

# The Genocide Question and Indian Residential Schools in Canada

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*What have you done? Listen! Your brother's blood cries out to Me from the ground!*

Shoah Foundation Director Stephen Smith quotes Genesis 4:10 three times at the Truth and Reconciliation Commission of Canada Forum, March 1, 2011.

## Introduction

In his seminal account of European colonization in North America, Richard Drinnon argues that “societies are known by their victims” (1980: xii). For Drinnon, as for many who contemplate the colonial era, what we understand about the United States and Canada is best framed by the status of the weakest and most marginalized members of the national community. In Canada, we confront ongoing disparities between average national standards of living and the disproportionately low economic, social and political status of Aboriginal peoples: First Nations, Métis and Inuit. How best to address these inequalities has been the topic of polit-

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ical and scholarly debate since at least the nineteenth century. Many of the challenges faced by Aboriginal peoples result from the ongoing inter-generational trauma of the Indian residential schools system (henceforth IRS).

Canada is only now approaching the point where we can adequately deliberate over what occurred in the IRS system, why it occurred and what the long-term implications might be for Aboriginal peoples and the rest of Canada. The 1996 Royal Commission on Aboriginal Peoples (RCAP) was a useful beginning, but access to the testimony of survivors remains controlled, and much of RCAP has little to do with the IRS. Many mainstream Canadians have little understanding of this lengthy era of our history and its continued impact on Aboriginal peoples (Regan, 2010: 11–12).

Since 2009, the Truth and Reconciliation Commission of Canada (TRC) has been investigating crimes committed against several generations of Aboriginal children in Canada's IRS network. At the TRC forum in Vancouver in March 2011 some TRC officials, including Commissioner Wilton Littlechild and some invited speakers like Stephen Smith argued that genocide merited close attention as a descriptor for what happened in the IRS system. Speakers pointed to section 2(e) of the United Nations Genocide Convention (UNGC) which refers to the forced transfer of children from one group to another. They are hardly alone. A number of Canadian academics assert that the UNGC does indeed apply to Aboriginal experiences (for example, Cardinal, 1999; Davis and Zannis, 1973: 175–76; Grant, 1996: 69, 270–71; Haig-Brown, 1988: 11; Neu and Therrien, 2003). Chrisjohn and Young hold little back when they argue that “The federal government of Canada bears primary responsibility for adopting and implementing an explicitly genocidal policy” (1997: 28). We argue that the IRS often produced *genocidal outcomes*, in terms of intergenerational trauma and cultural disintegration. As MacDonald has argued, the parallels between IRS survivors and genocide survivors in other contexts are often striking (2007: 1009–11). However, there are also differences lying with the scale of atrocities and the nature of the intent to destroy (Grant, 1996: 270–71).

In this article we deal with several research questions that have important social, legal and political implications: Did the Canadian federal government in partnership with the Catholic, Anglican, Presbyterian and United Churches, commit genocide against Aboriginal peoples by attempting to forcibly assimilate them in residential schools? How do legal instruments like the UNGC help us interpret genocide claims and match them with Aboriginal experiences? If not genocide, what other descriptors are more appropriate? What are the legal, political and social consequences of a finding of genocide? These questions, which form the core of this article, are being asked with increasing frequency.

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**Abstract.** The Truth and Reconciliation Commission has been investigating the array of crimes committed in Canada's Indian Residential Schools. Genocide is being invoked with increasing regularity to describe the crimes inflicted within the IRS system, the intent behind those crimes, and the legacies that have flowed from them. We ask the following questions. Did Canada commit genocide against Aboriginal peoples by attempting to forcibly assimilate them in residential schools? How does the UN Genocide Convention help interpret genocide claims? If not genocide, what other descriptors are more appropriate? Our position might be described as "fence sitting": whether genocide was committed cannot be definitively settled *at this time*. This has to do with polyvalent interpretations of the term, coupled with the growing body of evidence the TRC is building up. We favour using the term cultural genocide as a "ground floor" and a means to legally and morally interpret the IRS system.

**Résumé.** La Commission de vérité et réconciliation a enquêté sur la matrice de crimes commis dans les pensionnats indiens au Canada. Le mot génocide est invoqué avec une régularité croissante pour décrire les crimes infligés au sein du système des pensionnats, l'intention derrière ces crimes, et l'héritage qui s'en est ensuivi. Nous posons les questions suivantes: le Canada a-t-il commis le génocide contre les élèves Aborigènes en essayant de les assimiler de force dans des pensionnats indiens? Comment la Convention des Nations Unies sur la prévention de génocide peut-elle aider interprétations des revendications de génocide? Si ce pas de génocide, quel autre descripteur est plus approprié? Notre position pourrait être décrite comme « séance de clôture »: la question de génocide ne peut être réglée définitivement *en ce moment*. Cela concerne les interprétations polyvalentes du terme, couplé avec le corps grandissant d'évidence que le CVR accumule. Nous préférons le terme génocide culturel comme « un rez-de-chaussée » et comme un moyen de légalement et moralement interpréter le système IRS.

