

“The Genocide Question and Indian Residential Schools in Canada”

David B. MacDonald*

Political Science Department, University of Guelph

Graham Hudson,

Criminal Justice and Criminology Department, Ryerson University

Introduction

Since 2009, the Truth and Reconciliation Commission of Canada has been investigating the staggering array of crimes committed against several generations of young Aboriginal children. At the TRC Forum in Vancouver (March, 2011), some TRC officials, including Commissioner Wilton Lonechild, and some invited speakers like Stephen Smith (quoted above), argued that genocide merited close attention as a descriptor for what happened to in residential schools. Speakers pointed to Section 2(e) of the UNGC which refers to the forced transfer of children from one group to another.¹ They are not alone. A number of Canadian academics have also asserted that the UNGC does apply to Aboriginal experiences (Davis and Zannis, 1973: 175–76; Chrisjohn and Young 1994, 2-6; 33-35, Therrien and Neu 2003, Cardinal, 1999; Grant, 1996: 69; 270-271).

If the IRS system was genocidal, what legal instruments exist internationally and in Canada to bring about justice for Aboriginal peoples? And if not, can other descriptors,

like “cultural genocide” be useful? We feel that Canada is only now approaching the point where we can adequately deliberate over what occurred, 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 was a useful beginning, but access to the testimony of Survivors remains controlled and much of RCAP has little to do with the IRS. Further, mainstream Canadians have little understanding of this lengthy era of our history and its continued impact on Aboriginal peoples (Regan, 2010, 11-12). As the crimes committed in the schools now gain a more robust public airing, questions about the legal and moral nature of the IRS system arise.

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 as a category of genocide in the UNGC, largely due to concerns by ratifying states that they might actually be committing breaches of the convention they were about to sign.³ The ratification process created a series of loopholes through which settler governments such as Canada, the USA, and Australia, have jumped. Cultural genocide is more accurate than “forcible assimilation”, we argue, because groups with clearly defined identities were targeted as groups, rather than as individuals. Forced assimilation does not convey the full extent of the loss of languages, traditions, and skills as a result of the IRS system. The term is a moral descriptor anchored in a legal historical process which did recognize the crimes to which Aboriginal peoples were being subjected. We also consider whether the UNGC should include cultural genocide and relax its strict emphasis on the *dolens specialis*.

A Brief Background to the Residential Schools.

The IRS system was created within the broader context of the colonization of Canada. The history of Aboriginal-European relations can be broken down into several periods, beginning with the era of initial contact and the fur trade. From 1867 to 1945, Confederation resulted in a two-tiered system with federal and provincial governments, a

system which largely ignored the treaty rights of Aboriginal peoples and froze out any attempts at self-government as a third branch.⁴ Aboriginal peoples lost their status and were often treated as “wards, or guardians, of federal authority”, and consequently denied the ability to represent themselves in provincial or federal legislatures, law courts, or land markets.⁵ A series of thirteen numbered treaties between 1871 and 1929 laid the basis for further European colonization. Aboriginal peoples surrendered land in return for concessions such as reserve land allotted on a per capita basis, and a variety of privileges, tax exemptions and government services. However in many cases, the treaty process “was riddled with deceit” as Fleras and Elliot put it, being seen as vehicle to separate Aboriginal peoples from their land and bring them further under government control.⁶

Certainly there were periods of cooperation, even *métissage*, as Saul has discussed (2008). However, the overall effects of European contact, treaty-making, and conquest have been negative in terms of the health, sovereignty, and well being of indigenous peoples. Aboriginal populations in many cases suffered dramatic population loss, the theft of ancestral lands, the outlawing of their languages, customs, and religions, and much else (Woolford, 2009, 82-4). The Department of Indian Affairs was created in 1880, in part motivated by a desire to manage Aboriginal peoples as the government expanded the size of the country. Later, forms of social control and assimilation fell within its ambit, including the IRS system (Friesen & Friesen, 2002, 102-5).

