27 September 2006) at para 854 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

<sup>67</sup> *Report of the International Law Commission on the Work of its Forty-Eighth Session*, UNGAOR, 51st Sess, Supp No 10, UN Doc A/51/10 (1996).

<sup>68</sup> *Ibid* at para 12 [footnotes omitted].

<sup>69</sup> *Ibid* [footnotes omitted].

<sup>70</sup> The ILC commented further that, because this prohibited act “would have particularly serious consequences for the future viability of a group as such,” it could also qualify as physical genocide: “[T]he forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c)” (*ibid* at para 17).

of the *Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* decided in 2015, the court held that

the *travaux préparatoires* of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context.<sup>71</sup>

The court further stated that the forcible transfer of children “can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group’s capacity to renew itself, and hence to ensure its long-term survival.”<sup>72</sup> Nonetheless, like the contrary authority in the *Krajišnik* case, since the forced transfer of children was not at issue in *Croatia v. Serbia*, the ICJ opinion too is *obiter dicta*. There is thus no conclusive authority categorically excluding the characterization of article II(e) as a form of cultural genocide.

It should furthermore be considered that the *travaux préparatoires* of the *Genocide Convention* are arguably not as conclusive as ICJ jurisprudence suggests. They indicate that the “[f]orced transfer of children” was originally conceived as “cultural genocide” and that it was considered as such by at least some delegates when it was retained in the final text of the *Convention*.<sup>73</sup> As mentioned previously, the 1947 *Draft Convention* prepared by the UN Secretariat recognized the three categories of physical, biological, and cultural genocide. The text of subparagraph (3) of article I defined “cultural genocide” as follows:

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

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<sup>71</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, [2015] ICJ Rep 1 at para 136 [*Croatia*].

<sup>72</sup> *Ibid.*

<sup>73</sup> *Draft Convention*, *supra* note 31 at 235.



uments and objects of historical, artistic, or religious value and of objects used in religious worship.<sup>74</sup>

Although there was significant disagreement on the inclusion of the broader concept of cultural genocide, the three experts consulted for the 1947 *Draft Convention* agreed on the inclusion of the forced transfer of children. Those experts were Professor de Vabres of the University of Paris Faculty of Law; Professor Pella, President of the International Association for Penal Law; and of course, Professor Lemkin, who had first coined the term “genocide”.<sup>75</sup> The Secretariat explained the logic behind the inclusion of the forced transfer of children as follows:

The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents’. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.<sup>76</sup>

This explanation clearly corresponds to the TRC’s emphasis in its definition of cultural genocide on “prevent[ing] the transmission of cultural values and identity from one generation to the next.”<sup>77</sup>

The final step before the adoption of the authoritative text of the *Genocide Convention* involved deliberations before the Sixth (Legal) Committee of the UN General Assembly. The French delegate had proposed the deletion of draft article III on cultural genocide from a later draft of the *Convention* prepared by an ad hoc committee. The Canadian delegate, Mr. Lapointe, enthusiastically supported the French proposal. He explained that his government

disagreed with [the *Draft Convention*] on the one fundamental point of cultural genocide. No drafting change of article III would make its substance acceptable to his delegation. Yet ... the Government and people of Canada were horrified at the idea of cultural genocide and hoped that effective action would be taken to suppress it. The people of his country were deeply attached to their cultural heritage, which was made up mainly of a combination of Anglo-Saxon and French elements, and they would strongly oppose any attempt to undermine the influence of those two cultures in Canada, as they would oppose any similar attempt in any other part of the world.

His delegation was not, therefore, opposed to the idea of cultural genocide, but only to the inclusion in the convention of measures to

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<sup>74</sup> *Ibid* at 229.

<sup>75</sup> See *ibid* at 222.

<sup>76</sup> *Ibid* at 235.