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It is beyond the scope of this piece to consider whether the lengthy and uneven process of colonialism, which often deprived Aboriginal people of their crucial identity-defining relationships with their lands, constitutes genocide (Woolford, 2009: 88–89). What we *do* consider is whether existing international and domestic law on genocide can be applied to crimes committed within the IRS system. We begin with a short history of IRS before proceeding to a theoretical discussion concerning the difficulty of defining genocide and applying that definition in a meaningful legal way in Canada. Our position might be described as "fence sitting," since we argue that whether genocide was committed cannot be definitively settled *at this time*. In part this has to do with polyvalent interpretations of the term and the increasing pool of evidence from survivors and documents which make any concrete judgment now merely a snapshot of an evolving process of accumulating evidence. We make the following observations.

First, Raphael Lemkin's original definition (1944) has been used by some scholars to interpret cultural, religious, linguistic and other forms of collective suffering. The case may be made that a "Lemkinian" form of genocide did take place in Canada, due to demonstrable attempts to forcibly assimilate indigenous people, exemplified in part by laws obliging them to attend the schools, and *inter alia*, by regulations forbidding students to speak their own Aboriginal languages and practice their traditional beliefs and religious customs.

Second, genocide is defined in international law through the UNGC and later interpretations at the International Criminal Tribunals for Yugoslavia and Rwanda, the International Criminal Court, and the International Court of Justice. The UNGC requires that prosecutors prove that perpetrators had a specific intent (or *dolens specialis*) to commit genocide; this provision makes it difficult to argue that genocide occurred over the long history of the IRS system in Canada. Case law has helped redefine the UNGC and has created expanded definitions and legal precedents that are influential in setting international and domestic norms, but may have a detrimental effect on the arguments of those who seek to assert that genocide occurred in Canada.

Third, genocide is more narrowly defined in Canadian law than in international law. In the Canadian criminal context, prosecutions may not be initiated against persons for allegedly committing genocidal acts within Canada prior to July 17, 1998. In the private law context, judges have ruled that genocidal acts are unlikely to sustain a cause of action even though common law doctrine may well permit claims of this nature.

Fourth, our knowledge about the IRS system is evolving, and any claims about genocide based on “facts” take place on shifting sands. Schedule N of the *Indian Residential Schools Settlement Agreement* has tasked the TRC with documenting abuses through oral and written statements by survivors and others. The TRC has planned public events designed to stimulate discussion between Aboriginal peoples and other Canadians about the ongoing legacies of this history and how forms of justice and reconciliation might be achieved. The Missing Children Research Project, created in 2007 as part of the TRC’s mandate, aims to name as many missing children as possible and to document how they died. The investigation will continue until 2014, and when the project issues its report, academics and other interested parties will be in a more solid position to consider whether the UNGC applies, based on a larger body of evidence (Working Group on Missing Children/TRC, no date). Anecdotally, researchers attending survivor forums, conferences, healing circles and gatherings routinely hear testimonies concerning siblings and friends who died in the schools through disease, physical abuse, dietary or medical neglect or other reasons. This is the sort of oral testimony which drives the TRC’s work in naming and locating missing children.

Fifth, we conclude that terms like “cultural genocide” and “ethnocide” convey the essence of what the IRS system was about: the attempted destruction of Aboriginal languages, religions and cultures in Canada. Cultural genocide was excluded from the UNGC, largely due to concerns by ratifying states that they might be committing breaches of the convention they were about to sign (Kiernan, 2007: 10–11). Cultural genocide is more accurate than “forcible assimilation,” because groups with clearly defined identities were targeted *as groups*, rather than as individ-

uals. Cultural genocide is a moral descriptor anchored in a legal historical process and as such is a useful ground floor. In short, the IRS system is an example of cultural genocide and maybe more. We also consider whether the UNGC should include cultural genocide, while relaxing its strict emphasis on the *dolens specialis*.

### **A Brief Background to the Residential Schools.**

In 1879, a residential school was established in Carlisle, Pennsylvania, which served as a model for the further 500 schools established in the United States (Milloy, 1996: 13). Strongly influenced by the American system, Canadian residential schools were first established in the mid-1880s and continued for more than a century. Aboriginal education was conceived in partially benign terms to help Aboriginal people to adapt better to life in a white-dominated country. Indeed, many treaties contained provisions for government funded on-reserve schools. Aboriginal leaders like Chief Shingwauk intended for on reserve schools, known as “teaching wigwams” to educate his people and prepare them for a better life. The early focus on benefits to Aboriginal people and the balance between Western and Aboriginal worldviews and languages soon gave way to a far more coercive system which entailed forced assimilation and cultural destruction. Residential schools were located off reserve and children were separated from their families. Miller notes how parents often strongly disapproved of the schools’ “aggressively assimilative practices,” and noted that these were “extremely dangerous places for young people,” where diet and medical care were inadequate, discipline was harsh and verbal, physical and sexual abuse were not uncommon while “disease and death were ever-present dangers” (Miller, 2004: 183–84).

The school day consisted of a half-day of studies, then a half-day of trades-related activities: blacksmithing, carpentry or auto mechanics for boys, sewing, cooking and other domestic activities for girls. The federal government worked closely with mainline Canadian churches. The Catholic Church ran approximately 60 per cent of the schools, the Anglicans about 30 per cent, with the Presbyterian, Methodist and United Churches running most of the remainder. Until the 1950s, attendance for children aged five to sixteen was compulsory (Miller, 2004: 84; Milloy, 1996).

