

THE UNSPOKEN GENOCIDE: CANADA'S RESIDENTIAL SCHOOLS AND AUSTRALIA'S STOLEN GENERATION

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INTRODUCTION

This article examines the social impact of colonial legislation and government policies for the establishment and running of Residential Schools in Canada and Australia in the 19th and 20th centuries. During this period, governments in both countries removed indigenous children from their communities and placed them in Residential Schools with devastating, long-term effects.¹ In Australia, the Human Rights and Equal Opportunities Commission Report, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, coined the phrase “stolen generation” as a moniker for their experiences. In Canada, the devastation wrought has been documented in the *Interim Report of the Truth and Reconciliation Commission*² published in 2012 as the result of an ongoing investigation into the impact of Residential Schools. Concern over lack of continuing government funding has put the Canadian investigation in a precarious position, but damning evidence already compiled by the Commission places it on par with Australia.

WERE RESIDENTIAL SCHOOLS INSTITUTIONS OF “GENOCIDE”?

This article assesses the impact of Residential Schools on indigenous communities against the *actus reus* and *mens rea* requirements of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948 [Convention on Genocide].³ Australia’s culpability is assessed under Article 2, subsection (e): Canada’s culpability is assessed under Article 2, subsection (c).

Article 2 of the Convention on Genocide defines “genocide” as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;

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¹ Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997 [*Bringing them Home*].

² Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Interim Report*, Manitoba, 2012 [*TRC Interim Report*].

³ The Convention on the Prevention and Punishment of the Crime of Genocide, was adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 [Convention on Genocide].

(e) forcibly transferring children of the group to another group.

Culpability under subsections (c) and (e) does not preclude culpability under other subsections. Legal liability in both countries is narrowed, however, by the fact that much of the residential school story occurred before the Convention on Genocide was ratified by either Australia or Canada. And customary international law, which could have bridged the gap in time and allowed for it to have retroactive effect, has also been precluded by domestic litigation in both countries.⁴ Thus, although the Convention on Genocide provides the strongest international legal definition of genocide, it cannot be used as a tool for domestic prosecution. This is not to say, however, that all of the requirements of the Convention are not fully met in both countries.⁵ Nor does it reduce the continuing devastating social impact on indigenous groups that makes the retelling of their stories necessary in order for them to move forward.

AUSTRALIA'S RESIDENTIAL SCHOOLS

For one hundred years, between 1869 and 1970, Aboriginal children throughout Australia were able to be forcibly removed from their communities and placed in state schooling institutions. Initially, this was accomplished via section 51 of the Australian Constitution, which granted states power to create separate legislation to deal with Aborigines.⁶ Children were removed from their homes in each state under protection and welfare Acts. These Acts included the Aborigine Protection Amending Act 1915 (NSW)⁷ and the Aboriginal Protection Act 1896 (VIC).⁸ In 1967, the power was reclaimed by the Federal government.⁹

Residential Schools were state funded and administration was split between church authorities and government officials.¹⁰ Most children who were taken were never returned to their communities and home visits were either actively discouraged or openly prohibited. Instead, children were institutionalised until they were considered to be old enough to enter mainstream, white, Australian society.¹¹

⁴ *Malbeouf v Saskatchewan (2005) 273 R Sask. 265; Kruger v Commonwealth (1997) 190 CLR 1.*

⁵ This distinguishes the exercise undertaken here from the thorough coverage of jurisdiction and the Convention in J Cassidy, "Unhelpful and Innapropriate?: The Question of Genocide and the Stolen Generations" in *Australian Indigenous Law Review*, 13, 2009, 1.

⁶ The Constitution of Australia, 1900, s51 (xxvi) states: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws".

⁷ The Act created the right to remove Aboriginal children for the purpose of "apprenticing them". Section 3 provided: "Any child who refuses ... may be removed to some home or institution".

⁸ Section 2(v) empowered the Governor and Board of Protectors to regulate "the care, custody and education of child aborigines".

⁹ This was done by simply deleting all other words in the section other than "people of any race".

¹⁰ Discussed in D Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia*, Abingdon, 2008, 100.

¹¹ Discussed in P Read, "The Return of the Stolen Generation", *Journal of Australian Studies*, December 1998, 8.

ACTUS REUS CULPABILITY UNDER THE CONVENTION

Culpability under subsection (e) of Article 2 of the Convention on Genocide requires proof that children were: (i) “taken”; (ii) “forcibly”; and (iii) “placed in another group”.

(i) “Taken”

The first requirement under subsection (e) is that children must have been “taken”. In this instance the best meaning to attribute to “taken” is its ordinary meaning, which is “to remove”.¹² In Australia, the action of taking is, arguably, exacerbated further by the fact that the estrangement was often permanent. Children were actively discouraged from returning home and many never did. However, the duration of the absence from community is not central to establishing whether a “taking” actually occurred. “Taking” is only the initial requirement that needs to be established, after which all the other necessary elements for liability must also be met.

The century in which children were taken can be divided into three consecutive eras: “protection”, “welfare”, and, “self-management”. Each era provided its own legislative procedure for the removal of children from their families.

a. The Protection Era

From 1860 through to the 1940s, states appointed high-ranking public servants and religious officials as “protectors” to oversee the removal of children from their communities and to facilitate their assimilation into colonial society. The Chief Protector and Protection Board had the power to direct where Aboriginal people lived. They used this power to take children from their communities without court approval.¹³ Protectors generally entered communities without warning and with an entourage of police, often removing several children in a single day. Residential School survivor, Bessie Singer, remembers standing by the community water tank and being grabbed from behind by a policeman and dragged off without a word being spoken to her.¹⁴

In New South Wales, the exercise of Protector discretion¹⁵ resulted in up to 300 children being institutionalised in Residential schools in the first two decades of the removal period.¹⁶ One New South Wales school, the Coolbrook Home, received around 350 indigenous children in its fifty-four years of operating.¹⁷ Although Protectors did not have to justify taking children from their homes, they often cited “child neglect” as

¹² *Oxford English Dictionary*, Oxford University Press, 3rd ed, 2010, 1811.

¹³ For example, section 6 of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*, states simply that a “Protector” once appointed by the Governor would “have and exercise the powers and duties prescribed” including “powers of relocation”, which was interpreted as giving the Queensland Protector unfettered power to remove children without parental consent.

¹⁴ M Jacobs, *White Mother to a Dark Race: Settler Colonialism, Materialism and the Removal of Indigenous Children in the American West and Australia*, Nebraska, 2009, 25.

¹⁵ *Aborigines Protection Bill 1915 (NSW)*.