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, through which 100,000 Native Americans passed (Milloy, 1996: 13; Smith, 2006; Wallace, 1995). Strongly influenced by the American system, Canadian residential schools were first established in the mid-1880s and continued until the 1980s. Aboriginal children were to be assimilated and made productive members of Canadian society, as workers and servants primarily, and not as competitors for jobs with European populations (Friesen & Friesen, 2002, 110; Deiter, 1999, 15-16). 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 the Catholic, Anglican, Presbyterian, and United Churches (see Milloy, 1996).⁷ Until the 1950s, attendance at these schools for children aged five to sixteen was compulsory.

At least 150,000 children passed through a network of some 125 schools.⁸ Of these there are approximately 80,000 Survivors alive today. Children were forced to attend and live at the schools for ten months a year. Beatings, verbal, physical, and sexual abuse were common. Indian languages were forbidden, as was the practice of traditional beliefs.⁹ As deputy minister of Indian Affairs Duncan Campbell Scott famously argued in 1920, epitomizing the attitude of the time: "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...".¹⁰

Indigenous cultures were destroyed and personal lives shattered, while children were given few skills to help them cope in white Canadian society. Problems of intergeneration trauma remain extremely serious. Survivors learned few parenting skills, were often deracinated from their languages and cultures, resulting in a myriad of social problems. As Woolford describes: "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). Was genocide committed here? A number of academics reviewed in the introduction argue that it was (Therrien and Neu 2003, Cardinal, 1999; Grant, 1996: 69; 270-271). 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" (Chrisjohn & Young, 1994, p. 28).

Some academics have even framed the IRS system through a Holocaust template. Neu and Therrien (2003), and Chrisjohn and Young (1997) make overt comparisons with the Holocaust as a means of criticizing the Canadian government, the RCMP, and the churches involved in the residential schools.¹¹ Historian Harold Cardinal argued in the

second edition to his *The Unjust Society* (1999) for similarities between the two cases, given that in many respects, “the horrors experienced by Indian Nations were no less than those experienced by others [European Jews].”¹² This type of discourse is to some extent understandable as a strategy for gaining public attention. Aboriginal peoples continue to face a mainstream culture of indifference, and sometimes denial (Regan, 2010). However, while the Holocaust may seem to be a useful way of gaining attention and changing public perceptions (which *does* need to be done in Canada), we propose a more critical approach to this type of discourse.

Comparison might be made between Nazi goals towards Slavic populations during World War II and the colonization of Canada. And certainly at the level of individual abuse, trauma, and intergenerational trauma, there are important similarities which bear examination. The schools often produced what we might call genocidal outcomes; the parallels between IRS Survivors and genocide survivors in other contexts is often striking, a point David has documented elsewhere.¹³ However, there are also crucial differences, lying with the scale of atrocities, and the nature of the intent to destroy (Grant, 1996, 270-71).

Information about the crimes committed within the IRS system really came to light during the mandate of the RCAP, which began its work in 1991. Submissions such the Assembly of First Nations’ report *Breaking the Silence* (1994) offered unambiguous testimony about what children endured. The AFN interviewed 13 survivors, and recorded their often horrific experiences of verbal, physical, and sexual abuse. Children had their tongues pierced with needles for speaking their own language, lighter skinned children were favoured over darker ones, beatings were common, while others described how “the threat of being sexually violated loomed ‘like a dark cloud’ on the horizon” (AFN, 1994, 25; 30; 31).¹⁴ 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).¹⁵ The report clearly stated problems of neglect, underfunding, and widespread abuse, not to mention the “very high death rate” from tuberculosis, as

well as “overcrowding, lack of care and cleanliness and poor sanitation.” Overall, the Report was a damning indictment of the government’s treatment of indigenous peoples (AINC-INAC, 1996).