At least 150,000 children passed through 125 schools (Barkan, 2003: 130–31). Of these there are approximately 80,000 survivors alive today. As Deputy Minister of Indian Affairs Duncan Campbell Scott argued in 1920, in a passage which is often characterized as a confession of guilt: “I want to get rid of the Indian problem ... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politics and there is no Indian question, and no Indian Department”

(Miller, 2004: 35). John A. MacDonald framed the matter in a similar way in 1883, when he remarked that the ideal school would ensure that “the Native child would ‘be dissociated from the prejudicial influence by which he is surrounded on the reserve of his band’” (Miller, 1996: 103).

Not only were traditional livelihoods to be lost. Once assimilated, Aboriginal children were to enter mainstream society primarily as workers and servants. They were to be on the lower rungs of the economic ladder, and not competitors for jobs with European settlers (Deiter, 1999: 15–16; Friesen and Friesen, 2002: 110). The IRS system destroyed many indigenous cultures and shattered personal lives. Problems of intergenerational trauma remain extremely serious, since survivors learned few parenting skills and were often deracinated from their languages and cultures, resulting in a myriad of social problems. As Woolford describes it, “Continuing cycles of emotional, physical and sexual abuse, as well as addiction, suicide and other markers of intergenerational trauma, within Aboriginal communities are considered residual effects of the residential-school experience” (2009: 85).

Information about crimes committed within the IRS came to public attention in 1990 when Assembly of First Nations leader Phil Fontaine publicly confessed his history of physical and sexual abuse and encouraged others to come forward with their stories. During the RCAP process, submissions, such as the AFN’s report *Breaking the Silence* (1994), documented the experiences of 13 survivors and their histories of verbal, physical and sexual abuse. Lighter skinned children were favoured over darker ones and beatings were common; one survivor described how “the threat of being sexually violated loomed ‘like a dark cloud’ on the horizon” (AFN, 1994: 25, 30, 31). Celia Haig-Brown recalls how her father, “who attended Alberni Indian Residential School for four years in the twenties, was physically tortured by his teachers for speaking Tseshaht; they pushed sewing needles through his tongue, a routine punishment for language offenders” (1988: 11).

The five-volume RCAP report in 1996 highlighted four main types of harms committed during the colonization process. The first of these concerned the physical and sexual abuse in residential schools (as well as their goals of assimilation and cultural destruction) (Cairns, 2003: 77–78). The report clearly stated problems of neglect, underfunding, and widespread abuse, as well as the “very high death rate” from tuberculosis, “overcrowding, lack of care and cleanliness and poor sanitation.” Overall, the report was a damning indictment of the government’s treatment of Aboriginal peoples (see MacDonald, 2007: 1002).

In 1998, the federal government released a Statement of Reconciliation, accompanied by a \$350 million “healing fund.” Churches involved had submitted apologies much earlier, beginning in 1986, with the United Church (DeGagné, 2002). In 2008, the Harper government formally apol-

ogized in Parliament, regretting that “mistakes” had been made, although he failed to reflect on the wider colonial social and institutional context which made the IRS possible. “Common experience payments” soon followed, as well as an independent assessment process, designed to compensate survivors. In 2009 the TRC began collecting statements. Within its ambit are important nation-defining questions about the nature of restorative justice, indigenous self-government, and genocide (AHF, 2010).

### Lemkin and the UNGC

We now turn to genocide, how it has been defined in a variety of contexts and what these definitions might mean for Aboriginal peoples. Raphael Lemkin’s original categories of political, social, cultural, economic, biological, religious and moral genocide can in theory be used to describe the history of indigenous–settler relations in Canada. Lemkin’s definition in *Axis Rule in Occupied Europe* (1944) was expansive, outlining “a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.” Yet killing was not crucial. “The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups” (1944: 27–28). His definition covered a variety of areas, including political, social, cultural, economic, biological, physical, religious and moral.

Lemkin provides a range of examples to illustrate his definitions of genocide: the persecution of Polish Catholic clergy by Nazi Germany (religious genocide); and the promotion of alcohol and pornography during the same period (moral genocide), using an appeal to “cheap individual pleasure” to weaken national consciousness and resistance (1944: 60). In all cases, intent is crucial, because destruction of the group has to be sought in order for genocide to occur. The 1948 UNGC’s article 2 defines genocide as follows:

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. (cited by Carlston, 1950: 206–07).

The UNGC was the product of a political process in which signatories rejected cultural genocide and some other categories, while retaining prohibitions on the forced transfer of children and the prevention of births. The UNGC's application to linguistic and cultural groups was removed during bargaining sessions between the Soviet Union and various settler societies, including the US, Canada and Australia. Henceforth, only religious, national and racial groups would be protected by the Convention (Power, 2002: 67; Ronayne, 2003: 6–17).

However, we must be careful not to see the UNGC as a static document. Power (2002) and Ronayne (2003) both tacitly focus on the weaknesses of the Convention, but offer little analysis of the case law that evolved from it. In recent years, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have refined the UN definition. Among the contributions of recent case law, we have judicial interpretations of how large a “part” of the target group must be killed for an act to be considered genocide. The ICTY has determined that a “substantial” part of the group must be targeted. In *Prosecutor v. Jelisić*, a “substantial part,” and *Sikirica*, a “substantial number relative to the total population of the group,” respectively, needed to be targeted for an allegation of genocide to be sustained. Similar definitions were upheld in the ICTR, in *Kayishema, Bagilishema*, and *Semanza* (MacDonald, 2008: 113).