¹⁶ *Bringing them Home*, n1 at 34.

¹⁷ *Ibid*, 30.

justification to other government agencies.¹⁸ Aboriginal communities, on the other hand, received little feedback justifying the actions of state authorities during this period.¹⁹

b. The Welfare Era

The 1940s saw a shift in control from Protectors and Protection Boards to Welfare Boards. These were statutory bodies created specifically to oversee removals in each state.²⁰ Importantly, takings had to be justified according to statutory criteria during this era. For example, the New South Wales Child Welfare Act 1939, stipulated that children who were “destitute”, “neglected” or “uncontrollable”²¹ could be removed. The same Act stated that “the best interests of the child” must be the predominant consideration for removal.²² Whilst it appeared to be benevolent legislation, officials used the poor living conditions of Aboriginal communities to justify taking greater numbers of children. While little government effort was made to alleviate the widespread poverty that existed in these communities, increasing numbers of “destitute” children were taken²³ during the 1950s.²⁴

Unlike the Protection Era in which the statutory framework was specifically directed at Aboriginals, state and federal legislation in this period covered *all* children. Legislation was, however, applied differently to Aboriginal children under the control of Welfare Boards, who existed in a half-way limbo state, and non-Aboriginal children who were truly wards of the State.²⁵ Segregation of the children ensured that Aboriginal children were placed in assimilationist institutions that intentionally denigrated their culture, in order to depreciate its value so that it could be replaced by settler culture and values.²⁶

c. The Self-Management Era

During the 1960s, Self-Management Era, Welfare Boards were abolished and Aboriginal children became wards of the state. This was a positive shift for Aboriginals. Even though takings were still occurring and young Aboriginals were still being placed in Residential Schools, voluntary enrolments and matriculation were now also possible.²⁷ Takings continued up until 1972 when the Aboriginal Advisory Council was established in New South Wales and protectionist legislation was repealed in the other territories,²⁸ thus ending the practice of removing Aboriginal children from their communities.²⁹

¹⁸ Ibid, 171. Auber Neville was a prominent Protector who frequently professed the noble and necessary nature of the work he and his cohort were carrying out so ruthlessly, in public and to authorities.

¹⁹ Jacobs, n14 at 23.

²⁰ This occurred in all states except the Australian Capital Territory, which instead used the Commonwealth Neglected Children and Juvenile Offenders Act 1905.

²¹ Sections 41-47 of the Child Welfare Act 1939 (NSW) are discussed in *Bringing them Home*, n1 at 39.

²² Ibid.

²³ Ibid, 40.

²⁴ Often this would occur when a child had been hospitalised for illness. *Bringing Them Home* records the story of ‘Evie’ who tells of being devastated at being from a hospital by men who claimed to be taking her back to her mother but instead took her to a residential school. See n1 at 128.

²⁵ Ibid at 27.

²⁶ Ibid.

²⁷ Jacobs, n14 at 125.

²⁸ The Aborigines Act 1971 (Qld), repealed the Aboriginals Preservation and Protection Act 1939 and the Torres Strait Islanders Act (Qld); in New South Wales Aboriginal children were to be dealt with by the

(ii) “Forcibly”

The second requirement of subsection (e) of the Convention on Genocide is that the taking must have been forcibly achieved. The natural and ordinary legal meaning of “forcibly” is to take by physical or mental compulsion, or without consent.³⁰ The use of force in the removal of Aboriginal children took three main forms: overt physical compulsion; removal without parental consent; and parental consent induced by duress.

The use of force by government agents when removing children often met with physical resistance. During the protection era when physical force was predominant, no justification was given and no consent was sought or deemed necessary.³¹ The testimony of Aboriginal communities in *Bringing Them Home* reflects the terror they experienced: survivors recount tales of hiding their young under mats and shrubbery in order to thwart armed police.³² When children who had been hidden were found, physical confrontation followed, usually led by the children’s mothers.³³

By the time the Welfare Era ended almost one-third of the Aboriginal population had been forcibly placed under state control without the valid consent of their parents.³⁴ This massive proportion was reached by a continuous stream of takings until the stolen generation period ended.³⁵ Although appeals were possible in the later period, few Aboriginal communities possessed, or were provided with, the knowledge or resources to utilise the appeals process.³⁶ Parental permission was rarely sought or given, and misrepresentation was frequently used by state agents to make families compliant. Mothers were told that police and welfare agents needed to take their children out of the community to receive emergency treatment, only to later find that they were not ill at all and had been taken instead to Residential Schools.³⁷ Scenarios like these satisfied the legislative criteria and reduced the immediate opposition of parents and communities, leaving them to deal with the heartbreak of a *fait accompli*. Even in the last decades of the Schools’ operation, duress was still evident.³⁸ By this time many powerless and poverty-stricken communities had been reduced to believing that the authorities were too strong and that they had no option other than to just let it happen.³⁹

Department for Child Welfare and Social Welfare which set up the Aboriginal Advisory Council: *Bringing them Home*, n1 at 42.

²⁹ *Ibid.*

³⁰ *Black’s Law Dictionary*, 5th ed, 580.

³¹ *Bringing them Home*, n1, provides numerous examples of forcible takings described as “kidnappings”.

³² Jacobs, n14 at 124.

³³ *Ibid.*, 172.

³⁴ Jacobs, n14 at 28; other estimates have ranged between 10 percent and 47 percent - see *Bringing them Home*, n1 at 30-31.

³⁵ *Ibid.*

³⁶ *Ibid.*, 35.

³⁷ *Ibid.*, 5.

³⁸ *Ibid.*, 29.

³⁹ *Ibid.*

(iii) “Placed in another group”

Residential Schools were not “schools” in the normal sense of being educational institutions that supplemented Aboriginal family and community knowledge. They were residential institutions aimed at completely severing the link between Aboriginal children and their communities and ensuring that they never drifted “back to the black”.⁴⁰ Aboriginal learning was considered dangerous and its removal was aimed at achieving a complete and permanent transition of identity. Children were re-parented, taught and cared for by white Australians in the employ of either the church or the government. *Bringing Them Home* details the trauma experienced by Aboriginal children whose parents never visited and who were “routinely told that the circumstances of their removals were that their mother couldn’t take care of them or had not wanted them”.⁴¹ Most Aborigines who left the Residential Schools could not locate their communities or family and had difficulty relating to them even when they could be found.⁴²

Exposure to white settler culture was a defining feature of the schools. Isolated from their communities, children were inculcated with an exclusively foreign mind-set.⁴³ Education was in English only, with aboriginality being so heavily derided in the curriculum that children became ashamed of being indigenous.⁴⁴ Aboriginal language and other cultural practices were prohibited and punished, and contact with Aboriginal communities was completely severed.⁴⁵ From the 1860s up until their closure in the 1970s, the consistent intention of the facilities was to eliminate indigenous identity and replace it with that of “another group”.⁴⁶ This reflected a widespread belief amongst white Australians that the best interests of the child required total assimilation into white Australian settler society.