In 1998, the federal government released a “Statement of Reconciliation”, accompanied by a \$350 million “Healing Fund”. Churches involved in the residential schools had submitted apologies much earlier. The first was the United Church of Canada, which gave its concise “Apology to First Nations” in 1986, followed by one by the Oblate Missionaries of Mary Immaculate in 1991. In 1993, Anglican Archbishop Michael Peers delivered his Church’s apology, followed a year later by the Presbyterian Church’s “Confession”.¹⁶

In 2008, the federal government formally apologized, and “common experience payments” soon followed, designed to compensate Survivors. Alternative dispute resolution mechanisms have also been introduced, and in 2010, the TRC began collecting statements around the country. We have already discussed some aspects of its mandate and several of its events. Within the ambit of the TRC are important nation-defining questions about the nature of restorative justice, indigenous sovereignty, self-government, and genocide.¹⁷ We now turn to the final point – how genocide has been defined and what these definitions might mean for Aboriginal peoples.

Lemkin and the UNGC

Raphael Lemkin’s original categories of political, social, cultural, economic, biological, religious, and moral genocide can in theory be used to interpret the history of Canada. Lemkin’s definition in *Axis Rule in Occupied Europe* (1944) was expansive, outlining “a coordinated 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 and as such: “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".¹⁸ His definition covers a variety of areas including political, social, cultural, economic, biological, physical, religious, and moral. Of these forms, only the third part of the physical form seems difficult to apply universally to indigenous peoples.

Central to Lemkin's argument was that genocide represented a crime committed against groups as collective entities, not the individuals who comprised them. Lemkin emphasized collective rights above those of the individual. This attitude was clear in some of his unpublished papers, when he argued that there was a collective tragedy involved with the decimation of group identity – that something unique and precious was lost from the world. Lemkin outlined two ways that genocide occurs. The most obvious is the mass killing of a large proportion of the members of a group. The second method is the intentional destruction of the foundation or underlying structure that supports the group and distinguishes it from other groups.¹⁹ Either way, genocide would be the result of intentional, sustained, and purposeful action.

Lemkin provided a range of examples to illustrate his arguments: the persecution of Polish Catholic clergy by Nazi Germany (religious genocide); 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. In all cases, the issue of intent is crucial, because the destruction of the group has to be sought out in order for genocide to take place. This intentionality found its way into the UNGC in 1948, but many of the other aspects of Lemkin's definition were substantially narrowed. The 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.²⁰

Yet, the UNGC was the product of a political process and subject to a certain degree of horse-trading. Cultural genocide and Lemkin's other categories were rejected, although the forced transfer of children and the prevention of births were retained. Political, linguistic, and cultural groups were removed during bargaining sessions between the Soviet Union and various settler societies, including the US, Canada and Australia, leaving behind religious, national, and racial groups.²¹

However, we must also be careful not to see the UNGC as a static document. Samantha Power (2002) and Peter Ronayne (2003) both tacitly focus on the weaknesses of the Convention, but offer little analysis of the case law that evolved from it. Indeed, we note, virtually every aspect of the UNGC is open to reinterpretation by the courts. In recent years, the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY) 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. In most cases the "part" should be significant, although the Srebrenica ruling is problematic on that count (since the "in part" were the Bosnian Moslems of *Srebrenica* not BiH as a whole).²² Other issues concern how clearly "intent" to commit genocide must be proven, and whether or not rape can be considered an act of genocide. It now can be.²³

Case law also firmed up the definitions of victims, perpetrators and a host of other aspects of the UNGC. Victim groups were quite narrowly demarcated under the 1955 *Nottebohm Case*, where nationality was defined as "the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state".²⁴ Case law from the ICTR and ICTY has broadened the definition to include "a collection of people who are perceived to share a legal bond on common citizenship, coupled with reciprocity of rights and duties".²⁵ Here references to the state have been dropped, allowing for stateless persons or indigenous peoples without state-based claims to be considered victims of genocide. A racial group

has also been defined in the course of the ICTR as a group “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”, while an ethnic group is defined as one “whose members share a common language or culture”.²⁶ It has been more precisely defined as a group whose members share a common language and culture or, “a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)”.²⁷

