

GENOCIDE REINTERPRETED

AN ANALYSIS OF THE GENOCIDE CONVENTION'S POTENTIAL APPLICATION TO CANADA'S INDIAN RESIDENTIAL SCHOOL SYSTEM

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Contents

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|---|-----------|
| I. Introduction | 1 |
| II. Early Conceptual Developments of Genocide and Cultural Genocide | 4 |
| Draft Convention on the Crime of Genocide, 26 March 1947 | 5 |
| The Travaux Préparatoires | 8 |
| Canada’s Position on Cultural Genocide in the Convention Debates..... | 11 |
| The Final Vote: Cultural Genocide Explicitly Rejected in the Convention | 14 |
| The Genocide Convention: The Final Text | 17 |
| III. The Traditional Interpretation: Continued Refusal to Recognize Cultural Genocide As Legally Legitimate | 17 |
| IV. Another Reading of Cultural Genocide: From Ambiguous Label to Specific Act..... | 25 |
| Focus on Group Viability and 2(e): Forcible Transfer of Children | 25 |
| Revisiting Group Destruction in Child Transfer..... | 28 |
| Different Types of Intent | 32 |
| Other Developments in Understanding Article 2(e) | 36 |
| The Relevance of Retroactivity for Pre-1948 Applications of the Convention..... | 42 |
| Parallel Developments in International Law..... | 51 |
| V. Application of Genocide Law by the Australian Human Rights and Equal Opportunity Commission to Australia’s “Stolen Generation” Policy | 51 |
| Historical Background | 52 |
| Establishment of the Commission and its Genocide Findings | 52 |
| VI. Recommendations and Initial Observations Regarding Application of Law to Canada | 56 |
| Appendix: Relevant Provisions in International Law | 63 |

I. Introduction

This paper examines the development of the Genocide Convention and subsequent international law on the crime of genocide to determine its appropriate application to cases of forced assimilation, removal, or education of indigenous or aboriginal children, such as those which occurred as a result of the Canadian Indian Residential School (IRS) system.

The paper begins with an overview of the drafting procedure of the Genocide Convention, from Professor Raphael Lemkin's original coining of the term "genocide" to the language contained in the Convention as adopted in 1948. This historical analysis also examines the concept of cultural genocide and its role in these early negotiations, paying particular attention to the position that Canada took regarding various proposals and amendments. For this analysis, we make extensive use of the compilation of documents which comprise the Genocide Convention's Travaux Préparatoires.¹

Jurisprudence subsequent to the adoption of the Convention can be read in two different ways. The first, more traditional view, focuses on the term "cultural genocide" itself. In the negotiations of the Genocide Convention and in subsequent developments in international law, it becomes apparent that cultural genocide lacks legitimacy as a codified international crime or as part of customary international law. Although cultural genocide has been a crucial part of the conversation regarding the definition of this crime as far back as the earliest discussions, the

¹ HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Boston, Martinus Nijhoff Publishers, 2008), Vols. 1 & 2 is the only work to gather together in a single publication the records of the multitude of meetings and statements which led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948. As it includes almost all of the preparatory work leading to the adoption of the Convention, the Travaux serves as a "supplementary means of interpretation" under Article 32 of the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention establishes that the preparatory work of international binding instruments may be consulted in order to help determine the meaning of a treaty when there is ambiguity regarding the actual terms of the agreement. *See* Vienna Convention on the Law of Treaties art.2, May 23, 1969, 63 A.J.I.L. 875, 1155 U.N.T.S. 331.

historical and legal record demonstrates that cultural genocide has never gained sufficient support among states to be included in any binding treaty or case law. We focus our analysis on this point on case law from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and official U.N. documents.

The second, and alternative, interpretation of the current state of genocide law also begins in the Genocide Convention, but instead of considering whether cultural genocide is included in the general definition (chapeau) of the crime of genocide (as an intent to eliminate a group, in whole or in part), this interpretation focuses on one specific enumerated act of genocide: the forcible transfer of children listed under Article 2(e) of the Convention. Bolstered by readings of the Convention that provide affirmative protections for groups, this argument supports interpreting the forced transfer of children from a group as a prohibited act of genocide. The alternative reading is modest, and locates the concept of cultural genocide within an enumerated act defined by the Convention rather than arguing for an expanded interpretation of the term of genocide that would include more broadly nonviolent acts. The crucial factor in determining whether the alternative interpretation covers the IRS system is whether the intent of the policy was to destroy the children's ethnic group, in whole or in part. We support this alternative reading of the Convention with an analysis of the most recent developments in the case law of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). This reading also is informed by parallel developments in international human rights law, a sample of which is included as an appendix. While research has not yet indicated that any courts have adopted this alternative reading with regard to indigenous schooling policies, the increased attention on indigenous and family rights may lead to its emergence.

The paper then turns from analysis of the text of the Convention to how courts and commissions have applied its terms. In particular, it examines how the Australian Human Rights and Equal Opportunity Commission interpreted the law of genocide to conclude that the Australian government was responsible for genocide against aboriginal people.² The Australian example is valuable to show how a non-judicial body adopted a more expansive interpretation of the Convention than international criminal courts.

We conclude with recommendations. The fact that cultural genocide currently is not recognized as an international crime nevertheless leaves open the possibility that genocide occurred in Canada or in other countries which adopted similar assimilation programs. Such policies may be considered acts of genocide under the more expansive reading of Article 2(e) that has emerged over the past two decades. We recommend that the TRC assess the country's IRS system under this invigorated approach, and we outline what such an analysis would require.

This paper does not offer a legal conclusion regarding whether the Canadian IRS (or similar policies in other countries) constituted genocide. In fact, we caution against over-reliance on the *legal* concept of genocide, as this may still differ significantly from the public perception of genocide. The paper aims rather to provide some conceptual legal tools that can be used to analyze the Canadian case and form the basis of further discussion.

² See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 234. The Australian policy involved the forced removal of aboriginal children from their families and their subsequent placement with white adoptive parents or in white-run boarding schools. The policy lasted from the turn of the twentieth century up to the 1970s. The victims of this policy have been referred to as Australia's "stolen generation."

II. Early Conceptual Developments of Genocide and Cultural Genocide

Although genocide as a human act has existed for millennia, the modern legal concept of genocide, and the term itself, are twentieth-century inventions. Their origin can be traced back to Raphael Lemkin, a Polish lawyer of Jewish descent, who coined the word “genocide” in his study of the Axis Powers’ occupation of Europe in 1944.³

Even before Lemkin’s first formal usage of the term genocide, he had proposed a similar concept that included cultural components as early as 1933. In a proposal to the International Conference for Unification of Criminal Law in Madrid, Lemkin strove “to declare the destruction of racial, religious or social collectivities a crime under the law of nations.”⁴ Lemkin proposed the creation of two new international crimes: the crime of “barbarity, consisting in the extermination of racial, religious or social collectivities, and the crime of vandalism, consisting in the destruction of cultural and artistic works of these groups.”⁵ Although various treaties and governments had previously made efforts to protect minority rights, and in particular had promised not to interfere with the use of language and practice of culture by minority groups during the interwar period,⁶ Lemkin’s 1933 proposal introduced “cultural genocide” as a potential legal concept for the first time. Although his proposal was not accepted by the countries represented at the Madrid Conference, he retained the idea of culture in his 1944 work, *Axis Rule in Occupied Europe*, the first place where the word “genocide” appeared in print.

³ See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - ANALYSIS OF GOVERNMENT - PROPOSALS FOR REDRESS* (Clark, NJ, The Lawbook Exchange, 2005), 93.

⁴ Raphael Lemkin, *Genocide as a Crime under International Law*, 41.1 AMERICAN JOURNAL OF INTERNATIONAL LAW, (Jan. 1947), 145-151: 146.

⁵ Raphael Lemkin, *Genocide as a Crime under International Law*, 41.1 AMERICAN JOURNAL OF INTERNATIONAL LAW, (Jan. 1947), 145-151: 146.

⁶ Johannes Morsink, *Cultural Genocide, the Universal Declaration, and Minority Rights*, 21.4 HUMAN RIGHTS QUARTERLY (Nov. 1999), 1009-1060: 1009-1011.

In Lemkin's 1944 definition, genocide was defined as the "destruction of a nation or ethnic group ...not only through mass killings, but also through a coordinated plan of different actions aiming at the destruction of essential foundations of the life of a national group, with the aim of annihilating the groups themselves." According to Lemkin, physical, political, social, cultural, biological, economic, religious, and moral genocide were all possible forms of genocide, albeit distinguished by different techniques of implementation.⁷

In a later article, Lemkin wrote "the crime of genocide involves a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life and health.... All these actions are subordinated to the criminal intent to destroy or to cripple permanently a human group."⁸ Lemkin explained that previous terms such as "mass murder" were insufficient to encompass the scope of these crimes, in particular because "mass murder does not convey the specific losses to civilization in the form of cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics."⁹

Draft Convention on the Crime of Genocide, 26 March 1947

In 1946, Lemkin drafted a resolution based on his previous work that proposed a genocide convention for consideration by the United Nations General Assembly. The General Assembly affirmed that genocide was a crime under international law in Resolution 96(1) and

⁷ See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - ANALYSIS OF GOVERNMENT - PROPOSALS FOR REDRESS* (Clark, NJ, The Lawbook Exchange, 2005), 79-95.

⁸ Raphael Lemkin, *Genocide as a Crime under International Law*, 41.1 AMERICAN JOURNAL OF INTERNATIONAL LAW, (Jan. 1947), 145-151: 147.

⁹ Raphael Lemkin, *Genocide as a Crime under International Law*, 41.1 AMERICAN JOURNAL OF INTERNATIONAL LAW, (Jan. 1947), 145-151: 147.

mandated the preparation of a draft convention on genocide.¹⁰ Resolution 96(1) stressed the fact that genocide resulted in great loss to the cultural and spiritual life of humanity.¹¹ According to the Travaux Préparatoires, the GA Resolution expressed the “desire to punish all forms of the crime genocide, not merely its physical aspect.”¹²

The initial draft of the Convention was prepared by the U.N. Secretariat in conjunction with Lemkin and Professors Vespasian Pella and Henri Donnedieu de Vabres. It divided genocide into three categories: physical, biological, and cultural genocide.¹³ The draft stated that genocide includes 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 documents and objects of historical, artistic, or religious value and of objects used in religious worship.¹⁴

This section is explicitly referred to in the draft’s table of contents as “‘cultural’ genocide,” and is the third category after “‘physical’ genocide” and “‘biological’ genocide.”¹⁵

¹⁰ William A. Schabas, “Introduction: Convention on the Prevention and Punishment of the Crime of Genocide,” UNITED NATIONS TREATY COLLECTION, <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html> (last visited April 16, 2011).

¹¹ United Nations General Assembly Resolution 96(I), U.N. Doc. A/Res/96(I) (11 December 1946).

¹² United Nations General Assembly, 178th Plenary Meeting, U.N. Doc. A/PV.178 (9 December 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 2042-2063: 2047.

¹³ William A. Schabas, “Introduction: Convention on the Prevention and Punishment of the Crime of Genocide,” UNITED NATIONS TREATY COLLECTION, <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html> (last visited April 16, 2011).

¹⁴ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 215.

The comments section of the draft states that a policy of “forced assimilation of a section of the population...even if the notion of ‘cultural’ genocide is admitted, does not as a rule constitute genocide.”¹⁶ Rather, minorities should be protected from forced assimilation under a separate system of protection. Furthermore, the draft states that “mass displacements of populations from one region to another also does [sic] not constitute genocide.”¹⁷ This is qualified by the statement that mass displacements would become genocide “if the operation were attended by such circumstances as to lead to the death of the whole or part of displaced population.”¹⁸

Despite these qualifications, cultural genocide was clearly present in the first draft of the convention. According to the comments section, Professors Pella and de Vabres held that cultural genocide represented an undue extension of the notion of genocide. However, Professor Lemkin “argued that a racial, national, or religious group cannot continue to exist unless it preserves its spirit and moral unity Means of cultural genocide were criminal acts under municipal law and ... there was no reason why they should not be included in the international crime of genocide.”¹⁹ Lemkin did distinguish cultural genocide from “a policy of forced assimilation by moderate coercion – involving for example, prohibition of the opening of schools

¹⁵ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 211.

¹⁶ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 232.

¹⁷ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 232.

¹⁸ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 232.

¹⁹ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 234-235.

for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on.”²⁰

Cultural genocide was limited to a policy which “by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.”²¹

Thus, it could be said that the original conception of cultural genocide as delineated by Raphael Lemkin was quite limited, required intent to completely eradicate a group’s culture, used extreme oppression and coercion to do so, and did not embody every instance of forced assimilation of minority groups. It was this limited conception of cultural genocide that existed at the time the first debates regarding the draft genocide convention began.

The Travaux Préparatoires

As the United Nations developed the 1948 Genocide Convention, state delegates debated Lemkin’s concept of cultural genocide. The debates and drafts are contained in the Travaux Préparatoires of the Genocide Convention and provide additional insight into the development of the concept of cultural genocide and its subsequent removal from the definition of genocide in the final Convention.

Early on in the drafting process of the Convention, a number of countries raised their opposition to the inclusion of cultural genocide in the draft instrument. The United States, for example, generally rejected “the idea of ‘cultural genocide,’ retaining only one of the acts under this heading in the draft convention, namely the ‘forced transfer of children to another human

²⁰ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 235.

²¹ United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (26 June 1947), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 209-281: 235.

group.”²² France also opposed the idea of cultural genocide, since this invited “the risk of political interference in the domestic affairs of States, and in respect of questions which, in fact, are connected with the protection of minorities.”²³ France pointed out that some of the acts proposed for inclusion in the concept of cultural genocide might be lawful, e.g., the right of States to impose certain restrictions on the use of the national language of minority group living in their territory.²⁴ Ultimately, France thought the issue of cultural genocide should be dealt with by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.²⁵

The commentary of the Ad Hoc Committee on Genocide²⁶ states that those who supported the concept of cultural genocide indicated that the Convention would fail fully to achieve its objective if it left out cultural groups, as there were two ways of suppressing a human group, the first by causing its members to disappear, and the second “by abolishing, without making any attempts on the lives of the members of the group, their specific traits.”²⁷

²² United Nations Economic and Social Council, The Observations of Governments, U.N. Doc. E/621 (2 November 1946 – 20 January 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 481-528: 526.