(iv) The Test for Liability under International Law

Liability under international law requires that a substantial part of the group must have been targeted.⁴⁷ The test drawn from international litigation requires that those affected must be a “substantial number proportionate to the population of the group”.⁴⁸ The number of children taken in Australia between 1860 and 1960 was around 100,000, which is nearly a third of the Aboriginal population.⁴⁹ This figure easily satisfies the “substantiality” test.

International law also requires that Aboriginals, Torres Strait Islanders and “half-castes” must form a type of group whose protection was intended by the Convention.⁵⁰

⁴⁰ C Tatz, “Genocide in Australia”, *AIATSIS Research Discussion Papers*, No8, Sydney, 2010, 26. Online at: <http://www.kooriweb.org/gst/genocide/tatz.html>.

⁴¹ Jacobs, n14 at 24.

⁴² *Bringing them Home*, n1 at 260.

⁴³ Short, n10 at 100.

⁴⁴ *Bringing them Home*, n1 at 120.

⁴⁵ Short, n10 at 91.

⁴⁶ *Bringing them Home*, n1 at 30.

⁴⁷ *Prosecutor v Goran Jelisic* (Trial Judgement) IT-95-10,T, (1999) para 81.

⁴⁸ *Ibid*, para 82.

⁴⁹ <http://reconciliation.org.au/nsw/education-kit/stolen-generations>.

⁵⁰ *Jelisic*, n47 at para 66.

Aboriginal and Torres Strait Islanders obviously come within the Convention on Genocide's scope because they are distinct, discernible, racial and/or ethnic groups. "Half-castes", however, are a group specially created by the Australian government for separation and segregation into state institutions in order to reconstruct their identities.⁵¹ *Bringing them Home* provides an incontrovertible narrative of how creating the classification of "half-castes" as a third racial group, aided government attempts at assimilation.⁵²

MENS REA CULPABILITY UNDER THE CONVENTION

The *mens rea* requirement for Article 2 of the Convention on Genocide is "intent to destroy". International law requires that "prosecutors must prove, both, that the accused committed the underlying offence, and that they did so with the specific intent to destroy a protected group".⁵³ David McDonald argues that the omission of "cultural" genocide from the Convention means that the type of destruction intended is either the physical destruction in whole or in part of the race, or the destruction of all traces of racial identity.⁵⁴ This position is also espoused by Julie Cassidy who presents a strong case as to why the actions of the state with regard to Aboriginal Australians *do not* meet the criteria for genocide.⁵⁵ Apparently, the slow, incremental, deterioration of culture over time is not sufficient to satisfy the second element.

The intent required by the Convention on Genocide is subjective. *Kruger v Commonwealth*⁵⁶ is the leading Australian case discussing this. In *Kruger* the plaintiffs were children who had been forcibly taken and a mother whose child had been taken. The parties claimed that state actions under the Northern Territories Aboriginal Ordinance 1918, which empowered Protectors to take children arbitrarily, amounted to genocide under Subsection (e) of the Convention. They sought judicial recognition of what had happened to them, acknowledgement of state liability, and damages. They failed in all three. The court held that the lack of formal codification into domestic law rendered the claim of genocide ineffective. The Court also suggested that the state's intention could not be "destruction" because the expressed state policy of acting in the best interests of the child precluded it.⁵⁷

The finding of the Court that *dolens specialis*, a form of subjective, specific aggravated intent, must fail if legislation states that it is enacted for the "protection" and "welfare" of an indigenous group by a colonial government, is wrong.⁵⁸ The Court confuses

⁵¹ A Neville frequently referred to the "three races ... black, white and half-caste", see *Bringing Them Home*, n1 at 94; Also see Short, n10 at 89.

⁵² J Ferrari, "Black Armband History Dumped", *The Australian*, 26/2/2010, online ed. at: <http://www.theaustralian.com.au/news/nation/black-armband-history-dumped/story-e6frg6nf-1225834505675>.

⁵³ D MacDonald and G Hudson, "The Genocide Question and Indian Residential Schools in Canada", *Canadian Journal of Political Science*, 45, 2, 2012, 9.

⁵⁴ *Ibid*, 5.

⁵⁵ Cassidy, n5 at 129.

⁵⁶ *Kruger v Commonwealth* (1997) 190 CLR 1.

⁵⁷ K Windschuttle, *The Fabrication of Australian History: Stolen Generation 1881-2008*, Macleay Press, Sydney 2009, 54.

⁵⁸ Tatz, n40 at 32.

morally worthy legislative intentions with *actual* intentions that can be evinced from the clear actions of those implementing the legislation. The *actual* intention of the state was to assimilate Aboriginal children by destroying their identity and replacing it with another identity, that of the white settler. In these circumstances, I believe that the “assimilationist intention” carried out on such a grand scale amounts to the intention to destroy Aboriginal society as it naturally existed, thus satisfying the requirements of the Convention.

(i) Defining Intention

Colin Tatz separates *actual* intent from *male fides* intent.⁵⁹ *Mens rea* is traditionally defined as encompassing two different mental states. The first is *direct* intent, where a perpetrator actually desires a particular result. The second is *oblique* intent, where an actor continues acting although certain that a specific outcome will occur if they persist.⁶⁰ In order to satisfy this high standard, mere knowledge or true belief is not enough. Intent must be subjective and a test of whether or not an actor “should have known an outcome” will not be held by the courts to be sufficient.

Male fides or “evil intent” on the other hand, refers to moral intention. The distinction between the two is essentially between what was *actually* intended and *why* it was intended. In discerning intent the court in *Kruger* should only have looked at the first. Instead, in making “the best interests of the child” the indicator of intent the Australian courts have imported the test of *male fides* into their assessment. When the Court in *Kruger* reasoned that the Australian government cannot have intended the physical destruction of the Aboriginal people because they were committed to the best interests of the people, they are essentially saying that the state was well-intentioned. They assume that a well-intentioned body could never desire racial destruction. But they are wrong. There was a *direct* intention to achieve the desired result of assimilating Aboriginal people into white Australian culture, using Residential Schools as the vehicle for destroying their own culture. If total assimilation is “destruction” under the Convention on Genocide, the Court should only have looked at this particular, *direct* form of intention and disregarded whether or not it was well intentioned. All that is required is a clear exposition of either a *direct* or *oblique* intention to assimilate. This is supported by the various policies and laws that affected that intention. Whether assimilation is considered to be in a group of individuals’ best interests is about the moral code that underpins the state’s policy position and is irrelevant to establishing *actual* intent.