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”. Although not identical, all of the acts prohibited by the UNGC, such as murder, assault, conspiracy, attempts, aiding and abetting, and forcible transfers, are already crimes under Canadian law. It is the added dimension of genocidal intent as towards a protected *group* that warrants the unparalleled stigma and punishment associated with the crime of genocide. 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. It should be recalled that, although a few courts have cautiously recognized the intent to destroy a group “as a social unit” to be culpable,²⁸ the preponderance of jurisprudence is that the accused must have intended the physical and biological destruction of a group.²⁹

Genocide in Canadian Law

Lacking centralized institutions of enforcement, the effectiveness of international law is highly dependent on the cooperation of domestic legal, political, and social institutions. Unfortunately, nowhere in Canadian constitutional or statutory law are there 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.³⁰ How one approaches the UNGC and its role in Canada can be tempered through the lenses of monism, dualism, and a “persuasive authority” approach. The monist view holds that international law should be recognized in domestic courts, unless it is seen to be in irreconcilable conflict with domestic legislation. Dualism implies almost the reverse – that unless specifically

stated by parliament, international laws and treaties have no standing unless implemented by government through statute. The third “persuasive authority” approach holds that all international law, whether customary or conventional, binding or non-binding, can be used by Canadian judges to interpret Canadian law.

What is genocide in Canada? Canada did ratify the UNGC in 1952 after lengthy debate in Parliament. However, portions of the Convention 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.”³¹ The official reasons given to Parliament by the *Report of the Special Committee on Hate Crimes in Canada* (also known as the *Cohen Report*) was that portions of the UNGC “intended to cover certain historical incidents in Europe that have little essential relevance to Canada” could safely be omitted. They even asserted that “mass transfers of children to another group are unknown ... in Canada” (see Churchill, 2004, 9; 86). These deliberate and disingenuous omissions have 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.³² When so inclined, judges would interpret statutes so as to give effect to the binding international treaties these statutes implemented. They also interpreted ordinary law and policy so as to consist with binding, but unimplemented, international customary law. In either case, judges did not apply such international law as Parliament clearly intended to violate. Adding contour to this framework is the recent emergence of a parallel, “relevant and persuasive” doctrine. This doctrine initially authorized 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*.³³ It has since evolved beyond this strictly constitutional setting, authorizing the judicial use of general international law as well as foreign law as sources of critical insight into all manner of legal problems that have global and multicultural dimensions.³⁴

Parliament helped bring the full UNGC to Canada in 2000, when it enacted the *Crimes Against Humanity and War Crimes Act* (CAHWCA).³⁵ The CAHWCA expressly implements the *Rome Statute of the International Criminal Court*. In general, the CAHWCA 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. Importantly, s. 9(3) states that the Attorney General or Deputy Attorney General must both consent to and conduct proceedings under this act.

Since the *Rome Statute* has incorporated the UNGC into its definition of genocide, it might appear that the UNGC has effectively been implemented into Canadian statutory law. However, a number of caveats are in order. 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*,³⁶ no such phrasing attaches to international criminal acts committed within Canada. When dealing with genocidal acts committed within Canada, genocide is considered to have been a crime under international customary law only *following* the international adoption of the *Rome Statute* i.e. July 17, 1998.³⁷ Parliament’s choice to expressly exclude a non-retroactivity principle for crimes committed outside of Canada, but not for international crimes committed within Canada, strongly suggests that it intended to bar the prosecution under this act of offences committed prior to July 17, 1998.

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.³⁸ Judges are encouraged to engage with a wide range of normative frameworks when establishing the content, scope, and applicability of genocide within Canada. Parliament’s position is that genocide is a part of international customary law and, according to common law tradition, this law is automatically a part of Canadian common law. Although the Attorney General possesses unfettered discretion over the prosecution of international criminal law in Canada under the CAHWCA, this act may encourage judges to rely on burgeoning international and foreign case law when adjudicating private law disputes.³⁹

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.⁴⁰ In the 2005 private law case of *Malboeuf v. Saskatchewan*,⁴¹ 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".⁴² 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*,⁴³ 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:

[T]here 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.⁴⁴

They then described arguments supported by reference to the UNGC as "political" and not justiciable, presumably because the convention had not been legislatively implemented.⁴⁵ Unfortunately, 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".⁴⁶ This judgment highlights a fairly common and highly 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 relevant and binding international customary law norms.