One of the distinguishing features of genocide which case law continually reaffirms is the crucial importance of a specific intent or *dolens specialis* to “destroy, in whole or in part, an identifiable group of persons.” With the slight exception of complicity, this requires prosecutors to prove, both that the accused committed the underlying offence and that they did so with the specific intent to destroy a protected group. Although a few courts have cautiously recognized the intent to destroy a group “as a social unit” creates culpability (*Jorgic v. Germany*, 2007: para. 23), the preponderance of jurisprudence rules that the accused must have intended the physical and biological destruction of a group (for example, *Prosecutor v. Krstic*, 2001: paras. 577–80). In practice, genocide is defined not so much by the crime itself or its aftermath but by the intention that brought that crime about. This legal emphasis on provable *premeditation* over the demographic and other *consequences* of the crime is contested by many genocide scholars, a point to which we return later. In other words, the *what* is far less important legally than the *why*.

### Genocide in Canadian Law

Since we lack centralized global institutions of law enforcement, the effectiveness of international law is highly dependent on the co-operation of

domestic legal, political and social institutions. Unfortunately, nowhere in Canadian constitutional or statutory law can we find clear rules governing the domestic legal status of international law. The judiciary has filled in this space by fashioning a hodge-podge of common law doctrines (Green, 1988), which generally fall within monist and dualist approaches. Monists hold that international law should be recognized in domestic courts unless it irreconcilably conflicts with domestic legislation. Dualism states that international laws and treaties have no standing unless implemented by Parliament through statute.

What constitutes “genocide” in Canadian law? The Pearson government ratified the UNGC in 1952, so we might superficially conclude that the entire UNGC passed into domestic law. This, however, is not the case. Portions of the UNGC were excluded from the Criminal Code, such that genocide means only “(a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction” (Criminal Code, 1985: s. 318). The official reasons given to Parliament by the *Report of the Special Committee on Hate Crimes in Canada* was that portions of the UNGC were “intended to cover certain historical incidents in Europe that have little essential relevance to Canada” and so could safely be omitted. They even asserted that “mass transfers of children to another group are unknown ... in Canada” (see Churchill, 2004: 9, 86). Further, Pearson argued during parliamentary debates that “mental harm” should only mean “physical injury to the mental faculties” of group members. For Pearson, “mental harm” was to be physical only and had nothing to do with other forms of mental cruelty. Schabas describes this perception as unsupported by the UNGC, and “excessively narrow” (2009: 161). These disingenuous omissions have had important ramifications for what Aboriginal peoples can claim as genocide in Canadian courts.

In the pre-charter era, the reception of international law was governed by the “presumption of conformity” doctrine. When so inclined, judges interpreted statutes so as to give effect to the binding international *treaties* these statutes implemented. Meanwhile, they often considered international treaty and *customary* law to automatically be a part of common law, unless Parliament clearly expressed its intention that such law should not alter domestic rights and obligations. In either case, judges did not apply such international law as Parliament clearly intended to violate. Adding contour to this framework is the emergence of a parallel, “relevant and persuasive” doctrine. This doctrine authorizes judges to treat international human rights law as a kind of comparative law or source of insight when interpreting the Charter of Rights and Freedoms (Hudson, 2008: 324–25; 327). Judges have also begun using general international law as well as foreign law as sources of critical insight into all manner of legal problems that have global and multi-

cultural dimensions (*Baker v. Canada*, 1999; *Canada Ltée et al. v. Hudson*, 2001).

Parliament helped bring the full UNGC to Canada in 2000, when it enacted the *Crimes Against Humanity and War Crimes Act* (CAHWCA). The CAHWCA expressly implements the Rome Statute of the International Criminal Court (ICC) and authorizes the Attorney General to criminally prosecute citizens and non-citizens in Canadian courts for the alleged commission of genocide, either at home or abroad. Since the Rome Statute, it might appear that the UNGC has effectively been implemented into Canadian statutory law. This, however, is not entirely so. First, whereas one may be prosecuted for crimes allegedly committed outside of Canada “either before or after the coming into force” of the CAHWCA and, indeed, the Rome Statute (2000: s. 6), no such phrasing attaches to international criminal acts committed within Canada. When dealing with genocidal acts committed within Canada, only those committed following the international adoption of the Rome Statute (July 17, 1998) are prosecutable (CAHWCA, 2000: s. 4). The CAHWCA is accordingly tethered to the Rome Statute and somewhat detached from prior customary and treaty law, including the UNGC.

Second, the CAHWCA expressly recognizes genocide as falling across international treaty law, international customary law and the general principles of law recognized by the community of nations (2000: ss. 4, 6). According to monist approaches, judges should have the authority to give effect to international customary law on genocide, to the extent that this does not conflict with the CAHWCA. Since the CAHWCA is silent on private law proceedings, judges should be able to rely on international customary and treaty law on genocide when adjudicating private law disputes, even if causes of action arose prior to the statutory cut-off point applicable to criminal prosecutions. However, because the precise content of international law on genocide remained highly ambiguous prior to the development of international case law in the 1990s, its practical utility to the adjudication of historical injustices is questionable.

### **The UNGC and the IRS System: Jurisprudential Trends**

To date, Canadian courts have refused to give effect to the UNGC in private law settings and have had few occasions to consider it in criminal proceedings (*R. c. Munyaneza*, 2009). In the 2005 private law case of *Malboeuf v. Saskatchewan*, for instance, the Government of Saskatchewan successfully applied to a court to strike out of a statement of claim references to the UNGC. Here, plaintiffs filed civil actions over abuses at residential schools that had occurred prior to 1948. Lawyers for the

government argued that the events giving rise to the plaintiff's claims pre-dated the UNGC and so the Convention was "irrelevant" (*Malboeuf v. Saskatchewan*, 2005: para. 11). The court agreed, striking out any reference to the UNGC or international law.