<sup>77</sup> *TRC Summary*, *supra* note 2 at 1.

suppress it. ... [I]t felt that the idea of genocide should be limited to the mass physical destruction of human groups.<sup>78</sup>

The reality was that the “cultural heritage” of Canada’s Indigenous peoples was deemed unworthy of protection. As a matter of fact, a telegram dated 27 July 1948 from the Secretary of State for External Affairs in Ottawa instructed the Canadian delegation as follows:

You should support or initiate any move for the deletion of Article three on “Cultural” Genocide. If this move [is] not successful, you should vote against Article three and if necessary, against the Convention.<sup>79</sup>

It is remarkable that Canada was willing to vote against the *Convention* as a whole if the concept of cultural genocide was retained; yet, it was not alone in this view. The majority of delegates agreed that cultural genocide did not belong in the *Convention* because it was not of the same gravity as physical and biological destruction. In the words of the Danish delegate, Mr. Federspiel, “it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.”<sup>80</sup> Why then, was the forced transfer of children retained, given that it fell under the category of cultural genocide?

Professor William Schabas refers to paragraph (e) as an “enigmatic” provision and notes that it “was added to the Convention almost as an afterthought, with little substantive debate or consideration.”<sup>81</sup> This provision was seemingly connected, however, with the Nazi policy of forcibly transferring so-called “racially valuable” children, which was one of the crimes that was prosecuted in the RuSHA case before the United States Military Tribunal at Nuremberg.<sup>82</sup> The evidence included the statement of Heinrich Himmler, commander of the notorious “SS” Protection Squadron, that among the “mixture of [occupied] peoples, there will always be some racially good types. ... I think that it is our duty to take their children with us, to remove them from their environment if necessary by rob-

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<sup>78</sup> UNGAOR, 3rd Sess, 83rd Mtg, UN Doc A/C.6/SR.83 (1948), reprinted in Abtahi & Webb, vol 2, *supra* note 29, 1499 at 1509–10 [UNGAOR 83rd Mtg].

<sup>79</sup> Document reproduced in Joseph Breen, “Canada Was Ready to Abandon 1948 Accord if UN Didn’t Remove ‘Cultural Genocide’ Ban, Records Reveal”, *National Post* (8 June 2015), online: <news.nationalpost.com>.

<sup>80</sup> UNGAOR 83rd Mtg, *supra* note 78 at 1508.

<sup>81</sup> William A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 201.

<sup>82</sup> “The RuSHA Case” in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10: Nuernberg, October 1946–April 1949*, vol 4 (Washington, DC: US Government Printing Office, 1950) 597 at 675.

bing or stealing them.”<sup>83</sup> The Office of Racial Policy had specified that “[t]he children suitable for [assimilation] are not to be over 8 to 10 years of age because, as a rule, a genuine ethnic transformation, that is, a final Germanization, is possible only up to this age. The first condition for this is a complete prevention of all connections with their Polish relatives.”<sup>84</sup> Thus, in the RuSHA case, count one of the indictment charging the commission of “crimes against humanity” included the “[k]idnaping [of] children of foreign nationals ... for Germanization” as “part of a systematic program of genocide.”<sup>85</sup> The Prosecutor’s argument as to the distinction between physical and cultural genocide is worth considering in regard to the residential school policy:

Many times throughout this proceeding we shall hear the defendants say how well these children were treated and of the wonderful care afforded them. In comparison to the treatment of other children whom these defendants rejected for Germanization this may well be true. But it is no defense for a kidnapper to say he treated his victim well. Even more important, we must ask ourselves why they were so treated. The answer is simple—these innocent children were abducted for the very purpose of being indoctrinated with Nazi ideology and brought up as “good” Germans. This serves to aggravate, not mitigate, the crime.<sup>86</sup>

It was perhaps these events from the war that resulted in the consensus among the three experts that the forced transfer of children should be retained in the 1947 *Draft Convention*, even if there was disagreement on the wider concept of cultural genocide. In the Sixth Committee, however, the French amendment eliminated the whole category of cultural genocide.<sup>87</sup> It was a subsequent Greek amendment that reintroduced the forced transfer of children into the definition of genocide. This amendment was apparently prompted by the alleged mass-abduction of an estimated thirty thousand children for indoctrination by communists during the 1946–1949 Greek Civil War—a policy that Greece had condemned as “genocide.”<sup>88</sup> In 1948, at the same time as the final deliberations on the *Draft Convention*, the UN Special Committee on the Balkans had obtained evidence that “children had been forcibly removed from their homes” and taken to communist countries such as Albania, Bulgaria, and

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<sup>83</sup> *Ibid* at 674–75.