²³ United Nations Economic and Social Council, The Observations of Governments, U.N. Doc. E/621 (2 November 1946 – 20 January 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 481-528: 527.

²⁴ United Nations Economic and Social Council, Summary Record of the Fourteenth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.14 (21 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 885-893: 889.

²⁵ See United Nations Economic and Social Council, Summary Record of the Fourteenth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.14 (21 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 885-893: 889. Ultimately, the Sub-Commission was in fact vested with the responsibility of tracking the entire Convention’s development in international law after ratification. See *infra* text accompanying notes 57-64.

²⁶ Following the GA’s adoption of Resolution 96 (I) on the Crime of Genocide in December 1946, the Economic and Social Council of the U.N. established an Ad Hoc Committee on Genocide to redraft the Convention. The Ad Hoc Committee prepared a Draft Convention on the Prevention and Punishment of the Crime of Genocide, which was subsequently considered in the Sixth Committee of the General Assembly. MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (New York, Intersentia, 2002), 405.

²⁷ United Nations Economic and Social Council, Commentary on Articles Adopted by the Committee, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.14 (26 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 979-984: 982.

Lebanon raised the idea that “while it was relatively easy to determine the motive for the massacre of a human group, it was much harder to prove the intention behind genocide which, for example, consisted of forbidding a group to use its own language.”²⁸

In a more general discussion of cultural genocide, the committee chairman (Mr. Maktoos of the United States) raised the possibility that an overly broad conception of genocide which included cultural genocide might lead some states to refuse to ratify the Convention, or to significantly delay signature.²⁹ However, representatives of Lebanon and the USSR expressed some measure of support for retaining the idea of cultural genocide in the draft, and the French representative agreed that “a definition of genocide should cover all violent measures used to destroy the cultural elements of a group.”³⁰

On 16 April 1948, members of the committee agreed to include the cultural genocide elements of the draft Convention in a separate article, in order to distinguish it from physical genocide and to make it easier to vote upon, although there was general agreement that both physical and cultural genocide shared a required element of intent.³¹ The Lebanese delegate proposed a more restricted definition of cultural genocide, which read:

²⁸ United Nations Economic and Social Council, Summary Record of the Fourteenth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.14 (21 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 885-893: 891.

²⁹ United Nations Economic and Social Council, Summary Record of the Fifth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.5 (8 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 715-737: 727.

³⁰ United Nations Economic and Social Council, Summary Record of the Fifth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.5 (8 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 715-737: 727-731.

³¹ United Nations Economic and Social Council, Summary Record of the Tenth Meeting, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.10 (16 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 834-844: 838-840.

Genocide includes all acts and measures which are directed against a national, racial or religious group on ground [sic] of the national or racial origin or religious beliefs of its members, and which aim at the systematic destruction by oppressive or violent means of the language [sic] religion or culture of that group.³²

As discussions progressed, it became apparent that there was general consensus on most of the draft with the exception of three areas: the concept of cultural genocide, the protection of political groups, and an international tribunal for the suppression of genocide.³³ On 23 October 1948, delegates generally agreed that forced transfer of children was the most serious and indeed “barbarous” act enumerated under the separate category of cultural genocide; the United States and Greece proposed including this provision under the acts constituting physical and biological genocide, and eventually it was.³⁴

Canada’s Position on Cultural Genocide in the Convention Debates

From the Travaux record, it is clear from the outset of the negotiations that Canada vociferously opposed the inclusion of cultural genocide in the Convention. Mr. Lapointe, the Canadian representative, “considered the draft convention prepared by the *Ad Hoc* Committee to be acceptable on the whole, but he disagreed with it on the one fundamental point of cultural genocide.”³⁵ Indeed, he stated that “no drafting change of article III [on cultural genocide] would

³² United Nations Economic and Social Council, Portions of Report Adopted in First Reading, Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/W.4 (30 April 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 1, 1054-1070: 1062.

³³ United Nations General Assembly, Sixty-Fifth Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.66 (4 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1310-1321: 1317.

³⁴ United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.82 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1495-97.

³⁵ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1509.

make the inclusion of cultural genocide acceptable to his delegation.”³⁶ Lapointe emphasized that the Government and people of Canada were “horrified” by the idea of cultural genocide; they were strongly attached to their cultural heritage of Anglo-Saxon and French elements.³⁷ Nonetheless, they opposed inclusion of cultural genocide within the definition of genocide contained in the Convention. If cultural genocide were retained, Lapointe stated that his delegation would have to make certain reservations.³⁸

In a separate statement, Canadian representative Mr. Stephens also raised Canada’s objections to cultural genocide, along with a condemnation of the acts of cultural genocide. According to Stephens, “Canada was a country with two main and abiding cultural traditions, and with a great variety of minority groups.”³⁹ Stephens “knew of no country where the government, and the people generally, were more concerned to ensure the preservation of the culture, language or religion of minority groups.”⁴⁰ Nonetheless, Canada was opposed to including cultural destruction in the Genocide Convention, and as it appeared “to be wholly and essentially a matter of minority rights ... [it] would, as such, best be dealt with in the Covenant

³⁶ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1509.

³⁷ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1510.

³⁸ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1510. According to the Vienna Convention on Treaties, a reservation is “a unilateral statement ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” *See* Vienna Convention on the Law of Treaties art.2, May 23, 1969, 63 A.J.I.L. 875, 1155 U.N.T.S. 331.

³⁹ United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1224.

⁴⁰ United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1224.

on Human Rights.”⁴¹ The Canadian representative continued by saying that “it was a far cry from the unspeakable crimes which had been perpetrated at the Nazi crematoria ... to the prohibition of the use of a museum cherished by some particular cultural group or other acts of cultural repression, deplorable and revolting though they might be.”⁴² Stephens said the Convention would be weakened by placing physical and cultural genocide on the same level, and that confusion would ensue from the inclusion of crimes such as “the suppression of a minority-language newspaper or the closing of a school.”⁴³ Still, Canada “would welcome early action to outlaw such discrimination or persecution by means of a suitable instrument.”⁴⁴

From the record contained in the Travaux, Canada’s opposition to including cultural genocide in the Convention stands out from that of other countries in terms of the strength of its opposition and its unwillingness to compromise to any degree on the provision. Cultural genocide was not just a sticking point for Canada; it was the *only* major concern Canada appears to have expressed with regards to the draft Convention.⁴⁵ Canada’s explicit statement that it

⁴¹ United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1224. Canada and other countries’ suggestions to place the destruction of culture into a different human rights instrument appears to have taken hold in the International Covenant on Civil and Political Rights (1966) (ICCPR), which in Article 27 states that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” However, while the ICCPR commits its signatories to respect minority rights, it is not a treaty which asserts to codify international crimes, and does not require states to criminalize violations of Article 27.

⁴² United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1225.

⁴³ United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1225.

⁴⁴ United Nations Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218 (26 August 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 1, 1219-1239: 1225.

⁴⁵ See the record of Canada’s participation in the debates as recorded in the Travaux Préparatoires: General Index, HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Boston, Martinus Nijhoff Publishers, 2008), Vol. 2, 2132-2217: 2136.

would lodge reservations regarding cultural genocide provisions were they to be included in the final text implies that Canada may not have intended to be bound by such provisions. Whether the reason for Canada's opposition relates to its domestic policies is not touched upon in the Travaux.

The Final Vote: Cultural Genocide Explicitly Rejected in the Convention

On 25 October 1948, the issue of whether or not to include cultural genocide in the final Genocide Convention was put to a vote before the Sixth Committee of the General Assembly.

States strongly in favor of including cultural genocide included Pakistan, Venezuela, China, the Byelorussian Soviet Socialist Republic, and Czechoslovakia, all of which understood cultural genocide as inseparable from physical and biological genocide. In particular, the Pakistan delegation viewed cultural genocide as representing the *primary* goal of a campaign to eliminate a group, "the end," whereas physical genocide was merely "the means."⁴⁶ Sardar Bahadur Khan, the head of the Pakistan delegation, stated that "for millions of men in most Eastern countries, the protection of sacred books and shrines was more important than life itself," and thus, attacks on culture were almost more damaging than attacks on one's person.⁴⁷

Venezuela likewise recognized that a group could be destroyed through the loss of specific traits, even though no attempt had been made on the life of its members.⁴⁸ China noted that "although it seemed less brutal, [cultural genocide] might be even more harmful than physical or biological

⁴⁶ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1502.

⁴⁷ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1502.

⁴⁸ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1505.

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.”⁴⁹ The Czechoslovak representative quoted numerous instances of cultural genocide during the Nazi occupation designed to pave the way for the systematic disappearance of the Czechoslovak nation through the destruction of national heritage. According to Mr. Zourek, “all those acts of cultural genocide had been inspired by the same motives as those of physical genocide” and had the same object: “the destruction of racial, national, or religious groups.”⁵⁰ Thus, according to these countries, cultural genocide would need to be included in the convention.

Those countries generally opposed to cultural genocide, in particular the U.S., France, Canada, South Africa, New Zealand, the Netherlands, Sweden, and Denmark, maintained several rationales against inclusion of the term: (1) unlike its physical counterpart, cultural genocide did not shock “the conscience of mankind;”⁵¹ (2) it fell within the sphere of general human rights protection, or protection of minority rights;⁵² (3) it was too vague a concept to include in the

⁴⁹ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1507.

⁵⁰ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1517.

⁵¹ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1514.

⁵² United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518. For example, the India representative stated: “The protection of the cultural rights of a group should be guaranteed not by the convention on genocide but by the declaration of human rights” (1512). The Swedish representative stated: “The content of article III had many similarities with certain clauses regarding the protection of national minorities contained in a number of treaties concluded after the First World War It would be desirable to establish the cultural protection of minorities on a more general international plane. The convention on genocide did not, however, seem to be the appropriate instrument for such protection” (1506). In addition, “some delegations held that cultural genocide should be excluded from the convention either because there were inherent in it certain factors covered by other conventions, such as the one for the protection of minorities, or because provision was already made for this norm in national legislation, such as laws on education and the protection of worship” (1505). According to the Chinese

genocide convention; and (4) it might lead to abuses of the concept or prevent widespread support of the convention.⁵³ A vote was taken, and by 25 votes to 16, with 4 abstentions, the Sixth Committee decided not to include provisions relating to cultural genocide in the Convention.⁵⁴

In the final debates leading up to the adoption of the Convention, several states reiterated their objections to the exclusion of cultural genocide from the definition, even going so far as to abstain from specific votes on the text in part because of the absence of cultural genocide in the draft.⁵⁵ Nonetheless, the United Nations General Assembly adopted the Genocide Convention on December 9, 1948, and the Convention entered into force on January 12, 1951. Canada joined the treaty, signing the Convention on November 28, 1949, and subsequently ratifying it on September 3, 1952.

The term cultural genocide encompasses a variety of possible acts and intentions, as the delegate quotations indicate. With the exclusion of cultural genocide from the final Convention,

representative, however, “no such convention [for the protection of minorities] existed even in the form of a draft” (1507).

⁵³ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1514.

⁵⁴ United Nations General Assembly, Eighty-Third Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.83 (25 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1499-1518: 1518. *States voting against including cultural genocide in the convention:* South Africa, U.K., U.S., Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Iran, Liberia, Luxembourg, Netherlands, New Zealand, Norway, Panama, Peru, Siam, Sweden, Turkey. *States voting for inclusion:* USSR, Yugoslavia, Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, Philippines, Poland, Saudi Arabia, Syria, Ukrainian Soviet Socialist Republic. *Abstaining:* Venezuela, Afghanistan, Argentina, and Cuba.

⁵⁵ See United Nations General Assembly, Hundred and Thirty-Third Plenary Meeting, Drafting Committee, U.N. Doc. A/C.6/SR.133 (2 December 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1922-1936: 1927-1928. The Yugoslav delegation abstained, while Venezuela and the Byelorussian Soviet Socialist Republic were among the countries which continued to protest the elimination of cultural genocide from the text. United Nations General Assembly, Hundred and Seventy-Eighth Plenary Meeting, Drafting Committee, U.N. Doc. A/PV.178 (9 December 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 2042-2062: 2050, 2061.

however, all these potential meanings were relegated to an undefined legal sphere outside of prohibited conduct contained in the Convention, and not punishable as such.

The Genocide Convention: The Final Text

In the text ultimately adopted by states, Article II of the Genocide Convention reads as follows:

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.

The initial clause, “intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” comprises the “chapeau” of the Article, or introductory text defining the principles and objectives of the law. The five acts listed underneath the chapeau, (a)-(e), constitute the enumerated acts. In this case, the chapeau with its requirement of “intent” is necessary to prove genocide. In other words, in order to establish that genocide occurred, one must have evidence not only of at least one of the enumerated acts, but of the intent to destroy in whole or in part one of the listed types of groups. Without the intent to commit genocide, evidence of one of the enumerated acts is not enough to constitute genocide under the Convention.