Lawyers' failure to argue for the domestic legal status of international customary law on genocide has obstructed the recognition of claims of genocide in cases concerning abuses perpetrated even after 1948. In *Re Residential Schools* (2000), plaintiffs were seeking, among other things, a declaration that the residential school system and the conduct of the defendants in respect thereof contravened the UNGC. Importantly, the plaintiffs were not seeking damages or monetary awards but simply a declaration that conduct carried out with respect to residential schools was inconsistent with the UNGC. The defendants countered by arguing that:

There is no independent cause of "genocide." The only statutory reference to genocide, they submit, is at section 318 of the Criminal Code, which prohibits the promotion of genocide. However, they point out that that section was not in force at the time that the alleged events occurred and that "genocide," as it appears in the Criminal Code refers only to the physical destruction of peoples and not "cultural genocide" which appears to be the subject of the United Nations Convention. (*Re Residential Schools*, 2000: para. 69)

They then described arguments supported by reference to the UNGC as "political" and not justiciable, presumably because the UNGC had not been legislatively implemented. The court ruled that it lacked "the jurisdiction to award a declaratory order on the basis of a non-legal or political code of conduct" (*Re Residential Schools*, 2000: paras. 70–71, 73). This judgment highlights a fairly common and contestable judicial attitude towards the UNGC as a "political" or moral standard and not, absent legislation to the contrary, a legally binding document. It also ignores legal doctrine that makes international customary law an automatic part of Canadian common law, independently of legislative implementation.

The UNGC has been invoked in a handful of other cases with colonial dimensions. In *Raubach et al. v. The Attorney General of Canada et al.* (2004), the court ruled against a claim that the government was liable for breach of contract for instituting and operating residential school systems in contravention of the UNGC. It held that it is "doubtful that even if proven such an allegation could sustain a cause of action" (2004: para 12). It did go on to rule, though, that the place of alleged assaults in "a program of cultural genocide" might be relevant to the assessment of punitive or aggravated damages for assaults perpetrated in residential schools (2004: para 12). The UNGC has on occasion been cited in support of arguments that Canadian law is not applicable to members of First Nations (for example, *R. v. Francis*, 2007; *R. v. Yellowhorn*, 2006),

but in no case have these arguments been recognized as legally valid, much less compelling.

In sum, courts have found the UNGC to be inapplicable owing to the principle of non-retroactivity and to its “political” nature. Because the UNGC became treaty law only in 1948, and many of the alleged abuses occurred prior to this point, the UNGC has been held to be inapplicable. Missing from judges’ reasoning, and claimants’ arguments, is the fact that the UNGC codifies customary law and, as such, IRS abuses could have been “genocide” under international law well before 1948. Indeed, in *Mugesera v. Canada* (2005: para. 82), the Supreme Court cited a 1951 International Court of Justice (ICJ) advisory judgment in support of the claim that the UNGC codified, but did not displace, *pre-existing* international customary law on genocide.

Recognition of this fact would have permitted the judicial reliance of international law on genocide in a private law context, consistent with common law doctrine. Again, because international tribunals have only recently spelled out the content of international law on genocide, it is unclear how useful long-standing international customary law on genocide would be to the redress of historic injustices. We do not make any substantive claims regarding what judicial applications of such law would look like; we claim only that there is a credible argument to be made that courts can and should engage with it in a more principled fashion.

### **Mapping Future Trajectories: Underlying Offences**

How might jurisprudence on underlying genocidal offences be applicable to residential schools? One plausible avenue might be to claim serious bodily or mental harm inflicted in IRSs as genocidal acts. Elements of this offence were defined as early as 1961, when the District Court of Jerusalem tried Adolf Eichman. It stated that serious bodily and mental harm could be inflicted on Jewish victims of genocide “by [their] enslavement, starvation, deportation and persecution ... and by their detention in Ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture” (*Israel v. Eichmann*, 1961: supra note 7, para. 340). Citing this passage, the ICTR trial chamber deciding *Akayesu* held that the harm need not be “permanent or irremediable,” a finding upheld in all subsequent cases (*Prosecutor v. Akayesu*, 1998: para. 502). It then outlined a non-exhaustive list of acts that constitute serious bodily and mental harm, which include “acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution” (para. 504), as well as acts of sexual violence, rape, mutilations and interrogations, combined with beat-

ings and/or threats of death as acts that amount to serious bodily harm (paras. 706–07, 711–12).

One year later, the trial chamber in *Kayishema* held that the phrases “serious bodily harm” and “serious mental harm” should both be defined contextually and on a case-by-case-basis (1999: paras. 108, 110). A tribunal for the ICTY further specified that the harm must be such as “to contribute, or tend to contribute, to the destruction of the group or part thereof” (*Prosecutor v. Krajisnik*, 2006: para. 862). Given that intent to destroy a protected group, in whole or in part, is a prerequisite of all acts of genocide, it can be inferred that the trial chambers did not feel the need to specify this element in their judgments. Alternatively, this qualification may represent an attempt to impose an added, material element to the offence, requiring that harms that meet the above-stated definitions also tend towards the physical and biological destruction of the group. It is not a qualification endorsed by many tribunals, suggesting that intent to destroy a group, when combined with acts that cause serious bodily and mental harm, constitutes a genocidal act regardless of how effective the act is at actually destroying a group.