<sup>84</sup> *Ibid* at 675 [emphasis removed].

<sup>85</sup> *Ibid* at 609–10.

<sup>86</sup> *Ibid* at 675–76.

<sup>87</sup> See UNGAOR, 3rd Sess, 82nd Mtg, UN Doc A/C.6/SR.82 (1948), reprinted in Abtahi & Webb, vol 2, *supra* note 29, 1487 at 1492 [UNGAOR 82nd Mtg].

<sup>88</sup> See *ibid* at 1492–99.

Yugoslavia.<sup>89</sup> The UN General Assembly had adopted a resolution calling for “the return to Greece of Greek children.”<sup>90</sup> It was in this context that the Soviet delegate, Mr. Morozov, opposed the Greek amendment, maintaining that “[f]rom the historical point of view, there were records of the destruction of children and young people, but there were none of forced transfer constituting genocide.”<sup>91</sup> Other delegates, such as Mr. Kaeckenbeeck of Belgium, emphasized that the Greek amendment “would give unduly broad scope to the convention” insofar as “[t]ransfers of population did not necessarily mean the physical destruction of a group.”<sup>92</sup> The Greek delegate, Mr. Vallindas, thus attempted to strategically distance the proposed amendment from the rejected concept of cultural genocide, but without denying its relevance. He argued that the forced transfer of children was “not primarily an act of cultural genocide” but that “it could in certain cases be considered as such.”<sup>93</sup> The United States delegate, Mr. Maktos, on the other hand, supported the Greek amendment by framing the forced transfer of children as a form of biological genocide. He maintained that “from the point of view of the destruction of a group” there was no difference “between measures to prevent birth half an hour before the birth and abduction half an hour after the birth.”<sup>94</sup>

Notwithstanding these differing views, the Greek amendment was ultimately adopted,<sup>95</sup> and thus article II contained a fifth prohibited act under paragraph (e) of “[f]orcibly transferring children of the group to another group.”<sup>96</sup> The Greek delegate apparently considered it broad enough to include cultural genocide. The subsequent explanatory statement of the Venezuelan delegate, Mr. Perozo, supported this view. His remarks are particularly instructive on the question of whether the Canadian residential school policy may be properly characterized as genocide in a legal sense. He stated that the inclusion of the forced transfer of children

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<sup>89</sup> “Threats to the Political Independence and Territorial Integrity of Greece: Reports of the United Nations Special Committee on the Balkans” in *Interoffice Memorandum from Mr. Cordier to Mr. Lie*, 3rd Sess, 182nd Mtg (2 November 1948), online: <search.archives.un.org/uploads/r/united-nations-archives/d/2/8/d289994eebac0de8d9fed4d35fc2fdeef3394783a5bff9d417e56285fea26bb0/S-0922-0002-11-00001.pdf>.

<sup>90</sup> *Threats to the Political Independence and Territorial Integrity of Greece*, GA Res 193 (III), UNGAOR, 3rd Sess, UN Doc A/RES/193 (1948) 18 at 21.

<sup>91</sup> UNGAOR 82nd Mtg, *supra* note 87 at 1493.

<sup>92</sup> *Ibid* at 1495.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid* at 1494.

<sup>95</sup> *Ibid* at 1498.

<sup>96</sup> *Genocide Convention*, *supra* note 14, art II(e).

implicitly recognized that a group could be destroyed although the individual members of it continued 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, 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.<sup>97</sup>