III. The Traditional Interpretation: Continued Refusal to Recognize Cultural Genocide As Legally Legitimate

Because of the explicit rejection of cultural genocide in the Convention, courts have continually refused to recognize the term as having legitimacy in international law. Many scholars and policy makers repeatedly have called for the inclusion of cultural genocide, either in

Convention interpretation or in a new treaty,⁵⁶ but for the first forty years of the Convention, no international bodies followed suit. For example, in 1971 the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities⁵⁷ appointed Nicodème Ruhashyankiko as Special Rapporteur to survey the current state of genocide law in the world and to offer recommendations moving forward.⁵⁸ Ruhashyankiko solicited opinions from governments and international organizations on whether cultural genocide should be included among the acts of genocide.⁵⁹ He also consulted a number of scholarly books and commentaries.⁶⁰ Ultimately, no consensus emerged from these sources. His 1978 report concluded:

On the basis of the information at his disposal,... the Special Rapporteur is unable to draw a definite conclusion as to whether the acts regarded as cultural genocide or “ethnocide” are constituent elements of the crime of genocide and whether it is possible to conclude an additional convention covering cultural genocide or to include it in a revised convention on genocide. Naturally, the possibility of securing recognition of cultural genocide through conventional instruments depends on whether the States Members of the United Nations and particularly those which are parties to the 1948 Convention want to review the problems related to the prevention and punishment of genocide, among which cultural genocide cannot be ignored, and to take international action in this matter as part of the prevention and punishment of the crime of genocide.⁶¹

⁵⁶ See, e.g., Daphne Anayiotos, *The Cultural Genocide Debate: Should the U.N. Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?* 22 NEW YORK INTERNATIONAL LAW REVIEW (2009), 99-129.

⁵⁷ The Sub-Commission on Prevention of Discrimination and Protection of Minorities (since July 1999, the Sub-Commission on the Promotion and Protection of Human Rights) was established by the Commission on Human Rights under the authority of Economic and Social Council resolution 9 (II) of 21 June 1946. The Sub-Commission was comprised of human rights experts and tasked with undertaking studies and making recommendations to the Commission on Human Rights. See Research Guide, UNITED NATIONS DOCUMENTATION, <http://www.un.org/depts/dhl/resguide/spechr.htm#subcom> (last visited April 22, 2011).

⁵⁸ Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 31st Sess., U.N. Doc. E/CN.4/Sub. 2/416 (4 July 1978).

⁵⁹ Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 31st Sess., U.N. Doc. E/CN.4/Sub. 2/416 (4 July 1978): paras. 450-454.

⁶⁰ Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 31st Sess., U.N. Doc. E/CN.4/Sub. 2/416 (4 July 1978): paras. 455-460.

⁶¹ Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 31st Sess., U.N. Doc. E/CN.4/Sub. 2/416 (4 July 1978): para. 461.

The report's final conclusions recommended a conservative reading of the Convention in general:

The Special Rapporteur agrees with some members of the Sub-Commission that it would be a mistake to interpret the 1948 Convention in broader terms than those envisaged by the signatories, and that it would be better to adhere to the spirit and letter of the Convention and to prepare new instruments as appropriate; this would avoid raising any difficulties for the States parties.⁶²

In the 1980s Special Rapporteur Benjamin Whitaker updated the report.⁶³ He noted that cultural genocide was gaining attention as a potential international crime, but still had an unclear status in international law: "Further consideration should be given to this question [of the legal status of cultural genocide], including if there is no consensus, the possibility of formulating an optional protocol."⁶⁴ No such protocol has since materialized.

Courts have adopted the U.N.'s approach to cultural genocide, refusing to recognize the term as included in the definition of genocide or as a separate offense. A representative example appears in American case law arising from litigation under the U.S. Alien Tort Statute, a law giving U.S. courts the power to decide civil actions brought by aliens for torts "committed in violation of the law of nations or a treaty of the United States."⁶⁵

⁶² Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 31st Sess., U.N. Doc. E/CN.4/Sub. 2/416 (4 July 1978): para. 618 (footnotes omitted).

⁶³ The assignment came in 1983; the final report in 1985. Benjamin Whitaker, Special Rapporteur, *Review Of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 38th Sess., U.N. Doc. E/CN.4/Sub.2/1985/6 (2 July 1985): para. 1.

⁶⁴ Benjamin Whitaker, Special Rapporteur, *Review Of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 38th Sess., U.N. Doc. E/CN.4/Sub.2/1985/6 (2 July 1985): para. 33.

⁶⁵ 28 U.S.C. § 1350 (2006).

In *Beanal v. Freeport-McMoran, Inc.*,⁶⁶ an indigenous leader brought suit against a metal mining company operating in Indonesia alleging environmental abuses, human rights violations, and cultural genocide.⁶⁷ The mining operations had destroyed the Lambaga Adat Suki Amungme people's habitat and religious symbols, forcing them to relocate. Both the district court and the court of appeals rejected the idea that commission of cultural genocide could be the basis of a claim upon which relief could be granted. The court relied on the Genocide Convention to conclude that "cultural genocide was not recognized in the international community as a violation of international law."⁶⁸ The court rejected arguments that cultural genocide constituted a discrete violation of international law based on, among other sources, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Universal Declaration of Human Rights (UDHR).⁶⁹ The court held that the affirmative rights contained in the documents were too "amorphous" to interpret as a new cause of action.⁷⁰ The court could not apply them "because they are devoid of discernable means to define or identify conduct that constitutes a violation of international law."⁷¹ The court concluded that it would be "imprudent for a United States tribunal to declare an amorphous cause of action under international law that has failed to garner universal acceptance."⁷²

In the 1990s, a trend toward accountability for international crimes began, and the international community established the first criminal courts vested with the power of

⁶⁶ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169 (5th Cir. 1999).

⁶⁷ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169, 163 (5th Cir. 1999).

⁶⁸ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169, 168 (5th Cir. 1999).

⁶⁹ See Appendix for the relevant passages from these documents.

⁷⁰ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169, 168 (5th Cir. 1999).

⁷¹ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169, 168 (5th Cir. 1999).

⁷² *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161-169, 168 (5th Cir. 1999).

prosecuting international crimes since the end of World War II.⁷³ The first such institutions were the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁷⁴ formed in 1991, and the International Criminal Tribunal for Rwanda (ICTR) in 1994.⁷⁵ These courts have the power to convict individuals of the international crime of genocide. The ICTR was the first to do so in the 1998 *Akayesu* decision.⁷⁶ The ICTY and ICTR are also the first courts to generate robust case law on genocide since the 1950s.

In 2001, the ICTY *Krstić* opinion explicitly rejected cultural genocide as a crime for which an individual may be liable.⁷⁷ In 2007, the International Court of Justice, the U.N.'s primary judicial organ, cited the *Krstić* majority opinion approvingly to show that even in customary law, "despite recent developments," genocide was limited to physical or biological destruction of a group.⁷⁸

ICTY case law has instead allowed the concept of cultural genocide to comprise evidence of the "intent to destroy" requirement contained in the chapeau.⁷⁹ This analysis first appears in Judge Shahabuddeen's partial dissent in the *Krstić* appeals judgment:

⁷³ Although the U.N. had established the International Court of Justice in 1946, jurisdiction is predicated on party consent and the court does not try cases in the traditional way with evidence, witnesses, etc., but instead more closely resembles an appeal hearing, where each side produces a single document, called a memorial, for the judges to consult. See How the Court Works, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited April 22, 2011).

⁷⁴ The official name of the court is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."

⁷⁵ There are now tribunals for Sierra Leone, Cambodia, and Lebanon as well.

⁷⁶ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998).

⁷⁷ See Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 580 ("The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.").

⁷⁸ Case concerning the Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [ICJ] Judgment, (26 February 2007), para. 344.

⁷⁹ See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 218-219; see also Kurt Mundorff, *Other People's Children: A Textual and Contextual*

[T]he foregoing [argument that the genocidal intent can be informed by cultural destruction] is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the culture of a group is not genocide.... But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such.⁸⁰

The destruction of mosques, Shahabuddeen argued, could be used to prove or confirm intent to destroy Muslims as a religious group, once combined with one of the enumerated acts.⁸¹

The majority in the *Krstić* appeal did not reach Shahabuddeen's intent argument because it decided the case on other grounds. Less than one year later, however, another trial court confronted a similar question. In *Blagojević and Jokić*,⁸² the defendants were accused of being involved in the killing and forced transfer of Muslims in and around the Bosnian town of Srebrenica. The trial court cited the *Krstić* dissent approvingly to support its conclusion that forced transfer with the requisite intent could constitute destruction of a group for genocide.⁸³ These ICTY cases show that some international courts consider cultural genocide significant for proving intent to commit acts of genocide. The type of acts described all relate to destruction of physical objects: the destruction of villages, willful damage to religious and historic buildings, plunder, the physical destruction of places and artifacts of cultural significance, etc. There is no discussion in these cases of non-physical aspects of culture, like language or customs.

Interpretation of the Genocide Convention, Article 2(E), 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 102 (talking about places where such reasoning was—and is predicted to be—used).

⁸⁰ Prosecutor v. Krstić, ICTY Case No. IT-98-33-A, [Appeals] Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, (19 April 2004), para. 53. See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 216-217 for a reading of the dissent and its implications for cultural genocide.

⁸¹ Prosecutor v. Krstić, ICTY Case No. IT-98-33-A, [Appeals] Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, (19 April 2004), para. 53.

⁸² Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005).

⁸³ Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), paras. 659-660. Note that although the convictions were reversed on appeal, this section was not commented on.

In 1996, the International Law Commission (ILC)⁸⁴ released a statement in connection with its work to prepare a comprehensive code of international crimes that interprets the Travaux as indicating delegates' intent to exclude all types of cultural destruction from the Convention:

As clearly shown by the preparatory work for the [Convention], 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. . . . [T]he 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 [earlier] two drafts and simply listed acts which come within the category of "physical" or "biological" genocide.⁸⁵

The ICJ, ICTY, and ICTR have all cited the statement approvingly.⁸⁶

Analysis of current international jurisprudence suggests that cultural genocide remains outside the Genocide Convention, as it was left in 1947, at the time the Convention was finalized. The term itself has no legal consequence – and, to the contrary, courts have rejected the opportunity to interpret the Convention to include incidents identified as cultural genocide. The term remains ambiguous, apparently able to encompass everything from destroying a relic or church to making an indigenous people's ancestral lands uninhabitable, to forcibly transferring a population. These acts, though labeled despicable and condemned by judges, government

⁸⁴ The International Law Commission was established by the United Nations General Assembly in 1947 for the "promotion of the progressive development of international law and its codification." It prepares draft articles on various topics of public international law, including international criminal issue, which are submitted to the General Assembly. See Introduction, INTERNATIONAL LAW COMMISSION, <http://untreaty.un.org/ilc/ilcintro.htm#methods> (last visited April 22, 2011).

⁸⁵ Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), 45-46 (emphasis added) (alteration in original) (footnotes omitted) as quoted Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 112.

⁸⁶ See Case concerning the Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [ICJ] Judgment, (26 February 2007), para. 344; Prosecutor v. Semanza, Case No. ICTR-97-20-T, [Trial] Judgment (15 May 2003), para. 315; Prosecutor v. Brđanin, ICTY Case No. IT-99-36-T, [Trial] Judgment (1 September 2004), para. 694; Prosecutor v. Krstić, ICTY Case No. IT-98-33-A, [Appeals] Judgment (19 April 2004), para. 25.

officials, and the public, are not considered valid charges under the Convention when labeled cultural genocide.

Although international tribunals clearly reject cultural genocide as a legal norm, they have not explicitly rejected every possible reading of cultural genocide into the Convention. Recall that in the original draft convention of cultural genocide, there were five enumerated acts. The first, forced transfer of children, became an enumerated act of the Convention. The last two⁸⁷ constitute acts of cultural destruction, which the ICTY has said have relevance only for showing intent. This intent must then be combined with an enumerated act that *can* be found in the Convention. The ICTY then, equates cultural genocide with cultural destruction. It does not explicitly comment on the other two enumerated acts in the draft convention.⁸⁸ There are two possible ways to interpret this silence. One is that the ICTY has limited the meaning of cultural genocide squarely to cultural destruction, to the exclusion of any other definition. The other is that the ICTY has ruled on the status of cultural destruction, but the other potential meanings of cultural genocide remain ambiguous. They have not been explicitly rejected, but have also not been affirmed.

⁸⁷ “(d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications;” and “(e) systematic destruction of historical or religious monuments or their diversion...or dispersion of documents and objects....”

⁸⁸ “(b) forced and systematic exile of individuals representing the culture of a group;” and “(c) prohibition of the use of the national language even in private discourse.”

IV. Another Reading of Cultural Genocide: From Ambiguous Label to Specific Act⁸⁹

Focus on Group Viability and 2(e): Forcible Transfer of Children

Although international tribunals reject the legal category of a crime of “cultural genocide,” they are largely silent on the specific types of acts and intentions that have been described as cultural genocide in the Travaux and subsequent scholarship. Therefore, it is worth re-examining how the foundational documents treat such concepts.

The text of the Genocide Convention can appear deceptively simple, especially given the complexity and length of earlier drafts of the convention. It is important, however, not to lose sight of the fact that the Convention has as its ultimate goal the protection of human *groups*, as opposed to solely the protection of individuals from murder or extermination. Thus, four of the five enumerated acts do not relate to killing at all, but rather fall under Article 2(c)’s “conditions of life calculated to bring about [the group’s] physical destruction in whole or in part.” This emphasis on group wellbeing is crucial to understanding the meaning and purpose of the Genocide Convention.

Drafters of the Genocide Convention aimed to fulfill dual purposes: (1) to stigmatize the worst forms of violence and (2) to provide affirmative protections for group viability.⁹⁰ In an advisory opinion by the International Court of Justice (ICJ) regarding reservations to the Convention, the Court stated that the Convention’s object “on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most

⁸⁹ The argument developed in this section of the paper is heavily based on an article by Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127. We will cite him extensively over the course of the discussion, but since most of the concepts are his, we thought it proper to credit the origins of this argument at the outset.

⁹⁰ Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 66.

elementary principles of morality.”⁹¹ It is the intent to target the group itself which distinguishes genocide from homicide and other crimes against humanity. This understanding has translated into protecting the group as an *entity*, and thus criminalizing as genocide the “selective killing of important group members, including cultural, political, or religious leaders, or military-aged men,” as well as the targeting of “small, geographically isolated segments of a larger group, even when there is no intent to destroy the larger group.”⁹²

This second purpose accords with the intentions expressed by original General Assembly Sixth Committee members in the Travaux to protect both the unique cultural resources possessed by each human group, and the general racial, religious, and ethnic diversity of the human population at large. Thus, although cultural genocide as a legal concept remains outside of the Genocide Convention, the recognition of the significance of the group as an entity in and of itself implies some understanding of the group as a cultural unit deserving of international protection.