Chambers have distinguished between bodily harm and mental harm. As a general indicator, the trial chamber in *Kayishema* held that serious bodily harm includes “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses” (1999: para. 109; *Prosecutor v. Ntagerura*, 2004: para. 664; *Prosecutor v. Semanza*, 2003: 320). It defined mental harm as that which is more than a minor or temporary impairment of mental faculties (*Prosecutor v. Kayishema*, 1999: para. 110). Chambers have consistently ruled that there need not be any correlation between bodily harm and mental harm. In *Rutaganda*, for instance, a trial chamber held that serious mental harm includes mental torture and inhumane or degrading treatment that may be inflicted independently of physical abuse or harm (1999: para. 51). This approach has been endorsed in a number of subsequent cases handled by the ICTR (*Prosecutor v. Musema*, 2000: para. 156; *Prosecutor v. Bagilishema*, 2001: para. 59; *Prosecutor v. Seromba*, para. 317).

Canadian courts have adopted these approaches to serious bodily and mental harm, agreeing that the determination of this offence should be made on a case-by-case basis (see Munyaneza, 2009: para. 87). Citing *Kajelijeli*, the Quebec Superior Court held that

the following principles emerge from the (international) jurisprudence: (a) the harm may be physical or mental; (b) the physical harm need not be permanent or irreversible, but must be likely to prevent the victim from living a normal life over a relatively long period; (c) the mental harm must go beyond slight or temporary deterioration of mental faculties; (d) the harm must be so serious

that it threatens to destroy the targeted group in whole or in part. (*R. c. Munyaneza*, 2009: para. 87)

We could reasonably hold that this genocidal act is directly applicable to the case of the IRS system. Many acts that constitute serious bodily and mental harm are known to have been performed by school officials and private parties during the operation of these schools. These include sexual assault, threats of death, severe beatings and assault, inhuman and degrading treatment (including systematic assaults on Aboriginal self-identity) and disfigurement and serious injuries to health as a result of the forced cohabitation of healthy children with children infected with communicable diseases. A high percentage of children also died while attending the schools, although casualty rates cannot be determined precisely at this stage. In some schools, during some time periods, the death toll exceeded 50 per cent (AFN, 1994; Grant, 1996; Miller, 1996, 2004; Milloy, 1996).

When dealing with the UNGC, namely “deliberately inflicting conditions of life calculated to destroy the group” we also need to consider how jurisprudence might apply in Canada. The trial chamber in *Akayesu* construed this term as the “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction” (1998: para. 505). It then provided a non-exhaustive list of acts which meet this definition, including subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirements (*Prosecutor v. Akayesu*, 1998: para. 506; *Prosecutor v. Musema*, 2000: para. 157; *Prosecutor v. Rutaganda*, 1999: para. 52). A year later, another trial chamber provided more detail, holding that the term “includes circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion” (*Prosecutor v. Kayishema*, 1999: para. 115). Lack of proper housing, coupled with reduction of medical services below minimum requirements as well as lack of clothing and hygiene, seem to allow for negligence or acts of omission to qualify as genocidal. These two sets of lists are non-exhaustive and not mutually exclusive, evidenced by subsequent trial chambers’ regular use of both (*Prosecutor v. Brdjanin*, 2007: para. 691; *Prosecutor v. Stakic*, 2006: para. 517;).

As regards *mens rea*, trial chambers have required proof that an accused has both intended to inflict through acts of commission or omission proscribed conditions of life and, that these conditions be among the primary mechanisms used to physically and biologically destroy a group. The conditions, in other words, cannot be incidental to other, possibly genocidal, acts; they must be one of the principal measures through which an alleged perpetrator carries out a plan to physically and biolog-

ically destroy a protected group (*Brdanin*, *supra* note 52 at para. 989). As a result of this weighty requirement, there have been no convictions regarding the horrific living conditions in Bosnian detention camps.

There is, though, evidence to suggest that some of the actions of those who participated in the administration of Aboriginal residential schools fall under the concept of “deliberately inflicting conditions of life calculated to destroy the group.” But, looming again is specific intention and distinctions among physical, biological and cultural genocide. Under the UNGC, all acts must have been “calculated” to destroy a group; this has been uniformly interpreted to mean that the conditions must be one of the primary means of *physically* and *biologically* destroying a group. The case law is clear on this corporal component. Such acts as placing healthy children within close proximity to those with infectious diseases and in these and other circumstances refusing to provide basic medical services to those in need, would perhaps fall under the UNGC. Provided genocidal intent is proven, such acts could reasonably be interpreted as calculated to cause physical and biological destruction.

What of forcible transfer of children? Here, the *actus reus* consists in the physical, forcible transfer of children from a protected group to another group, while the *mens rea* consists in the specific intent to forcibly remove children from one group to another group. However, the real issue is genocidal intent. All of the other categories of genocidal acts relate to physical and biological destruction of the group and so the attribution of intent is directed to material destruction. In the case of forcible transfer, the result would be, on its own, long-term cultural destruction of the group. Physical and biological destruction would only occur simultaneously if acts falling under any of the other categories of genocidal acts were also performed. But in this case, culpability would arise from those acts alone. At root, culpability for the forcible transfer of children on its own would seem to require that alleged perpetrators have intended the *cultural* extinguishment of a protected group. It is for this reason that there is so little international jurisprudence concerning this genocidal act. It has been left to national courts to progressively expand the scope of genocide to include cultural acts, using in many instances this very category as justification.