At the very least, the Venezuelan statement demonstrates that the *travaux préparatoires* are not as conclusive on the question of cultural genocide as the ICJ and the ILC have suggested. It should also be noted that, under article 32 of the *Vienna Convention on the Law of Treaties*, “the preparatory work” of a treaty only serves as a “supplementary means of interpretation,” where the ordinary meaning of a term is “ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.”<sup>98</sup> Accordingly, could the question of whether paragraph (e) of article II constitutes biological or cultural genocide be simply answered by applying the ordinary meaning of its terms to the facts of the residential school policy? At first glance, the conceptual distinctions would appear less relevant than the straightforward legal interpretation of the text. Clearly, the Canadian government’s residential school policy involved the forced transfer of children.<sup>99</sup> As mentioned previously, however, it is the *mens rea*, not the *actus reus*, that is decisive. The acts must be committed with the requisite *dolus specialis* identified in the *chapeau* of article II. In this regard, there is a substantial difference between the forced transfer of children with the intention to “destroy” a group biologically as opposed to culturally. In the case of biological destruction, children are permanently separated from a group, with the intention to destroy the group’s capacity to physically reproduce itself. In the case of cultural destruction, however, children are separated from a group temporarily or for a prolonged period with the intention to “destroy” the group’s cultural identity rather than its reproductive capacity. This is the exact case of residential schools.

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<sup>97</sup> UNGAOR 83rd Mtg, *supra* note 78 at 1504.

<sup>98</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 332, art 32 (entered into force 27 January 1980) [*Vienna Convention*].

<sup>99</sup> See *TRC Summary*, *supra* note 2 at 2.

It is on this basis, for example, that *Bringing Them Home*, the report of the Australian National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, concluded that the Australian residential school policy constituted genocide under article II(e) of the *Genocide Convention*. The report states as follows:

When a child was forcibly removed that child's entire community lost, often permanently, its chance to perpetuate itself in that child. The Inquiry has concluded that this was a primary objective of forcible removals and is the reason they amount to genocide.<sup>100</sup>

In support of its conclusion, the report quoted the testimony of a mental health expert, Lynne Datnow, who stated that

[Children are] core elements of the present and future of the community. The removal of these children creates a sense of death and loss in the community, and the community dies too ... there's a sense of hopelessness that becomes part of the experience for that family, that community.<sup>101</sup>

Aside from the rules of treaty interpretation, including recourse to the *travaux préparatoires* of the *Genocide Convention* as a subsidiary means of interpretation,<sup>102</sup> the inclusion or exclusion of cultural genocide within the ambit of article II(e) is itself a cultural question. It depends on differing cultural conceptions of what it means for a group to exist and survive. In light of the ambiguities that have been set forth, it is clearly one possible interpretation of that provision, albeit an expansive one. It should be noted that in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ emphasized that the treaty reflected “a common interest” rather than “the maintenance of a perfect contractual balance between rights and duties” of individual States.<sup>103</sup> As a result, “[t]he high ideals which inspired the *Convention* provide ... the foundation and measure of all its provisions.”<sup>104</sup> In the context of this “purely humanitarian and civilizing purpose,”<sup>105</sup> the principles of treaty interpretation would call for an expansive rather than a restrictive interpretation in resolving ambiguities. Nonetheless, these

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<sup>100</sup> Austl, Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Sterling Press, 1997) at 218.

<sup>101</sup> *Ibid* [brackets in original].

<sup>102</sup> See *Vienna Convention*, *supra* note 98, art 32.

<sup>103</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951], ICJ Rep 15 at 23.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid*.

principles cannot easily be reconciled with the more recent jurisprudence that implicitly rejects cultural genocide from the scope of the treaty.<sup>106</sup>

Leaving aside this specific legal question, it is important to consider that during the drafting of the *Convention* in 1948, much of the world's peoples had not yet attained self-determination. This was a time when the process of decolonization was still in its early stages. India had gained independence just one year earlier, and millions in Asia and Africa in the so-called "Third World" had not yet embarked on their struggles for liberation. The Indigenous peoples in the "Fourth World" were even more oppressed. In other words, the experience, priorities, and views of non-European peoples subjected to "civilizing missions" were either totally absent or otherwise represented by a small minority. For example, the delegate of Egypt, Mr. Raafat, argued for the inclusion of cultural genocide, in light of "the behaviour of certain metropolitan Powers in Non-Self-Governing Territories, which were attempting to substitute their own culture for the ancient one respected by the local population."<sup>107</sup> The Chinese delegate, Mr. Tsien Tai, emphasized that, although cultural genocide

seemed less brutal, that aspect of the crime against the human group might be even more harmful than physical or biological genocide, since it worked below the surface and attacked a whole population, attempting to deprive it of its ancestral culture and to destroy its very language.<sup>108</sup>