(ii) Intended Assimilation

Assimilationist intent during the Protection Era is evidenced by statements made by government officials responsible for removing children. Auber Neville, the Chief Protector in Western Australia is a clear “protector” villain in stolen generation history. He intended to instigate a three-phase assimilation process in which the first stage would see “full bloods die out”; the second phase would separate “half-castes” from their communities; and, the third would control marriage.⁶¹ *Bringing Them Home* concludes

⁵⁹ Ibid, 23.

⁶⁰ For a basic definition of intent similar to this see: *R v Wentworth* [1993] 2 NZLR 450.

⁶¹ *Bringing them Home*, n1 at 25.

that under his regime, “the ultimate purpose of removal was to control the reproduction of Indigenous people with a view to ‘merging’ or ‘absorbing’ them into the non-Indigenous population”.⁶² The end product would be total eradication of aboriginality and its replacement by Western culture and norms.⁶³

In the Welfare Era, Residential Schools were the main federal machine for achieving assimilation.⁶⁴ At the Commonwealth-State Native Welfare Conference held in 1937, repeated references were made to the “Aboriginal problem”, by an aging Neville, in a speech chillingly called “the destiny of the race”.⁶⁵ Protectors implored both state and federal governments to enact legislation to manifest the desired assimilationist intention. Consequently, in 1944, the Native Citizenship Act required Aboriginals to renounce all tribal links and affiliations in order to acquire citizenship⁶⁶ and child removal policies continued as in the previous era. Children were absolutely prohibited from speaking their own languages and expressing any of their cultural practices or values. At the same time, they were heavily inculcated with colonial Christian ideology and practices as well as capitalist ideals that were inconsistent with the values learnt in their communities.⁶⁷

Assimilationist intent is more difficult to prove in the third, Self-management Era. Tracey Westerman describes the period as one in which “a continuation of the systematic genocide continued even if it masqueraded under a stated policy of ‘integration’”.⁶⁸ Up until the 1970s the goal was still to eventually eradicate full-blooded Aborigines by bringing their standard of living up to that of the “ordinary [white] Australian”.⁶⁹ The schools were seen as instrumental in providing the tools for Aborigines to become successful cogs in the white Australian state machine. The intention to completely absorb Aboriginal society into white colonial culture continued, unabated, for just over a century even though the degree of legal justification required changed in each era.

(iii) Assimilation as “Destruction”

If we keep MacDonald and Cassidy’s relegation of “cultural genocide” in mind, then viewing assimilation as tantamount to physical destruction or obliteration of racial identity is a cautious path to establishing specific intent. However, forced assimilation as set out above is enough to trigger the Convention and satisfy the “destruction” criteria. Subsection (e) was included so that “the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation

⁶² Ibid.

⁶³ Short, n10 at 90.

⁶⁴ T Westerman, *Government Policies Affecting Aboriginal People in WA*, Psychology Speaking, Western Australia, 1997, 3.

⁶⁵ Short, n10 at 90.

⁶⁶ Section 4(2) Native Citizenship Act 1944 (WA).

⁶⁷ J White, “Histories of Indigenous-Settler relations: Reflections on Colonialism and the Hybrid Economy” in *Australian Aboriginal Studies*, vol 1, 2011, 85.

⁶⁸ Westerman, n64 at 3.

⁶⁹ Ibid, 4.

of children”.⁷⁰ Australian Residential Schools deconstructed Aboriginal children’s identity by depriving them of their culture and links, destroying their memories of who they were, and then imported new ideals and skill sets to ease their permanent transition into white Australia. When they exited the institutions at around 15, purposely created language barriers and cultural ignorance prevented the children connecting back into their communities. It was hoped that former school residents would then, through miscegenation, ensure the discontinuation of Aboriginality.⁷¹

The insidious nature of the Residential School System was the drawing of a generational line that prevented Aboriginal communities from regenerating and promulgating an independent future. Thus, assimilation is “physical destruction” because it literally depopulates, not as quickly as immediate killing, but just as effectively in the end. Simultaneously, it completely destroys racial identity, as distinct from cultural identity. The Report cites numerous people who lack knowledge and any understanding at all that they are Aboriginal. This is well beyond simply being unaware of cultural practices attaching to identity.⁷² It is severance.

CANADA’S RESIDENTIAL SCHOOLS

In 1920, Duncan Scott, Deputy Minister for Indian Affairs, said that he wanted “to get rid of the Indian Problem ... our object is to continue until there is not a single Indian in Canada who has not been absorbed into the body politic”.⁷³ Although the Canadian story reflects the Australian experience in many ways, for the purpose of liability under Article 2(c) of the Convention on Genocide, discussion will focus less on how indigenous children got into the schools and more on the conditions they encountered once they were there. As was the case in Australia, indigenous children were forced into Residential Schools with the intention of denying them their culture and identity until they ceased to exist as indigenous and became white Canadians.⁷⁴ The schools became a defining feature of indigenous-government relations. 125,000 indigenous children passed through 125 schools between 1880 and 1996.⁷⁵ 20 percent of the indigenous population was processed through them. Thus, the common law requirement discussed in the Australian component concerning substantiality of population is *prima facie* satisfied. With regard to the extra criteria in subsection (c) that a part or whole of the people be targeted, such a substantial portion of the youth population represents not only a part, but given their potential as future-adults-in-the-making, the entire group.

Administration of the institutions was split between church and state, although, in contrast to Australia, the Federal government retained final control. Federal legislation, including the Gradual Civilization Act 1856 and the infamous and still operative Indian Act, vested all powers of decision-making concerning indigenous education in the Canadian government and made attendance at Residential Schools compulsory for

⁷⁰ MacDonald and Hudson, n53 at 17.

⁷¹ *Bringing them Home*, n1 at 94.

⁷² *Ibid*, 241.

⁷³ G Erasmus, *Notes on a History of the Indian Residential School System in Canada*, University of Calgary, 2004, 3.

⁷⁴ *Ibid*, 4.

⁷⁵ MacDonald and Hudson, n53 at 6.

indigenous children.⁷⁶ With the Truth and Reconciliation Commission on Residential Schools currently preparing a report similar to *Bringing Them Home*, due in 2014, the discussion of genocide in Canada is very pertinent.