It is also easy, when looking at the current text of the Genocide Convention, to forget that one of the enumerated acts was taken directly from the earlier definitions of cultural genocide, and remains the sole representative of the crimes constituting Lemkin’s view of cultural genocide. Article 2(e), which criminalizes “forcibly transferring children of the group to another group,” is arguably the only enumerated act which does not imply a likelihood of violent action.⁹³

It is curious that while there was adamant opposition to the issue of cultural genocide from a number of countries, drafters included the prohibition against forcible transfer of children

⁹¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (28 May 1951), 1951 I.C.J. 15-58: 23. The Convention is one of the earliest human rights instruments specifically designed to protect groups. See G. Daniel Cohen, Book Review, *HOLOCAUST GENOCIDE STUDIES* 24(1) (2010) 130-133: 132.

⁹² Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 *HARVARD INTERNATIONAL LAW JOURNAL* (2009), 61-127: 87.

⁹³ See *infra* text accompanying notes 118-138 for additional discussion on this point.

in the final Convention without much resistance. This was true even among countries that may have had good reason to oppose such a provision. For instance, the United States delegation, “although opposed to the principle of cultural genocide as enunciated in the first draft convention, had nevertheless made an exception in the special case of the forced transfer of children to another human group.”⁹⁴ The U.S. delegate went so far as to stress that “in the eyes of a mother, there was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth.”⁹⁵ The Belgian delegate raised the question of whether the transfer had to be permanent and the children destroyed, or whether transfer for purely religious or cultural reasons was permitted, and the Netherlands questioned “whether the forcible transfer of children to schools of a different language or religion constituted genocide.”⁹⁶ In response to the Netherlands, the United States emphasized that “a judge considering a case of the forced transfer of children would still have to decide whether or not physical genocide were involved.”⁹⁷ One legal scholar has noted that, at the time, the United States did not appear to entertain the idea that the forced transfer of children provision “might implicate its American Indian residential school program, which by 1948 had been operating for eighty years.”⁹⁸ Compared to the discussion on cultural genocide, countries expressed only tepid opposition to

⁹⁴ United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.832 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1493.

⁹⁵ United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.832 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1496.

⁹⁶ United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.832 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1496, 1498.

⁹⁷ United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.832 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1496.

⁹⁸ Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 *HARVARD INTERNATIONAL LAW JOURNAL* (2009), 61-127: 110.

the proposition of including forcible transfer of children under physical genocide. When the time came to vote, the provision was adopted 20-13.⁹⁹

The record suggests that certain countries did not want genocide to apply to their assimilationist policies towards indigenous groups or minorities. Nevertheless, the text is relatively clear, and its plain meaning is the legal standard. Therefore, the forced transfer of children from one group to another remains an enumerated act prohibited by the Convention as long as both the enumerated and chapeau elements are satisfied.

Revisiting Group Destruction in Child Transfer

Thus, the Convention places an emphasis on group viability and explicitly contains as an enumerated, prohibited act the forcible transfer of children. These factors have significant consequences for applying the Convention to situations like that confronting the TRC. For one, it means that destruction of the group need not mean exactly the same thing as destruction of

⁹⁹ The discussion on Article 2(e) occurs in the Travaux *before* the major debate and vote on cultural genocide. This seems to imply that, at least in the minds of the delegates, forced removal of children was considered a separate issue from cultural genocide. Because some delegates were concerned that that states would not accept cultural genocide in the final document, Greece submitted in advance an amendment to consider it as an enumerated act under genocide, thus preventing the forced transfer of children from also being permanently expunged. See *supra* note 34 and accompanying text. The relevant discussion is in United Nations General Assembly, Eighty-Second Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.82 (23 October 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498: 1494-98. While Belgium, for example, argued that “[t]ransfers of population did not necessarily mean the physical destruction of a group” (1495), the Iranian delegate “felt that, as the Greek amendment concerned cultural as well as physical genocide, it should rather be discussed after article III [cultural genocide]” (1496). Netherlands agreed; Greece emphasized that its amendment and forced transfers were “not connected with cultural genocide, but with the destruction of a group – with physical genocide” (1496); the overall discussion centered on whether to include the forced transfer provision in article II (physical genocide) or article III (cultural) and where to place the debate on the amendment in the discussions. Shortly thereafter, countries voted *not* to postpone consideration of the Greek amendment until after article III [cultural genocide] had been discussed (1497). A vote was taken in the same session, and the Greek amendment to place forced transfer in article II under the crimes listed as physical genocide was adopted by 20 votes to 13, with 13 abstentions (1498). United Nations General Assembly, Eighty-Second Plenary Meeting, Sixth Committee, U.N. Doc. A/C.6/SR.82 (9 December 1948), *reprinted in* HIRAD ABTAHI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (Martinus Nijhoff Publishers, 2008), Vol. 2, 1487-1498.

individual members of the group.¹⁰⁰ In other words, the group may be destroyed through the destruction of the elements that distinguish it as a separate, or minority group, rather than the physical destruction of its members. In this sense, destroying a group's language, culture, and history through the re-education and removal of its children, causing the group to disintegrate, could equate to destruction of the group, even as the children live on.

Although the Convention would not extend to prohibit cultural destruction of a group as a form of physical or biological destruction (the current requirement for genocide), physical or biological destruction of a group by destruction of a group's culture might fall within the Convention. Many of the examples brought up in the Travaux and case law addressed the physical destruction of objects associated with groups – their land, buildings, property, etc. – in contrast with the group itself. In other words, the group was stripped of its culture, but remained intact. In such situations, it appears that the intent of the actor was to destroy the group's cultural objects – or, at the very most, its culture. This type of harm likely is prohibited conduct under other international criminal laws, but does not rise to the crime of genocide. On the other hand, if the intent of the perpetrator is to make a group cease to exist as a distinct, identifiable community, such intent may satisfy the standard established by the Convention. Furthermore, this goal of physical destruction may be accomplished through a variety of nonviolent means if the intended result is that the group is no longer identifiable as such.

The following chart may be useful in keeping distinct the various possibilities. It juxtaposes the intent element in the chapeau (“object one intends to destroy”) with the enumerated act (“means of perpetrating destruction”) to illustrate that different understandings of

¹⁰⁰ *But see* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 218-219 (arguing the Travaux do not support a distinction between the intent to destroy a group and the intent to destroy individuals within a group).

cultural genocide involve various combinations of these factors, some of which fit into the Convention, and some of which do not:

Potential Intents and Acts Involved in “Cultural Genocide”
and Their Possible Combinations

| <u>Object One Intends to Destroy (Chapeau)</u> | | <u>Means of Perpetrating Destruction (Act)</u> |
|---|---|---|
| Group as physical or biological entity (fits in Convention) | + | Destruction of individuals within the group (fits in Convention) |
| | | Separating group/ destroying cultural ties |
| Cultural identity of group (does not fit in Convention) | | Destruction of cultural objects of group generally (does not fit in Convention) |

In order for an implemented policy to qualify as genocide, both the intent of the policy and the act need to fit into the Convention. Traditional understandings of genocide would fit into the first row: a group targeted as a physical/biological entity, whose individuals are destroyed. On the other hand, if individual members of a group were killed with the intent to destroy the group’s culture (i.e. killing Jews to cause Judaism to disappear, not the Jewish people), the intent element of the Convention would not be satisfied, and so there could not be a finding of genocide. The conception of cultural genocide rejected by international tribunals fits into the last row: a group’s culture targeted via destruction of that group’s cultural objects. The case of the IRS falls somewhere in the middle of these patterns. The applicable “act” would be group separation effectuated by the removal of children from their homes. However, it is not clear whether the IRS policy satisfies the “intent” element. If the intent was to cause the group to cease to exist as a

physical or biological entity, then there could be a finding of genocide. If the intent was to destroy the group's cultural identity, then the policy does not support a finding of genocide.

The ICTY trial court in *Blagojević and Jokić* supports this distinction between the destruction of culture as a target and destruction of the group, as such, stating that while cultural genocide must remain excluded from the definition of the crime of genocide, “this does not in itself prevent [the possibility] that physical or biological genocide could extend beyond killings of members of the group.”¹⁰¹ If the culture is not the target of destruction, but the group is instead, we may be dealing with another kind of crime. The court in *Blagojević and Jokić* goes on to discuss how forcible transfers can lead to physical destruction of a group:

A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself— particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.¹⁰²

Many of the components of a group the court identified fall under the category of culture; however, when these serve to bind the group together, intentionally destroying these components to disintegrate the group may constitute genocide.

¹⁰¹ Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), para. 658. The finding was considered an “expansive interpretation” at the time, since it was the first time that any enumerated act apart from killing was considered. See Daryl A. Mundis & Fergal Gaynor, Highlight, *Current Developments at the Ad Hoc International Criminal Tribunals*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE (November 2005), 1134-1160: 1136-1137. However, other international tribunals confirmed earlier that “the term should be broadly interpreted and encompass acts that are undertaken not only with the intent to cause death but also includes acts which may fall short of causing death.” Prosecutor v. Kayishema, Case No. ICTR-95-1-T, [Trial] Judgment (21 May 1999), para. 95.

¹⁰² Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), para. 666.

Different Types of Intent

Having introduced a new understanding of physical destruction of a group, we turn now to the intent element of genocide. The legal concept of intent must be distinguished from the legal concept of motive. Intent is what a person means to do, i.e. steal money or kill someone. Motive is the reason or reasons that a person decided to perform the act, i.e. to pay rent or hatred. Although these two concepts do inform each other in criminal law, it is important to remember that they are distinct. The Convention does not address the legal concept of motive.¹⁰³ So long as the intent to destroy the group is present, motive is irrelevant.¹⁰⁴ If a policy of transferring children was *intended* to destroy the ethnic group to which the children belonged by assimilating them completely into the dominant culture/ethnicity, under this reading of the Convention, the policy as carried out constitutes genocide.¹⁰⁵ Government officials who conceived, drafted, and executed the policy might have had the best of motives for *individual* children within the group, genuinely wanting to help them. However, if the policy is conceived, designed, and executed with the intention of making the group itself cease to exist in a physical or biological sense, and the means of perpetrating that disappearance is one of the enumerated acts, then that policy falls

¹⁰³ See Prosecutor v. Kayishema, Case No. ICTR-95-1-A, [Appeals] Judgment (Reasons) (21 May 1999), para. 161: (“criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility”); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, [Appeals] Judgment (9 July 2004), paras. 49-52 (discussing the explicit decision of the Convention drafters not to include motive, lest it be too restrictive); Prosecutor v. Tadić, ICTY Case No. IT-94-1-A, [Appeal] Judgment (15 July 1999), paras. 268-69 (stating “motive is generally irrelevant in criminal law” except at the sentencing stage); Prosecutor v. Jelisić, ICTY Case No. IT-95-10-A, [Appeals] Judgment (5 July 2001), paras. 49, 71 (agreeing with the Tadić Appeals Judgment on the irrelevance of motive).

¹⁰⁴ Note, however, that it is not always clear whether specific evidence relates to motive or intent at trial. See, e.g., Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NATIONAL BLACK LAW JOURNAL (1999), 144-168: 156-57 (noting that motive and intent are not always analytically distinct).

¹⁰⁵ The cases before the ICTY all dealt with individual culpability for genocide, not government policies. At this point in the discussion, we will refer to policies instead of individual conduct in order to make application of the law to the TRC’s work more obvious. However, it is important to note that inferring intent from policy is a slightly different analysis than that which the judges in these cases considered. In other words, the international criminal law is not directly on point. Further research into the practices of other truth commissions may offer insight on how to apply liability standards in international criminal law to state action enshrined in governmental policies. See also discussion accompanying notes 168-169.

under the scope of the Convention. Even if the policy was explicit in wanting to keep children safe, or save them, this will not remove it from the genocide definition if children were transferred in order to destroy their ethnic group.¹⁰⁶

This interpretation of the Genocide Convention separates intent toward the group from intent toward individuals. It also expands the definition of “destroy.” However, this reading does not expand the traditional interpretation of the intent requirement; this element remains within the confines of the specific intent mandated for genocide by international tribunals. Specific intent, as opposed to basic (or general) intent, requires that the perpetrator purposely follow (or a policy purposely instruct individuals to follow) the course of action to achieve the destruction of the group. Basic intent, on the other hand, might be satisfied if the perpetrator were aware that destruction was a certain or highly likely consequence of the action and carried it out anyway, but without actually meaning for the destruction to occur. In other words, if someone shot a gun into a crowd, he could be found guilty of murder under a general intent requirement regardless of his intent, because he should have known that a death would result.

The distinction between basic and specific intent may appear subtle, but specific intent is a significantly higher standard, more difficult to prove than basic intent. The *Akayesu* decision reiterated that specific intent is a required element for criminal sanction for genocide, a finding that has been followed by other international criminal and hybrid courts: “Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands

¹⁰⁶ See Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 120 (“The sympathy that motivated these activists to ‘help’ American Indians as individuals does not negate the genocidal intent they assumed toward the many American Indian groups they advocated destroying.”).

that the perpetrator clearly seeks to produce the act charged.”¹⁰⁷ In the context of the Genocide Convention, caselaw confirms that the specific intent must be directed at the group;¹⁰⁸ our reading preserves this element as well.

Commissions and courts have used confessions and tangible documentation of plans or acts as the best evidence of intent. In other words, if representatives of the state admitted that the IRS system was designed to destroy the aboriginal people as a group, such statements or policies may be used as evidence of intent. Some courts have also inferred intent from the number of victims, methodology and pattern of the genocidal planning or conduct, and the prior statements and acts of the defendant, the scale and general nature of the atrocities committed, the discriminatory targeting of the members or property of one group to the exclusion of other groups, the weapons employed, and the extent of bodily injury. Specific factors that international tribunals have used to prove or infer intent include: “the general political doctrine which gave

¹⁰⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998), para. 498. *See also id.* para. 518:

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.