The delegate of Pakistan, Mr. Bahadur Khan, bemoaned the fact that

[s]ome representatives appeared to consider cultural genocide as a less hideous crime than physical or biological genocide. ... [F]or millions of men in most Eastern countries the protection of sacred books and shrines was more important than life itself; the destruction of those sacred books or shrines might mean the extinction of spiritual life. Certain materialistic philosophies prevented some people from understanding the importance which millions of men in the world attached to the spiritual life.<sup>109</sup>

The Pakistani delegate went so far as to state:

[C]ultural genocide represented the end, whereas physical genocide was merely the means. The chief motive of genocide was a blind rage

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<sup>106</sup> For a discussion of the *Croatia* case (in which the ICJ opined that article II(e) of the *Genocide Convention* refers to biological rather than cultural genocide), see the text accompanying note 71.

<sup>107</sup> UNGAOR 83rd Mtg, *supra* note 78 at 1509.

<sup>108</sup> *Ibid* at 1507.

<sup>109</sup> *Ibid* at 1502.

to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence.<sup>110</sup>

Understanding the gravity of cultural genocide is itself a matter of cultural experience. Perhaps the ascendant Western civilization, while commendably conscious of the sanctity of physical life, is less conscious of what the spiritual life means for human existence and survival. In fact, Justice Sinclair explains that what cultural genocide captures is “a systematic and concerted attempt to extinguish the *spirit* of Aboriginal peoples.”<sup>111</sup> Attributing such fundamental importance to the extinction of a people’s soul implies an organic fusion of being and belonging; a conception seemingly at variance with rationalistic and materialistic views of the purpose and significance of collective identity. In a somewhat different context, Professor Val Napoleon observes that “the term ‘nation’ imports western assumptions created by a particular history and culture. Many First Nations have incorporated wholesale the centralized version of nation to the detriment of their own governing structures and social organization.”<sup>112</sup> If reconciliation implies a genuine dialogue between different cultures, and legal pluralism is an expression of that dialogue, then it is necessary to explore the different meanings attributed to words in particular normative contexts.

Professor John Borrows suggests that a measure of recognition of past harms is to apply the “laws and political traditions” of Indigenous peoples “to further address the responsibilities we have toward one another in Canada. Indigenous laws and philosophies provide important standards for judgment.”<sup>113</sup> It is in this context that reducing the attempted extinction of a people’s spirit to a precise legal taxonomy must give way to a deeper appropriation of words as a means of healing. One aspect of legal pluralism may well be that Indigenous laws and philosophies experience norms differently. Perhaps it is this profound connection with the sacred, this intense awareness of the wholeness of communal ties and interdependence of all creation, that explains the importance attached to cultural genocide among the Indigenous peoples of Canada.

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<sup>110</sup> *Ibid.*

<sup>111</sup> Justice Murray Sinclair, “For the Record: Justice Murray Sinclair on Residential Schools”, *Maclean’s* (2 June 2015), online: <[www.macleans.ca](http://www.macleans.ca)> [emphasis added].

<sup>112</sup> Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16:1 CJLS 113 at 144.

<sup>113</sup> Borrows, *supra* note 9 at 501 [footnotes omitted].



### III. Appropriating Genocide

We return to the question of why laypersons as far apart as Canada and Guatemala, who are not experts of international law, greet the appropriation of genocide with such passion? Why should it matter how we label our suffering? Perhaps the answer lies at least partially in the designation of genocide as the “crime of crimes”,<sup>114</sup> the pinnacle of evil. For Raphaël Lemkin, it was the extermination of European Jews, including forty-nine members of his own family in Poland, that prompted him to introduce the term “genocide” to our lexicon. “New conceptions require new terms,” he wrote with academic detachment in *Axis Rule in Occupied Europe*.<sup>115</sup> Yet, elsewhere, in his unpublished autobiography, he spoke of his unspeakable anguish, describing his personal crusade for the adoption of the *Genocide Convention* as “an epitaph on my mother’s grave.”<sup>116</sup> Even for him, genocide was seemingly both an academic abstraction and a site of sorrow.