ACTUS REUS CULPABILITY UNDER THE CONVENTION

The *actus reus* requirement of Article 2, subsection (c) of the Convention on Genocide requires proof that conditions of life calculated to bring about physical destruction are deliberately inflicted. The conditions have to be severe enough to cause the death of a substantial part of the targeted population.⁷⁷ Common law clarification of the conditions required to satisfy subsection (c) is found in *Prosecutor v Akayeshu*.⁷⁸ The *Akayeshu* test is whether a situation exists in which minimal requirements essential to life, such as a bare subsistence diet and insufficient medical supplies, are not being provided. *Prosecutor v Kayishema*⁷⁹ also added inadequate housing, hygiene, and clothing to this list of basic provisions.

(i) “Minimal Requirements Essential to Life”

Living standards in Residential Schools clearly met this test. The types of treatment Indian, Inuit and Metis children were subjected to combine to form a range of omissions to provide “essentials” that have been described as verging on physical torture. Celia Haig-Brown comments that the most commonly held memories of the school experience are of fear and hunger.⁸⁰ Physical labour took precedence over learning and whilst non-indigenous children received five hours education a day, indigenous children received two hours education and were then put to work.⁸¹ Avoidance of prescribed tasks often “resulted in public humiliation, head shaving and bread and water diets”.⁸² The situation at the schools was so severe that children frequently ran away, in many cases into harsh geographical surroundings in which they died, or committed suicide.⁸³ Exposure to disease and poor medical care were also defining features of the schools, to the extent that “Residential Schools endangered the bodies of aboriginal children through exposure to disease, over work, underfeeding and various forms of abuse”.⁸⁴ The conditions worsened when children expressed their own indigenous culture. Haig-Brown records that her father had a needle pressed through his tongue for speaking his language.⁸⁵ The Truth and Reconciliation Commission states that minimal clothing,

⁷⁶ Erasmus, n73 at 3. The term “Indigenous” is used to refer to the children who attended residential schools in Canada, in order to distinguish them from the “Aboriginals” who attended similar institutions in Australia.

⁷⁷ *Prosecutor v Jelusic*, n47 at para 82.

⁷⁸ *Prosecutor v Akayeshu* (1998) ICTR 96-4-T, para 506.

⁷⁹ *Prosecutor v Kayishema* (1999) ICTR-95-1-T, para 115.

⁸⁰ C Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School*, Arsenal Pulp Press, Vancouver, 2010, 61.

⁸¹ V Kirkness, “Aboriginal Education in Canada: A Retrospective and a Prospective”, *Journal of American Indian Education*, Volume 39, 1999, 3.

⁸² Haig-Brown, n80.

⁸³ E Furniss, *Victims of Benevolence: The Dark Legacy of Williams Lake Residential School*, Arsenal Pulp Press, Vancouver, 2010, 62.

⁸⁴ M Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia 1900-1950*, UBC Press, Vancouver, 1998, 57.

⁸⁵ Haig-Brown, n80 at 16.

sleeping on the ground, a maize and water diet, physical and sexual abuse, and wind-torn, structurally unsound school buildings, are conditions of life no better than prisoner of war camps.⁸⁶

(ii) “Physical Destruction”

The types of conditions inflicted on malnourished children were a fast track to death. Doctor Peter Bryce’s state-funded report on the schools in 1919 exposed a child death toll of between 30-60 percent from treatment he described as amounting to a “national crime”. Of 125,000 matriculations, Macdonald reports that only 80,000 survived the schools.⁸⁷ Although this is a higher proportion than that estimated by Bryce, it still represents physical destruction on a scale that affects a substantial portion of the race. Although murder is sometimes claimed, survivor reports show the strongest causal links for death as being the substandard physical conditions that were inflicted on the children.⁸⁸ The reason that a large number of children were dying in these conditions ought to have been obvious to those running the schools.

(iii) “Inflicted”

The substandard living conditions were inflicted by government agents in a number of ways. The first is through inadequate funding. The government refused to provide enough money to raise school conditions to livable standards.⁸⁹ Although it received numerous reports of the dire conditions in Residential Schools, the Federal government continued to give them only a tenth of the funding provided to schools for other Canadian children.⁹⁰ This meant that even if the schools wanted to improve their living conditions the money to do so was not available. Schooling institutions that were funded by the churches, predominantly the Catholic Church, were no better. Religious staff show up in the testimonies of survivors as fearful figures bent on maintaining torturous conditions of subjugation that were administered with religious zeal.⁹¹

(iv) State Liability

Federal culpability can also be found in the administration and running of the schools. While many individuals responsible for the abhorrent treatment of indigenous children were under the direct mandate of the church, all of them had to comply with and were controlled at the highest levels, by the government.⁹² In this sense the individuals operating the schools and administering the sorts of treatment discussed above were acting as government agents, thus making the state vicariously liable for their behaviour under Article 3 of the Convention on Genocide. Article 3 creates liability for “complicity” in genocide.⁹³ Colin Tatz describes this as effectively creating three legal personalities

⁸⁶ *TRC Interim Report*, n2 at 5.

⁸⁷ Macdonald and Hudson, n53 at 96.

⁸⁸ K Annett, *Hidden No Longer: Genocide in Canada Past and Present*, Squamish Nation, 2010, 10.

⁸⁹ Haig-Brown, n80 at 69.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 62.

⁹² D Paul, *We Were Not the Savages: A Mi'kmaq Perspective on the Collision Between European and Native American Civilizations*, Fernwood, Nova Scotia, 2000, 27.

⁹³ Convention on Genocide, n3 at Article 3.

in the genocide discussion: the victim; the perpetrator; and, the bystander.⁹⁴ This tripartite foundation draws a direct causative link between the government as vicarious perpetrator and the conditions inflicted on indigenous children as victims. Such a conclusion requires full awareness and complicity, which will be established in the *mens rea* discussion below.⁹⁵

MENS REA CULPABILITY UNDER THE CONVENTION

Mens rea requires that physical destruction was intended, calculated and deliberately inflicted. Intention to physically destroy is a very high standard and notions of cultural or racial identity destruction under section (c) will not satisfy it. The latter two *mens rea* requirements, *deliberate* and *calculated* combine to form *oblique intention*, which I believe is sufficient to satisfy the overarching requirement that physical destruction was intended.