For other examples from international tribunal case law requiring specific intent to be liable for genocide, see Case concerning the Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [ICJ] Judgment, (26 February 2007), para 187; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, [Trial] Judgment (7 June 2001), para. 55; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, [Trial] Judgment (21 May 1999), para. 91; Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), paras. 655-56; Prosecutor v. Brđanin, ICTY Case No. IT-99-36-T, [Trial] Judgment (1 September 2004), para. 695; Prosecutor v. Jelisić, ICTY Case No. IT-95-10-A, [Appeals] Judgment (5 July 2001), paras. 45-46; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, [Trial] Judgment (6 December 1999), para. 59; Prosecutor v. Stakić, ICTY Case No. IT-97-24-T, [Trial] Judgment (31 July 2001), para. 520; Prosecutor v. Krstić, ICTY Case No. IT-98-33-A, [Appeals] Judgment (19 April 2004), para. 20.

¹⁰⁸ *See, e.g.*, Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, [Appeals] Judgment (9 July 2004), para.53; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998), paras. 521-22; Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 561; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, [Trial] Judgment (21 May 1999), para. 99 (“This phrase speaks to specific intent (the requisite *mens rea*). The ‘destroying’ has to be directed at the group *as such*, that is, *qua group*, as stipulated in Article 2(2) of the Statute.”).

rise to the [prohibited] acts”;¹⁰⁹ the general nature of atrocities in a region or a country;¹¹⁰ existence of a genocidal plan and the accused’s participation in its creation and/or execution;¹¹¹ the scale of atrocities committed;¹¹² “the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group”;¹¹³ and the degree to which the group was in fact destroyed in whole or in part.¹¹⁴

Finally our proposed reading of the Convention does not directly contradict the 1996 findings of the ILC,¹¹⁵ which declared that the Travaux excluded cultural destruction from being considered genocide. There, the focus was on destruction of the group in contrast to cultural destruction. The Commission equated cultural genocide with destruction of culture, which the Commission rejected as not coming within the definition of genocide contained in the 1948 Convention. The Commission was not interested in the means of group destruction, just the ends. Therefore, so long as the type of destruction intended by the IRS is conceived as physical and not cultural, and so long as one of the enumerated acts is being performed, the argument can be made that the IRS policy of forced transfers of children is prohibited by the Genocide Convention and is consistent with the ILC’s reading of the treaty.

¹⁰⁹ Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.

¹¹⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998), para. 523; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, [Trial] Judgment (21 May 1999), para. 93; Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.

¹¹¹ Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.; Prosecutor v. Jelisić, ICTY Case No. IT-95-10-A, [Appeals] Judgment (5 July 2001), para. 48.

¹¹² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998), para. 523; Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.

¹¹³ Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.

¹¹⁴ Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 61.

¹¹⁵ *Supra* notes 84-85 and accompanying text.

Other Developments in Understanding Article 2(e)

For nearly fifty years, Article 2(e) lay dormant. Courts and legal scholars rarely addressed the provision, which one commentator characterized as a legal anachronism.¹¹⁶ However, in 1997, with the publication of the Australian Human Rights and Equal Opportunity Commission report, Article 2(e) received new attention. The Australian report, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (“*Bringing Them Home*”), found that “[t]he policy of forcible removal of children from indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labeled ‘genocidal’ in breach of binding international law.”¹¹⁷ The assertion that the state policy constituted a violation of the Convention (as opposed to a non-binding norm of “cultural” genocide) created a firestorm in Australia. The report also raised questions surrounding Article 2(e) and the extent to which other child removal policies may have constituted genocide.

Subsequent international criminal cases have attempted to elucidate a method for interpreting Article 2(e) and its components. This has required in part addressing the meaning of “forcible” transfer. In order for a transfer of children to constitute genocide under Article 2(e), the transfer must be carried out *forcibly*. Through its decisions, the ICTR has demonstrated a broad understanding of force in the context of Article 2(e), going so far as to sanction non-direct acts leading to the transfer of children. This approach was best stated in *Akayesu*, in which the

¹¹⁶ Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 62.

¹¹⁷ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 275. Australia ratified the Genocide Convention in 1949, and continued its child removal policy until the 1970s. Therefore, the Commission evaluated the state policy in light of Australia’s obligations under the Convention.

Trial Chamber explained that “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.”¹¹⁸ In other words, physically taking the children was not the only way to effect forcible transfer; the ICTR held that threats or forms of duress which might lead to forcible transfer could also constitute criminal behavior under the international definition of genocide.

The Preparatory Commission for the ICC proposed an even broader standard for forced transfer, stating that “the term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.”¹¹⁹ Under this standard, the fear of violence, with or without the presence of an actual threat or coercion, as well as a potentially coercive environment, would be enough to qualify as forcible transfer.

The ICJ recently announced a narrower standard in the Bosnia genocide case when it declared that “forcible transfer too requires deliberate intentional acts.”¹²⁰ The court reached this conclusion by determining that “the acts [listed in Article 2] themselves include mental elements,” and “are by their very nature conscious, intentional or volitional acts.”¹²¹ Legal scholar Kurt Mundorff argues that the ICJ overreached with this interpretation, as both Article

¹¹⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998) para. 509; *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, [Trial] Judgment (6 December 1999), para. 53; WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (New York, Cambridge University Press, 2009), 176-177.

¹¹⁹ Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (July 6, 2000), 1-40: 7 n.5.
<http://www.unhcr.org/refworld/category,LEGAL,ICC,,46a5fd2e2,0.html> (last visited April 24, 2011).

¹²⁰ Case concerning the Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [ICJ] Judgment, (26 February 2007), para. 186.

¹²¹ Case concerning the Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [ICJ] Judgment, (26 February 2007), para. 186.

2(c) and Article 2(d) include intent wording (“deliberately,” and “intended”), but Article 2(e) does not.¹²² Mundorff summarizes the existing case law as interpreting “forcible transfer” as acts in which “a perpetrator takes advantage of conditions of force to transfer children.”¹²³ This latter interpretation of “forcible” is broad enough to apply to multiple situations under which indigenous children were taken from their families and placed in educational institutions.

Based on a definition of forcible which includes threats or coercion and is not limited to physical force, courts have relied on the following¹²⁴ as evidence of forcible transfer:

1. Evidence of transfer, e.g. from one camp to another.¹²⁵
2. Evidence of transporting victims out of an area, which may include procuring, monitoring, or ordering transportation of victims out of an area, and evidence of convoys carrying victims out of an area.¹²⁶ Additionally, evidence can be provided to demonstrate that the transfer was not a provisional measure, and thus distinct from evacuation.¹²⁷

¹²² Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 96-97.

¹²³ Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 97.

¹²⁴ This list is not meant to be exhaustive; rather, it includes only those types of evidence we believe potentially relevant to the TRC’s analysis.

¹²⁵ See Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), paras. 531-32; Commentary on the ILC Draft Code, p 122: “The Trial Chamber considers it to be well established that forcible displacements of people within national boundaries are covered by the concept of forcible transfer.”

¹²⁶ See Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 293 (“When the plan to transport the Bosnian Muslim population out of Potočari was devised, the Drina Corps were called upon to procure the buses. Drina Corps personnel were also present in Potočari, overseeing the transportation operation, knowing full well that the Bosnian Muslims were not exercising a genuine choice to leave the area.”).

¹²⁷ See Prosecutor v. Naletilić & Martinović, ICTY Case No. IT-98-34-T, [Trial] Judgment (31 March 2003), para. 520 n. 1362 (“The Commentary to the Geneva Convention IV holds ‘[unlike] deportation and forcible transfer, evacuation is a provisional measure,’ (p.280). The Chamber sees this as indicative of that deportation and forcible transfer are not by their nature provisional, which implies an intent that the transferred persons should not return.”).

3. Evidence of transfer gathered from population dynamics, including evidence of total numbers of victims displaced.¹²⁸
4. Evidence of publicly announcing transfer, or calling out residents' names for future transfer.¹²⁹
5. Evidence of the creation of an infrastructure to facilitate transfer, including facilitating applications for transfer, setting up agencies to facilitate transfer and collection centers to oversee transfer.¹³⁰
6. Evidence of forcible transfer using duress, trauma or coercion, including the illegal confinement of the adults, while the children were forcibly transferred out of the territory; evidence of transferred persons generally having no real choice but to leave,¹³¹ and evidence of the destruction of person or persons' homes.¹³²

ICTY caselaw also makes it clear that evidence of transfer as the result of

¹²⁸ See *Prosecutor v. Stakić*, ICTY Case No. IT-97-24-T, [Trial] Judgment (31 July 2001), paras. 706, 711.

¹²⁹ See *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, [Trial] Opinion and Judgment (7 May 1997), para. 387.

¹³⁰ See *Prosecutor v. Blagojević & Jokić*, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), para. 216 (The Trial Chamber found that “the Bratunac Brigade contributed vehicles and fuel to the transfer operation. . . . Furthermore, members of the Bratunac Brigade Military Police assisted in the transfer by counting people as the buses were loaded. . . . Captain Nikolić gave the orders to the Bratunac Brigade Military Police to go to Potočari and to count the people. . . . Finally, elements of the Bratunac Brigade regulated traffic as the buses passed through Bratunac on their way to Konjević Polje.”); see also *Prosecutor v. Stakić*, ICTY Case No. IT-97-24-T, [Trial] Judgment (31 July 2001), para. 709 (using evidence of facilitating applications for transfer); *Prosecutor v. Brđanin*, ICTY Case No. IT-99-36-T, [Trial] Judgment (1 September 2004), para. 580 (using evidence of setting up agencies to facilitate transfer); *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, [Trial] Opinion and Judgment (7 May 1997), para. 379 (using evidence of setting up collection centers to oversee transfer).

¹³¹ See *Prosecutor v. Krnojelac*, ICTY Case No. IT-97-25-A, [Appeal] Judgment (17 September 2003), para. 233 (“The Trial Chamber finds that living conditions in the KP Dom made the non-Serb detainees subject to a coercive prison regime which was such that they were not in a position to exercise genuine choice. This leads the Appeals Chamber to conclude that the 35 detainees were under duress and that the Trial Chamber erred in finding that they had freely chosen to be exchanged.”); see also *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 149 (“The Trial Chamber finds that, on 12 and 13 July 1995, the Bosnian Muslim civilians of Srebrenica who were bussed out of Potočari were not making a free choice to leave the area of the former enclave. The Drina Corps personnel involved in the transportation operation knew that the Bosnian Muslim population was being forced out of the area by the VRS.”).

¹³² See *Prosecutor v. Brđanin*, ICTY Case No. IT-99-36-T, [Trial] Judgment (1 September 2004), para. 550 (“The expulsion of Bosnian Muslims and Bosnian Croats was often accompanied by a widespread destruction of their homes and institutions dedicated to religion.”).

agreements between leaders of different groups is not always sufficient to establish reasonable doubt of forced transfer:¹³³

In addition to the evidence used to prove the material elements of forced transfer, courts have also relied on evidence to demonstrate the required mental element of conducting forced transfer with the intent of destroying the group. This has included the following:

1. Evidence inferred from an utterance, a document, or a deed of the perpetrator, including orders and plans for forcible transfer, procuring transportation for forcible transfer, supervising or otherwise being present during the forcible transfer, as well as evidence inferred from the perpetrator supporting ideology necessitating forcible transfer.¹³⁴
2. Evidence inferred from calling out residents' names for future transfer, from publicly announcing that transfer would take place, from the perpetrator intending for person or persons never to return to the area, from the perpetrator creating intolerable living conditions to force person or persons to flee, from public statements calling for person or persons to leave an area, and from the perpetrator frequenting an area near where forcible transfers occurred.¹³⁵

If there is evidence that temporary transfer of children occurred for medical or safety reasons, this acts as exculpatory evidence to show that the act did not constitute forced transfer.¹³⁶

¹³³ See Prosecutor v. Naletilić & Martinović, ICTY Case No. IT-98-34-T, [Trial] Judgment (31 March 2003), paras. 522-523. "An agreement between two military commanders or other representatives of the parties in a conflict does not have any implications on the circumstances under which a transfer is lawful. Military commanders or political leaders cannot consent on behalf of the individual."

¹³⁴ See Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), paras. 293, 335, 339-340, 344, 353, 359, 387, 459, 615.

¹³⁵ See Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), paras. 147, 387, 459, 615.

¹³⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, Art. 78, 16 I.L.M. 1391, 1125 U.N.T.S. 3 ("No party to the conflict

The aforementioned rules of evidence established by ICTR and ICTY caselaw can be applied to the TRC analysis in order to determine whether transfer was conducted forcibly. In addition, Article 2(e) requires that children of the group be forcibly transferred to “another group” in order to be considered a prohibited act under the Convention. This element calls into question whether simply removing the children by force and placing them elsewhere satisfies the forced transfer provision, if the children are not placed with a distinct, separate group. In the Australian case, the state removed indigenous children from their birth parents and placed them with white families. The Commission found that this policy qualified as a transfer from one group to another group. In the Canadian case, however, the state removed aboriginal children from their birth parents and sent them to schools, where they were surrounded by other aboriginal children. In theory, one could argue that the children were not transferred to a different group, but merely to a different setting, where they remained surrounded by members of the same group.