The Holocaust was a paradigmatic crime, and its legal representation as a transcendent concept made its potent historical legacy capable of appropriation by others. As the ultimate crime, calling the plight of victims “genocide” elevated their demands for justice to a privileged status.<sup>117</sup> Yet, in the killing fields of Bosnia, Rwanda, Darfur, and today, in Iraq and Syria, we witness what are often sterile polemical debates on the genocide label, a pretense of empathy, creating the illusion of progress, while we remain bystanders to radical evil. We reduce the enormity of human suffering to the rationalist credo of law in self-delusional rituals that substitute lofty incantations for meaningful action. But even in doing so, we adopt a double standard, condemning the abominations of others while avoiding those of our own past.

Professor Lemkin was mindful of historical precedents before the Holocaust, such as the Ottoman Empire’s mass-murder of Armenians in 1915.<sup>118</sup> But the extermination of colonized peoples never featured prominently in the European imagination. The Nazi crimes are often singled out, sometimes in a fetishistic way, as an unparalleled evil

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<sup>114</sup> *Prosecutor v Jean Kambanda*, ICTR 97-23-S, Judgment and Sentence (4 September 1998) at para 16 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <[www.ictor.org](http://www.ictor.org)>.

<sup>115</sup> Lemkin, *supra* note 22 at 79.

<sup>116</sup> Lemkin quoted in William Korey, *An Epitaph for Raphael Lemkin* (New York: American Jewish Committee, 2001) at 115 [pre-publication copy].

<sup>117</sup> See Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012) at 121–40 (discussing the contest over ownership of the term “genocide”).

<sup>118</sup> See *ibid* at 91–92.

committed by others, in the distant past, divorced from present realities. The ideological thread that connects Nazi racism with the Anglo-American treatment of Indigenous peoples is a disturbing thought that we may prefer to dismiss as an exaggeration. But an honest reckoning with history suggests otherwise. In his book on Adolf Hitler, Pulitzer Prize-winning author John Toland notes that

Hitler's concept of concentration camps as well as the practicality of genocide owed much, so he claimed, to his studies of English and United States history. He admired the camps for Boer prisoners in South Africa and for the Indians in the wild West; and often praised to his inner circle the efficiency of America's extermination—by starvation and uneven combat—of the red savages who could not be tamed by captivity.<sup>119</sup>

Similarly, in *Hitler and His Secret Partners*, James Pool states that

[Hitler] was very interested in the way the Indian population had rapidly declined due to epidemics and starvation when the United States government forced them to live on the reservations. He thought the American government's forced migrations of the Indians over great distances to barren reservation land was a deliberate policy of extermination. Just how much Hitler took from the American example of the destruction of the Indian nations for his plans of the Holocaust is hard to say; however, frightening parallels can be drawn. For some time Hitler considered deporting the Jews to a large "reservation" in the Lubin area where their numbers would be reduced through starvation and disease.<sup>120</sup>

But in dwelling on historical controversy and legal taxonomy, we must not forget, as George Steiner rightly observes, that transgressions such as the Holocaust "defy the ordering of common sense. They seem to lie just on the other side of reason. They are extraterritorial to analytic debate."<sup>121</sup> There is a danger that in focusing inordinately on the cultural genocide debate, we may become lost in abstractions, in a rationalistic culture that cannot fathom the depth of human suffering that confuses politically correct platitudes and superficial sentimentality with genuine empathy and meaningful engagement. As wielders of academic distinctions, we may forget the stories of survivors like Leona Bird, with whose testimony I began, and instead indulge in sterile debates. The cry of a six-year-old torn away from the arms of her mother speaks more forcefully than any legal label about the gravity of this historical injustice and the work of healing

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<sup>119</sup> John Toland, *Adolf Hitler* (New York: Anchor Books, 1992) at 702.

<sup>120</sup> James Pool, *Hitler and his Secret Partners: Contributions, Loot and Rewards, 1933–1945* (New York: Pocket Books, 1997) at 274.

<sup>121</sup> George Steiner, *No Passion Spent: Essays, 1978–1995* (New Haven: Yale University Press, 1996) at 346.

that remains ahead. The survivors who celebrate its recognition as cultural genocide are most probably less concerned with precise terminology than they are with mourning their loss.