(i) “Deliberate” and “Calculated”

In order to conclude that infliction was *deliberate* it must be shown that conditions at the schools were not accidental. This, in turn, is tied to whether or not the effect was *calculated*, which requires the government to have actively turned their mind to it. It needs to be shown that the government was aware that the schools were operating under conditions causing physical destruction, and despite that knowledge, continued to provide only enough funding to allow the administration to continue operating in the same destructive manner. It must be clear that the effect was “calculated” in the sense that it had been mentally processed and that existing conditions were “deliberately” inflicted through subsequent, informed, actions. This was, in fact, exactly the case: “The high infant and child mortality rate became known right at the beginning of the twentieth century”.⁹⁶ The Truth and Reconciliation Commission Chairperson, Murray Sinclair, commented recently that: “mass graves, deaths, no surprise really, of course we knew”.⁹⁷ This information had been provided to the government in reports that it had instigated and paid for. One 1915 report to the Federal government stated that 24 percent of healthy children died from illness after moving to Residential Schools.⁹⁸ In the 1920s another informant, Doctor Corbett, found a similar mortality rate to Bryce and observed that nearly all of the students were below a passable standard of health.⁹⁹ Whilst tuberculosis was a problem in wider Canadian society, and should be acknowledged as a contributing factor to the mortality rate, the problem was exacerbated in the schools where moribund children were forced to continue work and

⁹⁴ Tatz, n40 at 4.

⁹⁵ A precedent for individual bystanders acting as “Crown agents” is found in the New Zealand case of *R v Symonds* in which individuals buying land directly from Maori in contravention of the Treaty of Waitangi were legally reconstructed into crown agents in order to prevent Maori sellers from claiming residual rights to property they had parted with. *R v Symonds* (1847) NZPCC 387.

⁹⁶ Kelm, n84 at 61.

⁹⁷ “TRC Chairman Declares Residential Schools Genocide”, *The Manitoban*, February 2012, online at: <http://www.themanitoban.com/2012/02/trc-chairman-declares-residential-schools-genocide/9266>.

⁹⁸ J Milloy, *A National Crime: The Canadian Government and the Residential School System 1879–1986*, University of Manitoba Press, Manitoba, 1999, 24.

⁹⁹ *Ibid.*

attend classes.¹⁰⁰ The death toll was met with either apathy or a concerning enthusiasm from the Department of Native Affairs and Federal government. A government worker in one of the schools is quoted as saying after one boy's death, "perhaps it's good this one dies, its parents still cling to the old ways".¹⁰¹

It is clear from the above that the government knew that the schools were producing mass physical destruction of indigenous children yet continued to mandate and empower their operation without change. This is especially apparent when the government made the Schools compulsory for indigenous children under the Indian Act in 1921, even though numerous reports, including Doctor Bryce's, expounded the devastating impact the Schools were having on the children.¹⁰² The government was operating under a policy of "aggressive civilization" based on the United States government's policy towards native Indians.¹⁰³

(ii) *Oblique Intention of Physical Destruction*

Assessment of the deliberate and calculated criteria shows that the Canadian government was fully informed about the impact and operation of Residential Schools by their own investigations. Therefore, actions taken, either directly or through agents, were fully informed and the government clearly possessed the requisite *oblique intention*. That is to say, the Federal government can be found to have deliberately pursued destruction as a goal because it acted knowing that such destruction was already occurring on a massive scale, and would continue to occur unless it intervened, and had the capacity to alter the situation, but chose not to.

In my view, the above satisfies the *actus reus* and *mens rea* requirements of Article 2, subsection (c) of the Convention and shows that Canada committed genocide against its indigenous people through the instrument of its Residential Schools.

ABORIGINAL / INDIGENOUS RESPONSES AND EFFORTS

When aboriginals/indigenous peoples ask why they were subjected to these bad things by colonial society, it widens the rift that already exists between themselves and members of that society.¹⁰⁴ Some contemporary commentators even believe that discussions about genocide are "inappropriate and unhelpful".¹⁰⁵ Yet, such conversations force recognition that historical atrocities actually occurred and have left a continuing legacy of dysfunctional indigenous communities. They also reveal a sense of apathy toward addressing this dysfunction by a settler society that is bent on moving on and leaving its past behind.

Aboriginal Responses in Australia

¹⁰⁰ Ibid, 99.

¹⁰¹ Kelm, n84 at 61.

¹⁰² Ibid at 64.

¹⁰³ Furniss, n83 at 25.

¹⁰⁴ Tatz, n40 at 35-37.

¹⁰⁵ Cassidy, n5 at 114, quoting Australian Prime Minister, Kevin Rudd.

There is a wealth of cases, community protest, and actions, undertaken by Aboriginal people in Australia in order to have the nation confront the legacy of its genocidal past. *Kruger* is one example of this. The case possessed strong socio-political motives. Although they lost, the claimants inspired other Aboriginal communities out of their passivity and to take a similar stand. Although *Cubillo v Commonwealth of Australia*¹⁰⁶ did not directly deal with genocide the court acknowledged that a claim for damages might lie against the Australian government. In 2001 the cases of *Nulyarimma v Thompson* and *Buzzacott v Minister for the Environment* (heard in conjunction)¹⁰⁷ both sought to have genocide recognised for modern state actions. The first case concerned implementation of the “Ten Point Plan” which restricted native title claims under *Mabo v Queensland*.¹⁰⁸ *Nulyarimma* argued that his people’s separation from the land and its vital resources and culture under the Plan would amount to genocide. *Buzzacott* concerned the Minister of Culture and Heritages’ refusal to name Lake Eyre a world heritage site, something that would have afforded it significant traditional environmental protection. Instead the government allowed the mining company BHP Billiton to commence oil-prospecting operations on the site. Both claims invoked customary international law yet failed because Australia has not yet ratified the Convention on Genocide. The later cases reinforce “genocide” as an appropriate term for articulating Aboriginal dispossession and a powerful weapon in combating their ongoing domestic mistreatment.

There have also been increased efforts to have genocide acknowledged on the socio-political front. At the vanguard of this activism is the Aboriginal Tent Embassy. Since 1972 there has been a Tent Embassy sitting without interruption in at least one state.¹⁰⁹ The Embassy is a peaceful means of protest aimed at achieving self-determination.¹¹⁰ The Embassy claims that the Australian government has committed genocide against Aboriginal and Torres Strait Islander peoples. In 2001, the Tent Embassy announced that it was dispatching an envoy to The Hague to persuade a delegation to return with them to Australia to investigate “the Australian obligation to honour the United Nations Convention on Genocide” concerning the stolen generation.¹¹¹ The central tenet of the Embassy’s Manifesto is to continue promoting Aboriginal issues in order to ensure that redress efforts do not weaken. The Embassy will remain in force as long as the group feels that injustice against Aboriginal Australians continues.¹¹² It has been lambasted by influential non-Aboriginals as promulgating a “black arm band history” that is run by troublemakers.¹¹³

Mindsets and Motivations

Reactions from Aboriginal communities promote genocide as being a two-fold process. First, Aboriginals believe that they still inhabit a seriously disadvantaged position in

¹⁰⁶ See for example, *Cubillo v Commonwealth of Australia* [2001] FCA 1213.