According to Claus Kieß, another legal scholar, “[t]he prohibited act in question is completed if at least one child has been distanced from the group to which it belongs. This result may be achieved by confining the child to a location outside the realm of the group from which it

shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required.”). The ICTY caselaw has also commented on situations in which the evidence is not substantial enough to indicate that forcible transfer has occurred. These include: evidence of mere transfer (not conducted forcibly), and evidence that the persons were apprehended and arrested in order to be detained, but not with the intent of forcibly transferring them. *See* Prosecutor v. Blagojević & Jokić, ICTY Case No. IT-02-60-T, [Trial] Judgment (17 January 2005), para. 660 (“Judge Shahabuddeen found that ‘mere displacement’ does not amount to genocide. However, he further found that displacement can constitute genocide when the consequence is dissolution of the group.”); *see also* Prosecutor v. Naletilić & Martinović, ICTY Case No. IT-98-34-T, [Trial] Judgment (31 March 2003), para. 537 (“The Chamber is not satisfied that these acts constitute unlawful transfer under Article 2(g) of the Statute, even though the persons, technically speaking, were moved from one place to another against their free will. They were apprehended and arrested in order to be detained and not in order to be transferred. Therefore, the requisite intent is not established.”).

comes; *it is not required that the child concerned is introduced into a different group, for example by way of adoption*” (emphasis added).¹³⁷ Mundorff interprets this to mean that

Article 2(e) does not require the children to be fully integrated into another group. Instead, Article 2(e)’s requirement that children be transferred “to another group” should be considered satisfied when the children are in another group’s control. It would be absurd to allow a perpetrator to defeat a charge of genocide by keeping children in an orphanage, away from their group of origin but also not integrated into another group.¹³⁸

There does not appear to be any case law addressing this particular point. Thus there is still some latitude to interpret transferring children from one group to another as not strictly reliant on their placement with a concrete group, as long as the other elements of Article 2(e) are satisfied.

Given the relatively recent attention to Article 2(e), there is little case law interpreting the provision. However, the current status of the law does not contradict application of Article 2(e) to the Canadian IRS.

The Relevance of Retroactivity for Pre-1948 Applications of the Convention

The IRS existed for almost 100 years before the creation of the Genocide Convention, which raises the question of whether state policy regarding the IRS that predated the Convention can be considered a violation of international law. Although the Convention came into force in 1951, it is possible that obligations contained in the instrument pre-dated its formal codification as a treaty. In 1951, the International Court of Justice pointed out that “principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even

¹³⁷ Claus Kreß, *The Crime of Genocide Under International Law*, 6 INTERNATIONAL CRIMINAL LAW REVIEW (2006): 484, as quoted in Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 91.

¹³⁸ Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 91.

without any conventional obligation.”¹³⁹ The ICJ’s choice of language here is deliberate, because when a norm is “recognized by civilized nations,” it is considered a general principle,¹⁴⁰ or a preemptory norm which according to the ICJ Statute can be a binding source of international law.¹⁴¹ The statute also lists “international custom, as evidence of a general practice accepted as law,” as a source of international law.¹⁴² This section outlines the development of *jus cogens* norms (binding norms, like the prohibition of slavery, from which no states may be exempted) and customary international law principles that could be used to show that genocide was a recognized crime in international law before its formal codification in the 1948 Convention.

Acts that later came to be known as genocide were likely part of the emerging norm of crimes against humanity by the interwar period. The first time that “the need for special protection of national minorities was recognized” was in the aftermath of World War I.¹⁴³ France, Great Britain, and Russia witnessed the atrocities committed against the Armenian people in the Ottoman Empire and made a joint declaration in May 1915 condemning “these new crimes of Turkey against humanity and civilization.”¹⁴⁴ They went on to say that these nations

¹³⁹ Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), [1951] ICJ Reports 16, p.23. Cited in WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 3.

¹⁴⁰ See RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (St. Paul, MN, the American Law Institute, 1987), section 102(4) (“General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”); see also Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57.2 AMERICAN JOURNAL OF INTERNATIONAL LAW (April 1963), 279-299: 284 (stating that “the ‘general principles of law recognized by civilized nations’ have in fact a very different basis [from natural law]: an examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement of the principles relevant to the case at hand”).

¹⁴¹ Statute of the International Court of Justice art. 38(1).

¹⁴² Statute of the International Court of Justice art. 38(1). See RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (St. Paul, MN, the American Law Institute, 1987), section 102(2). (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”)

¹⁴³ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 19.

¹⁴⁴ Quoted in WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 20.

would hold members of the Ottoman government responsible for such crimes, and the United States added that the brutality of the crimes justified international intervention, despite the fact that Armenians were Turkish subjects.¹⁴⁵ Although an attempt was made during the negotiations of the Treaty of Versailles to establish a tribunal to try Kaiser Wilhelm II, nothing ever came of it.¹⁴⁶ According to leading genocide scholar William Schabas, all attempts “at international prosecution of war crimes and crimes against humanity [in this period] were a failure.”¹⁴⁷ However, the efforts did spur the international legal community to begin looking into international crimes.

Following World War II, the Nuremberg trials were established by the Allies to try Nazi war criminals. Issued on August 8, 1945, the London Charter of the International Military Tribunal set forth the laws and procedures by which the Nuremberg trials were to be conducted, and defined three categories of crimes: war crimes, crimes against peace, and crimes against humanity.¹⁴⁸ Many of these crimes had never previously been codified; rather they “encompassed actions committed that in a more general sense violated the laws and dictates of humanity.”¹⁴⁹

These features of the Charter and the subsequent trials gave rise to criticism of the trials on the grounds that defeated soldiers were being prosecuted for the violation of nonexistent laws.

As late as 1944, war crimes had been defined only as “(1) violations of the rules of war by

¹⁴⁵ WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (New York, Cambridge University Press, 2009), 20.

¹⁴⁶ WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (New York, Cambridge University Press, 2009), 23.

¹⁴⁷ WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (New York, Cambridge University Press, 2009), 26.

¹⁴⁸ Charter of the International Military Tribunal, *NUREMBERG TRIAL PROCEEDINGS VOL. 1*, AVALON PROJECT, <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited April 25, 2011).

¹⁴⁹ Norman E. Tutorow, *Introduction to WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* (Norman E. Tutorow, ed., New York, Greenwood Press, 1986), 3-30: 9.

members of the armed forces or (2) armed hostilities by non-members of the armed forces.”¹⁵⁰

There was “no known code of rules for warfare with such general custom and universal approval as to have entered generally into international law and require [sic] to be observed by those nations which have made agreement to it.”¹⁵¹ Thus, with respect to the use of poison gas and unrestricted submarine warfare, even after the termination of World War II, “the victors could not agree upon any pact outlawing the use of such weapons.”¹⁵²

Critics of the trials argued that crimes against peace and crimes against humanity had even less foundation in international law than war crimes. According to Eric Kobrick, these crimes “were not international crimes over which universal jurisdiction could be exercised as a matter of customary law when committed.”¹⁵³ The Charter of the Tribunal relied on various international treaties to support its claim that crimes against humanity and against the peace were established international law, yet “all these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions.”¹⁵⁴

According to Hans Kelsen, killings, assaults, deprivation of liberty and destruction of property performed in a legal war do not constitute crimes against humanity or the peace; if performed in an illegal war, they are covered by the concept of war crimes.¹⁵⁵ It was thus generally considered

¹⁵⁰ Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL LAW REVIEW 335 (1964-1965), 333-347: 338.

¹⁵¹ Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMPLE LAW QUARTERLY (1947-1948), 27-61: 47.

¹⁵² Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMPLE LAW QUARTERLY (1947-1948), 27-61: 47.

¹⁵³ Eric S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUMBIA LAW REVIEW (1987) 1515-38: 1533

¹⁵⁴ Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* 1 INTERNATIONAL LAW QUARTERLY (Summer 1947), 153-171: 155.

¹⁵⁵ Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* 1 INTERNATIONAL LAW QUARTERLY (Summer 1947), 153-171: 158.

that the inclusion of these crimes in the London Charter represented the creation of new law more than the codification of existing law.¹⁵⁶

The Tribunal responded to the argument that the crime of an aggressive war was not an international prohibition by stating that the “Charter is not an arbitrary exercise of power on the part of the victorious nations, but . . . the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”¹⁵⁷ The Tribunal maintained that it was not relying on ex post facto laws and that the maxim *nullum crimen sine lege*¹⁵⁸ did not apply, as the state of international law in 1939 had made aggressive war illegal. In justifying its jurisdiction over the crimes, the Tribunal cited the Kellogg-Briand Pact of 1928, which Germany had joined, as well as the Hague Convention of 1907, prohibiting resort to certain methods of waging war, as previous international law instruments that were binding on states in outlawing aggressive war and certain war crimes.

In a report to the President of the Tribunal on atrocities and war crimes given on June 7, 1945, Justice Robert Jackson claimed that “atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933” were criminal under international law.¹⁵⁹ He went on to maintain that “the Fourth Hague Convention provided that inhabitants and belligerents sh[ould] remain under the protection and the rule of ‘the principles of the law of nations, as they result from the usages established among civilized peoples, from

¹⁵⁶ Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* 1 INTERNATIONAL LAW QUARTERLY (Summer 1947), 153-171: 155.

¹⁵⁷ Judgement: The Law of the Charter, NUREMBERG TRIAL PROCEEDINGS VOL. 1, AVALON PROJECT, <http://avalon.law.yale.edu/imt/judlawch.asp> (last visited April 25, 2011).

¹⁵⁸ Literally, “no crime without law.”

¹⁵⁹ Justice Jackson's Report to the President on Atrocities and War Crimes, June 7, 1945, NUREMBERG TRIAL PROCEEDINGS VOL. 1, AVALON PROJECT, http://avalon.law.yale.edu/imt/imt_jack01.asp (last visited April 25, 2011).

the laws of humanity and the dictates of the public conscience.”¹⁶⁰ In other words, Justice Jackson argued that the criminality of targeting groups for violence based on their race or religion was already an international norm and custom at least since 1907.¹⁶¹

The Tribunal did not concede that this norm had existed for quite so long, but did conclude that a similar international norm and custom had existed at least since 1939. The Tribunal noted that the “law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition,”¹⁶² and mentions a Treaty of Mutual Assistance (1923), sponsored by the League of Nations; a League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (“Geneva Protocol”); and a declaration concerning wars of aggression adopted at a League of Nations meeting at which Germany was present as additional instruments that contribute to this body of international law.

Addressing crimes against humanity specifically, the Tribunal concluded:

To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.¹⁶³

¹⁶⁰ Justice Jackson’s Report to the President on Atrocities and War Crimes, June 7, 1945, NUREMBERG TRIAL PROCEEDINGS VOL. 1, AVALON PROJECT, http://avalon.law.yale.edu/imt/imt_jack01.asp (last visited April 25, 2011).

¹⁶¹ The source is somewhat ambiguous as to whether Jackson sees the norm as predicated on the existence of armed conflict.

¹⁶² Judgement: The Law of the Charter, NUREMBERG TRIAL PROCEEDINGS VOL. 1, AVALON PROJECT, <http://avalon.law.yale.edu/imt/judlawch.asp> (last visited April 25, 2011).

¹⁶³ Judgement: The Law Relating to War Crimes and Crimes Against Humanity, NUREMBERG TRIAL PROCEEDINGS VOL. 1, AVALON PROJECT, <http://avalon.law.yale.edu/imt/judlawre.asp> (last visited April 25, 2011).

The Tribunal thus dismissed the defense's arguments regarding "nullum crimen sine lege, nulla poena sine lege" and the illegality of holding individuals responsible for laws which did not exist at the time by maintaining that laws criminalizing war crimes and crimes against humanity did exist at the time of World War II in international law, through the agreements banning aggressive war, among others.¹⁶⁴

Despite the Nuremberg Tribunals' ex-post-facto application of certain crimes, it would still be difficult to find recognition of the particular crime of genocide any earlier than 1946. Although national minorities treaties passed in 1919 and 1921 could be considered forerunners to the Convention,¹⁶⁵ no one conceived of anything approaching the scope of the crime of genocide until Lemkin. When Lemkin presented his findings to the third International Congress on Penal Law in 1933, nothing definitive occurred to support international recognition of the crime of genocide.¹⁶⁶ The Tribunal opinion dating criminal responsibility for crimes against humanity to 1939 is predicated on the fact that these crimes occurred during an international armed conflict. The Tribunal made no firm finding about whether such activities would be criminal during peacetime under international law. It was not until 1946 that the United Nations General

¹⁶⁴ Critics continue to argue that "all these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions." Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* 1 INTERNATIONAL LAW QUARTERLY (Summer 1947), 153-171: 155. It is further in dispute whether any of these treaties actually stipulated individual criminal responsibility to the extent relied upon by the Tribunal. *Id.*

¹⁶⁵ Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland, 28 June 1919, British Treaty Series, No. 8, U.S. Senate Doc. 82, 66th Congress, 1st Session: art. 8 ("Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals."); Treaty between the Principal Allied and Associated Powers and Roumania, 9 December 1921, British Treaty Series, No. 6, art. 9 ("Roumanian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Roumanian nationals."); Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, 10 September 1919, British Treaty Series, No. 17, art. 8. See also discussion in WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 27, note 63.

¹⁶⁶ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (New York, Cambridge University Press, 2009), 30-31.

Assembly declared genocide, in and of itself, an international crime.¹⁶⁷ That being said, research into minority protections in the interwar period may reveal recognition of the criminal dimension of specific acts of genocide in general principles and customary international law, as well as the nature of state obligations to protect minorities. Such findings would be instructive and applicable to Canada during the same period, particularly if customary international law norms emerged around situations similar to that confronting the TRC.

One reason that the Nuremburg trials were so controversial was because they appeared to prosecute individuals for actions that were not criminal at the time they were committed. Such a practice would violate the principle of non-retroactivity, that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”¹⁶⁸ Because the TRC is not interested in individual criminal accountability, and is not adjudicating legal findings, many of these concerns will not be relevant to its work. However, to the extent that the TRC makes legal characterizations about the IRS system in light of genocide norms, the Commission will

¹⁶⁷ United Nations General Assembly Resolution 96(I), U.N. Doc. A/Res/96(I) (11 December 1946), para. 1: “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...and is contrary to moral law and to the spirit and aims of the United Nations.”

¹⁶⁸ ICCPR Article 15. According to Eric Kobrick, there is still an argument to be made for the application of retroactivity in international law as opposed to domestic criminal law because ex post facto laws play a different role in international versus domestic law:

International law is not a product of statutes, but of treaties, conventions, judicial decision and customs. It is the ‘gradual expression, case by case, of the moral judgments of the civilized world.’ To apply the ex post facto prohibition to a common-law decision of an international tribunal would substantially hinder society’s efforts to respond to the exigencies of changing conditions. Since there is no governmental body authorized to enact substantive rules of international law, the only way such law can grow is through judicial decision, treaties and conventions widely accepted by nations. To apply the ex post facto prohibition to any of these sources would cripple the development of international law.