### **Reworking *Dolens Specialis*?**

Overall, the corpus of international and domestic law built up around the UNGC is unlikely to support a judicial finding of genocide in Canada, because within the criminal law context, courts lack the discretion and, apparently, the will to consider such claims. Criminal prosecutions require the attorney generals’ written consent and are limited by statutory non-

retroactivity clauses when concerned with genocidal acts committed within Canada. More broadly, there exists a persistent judicial tendency to misrecognize the domestic legal status of relevant international law under the cover of non-retroactivity. This has impeded sustained engagement with relevant law in common-law settings, where the judiciary does possess the discretion to give effect to international treaty and customary law on genocide.

Clearly many *acts* committed during the residential school era may credibly be subsumed within underlying genocidal offences and maybe even within progressive interpretations of special intent. But the slow trend towards relaxing the *dolens specialis* requirement is nowhere near a tipping point. Understandably, there is dissonance between many genocide scholars and jurists over *dolens specialis* and its central role in the UNGC (see Barta et al., 2008). Many argue for an emphasis on “relations of destruction”—the outcome on colonization for the victims rather than the ideology or the specific intent (Bischooping and Fingerhut, 1996: 487). This would involve the removal of the current “emphasis on policy and intention which brought [a genocidal situation] into being” (Chalk, 1994: 54). To this Smith adds that even if there is no genocidal intent initially, once a government recognizes that its policies are genocidal and does nothing, genocidal intent is clearly inferred since, “to persist is to intend the death of a people” (cited in Moses, 2005: 28). We recognize the merit and the persuasiveness of these arguments, although we also recognize that it is unlikely that international law will change to reflect these concerns, and equally unlikely that Canadian courts will adopt an even more progressive stance.

### Cultural Genocide

We have argued that “cultural genocide” or “ethnocide” may be appropriate as a ground floor to describe much of Canada’s treatment of Aboriginal peoples and is often used by genocide scholars. This is employed when mass death did not accompany colonization, but where we see active attempts to destroy culture, language and religion, while stealing land and outlawing customs (Hitchcock and Twedt, 1997: 372–74). As Charny has argued, ethnocide aims at the, “intentional destruction of another people,” but crucially, “[does] not necessarily include destruction of actual lives” (1994: 85). Miller and other historians of the IRS system use this term, as has the AFN (AFN, 2004; Miller, 1996: 10). As with any ground floor, there is theoretical room for invoking the UNGC if evidence accumulates.

Could the UNGC be expanded? The original May 1947 draft, authored by Lemkin and two others for the UN Secretariat, included cul-

tural genocide as one of its three aspects of genocide, and arguably should the UNGC be revised in future, aspects of the original draft merit consideration for insertion. The cultural form enumerated five methods of attempting to destroy the specific characteristics of the group:

- (a) forcible transfer of children to another human group; or
- (b) forced and systematic exile of individuals representing the culture of a group; or
- (c) prohibition of the use of the national language even in private intercourse; or
- (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship. (UN Secretariat, 1947)

Of these only (a) survived the vote of the Sixth Committee of the General Assembly. The remaining articles, which would have applied to Aboriginal people, were never adopted (see Schabas, 2008). Calls for a more inclusive definition of genocide are hardly new. In 1973, Davis and Zannis called for a wider definition to include not just “mass homicide” but cultural destruction, characterized by “warping and mutilating the lives of groups of people” (1973: 175–76). Chrisjohn and Young (1997), as well as Neu and Therrien (2003), see the differences between “genocide” and “cultural genocide” as semantic rather than substantive, arguing instead for the original 1947 draft to be considered as the *real* standard by which genocide should be judged (MacDonald, 2007: 1006). Changes in the UNGC to “restore” cultural genocide, while reducing the impact of *dolens specialis* would have a marked impact on how Aboriginal history in Canada would be reinterpreted, both legally and morally. These changes would provide wider legal scope for reassessing the IRS system and the nature of truth and reconciliation.

### **Aboriginal Peoples, the Canadian Government and International Law**

Have Aboriginal groups attempted to take the Canadian government to court at international bodies for genocide? To date no such attempts have been made. Aboriginal groups are not states, so they cannot take Canada to the International Court of Justice, as did Bosnia to Serbia. They cannot petition the UN Security Council, and any crime tried by the ICC must have occurred after July 2002. This of course does not preclude Aboriginal peoples seeking redress under other international agreements

or covenants. When opportunities arise, Aboriginal people have sometimes pursued them.

During the 1970s, Canada's ratification of the human rights covenants and its efforts to repatriate the Constitution opened a window of opportunity for Aboriginal groups to petition the UN. Through a series of cases during the 1970s and 80s, including *Lovelace v. Canada*, *Mikmaq Tribal Society (Denny) v. Canada*, and *Lubicon Lake Band v. Canada*, Aboriginal groups used the Optional Protocol to bring cases of human rights violations to the UN's Commission of Human Rights. The above cases demonstrate some notable successes and failures in changing Canadian law. *Lovelace* led to changes in the Indian Act to allow women to retain their tribal status after marrying, after a finding that Canada was in violation of Article 23(I) of the Civil and Political Rights Covenant. The Mi'kmaq case, however, did not succeed in allowing the Mi'kmaq Grand Council to participate in constitutional negotiations. The upshot, Henderson explains, is that "these decisions affirmed that First Nations have specific human rights under the Human Rights Covenants, but those rights could be disregarded by Canada and ignored by the provinces. The covenants gave little protection" (2008: 40).