¹⁰⁷ *Nulyarimma v Thompson & Buzzacott v Minister for the Environment* (1999) 96 FCR 153.

¹⁰⁸ *Mabo v Queensland* [No 2] (1992) 175 CLR 1.

¹⁰⁹ Short, n10 at 33.

¹¹⁰ *Ibid*, 149.

¹¹¹ Aboriginal Tent Embassy: The Hague Declaration, 2001, at: <http://www.eniar.org/news/ate.html>.

¹¹² <http://www.aboriginaltentembassy.net/>, 27/5/2012.

¹¹³ P Muldoon and A Schaap, “Confounded by Recognition: The Apology, The High Court and The Aboriginal Tent Embassy” in A Hirsch (ed), *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair*, Routledge, London, 2011, 14-15.

society. Second, they do not believe their disadvantage is being properly acknowledged or addressed by either the government or Australian society. Indigenous rights commentator Chris Graham sums it up by saying that despite the Tent Embassy being set up “all those years ago” because Aboriginal people were seeking land rights, a treaty and sovereignty, there is still only minimal and restricted recognition of land rights, no treaty and no self-governance.¹¹⁴ This exacerbates the social problems caused by Residential Schools. The Aboriginal students who left the Schools found themselves victims of abuse when confronted by a world in which they had no community and family support. Hundreds of powerful individual stories are contained in *Bringing Them Home*. Once outside the School many Aboriginals battled alcohol problems and severe mental health issues. Suicide rates amongst Aboriginal people are particularly distressing.¹¹⁵ Aborigines are at the bottom of income, housing and education statistics and have the highest numbers in the criminal justice system, domestic abuse and drugs and alcohol.¹¹⁶ The link between the stolen generation and the persistence of these statistics is that the trauma has been inherited. Psychologists employed by the Human Rights and Equal Opportunities Commission responsible for compiling *Bringing them Home*, concluded that “the impact of the forcible removals continues to resound through the generations of indigenous people. The overwhelming evidence is that the impact does not stop with the children removed, it is inherited by their own children in complex and often heightened ways”.¹¹⁷ The social experiences also threaten the existence of Aboriginal culture as a whole. Evidence of this can be found in the area of language, with only 6 percent of 250 Aboriginal languages now being considered “healthy”.¹¹⁸

The second concern is the growing sense of apathy amongst other Australians. When *Bringing them Home* was first released, Prime Minister, John Howard, was adamant that “this generation of Australians” was not going to apologise and bear the guilt of actions undertaken by previous generations.¹¹⁹ This view peaked again when the Leader of the Opposition, Tony Abbott, commented that it is “time to move on” when questioned about the Tent Embassy.¹²⁰ While this caused a dramatic and immediate protest by the Embassy, leading to a public confrontation with the Prime Minister, there was a substantial amount of public support for Abbott’s statement from within non-Aboriginal Australian society. This was largely based on the view that an earlier state apology and reparations meant the government had done enough to compensate for the past and Aboriginals now owned their own problems.¹²¹

¹¹⁴ C Graham, “The Tent Embassy: Fact v Fiction, Black v White”, *Crikey*, 15/2/2012 online at: http://www.crikey.com.au/2012/02/15/the-tent-embassy-fact-v-fiction-black-v-white/?wpmp_switcher=mobile.

¹¹⁵ *Bringing them Home*, n1 at 327.

¹¹⁶ *Ibid*, 198.

¹¹⁷ *Ibid*.

¹¹⁸ G Zuckermann, “Aboriginal languages deserve revival” in *The Australian Higher Education*, 26/9/2009, online at: <http://www.theaustralian.com.au/higher-education/opinion/aboriginal-languages-deserve-revival/story-e6frgcko-1225766141160>.

¹¹⁹ J Gemes, “Witnessing the Apology”, *Australian Aboriginal Studies*, Vol 1, July 2008, 1.

¹²⁰ Graham, n114.

¹²¹ Supporting a movement in this direction is a group of academics and journalists who have been labelled “Australia’s very own holocaust deniers”. See Tatz, n40 at 36.

Indigenous Actions/Responses in Canada

Canadian case law on genocide is limited. In *Malbouef v Saskatchewan*¹²² in 2005, the court struck consideration of the Convention on Genocide from the claim in order to prevent it having retroactive effect. However, using the Convention to support an analysis of the sort undertaken here would have been valuable. The case is interesting because, as with the later Australian cases, it reveals that the term “genocide” is a powerful weapon in the Indigenous claim for reparation for past injustices suffered at the hands of the government.

Social pressure from indigenous groups within Canada has taken a distinct form. The controversial figure of Kevin Annett and the organization, “Hidden from History”, sits at the forefront of radicalism aimed at exposing what they deem to be the silent genocide of Indigenous Canadians and providing a solution.¹²³ Annett’s involvement also extends to the groups “Friends and Relatives of the Deceased” and the “International Human Rights Tribunal into Genocide in Canada”. They have used the media to highlight the substantial number of hidden deaths stemming from forced matriculation in Residential Schools and to expose unmarked mass graves.¹²⁴ The group sees the only redress to the “systemic genocide” committed by the Canadian government to be the establishment of an independent republic comprised of Canada’s indigenous people to be known as “The Republic of Kanata”.¹²⁵

Mind-sets and Motivations

The motivation behind Canadian and Australian initiatives is supported by two similar kinds of evidence. The continuing suffering caused by the schools in Canada is believed to be so bad by some commentators that it requires repeal of the Indian Act to end the genocide.¹²⁶ The Indian Act and the schools are both fundamental threads of the same story, both having made significant contributions to the same status quo. Whilst the 1985 amendment of the Indian Act saw the repeal of its most offensive discriminatory provisions, it continues to significantly disadvantage indigenous individuals and upholds the supremacist mind-set that originally promoted the establishment of Residential Schools.¹²⁷ Similar to Australia, the “controlling of education” saw a deconstruction of identity that some commentators say continues to threaten the survival of indigeneity.¹²⁸ As in Australia, this is manifested in extremely poor social statistics, where: “Common circles of emotional, physical and sexual abuse, as well as addiction, suicide, poverty and other markers of generational trauma are considered the

¹²² *Malbouef v Saskatchewan* (2005) 273 R Sask. 265.

¹²³ <http://www.hiddenfromhistory.org/>, 27/5/2012.