Eric S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUMBIA LAW REVIEW (1987) 1515-1538: 1533. Thus, an argument could be made that in certain extreme cases, such as Nazi actions during the second World War, “where there has been a grave, deliberate, and flagrant violation of widely accepted standards ... it is more important to condemn and punish such conduct than to follow literally the principle against retroactivity.” Bernard D. Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 UNIVERSITY OF CHICAGO LAW REVIEW (April 1947), 455-469: 458.

need to apply the law prevailing at the time of the events in question. Caselaw interpreting the law of genocide for acts that took place after the close of the IRS in the mid-1990s (i.e. caselaw from the ICTY and ICTR) would have to be understood as applying the law of genocide as it existed earlier in time in order to evaluate IRS policies against these standards.¹⁶⁹

The TRC may, in the exercise of its discretion, apply norms like the prohibition against genocide to its analysis of the history of the IRS even if these norms would not be applicable in a court of law. For example, the TRC may find that certain acts related to the IRS were not prohibited in international law at the time they occurred, but nevertheless decide (perhaps for purposes of rendering a moral account of the IRS to a contemporary public) to adopt a modern legal framework to evaluate historic events. Practices of other commissions may be instructive in this regard. However, the question of how to balance such purposes and principles with the actual state of international law is not a straightforward one, and so any such action should be undertaken openly and cautiously.

¹⁶⁹ In addition to its international obligations under *jus cogens* and customary international law, Canada formally agreed not to commit genocide when it ratified the Convention in 1952. See Maurice Copithorne, *National Treaty Law and Practice: Canada*, in NATIONAL TREATY LAW AND PRACTICE, ed. Duncan B. Holliss et al (Boston: Martinus Nijhoff Publishers, 2005): 91-121: 91-92. Genocide did not become illegal under Canadian domestic law, meaning it could be prosecuted in Canadian courts, until 2000, with the passage of the Crimes Against Humanity and War Crimes Act. In 1970, advocating genocide became a crime under domestic law. See An Act to Amend the Criminal Code, 1970, c. 11 (1st Supp.), later Criminal Code, R.S.C. 1985, c. C-46. In 2004 the Act was amended to include sexual orientation in the identifiable groups section. See An Act to Amend the Criminal Code (hate propaganda), S.C. 2004, c. 14. We mention this law because the definition of genocide is interesting. It follows the Convention's closely, but not exactly; perhaps most tellingly, only two of the five enumerated acts are included in the Canadian statute.

Parallel Developments in International Law

The accumulation of international law and custom regarding cultural rights, indigenous rights, and family rights over the past sixty years also may bolster the legitimacy of the more expansive reading of the Genocide Convention. Interpretation and application of such law is beyond the scope of this paper, but we have included a representative selection as an appendix.

V. Application of Genocide Law by the Australian Human Rights and Equal Opportunity Commission to Australia's "Stolen Generation" Policy

In the last ten years, judicial bodies and commissions have begun to examine past incidents of state policies targeting indigenous communities as potential acts of genocide. For example, in 1994, the Guatemalan Commission for Historical Clarification (CEH) began to examine what occurred in the country during the armed conflict of the previous three decades. In its 1999 report, the Commission applied the Genocide Convention and concluded that "agents of the State of Guatemala, within the framework of counterinsurgency operations...committed acts of genocide against groups of Mayan people."¹⁷⁰ Such conclusions have helped strengthen the notion that genocide is a contemporary legal concept, one that can be applied with the proper evidentiary findings. With the recent Declaration on the Rights of Indigenous Peoples¹⁷¹ and the 1997 Australian Commission findings of genocide, indigenous groups and states may pay more attention to avenues for application of genocide law to past and present assimilation policies.

¹⁷⁰ GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE (1999), para. 122, available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>.

¹⁷¹ See Appendix.

Historical Background

Australia is one of the few examples of a nation that conducted an independent legal analysis of state policies targeting its indigenous population and made use of the law of genocide. Since this case is similar to Canada's IRS system, this section discusses the Australian Commission's analysis.

From the turn of the twentieth century up to the 1970s, Australia engaged in a systematic policy of forcibly removing aboriginal children from their parents and transferring custody to white, adoptive parents, or placing older children in charitable institutions or white-run boarding schools.¹⁷² Ordinances or acts often established a "guardian" or "director of native welfare" who became the legal guardian of all aboriginals or half-castes in a given region, authorized to "undertake the care, custody, or control of any aboriginal or half-caste," or to remove or detain aboriginals for any reason to an appropriate institution.¹⁷³ The Commission concluded that the state forcibly removed between one in three and one in ten indigenous children from their families and communities between 1910 and 1970. The Commission found that "not one Indigenous family ... escaped the effects of forcible removal."¹⁷⁴

Establishment of the Commission and its Genocide Findings

In 1995, the former Australian Attorney-General, the Hon. Michael Lavarch MP, established a national inquiry in response to increasing concern among key indigenous agencies and communities that the general public's ignorance of the history of forcible removal was

¹⁷² See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 234.

¹⁷³ See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 235.

¹⁷⁴ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 31.

hindering the recognition of the needs of its victims and their families and the provision of services.¹⁷⁵ The inquiry's purpose and recommendations were "directed to healing and reconciliation for the benefit of all Australians."¹⁷⁶

On 11 May 1995, the then Attorney-General referred the issue of past and present practices of separation of indigenous children from their families to the Human Rights and Equal Opportunity Commission (HREOC),¹⁷⁷ committed a budget of \$1.5 million over two years, and required the Commission to issue a report by December 1996.¹⁷⁸ The Commission conducted hearings and received evidence, testimony, and submissions before issuing the 700-page report, "Bringing Them Home", in Federal Parliament on 26 May 1997.¹⁷⁹

"Bringing Them Home" provided an in-depth review of the history of forced removal of aboriginal children in Australia by territory, before examining the consequences of removal. In Part 4 ("Reparations"), a section entitled "International Human Rights" concluded that the "Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law."¹⁸⁰

Leaving the Commission's discussion of racial discrimination aside, it is useful to examine the Commission's genocide analysis to assess whether it drew upon the recent expanded

¹⁷⁵ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 15.

¹⁷⁶ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 5.

¹⁷⁷ The HREOC is an Australian government body overseeing the application of federal legislation in the area of human rights, anti-discrimination, social justice.

¹⁷⁸ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 15.

¹⁷⁹ See *supra* discussion accompanying note 117.

¹⁸⁰ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 231.

interpretation of genocide law as exemplified by Article 2(e). The report stated that Australia ratified the Genocide Convention in 1949, that it came in force in 1951, and as a result “any removals after that time with the intention of destroying Indigenous groups culturally [were] in breach of international law.”¹⁸¹

The Commission asserted categorically that “forcible transfer of children can be genocide.”¹⁸² To support this assertion, the Commission’s examined Professor Lemkin’s definition of genocide and the idea that genocide can be non-physical.¹⁸³

The Commission emphasized the fact that “plans and attempts can be genocide,” and thus, even partial destruction of the group, or partial removal, can constitute genocide.¹⁸⁴ In the Commission’s examination of the policy’s intent, it concluded that “the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture.”¹⁸⁵ There was an assumption, stated by certain government officials in interviews and newspaper articles, that “[half-caste] children were taken from their mothers in order to become part of the white society. Pure Aborigines in their remote

¹⁸¹ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 238. There is no discussion of non-retroactivity; the Commission assumes that because Australia was party to the Genocide Convention, it was obligated to abide by all of the Convention’s laws. There is no analysis of whether this would be different if interpretation of the laws had changed over time.

¹⁸² AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 235.

¹⁸³ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 235-236.

¹⁸⁴ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 236.

¹⁸⁵ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 237.

desert settlements were expected to die out over time.”¹⁸⁶ The Commission, reviewing such testimony, concluded that the “removal of children with this objective in mind is genocidal because it aims to destroy the ‘cultural unit’ which the Convention is concerned to preserve.”¹⁸⁷

The Commission recognized that some individuals may have more benign motives when developing and executing the policy of forced removals; however, it found that “mixed motives are no excuse,” citing the work of several scholars to the effect that:

- The debates at the time of the drafting of the Genocide Convention establish clearly that an act or policy is still genocide when it is motivated by a number of objectives;
- To constitute an act of genocide the planned extermination of a group need not be solely motivated by animosity or hatred;
- General intent can be established from proof of reasonable foreseeability and that such a general intent, as contrasted with the specific intent when the objective was to absorb indigenous people, is sufficient to establish the Convention’s intent element.¹⁸⁸

¹⁸⁶ ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES*, (New York, W.W. Norton & Company, 2000), 246.

¹⁸⁷ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES* (Sydney, Human Rights and Equal Opportunity Commission, 1997), 237.

¹⁸⁸ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES* (Sydney, Human Rights and Equal Opportunity Commission, 1997), 238. The Commission’s decision to require only specific intent could be said to be consistent with the *Krstić* trial judgement. Although the court confirmed that specific intent is required in international tribunals,

[L]egal commentators further contend that genocide embraces those acts whose foreseeable or probable consequences is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act. Whether this interpretation can be viewed as reflecting the status of customary international law at the time the acts involved here is not clear.

Prosecutor v. *Krstić*, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 571 (footnote omitted).

From this analysis, the Commission concluded that the forced removal policy “could properly be labeled ‘genocidal’ in breach of binding international law from at least 11 December 1946.”¹⁸⁹

The Commission’s analysis is not particularly extensive, comprising only five pages of the entire report. However, its application of a genocide framework to a policy of forced removals is one of the first of its kind,¹⁹⁰ and is instructive in its interpretation of Article 2(e), particularly in its finding that intent need not be specific nor necessarily motivated by hatred or racism, but merely foreseeable in its genocidal effect.

VI. Recommendations and Initial Observations Regarding Application of Law to Canada

We recommend that the TRC undertake an evaluation of the IRS according to the alternative reading of Article 2(e) that we have outlined in this paper. Such an analysis will fulfill several aspects of the Commission’s mandate. It will serve as state acknowledgement of the impact of the IRS on former students, their families, and the First Nations communities; it will serve as an additional method of raising awareness of the legacy of the IRS among white

¹⁸⁹ AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 239.

¹⁹⁰ Investigations into forced removal or education of indigenous programs remain rare, as evidenced by the lack of U.S. attention to its own assimilation policy of Native Americans. In the late nineteenth to early twentieth centuries, the United States engaged in a policy of assimilation similar to that of Canada and Australia, with respect to its Native American tribes. Assimilation efforts included a policy of removing Native American children from reservations and placing them at boarding schools, often forcibly and without parental consent. As in the Australian and Canadian cases, Native American children who were subjected to forced removals and assimilation education suffered from disease, abuse, and cultural erosion. Although a genocide analysis under Article 2(e) could easily be applied to the U.S. case, the United States to date has not initiated such a review. However, legal scholars such as Kurt Mundorff have applied genocide analyses to the U.S. case, which may be worthy of examination for the relevance of its analysis to the Canadian case. *See* Kurt Mundorff, *Other People’s Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 119-21. It is perhaps also to be hoped that the results of the TRC’s inquiry will engender support for a similar initiative within the United States.

Canadians; it will provide a legal organizational framework against which to analyze the historical record, particularly the government's purpose of the IRS; and it will contextualize the Canadian experience with assimilation policies in the international community. Such an analysis will not violate the TRC mandate prohibiting formal legal process¹⁹¹ because this review will not constitute a legal investigation and will not result in adjudication of individual or state liability.

We recommend that the TRC analyze the potential applicability at Article 2(e) in a three-step inquiry¹⁹²:

1. Determine whether children of a particular group were transferred to another group.

This necessitates a determination regarding whether transfer to a school constitutes a transfer under the Convention, since in the Canadian IRS, the transfer to the school was of limited duration (i.e. until the child completed secondary school). Information about the frequency of contact between the child and his or her family during enrollment in a residential school, and what happened at the end of a child's time in the school, may be relevant to this determination. The Commission would also have to decide whether "to another group" is a necessary element of this step, and, if so, whether the school would constitute another group.¹⁹³

¹⁹¹ Formal legal process is forbidden under TRC Mandate 2(e) and 4. *See Our Mandate*, TRC OF CANADA, <http://www.trc.ca/websites/trcinstitution/index.php?p=7> (last visited April 23, 2011).

¹⁹² The order of this three-prong inquiry is deliberate, with the child transfer and forcible analyses coming before the intent analysis. Although the intent requirement is in the chapeau of the Convention, we recommend that the TRC being its analysis with the components of the enumerated act. It will likely be easier to find evidence on forced transfer, whereas evidence of intent to commit genocide may be significantly more difficult to find. Performing the enumerated act analysis first will achieve two things. First, the order will help orient the intent analysis, and provide additional evidence for intent. For this reason, some tribunals have likewise examined the genocide elements out of order, see e.g. *Krstić*, first proving the defendant's participation in the act, then proving intent. Second, this ordering will ensure all three prongs of analysis are performed, in the event the TRC concludes it cannot find the requisite intent. As the TRC has more leeway than international courts, it is important for expressive as well as legal purposes that all three components of the analysis are completed, regardless of whether one may not produce the evidence needed to prove genocide.

¹⁹³ *Supra* discussion attached to footnotes 137-138.

2. Assess whether the transfers were conducted forcibly. This assessment should rely on the standards of evidence and the interpretation of “forced” transfer as established by international tribunals and bodies as discussed earlier in this paper. International cases that interpret force to include a contextual analysis may be applicable to this analysis.¹⁹⁴ Relevant information in the IRS context would include the means by which the children left or were taken from their families, any threats made by government officials regarding noncompliance with mandatory enrollment, and the consequences of not participating in the IRS.