A stronger footing may be found in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was approved by Parliament in November 2010. Article 7 does discuss genocide in section 2, insofar as "Indigenous peoples ... shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group" (UNDRIP, 2007). Going further still, the 1994 draft made reference to both "ethnocide and cultural genocide" but defined neither term. It also laid out in article 7 that signatory states would be responsible for "prevention of and redress for" a series of acts, many of which were very similar to the acts covered under Lemkin's cultural genocide definition of 1947 (Draft, UNDRIP, 1994–1995).

Certainly some Aboriginal groups in Canada will pursue legal remedies internationally and domestically. Henderson observes however, that international law and domestic treaties are but "one wing of Indigenous diplomacy." "The other," he asserts, "is political action and strategy." He concludes, "The legal documents and the courts play a limited role, but the ultimate answer is political. The courts cannot do the political work of self-determining peoples" (2008: 92). As such, while courts may play a role in recognizing genocide (or not), Aboriginal activism and the quest for political rather than legal solutions is generally seen as a more realistic pursuit. What Henderson and many other Aboriginal scholars seek is the full and fair recognition of existing treaty rights as affirmed under the Constitution. Thus a legal finding of genocide might not necessarily promote the sort of treaty federalism that Henderson (1994) and Ladner (2003) have consistently argued for.

## Conclusion

From our reading of Canadian history, there seems to be clear evidence of intention to commit cultural genocide through the outlawing of traditional customs, like the potlatch and sundance, through the pass system which kept First Nations people on reserves, and through strict policies promoting forcible assimilation, including denigration of traditional languages and religious practices, using the IRS as an expedient. Amendments to the Indian Act further demonstrate intent to denigrate and destroy Aboriginal culture in Canada, denying Aboriginal people the right to use the Canadian legal system, denying First Nations women the right to keep their status when marrying outside the community, provisions allowing for forcible stripping of First Nations status and citizenization and other similar measures (Miller, 2004: 187–97). These and other aspects of colonial policy indicate the intent of the Canadian government to commit cultural genocide as Lemkin and others have defined it.

What would constitute proof of a *dolens specialis* for the UNGC to apply? Evidence would need to be adduced of specific intent to eradicate Aboriginal people as a group, not just culture and traditions but the very lives of group members *qua* members and their ability to perpetuate the group's physical existence. For example, a very high death rate in the IRS system that could be proven to be *intentional*, such as the deliberate spread of disease with the intention of killing large numbers of Aboriginal children, would qualify. Proof of an *intentional* policy of forced sterilization targeting Aboriginal women would also qualify, coupled with evidence of the widespread use of this practice. Forced removal as a means of *intentionally* destroying the group would also be convincing. We have examples of forced removal through the IRS system and the "60s' scoop," a topic which merits further investigation. Beginning in the 1930s and 1940s, thousands of Aboriginal children were taken from their parents and sent for adoption or to foster homes, the majority sent to non-Aboriginal homes. Many were even shipped to the United States. At its height, one in four status Indian children had been taken from their parents. Alston-O'Connor's reading of this period suggests that cultural genocide occurred here as well (2010: 4).

To invoke the UNGC, it is insufficient to describe the process and the outcome only; proving the specific intent behind the policy is crucial to a determination. To expand on our earlier reference to Bosnia-Herzegovina, 60 per cent of Bosnia's inhabitants were forced from their homes and more than 1.3 million people (30 per cent of the population) were dispersed in 63 countries. This was in addition to a death toll of nearly 280,000 at the war's end. Yet, the ICTY only recognized the 8,000 men and boys of Srebrenica as being the victims of genocide (Mac-

Donald, 2009: 114). Ethnic cleansing, forced displacement and mass murder do not automatically in and of themselves prove genocide. We feel that the evidence of genocide in Canada is building but is by no means conclusive yet, especially in light of the fairly circumspect interpretations made by international tribunals and the even narrower interpretations of international law favoured by Canadian courts.

Certainly, a finding of “genocide” (whether Lemkinian, UNGC, Canadian Criminal Code, or a revised version of the UNGC) would have social and political ramifications. It would make a stronger moral and legal case for treaty rights to be upheld, for forms of Aboriginal self-determination and for better political representation as suggested by the Royal Commission on Aboriginal People. It might promote a second apology, greater reparations and a stronger sense of national responsibility. It might promote real attempts at conciliation on the part of many Canadians. It might, alternatively, prompt a backlash from the right and the rejection of a Canadian “black armband history,” a term used in Australia by right-of-centre politicians and activists who denied claims of Aboriginal genocide (Curthoys and Docker, 2001: 11). Or claims of genocide might be dismissed by Canada’s passive and indifferent mainstream population as an exaggeration or a problem for the churches and the government to deal with. As we have outlined, genocide has different interpretations among academics, domestic courts, international tribunals and victimized people. Whether or not the IRS system will be proven to be genocidal, Canada still has a very long way to go before any form of conciliation can be achieved.

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