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.*,⁴⁷ 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”.⁴⁸ 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.⁴⁹ The UNGC has on occasion been cited in support of arguments that Canadian law is not applicable to members of First Nations,⁵⁰ 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 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, residential abuses could have been “genocide” under international law well before 1948. Indeed, in *Mugesera v. Canada (Ministare of Citizenship and Immigration)*, the Supreme Court cited a 1951 ICJ advisory judgment in support of the claim that the UNGC codified, but did not displace, *pre-existing* international customary law on genocide.⁵¹ The CAHWCA also signaled this well before some of these lower court decisions were issued. 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.

Mapping Future Trajectories: Specific Intent

Although existing case law is hardly encouraging, changes in the legislative framework ushered in by the CAHWCA, as well as developments in international and foreign

jurisdictions, suggest that judicial attitudes may change, particularly if advocates construct more sophisticated legal arguments. For instance, the question of forcible transfer will be of primary concern in any future legal deliberations. What does forcible mean and might that definition change over time? This is open to interpretation by the courts and has not yet been considered in Canada. However, the Supreme Court made clear (in October, 2005) that removing Aboriginal children and forcing them to attend residential schools was not grounds for suing the government. Specific “wrongful abusive acts” would have to be proven by individuals to justify legal action. While the court conceded that safety measures were “clearly inadequate”, the “foreseeable risk of sexual assault to the children was not established” according to the standards of the time. While the decision is negative insofar as claims of genocide have not been supported, the decision laid the basis for further compensation, based on individual suffering.⁵²

These weighty requirements for *dolens specialis* have been a persistent obstacle to successful genocide claims in general, but especially in the context of colonial injustices. This is a particular problem with the UNGC, and in some respects predictable, since states who ratified the UNGC were also concerned about the potential for being judged under its provisions themselves. Those accused of genocide will, hypothetically, argue that even if they are guilty of underlying offences such as assault or homicide, they intended to help Aboriginals adapt to Canadian society, or, less benignly, that they directed their criminal actions towards individuals, not groups. The former is precisely what was argued in *Kruger v Commonwealth* (The “Stolen Generations Case”), which was concerned with the Australian government’s 19th and 20th century policy of forcibly removing Aboriginal children from their homes, transferring them to non-Aboriginal families and residential schools, and preventing their return home. While these actions were demonstrably part of an official plan, the High Court of Australia accepted the government’s rationale that this policy was aimed at helping Aboriginal children escape poverty and neglect.⁵³

In Canada, evidence is coming to light of deliberate spread of disease, withholding of vaccinations, forced sterilization, and systematic discrimination against Aboriginal

peoples. Is there a *dolens specialis* that we can isolate? A collection of documents? Speeches? At the present time, we are not aware of any “smoking guns” although one or more may come to light as we stressed in our introduction. Nevertheless, a number of prominent genocide scholars argue that even if there was no overarching and provable intent to destroy indigenous peoples as a group in whole or in part in a given area, if the end result had genocidal consequences that was or even could have been foreseen, then genocide can be understood to have occurred. This approach would require that the standard of fault be lowered from intent to destroy a group to either: a) knowledge that one’s acts *probably* will destroy a group, b) recklessness or willful blindness to the realistic *possibility* of this effect, or 3) negligence.