3. Determine whether the transfers were conducted with intent to destroy the group as such, at least in part. As discussed earlier,¹⁹⁵ intent to destroy must be specific, which is a high burden of proof. In addition, that intention must extend to all or part of a protected group, as opposed to being directed at an individual or an institution.¹⁹⁶

Note that the question of how many people an individual intended to destroy is

¹⁹⁴ *Supra* discussion attached to footnotes 118-136.

¹⁹⁵ *Supra* paragraph attached to note 107-114.

¹⁹⁶ There is caselaw specifying how much of the target group the perpetrator must intend to destroy to satisfy the “in whole or in part” provision, but again, as with the character of the group, this will be relatively simple in the present case. The ICTY Trial Chamber has held that a Chamber is “left with a margin of discretion in assessing what is destruction ‘in part’ of the group.” *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 590; *see also id.* paras. 583-88 (explaining the chamber’s decision). Scholars agree that the bare minimum appears to be “a substantial portion of the group.” *See* William A. Schabas, *Article 6: Genocide*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE*, ed. Otto Triffterer (1999): 109 (“[T]he expression ‘in whole or in part’ indicates that the offender need not intend to destroy the entire group but only a substantial portion of it.”); NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* (New York: Institute of Jewish Affairs, 1960): 62-63 (“...the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide, even if these persons constitute only a part of a group...provided that the number is substantial.”). Courts suggest substantial is measured by showing “the part targeted must be significant enough to have an impact on the group as a whole.” *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-A, [Appeals] Judgment (19 April 2004), para. 8; *see also* *Prosecutor v. Sikirica*, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), para. 65.

wholly separate from the actual destruction achieved.¹⁹⁷ This means that no proof of numbers is needed; it also means that if a specific sub-population was wiped out of a group without intent toward that population shown, the intent requirement has not been met.¹⁹⁸ In the context of the IRS system, this means that even if an entire tribe was annihilated, if it was not specifically targeted, that fact has little relevance for the intent requirement.

Whether the intent requirement is satisfied is probably the most difficult question facing the TRC under this analysis, and the most controversial. Even under its strongest reading, Article 2(e) still permits states to remove minority group children in certain circumstances, e.g. allegations of mistreatment, or to compel education in the dominant culture and language, so long as this education does not transfer custody of the children outside of the group.¹⁹⁹ States can even go so far as to compel boarding school attendance, as long as the education provided is sensitive to the children's culture and is not intended to threaten the group's existence.²⁰⁰

¹⁹⁷ Although genocidal intent may be inferred from large-scale atrocities, the *Akayesu* Trial Judgment states that genocide “does not imply the actual extermination of the group in its entirety, but is understood as such once any one of the enumerated acts [...] is committed with the specific intent to destroy ‘in whole or in part’ a national, ethnical, racial or religious group.” See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, [Trial] Judgment (2 September 1998), para. 497. Machteld Boot concurs that the number of victims is irrelevant in principle, as long as there is an intention to destroy at least a substantial part of a particular group. See MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (New York, Intersentia, 2002): 421-422.

¹⁹⁸ Note however that the *Krstić* Trial Judgment held that the requirement “in part” may be satisfied by the intended destruction of “only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.” Prosecutor v. Krstić, ICTY Case No. IT-98-33-T, [Trial] Judgment (2 August 2001), para. 590; see also Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), paras. 63-85 (discussing whether a part of the Bosnian Muslim or Bosnian Croat populations in Prijedor was intended to be destroyed).

¹⁹⁹ Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 127.

²⁰⁰ Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009), 61-127: 127.

However, statements made by Canadian officials asserting to “kill the Indian in the child”²⁰¹ and by Australian officials to address the “half-caste problem” by keeping “the pure blacks segregated and absorb[ing] the half-castes into the white population,”²⁰² indicate that these policies were far from benign attempts to educate minority children. It is in such statements that the element of intent may be most directly discerned.

We appreciate the sensitivities involved in the TRC findings regarding the IRS system and its relevance to international legal norms. On the one hand, a commission is not a court; it is not prosecuting individuals or adjudicating claims, and so it is not strictly bound by the same legal strictures, particularly with regard to attributing individual liability. On the other hand, a finding that the IRS amounted to genocide or that aspects of state policy compromised Canada’s legal obligations under the Convention will have political and social impact. Declaring that the IRS was genocidal will likely be seen by some Canadians as a vindication of the suffering of the First Nations and the wrongdoing of the government, a condemnation framed in universal terms. It also will likely engender opposition among others who do not want to associate their heritage and country’s history with the stigma of genocide. An additional group to consider is the international human rights community, who may appear on both sides of the spectrum. Some may strongly support applying international criminal and human rights law regarding the protection of national minorities to an analysis of the government’s treatment of First Nation children, while others may feel strongly that genocide norms should not be applied to non-violent policies like the IRS.

²⁰¹ See About the Commission, TRC OF CANADA, <http://www.trc.ca/websites/trcinstitution/index.php?p=39> (last visited April 24, 2011).

²⁰² See AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL ENQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Sydney, Human Rights and Equal Opportunity Commission, 1997), 24.

Australia can serve as a cautionary tale in this regard. Public attention of the Australian Commission report centered largely on its finding that the state's policy of forced removal of aboriginal children constituted genocide, to the exclusion of virtually all other issues addressed in the report. The head of the Commission, former High Court Judge Sir Ronald Wilson, later stated he regretted the Commission's use of the term genocide. Although he considered the finding warranted by the facts, he suggested that the use of the term distracted the public from considering the full report, and provoked a government backlash. Instead of encouraging the government to offer an apology or reparations, the assertion of genocide by the Commission resulted in staunch denials by government figures, at least in the initial period following the report's release.²⁰³

Finally, the TRC may also consider examining the relevance of other international norms to the IRS, in addition to the Genocide Convention. For example, the Rome Statute of the International Criminal Court includes "deportation or forcible transfer of population" as a crime against humanity, suggesting crimes against humanity as a potential standard against which to evaluate the IRS.²⁰⁴ Proceeding with an analysis of the IRS subject to the norms of crimes against humanity may also help the TRC engage the larger international debates currently focused on indigenous rights.

It is beyond the scope of this paper to consider all potential violations of international criminal law and human rights standards to the IRS context. We do note that the applicability of various universal rights will depend in part on how the TRC conceptualizes the IRS. For

²⁰³ Michael A. Innes, *Genocide, Ethnocide, Or Hyperbole? Australia's 'Stolen Generation' and Canada's 'Hidden Holocaust'*, 25.4 CULTURAL SURVIVAL QUARTERLY (Winter 2001), <http://www.culturalsurvival.org/ourpublications/csqa/article/genocide-ethnocide-or-hyperbole-australias-stolen-generation-and-canadas> (last visited April 24, 2011).

²⁰⁴ Rome Statute of the International Criminal Court, U.N. Doc. A/ Conf. 183/9 (1998), art. 7 §1(d).

example, emphasizing the wrongs committed in the IRS against the individual child, the family, or the cultural and racial group will each result in analyses of different rights. These interpretations are not mutually exclusive, but they are distinct.²⁰⁵ Thus attention should be given to the goals of the legal analysis as these will dictate the norms to consider. Given the moral and normative importance of genocide, we believe that the TRC should include a legal analysis of its obligations under the Convention as applied to the IRS, in addition to any other international norms. The question of whether the IRS constituted acts of genocide remains pertinent and worthy of inclusion in the final discussion to increase public awareness and understanding of the legal ramifications of the Canadian government's IRS policies.

²⁰⁵ See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 242. The authors argue that family separation threatens the cultural integrity of groups "by preventing younger members from learning the group's traditions and history" and threatens the group's very survival by "interfering with reproductive autonomy." *Id.* at 234. Brilmayer and Starr place particular emphasis on the effect of family separation on those who remain. The families lose hope, the community disintegrates in turn: "The net effect, felt both by those who are removed and those who remain, is a sense of instability, loss, confusion, and abandonment." *Id.* at 236.

Appendix: Relevant Provisions in International Law

This appendix offers a representative sample of the most important human rights provisions relevant to the Indian Resident School System. It highlights the breadth of affirmative rights in international law on the topic, operative articles and language, the earliest date at which they were recognized, and the ways in which Canada is bound. In brief:

- Since 1948, there have been numerous declarations and conventions supporting a right to culture.
- There have several international instruments affirming family rights, recognizing the family as the basic unit of civilization.
- 1989's Convention on the Rights of the Child has many relevant provisions, outlined below.
- Fifteen years of effort to codify rights for indigenous peoples has come to fruition in 2007's Declaration of the Rights of Indigenous Peoples.
- Because child removal policies target racial and ethnic groups, international anti-discrimination norms may come into play.²⁰⁶

A. International Law Supporting an Affirmative Right to Culture (chronological)

1. American Declaration of the Rights and Duties of Man²⁰⁷

From Preamble: "Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.

And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect."

Article XIII: "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries."

Article XV: "Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit."

²⁰⁶ See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 240 for additional discussion.

²⁰⁷ Adopted by the Organization of American States (OAS) April 1948.

Article XXII: “Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.”

2. Universal Declaration on Human Rights²⁰⁸

Article 27.1: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

Article 22: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

3. International Covenant on Civil and Political Rights (ICCPR)²⁰⁹

Article 1.1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 15.1: “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life;”

Article 27: “ In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”

4. International Covenant on Economic, Social and Cultural Rights (ICESCR)²¹⁰

Preamble: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,”

Article 1.1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

²⁰⁸ Adopted by the U.N. General Assembly on December 10, 1948.

²⁰⁹ Adopted and opened for signature 16 December 1966; entered in force 23 March 1976 (Canada acceded 19 May 1976).

²¹⁰ Adopted and opened for signature, ratification and accession on 16 December 1966; entered into force 3 January 1976 (Canada acceded 19 May 1976).

Article 15: 1. “The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.”

5. American Convention on Human Rights (aka Pact of San José)²¹¹

Article 16.1: “Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”

6. UNESCO Convention on Cultural Diversity 2005²¹²

As the title suggests, the entire convention is relevant, but of particular interest is:

Article 2.3: “The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.”

B. Family Rights

American Declaration Article VI: “Every person has the right to establish a family, the basic element of society, and to receive protection therefor.”

ICCPR Article 23:

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.”

ICESCR Article 10.1: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

²¹¹ Adopted November 22, 1969; linked with the Inter-American Commission on Human rights; Canada has no independent connection.

²¹² Adopted 2005, entered into force 2007; Canada accepted 28 November 2005.

C. Children's Rights

Convention on the Rights of the Child (CRC)²¹³

Again, most of the convention is of relevance, but here are a few key points:

Preamble: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,"

Preamble: "Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,"

Article 9:

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

Article 20

1. "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

²¹³ Adopted and opened for signature 20 November 1989; entered into force 2 September 1990. Canada signed 28 May 1990, ratified 13 December 1991 with the following reservation and statement:

Reservations:

"(i) *Article 21* [relating to adoption]

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.

"(ii) *Article 37 (c)* [omitted]

Statement of understanding:

"*Article 30.* It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language."

3. ... When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”

Article 29.1: “...education of the child shall be directed to:

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;”

Article 30: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”²¹⁴

D. Enhanced Attention to Indigenous People’s Rights

Over the last fifty years, there has been increased attention paid to the particular rights of indigenous peoples. The U.N. Declaration of the Rights of Indigenous Peoples²¹⁵ was an attempt to bring together emerging protections of indigenous rights, which had not been specified in other treaties besides the African Charter. As S. James Anaya wrote in 1996:

While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability Even as ... policies [of assimilation] have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a nondominant position in the larger societies within which they live.²¹⁶

²¹⁴ Daphne Anayiotos argues that this article and the protection in 29.1(c) “does not deal with the idea of eradication of a culture as a whole, but rather with the protection of cultural freedom for the individual.” Daphne Anayiotos, *The Cultural Genocide Debate: Should the U.N. Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?* 22 NEW YORK INTERNATIONAL LAW REVIEW (2009), 99-129: 117. Anayiotos’s article contains a comprehensive list of treaties that protect cultural integrity on pages 115-119.

²¹⁵ Adopted 13 December 2007. Canada endorsed on 12 November 2010, after a great deal of controversy. A statement by the Canadian ambassador regarding his concerns about the Declaration in 2007 is available here: http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/general_assembly-assemblee-generale/10373.aspx?lang=eng (last visited March 10, 2011).

²¹⁶ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford University Press, 1996), 102. Anaya cites as an example, *Ominayak v. Canada*, in which the Human Rights Committee of the ICCPR found that Canada had violated article 27 of the ICCPR by allowing Alberta to grant oil and gas leases within aboriginal territory. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford University Press, 1996), 100 (citing Human Rights Comm., *Comm’n No. 167/1984: Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990)); see also Carlos M. Ayala Corao, *Situation of the Human Rights of*

The situation has changed somewhat in the last ten years, particularly because of the U.N. Declaration of the Rights of Indigenous Peoples.

Article 7 of the draft declaration is particularly interesting:

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

- (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.”²¹⁷

In the final Declaration, Article 8 read:

“1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

- (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 forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.”

Article 15 in the draft declaration read as follows:

“Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous Persons and Peoples in the Americas, OAS Doc. OEA/Ser.L/V/II.108 Doc. 62 (2000) (critiquing inadequacy of current treaty law), available at <http://www.cidh.oas.org/indigenas/intro.htm>.

²¹⁷ Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.”

Article 14 in the final Declaration read:

“1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in 7b55 their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”

E. General principles of nondiscrimination

Because child removal policies target racial and ethnic groups, customary international law and conventions against discrimination may come into play.²¹⁸

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)²¹⁹

Article 1.1: “In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Article 2:

“1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

²¹⁸ See Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), 213-287: 240 for additional discussion.

²¹⁹ Adopted and opened for signature and ratification on 21 December 1965, entry into force 4 January 1969, Canada signed 24 August 1966, ratified 14 October 1970.

- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”

ICCPR Article 2.1: “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.”

ICESCR Article 2.2: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”