Therein lies the confusion between cultural genocide as an academic disputation about the past, rather than the present challenge of reconciliation with Canada's Indigenous peoples. For Leona Bird and thousands of others like her, the residential schools are a horrific legacy of forced removal, humiliation, abuse, and death. It is a grim past that explains the contemporary reality of poverty and violence, of substance abuse and suicide. Redressing this injustice puts on trial our very self-conception as Canadians. In almost every respect, ranging from drop-out rates, unemployment, median income, incarceration rates and homicide rates to infant mortality and life expectancy, Canada's Indigenous peoples are worse off than African Americans whose plight we bemoan with smug self-satisfaction. Infant mortality is 2.3 times the national average, and 40 per cent of Indigenous children suffer from hunger. The homicide rate is over six times the national average; the incarceration rate ten times.<sup>122</sup> The Inter-American Commission on Human Rights has found that the "disappearances and murders of [I]ndigenous women in Canada are part of a broader pattern of violence and discrimination against [I]ndigenous women in Canada."<sup>123</sup> Quite simply, the situation is disgraceful. This certainly is not the historical self-image that Canadians want, that of a human rights champion on the global stage that is unable to clean its own backyard. Exposing the truth of the past is about exploring the future of reconciliation. Fortunately, there are hopeful signs today that we may be finally moving toward a new relationship, in which our Indigenous brothers and sisters will take their rightful place in the cultural mosaic that we call our common home, to partake the shared human dignity that we espouse as our fundamental belief.

Since this discussion has been about the power of words, I will conclude by recalling an experience that taught me the power of silence. During my first year at York University at eighteen years of age, I had the privilege of spending a month in Baker Lake, Keewatin District, the geographic centre of Canada. It was then in the Northwest Territories, and is now in Nunavut. It was an experience I shall never forget. The Arctic is an extraordinary place, the overwhelming vastness of its space a remind-

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<sup>122</sup> See Scott Gilmore, "Canada's Race Problem? It's Even Worse than America's", *Macleans*'s (22 January 2015), online: <www.macleans.ca>; David Macdonald & Daniel Wilson, *Poverty or Prosperity: Indigenous Children in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2013) at 12–14.

<sup>123</sup> OAS, Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, OR OEA/Ser.L/V/II.Doc.30/14 (2014) at 123.

er of our insignificance in the universe. Its unforgiving cold is tempered by the magical warmth of the northern lights. But most of all, at the beginning of my studies in law, a vocation not known for scarcity of words, I was profoundly impressed by the purposeful silence of the Inuit. It was a silence that spoke, a wisdom that cannot be put into words, like the Arctic wind that carried mysterious messages from other worlds. The Inuit used very few words, but what words they used carried great meaning.

This formative experience from my youth reminded me of the encounter of Knud Rasmussen, the early twentieth-century Danish Arctic explorer and anthropologist, born to an Inuit mother, who became the celebrated father of “Eskimology”, as it was then called. During his expedition to Arctic America in the 1920s, he recorded the words of Orpingalik, a shaman priest from the Kitikmeot region of present-day Nunavut, as follows:

Songs are thoughts, sung out with the breath when people are moved by great forces and ordinary speech no longer suffices.

Man is moved just like the ice floe sailing here and there out in the current. His thoughts are driven by a flowing force when he feels joy, when he feels fear, when he feels sorrow. Thoughts can wash over him like a flood, making his breath come in gasps and his heart throb. Something, like an abatement in the weather, will keep him thawed up. And then it will happen that we, who always think we are small, will feel still smaller. And we will fear to use words. But it will happen that the words we need will come of themselves. When the words we want to use shoot up of themselves—we get a new song.<sup>124</sup>

For the survivors that applauded in Ottawa, cultural genocide is above all a song of bereavement, a metaphor for mourning, rebuilding a shattered self-conception through the power of words. It is for us to hear those words, heal those wounds, and to reclaim our shared humanity.

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<sup>124</sup> Knud Rasmussen, *Report of the Fifth Thule Expedition, 1921–24* (Copenhagen: Gyldendal, 1931) vol 8 at 321.