Mapping Future Trajectories: Underlying Offences

Leaving these issues aside, 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 residential schools 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.”⁵⁴ Citing this passage, the ICTR Trial Chamber deciding the *Akayesu* case held that the harm need not be “permanent or irremediable”, a finding upheld in all subsequent cases.⁵⁵ 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”,⁵⁶ as well as acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death as acts that amount to serious bodily harm.⁵⁷

This was the first time rape was regarded as a potentially genocidal act. 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.⁵⁸ 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”.⁵⁹ 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 Trial Chambers for the ICTR 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, however, 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”.⁶⁰ It defined mental harm as that which is more than a minor or temporary impairment of mental faculties.⁶¹ 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.⁶² This approach has been endorsed in a number of subsequent cases handled by the ICTR.⁶³ Trial Chambers for the ICTY similarly held that, while serious harm “must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation”, it includes “harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.⁶⁴

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.⁶⁵ 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.”⁶⁶

It would be reasonable to hold that this genocidal act is directly applicable to the case of Aboriginal residential schools. Many of the acts that constitute serious bodily and mental harm are known to have been performed by governmental officials and private parties during the operation of these schools. These acts include: sexual assault, threats of death, severe beatings and assault, resultant disfigurements, inhuman and degrading treatment (including systematic assaults on Aboriginal self-identity), disfigurement, and serious injuries to health as a result of the forced cohabitation of healthy children with children infected with communicable diseases.

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”.⁶⁷ 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.⁶⁸ 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”.⁶⁹ 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.⁷⁰

As regards *mens rea*, Trial Chambers have required proof that an accused have, 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 biologically destroy a protected group.⁷¹ 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 special intention and distinctions among physical, biological, and cultural genocide. All acts must have been “calculated” to destroy a group and 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. Now, 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 be the best candidates. 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, the category of the UNGC on which the Australian stolen generations was found to be victims of genocide? In some ways, the elements of this category of genocidal acts are clear. The *actus reus* consists in the physical, forcible transfer of children from a protected group to another group. The *mens rea* consists in the specific intent to forcibly remove children from one group to another group. However, the real problem 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 transfers of children, 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, more than any other, 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.

Cultural Genocide

We have argued that “cultural genocide” or “ethnocide” may be appropriate to describe much of Canada’s treatment of Aboriginal peoples, and is often used by genocide scholars. This is employed in cases where mass death did not accompany colonization, but active attempts to destroy culture, language, and religion, while stealing land and outlawing customs did occur.⁷⁸ As Israel Cherny has argued, ethnocide aims at the,

‘intentional destruction of another people’, but crucially, ‘[does] not necessarily include destruction of actual lives.’⁷⁹ James Miller and other historians of the IRS system do use this term in interpreting history, and the Assembly of First Nations has used the term on several occasions with reference to residential schools.⁸⁰

The original May 1947 draft of the UNGC, authored by Lemkin and two others for the UN Secretariat, included cultural genocide as one of its three aspects of genocide, together with physical and biological forms. 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.⁸¹

Of these only (a) survived the vote of the Sixth Committee of the General Assembly. Another aspect of genocide, forcing people to abandon their homes, was also voted down (see Schabas, 2008).⁸² Calls for a more inclusive definition of genocide are hardly new. In 1973, Davis and Zannis called for a wider definition of genocide to include not just “mass homicide” but cultural destruction as well, “warping and mutilating the lives of groups of people” (Davis and Zannis, 1973: 175–76). Chrisjohn and Young (1997) as well as Therrien and Neu (2003) see the differences between “genocide” and “cultural genocide” as being purely semantic. Their lack of distinction stems from the original 1947 draft and their advocacy of this over the current incarnation of the UNGC (MacDonald 2008 1006).

Despite his controversial nature (which we discuss below), Ward Churchill’s 1997 proposal for a revised UNGC seems the most appropriate for covering the concerns of

Aboriginal people. His revised UNGC has three types of genocide: physical, biological, and cultural, consonant with Lemkin's original 1947 formulation. Adopting American criminal legal norms on murder, Churchill proposes assessing genocide according to four "degrees". The first concerns premeditation; the second, "reckless disregard" for the outcome; the third, situations where genocide inadvertently results from "other violations of international law"; and the fourth, where there was no "evidence of premeditation" but the perpetrators showed a "depraved indifference" to the potentially genocidal outcomes of their actions. This is clearly an alternative to the rigid *dolens specialis* provision, which would clearly apply to the "first degree" but not the remaining three (1997 431-36)[†]. Arguably, 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 in Canada.