¹²⁴ Annett, n88 at 55.

¹²⁵ Hiddenfromhistory, n123.

¹²⁶ Ibid.

¹²⁷ “It’s Time to Repeal the Indian Act”, *The Vancouver Sun*, 27/1/2012, online at <http://www.vancouver.sun.com/life/Guest+editorial+time+repeal+Indian/6064568/story.html>.

¹²⁸ Erasmus, n73 at 4.

residual effects of the Residential School experience”.¹²⁹ The youth suicide rate amongst indigenous peoples is 11 times higher than the national average.¹³⁰

The problem is compounded in Canada, as in Australia, by a growing sense of apathy amongst the descendants of white settler society. Even the dramatic difference in suicide rates has manifested an attitude of indignation towards the complaints and grievances of indigenous societies.¹³¹ Furthermore, there is now a threat to the Truth and Reconciliation Commission completing its task because its funding is inadequate¹³² and three commissioners, including the Chairperson, Harry Laforme, have resigned.¹³³ Given the social and socio-economic situation of Canada’s indigenous population, the failure to support an Inquiry into the actions that produced such a situation undermines the values of trust, care and redress that underpin the Commission and the government’s purported new inclusive approach to indigenous peoples.¹³⁴

As in Australia, the term “genocide” is important to indigenous groups because Residential Schools have produced a legacy of continuing disadvantage, which settler society and governments have become apathetic towards. It is one way of highlighting what happened to them, and of triggering legal processes and exposing the inadequate redress and acknowledgement made by the government. It challenges the settler view that enough has been done and indigenous people are now solely responsible for their own problems.

GOVERNMENT RESPONSES

The Australian Government

Government responses in both Australia and Canada have been to ignore the claim of genocide. Thus the possibility of ongoing disadvantage and apathy has never been seriously considered by them. In 2008 the incoming Rudd government apologised to the Aboriginal peoples of Australia. This apology acknowledged “the great wrong” done to a “proud people” but ignored the term “genocide”.¹³⁵ Prime Minister Rudd stated that the apology would serve as “just the first step” to redress, which included “acknowledgment of the past”. The scope of the apology has led to it being labelled “counter-productive” because it focuses on the victims instead of the actions of the perpetrator, thereby reinforcing the view that the state is a “neutral arbiter”, which somehow lessens its culpability and, therefore, its responsibility to provide redress.¹³⁶ Recognition is limited to financial deals struck with individual Aboriginals. These payments do not guarantee support for the healing or rebuilding of Aboriginal

¹²⁹ MacDonald and Hudson, n53 at 7.

¹³⁰ J Bhatia, “Canada: Aboriginal Youth Suicides Hit Crisis Rate”, *Global Voices*, January 18 2011.

¹³¹ C Sampson, “A Colonial Double Bind”, (eds) H George, L Kermayer, *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada*, UBC Press, Vancouver, 2008, 109.

¹³² *TRC Interim Report*, n2 at 8.

¹³³ “Chairman Quits Troubled Residential School Commission”, *CBC News Canada*, 20/10/2008 online at <http://www.cbc.ca/news/canada/story/2008/10/20/truth-resignation.html>.

¹³⁴ M James, “A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission”, *The International Journal of Transitional Justice*, 2012, 1–23, 1.

¹³⁵ Muldoon and Schaap, n113 at 186.

¹³⁶ *Ibid* at 185.

communities. *Bringing them Home* identified the need for greater efforts to provide aid to support the social reconstruction of Aboriginal communities.¹³⁷ Money in and of itself would not provide this and the focus needs to be oriented toward development of grassroots sustainable organisations.¹³⁸ Financial payouts and other efforts at redressing the plight of indigenous peoples in both countries, fail to address the systemic reasons for social inequality, and, have been relatively ineffective.¹³⁹

The Canadian Government

Canada has an all-party genocide protection group whose fifty-three members hold a mandate to observe situations where genocide may be occurring and undertake actions to prevent it transpiring or escalating.¹⁴⁰ Even with such a group expressing a commitment to abhorring genocide, there has been no government use of the term concerning its own actions. Truth and Reconciliation Commission member, Murray Sinclair, has already publicly admitted when referring to Residential Schools, that “in reality it was an act of genocide”.¹⁴¹ In Australia, *Bringing them Home* addressed genocide as a means of recognising and affecting the need for redress and concluded that it applied absolutely to the stolen generation.¹⁴² Yet the Australian government has never acknowledged that aspect of the Report. Therefore, in Canada, even if the Truth and Reconciliation Commission’s final report concludes that genocide did occur, political action may not follow. The state may, itself, obscure the pathway to truth and reconciliation by keeping records sealed and delaying funding.¹⁴³

As in Australia, there has been an apology by the Canadian government to its indigenous peoples. While some officials accepted the apology, other indigenous leaders felt it was an insufficient acknowledgment of the continuing harm that has been inflicted by Residential Schools.¹⁴⁴ The apology has been coupled with a financial settlement of a \$1.9 billion “healing fund”, topped up by a subsequent payment of \$40 million. This was to be allocated in part to reparations, with former Residential School students being given the option to elect to either sue the government or receive a “Common Experience Payment”, or an “Independent Assessment process” if there had been significant sexual or physical abuse.¹⁴⁵ As the comments by Sinclair in the *Interim Report* reveal, however, not enough is being done to accompany this with support to ensure that healing accompanies the payment.¹⁴⁶ Sinclair also intimated that acknowledging the devastating impact of the Residential Schools is a long-term process that goes far beyond an Official Apology and Commission Report. He highlights the proclivity of

¹³⁷ *Bringing them Home*, n1 at 307.

¹³⁸ For example “Link up”. This is a grass roots family-tracing and reunion agency that reintroduces separated aboriginal peoples back into their own communities: see *Bringing them Home*, n1 at 30.

¹³⁹ James, n134 at 1.

¹⁴⁰ <http://www.preventiongenocide.org/>, 27/5/2012.

¹⁴¹ TRC Chairman Declares Residential Schools Genocide, n97.

¹⁴² *Bringing them Home*, n1 at 234.

¹⁴³ *TRC Interim Report*, n2 at 8.

¹⁴⁴ See Beverley Jacob’s response to the apology on behalf of the Native Women’s Association of Canada at: <http://www.youtube.com/watch?v=jxc1TNWKFoM>, in which she acknowledges the apology with gratitude but suggests it is a step in the bigger direction of making indigenous nations strong again through respect.

¹⁴⁵ “School Abuse Victims Getting 1.9 Billion”, *CBC News Canada*, 23/11/2005 online at: <http://www.cbc.ca/news/canada/story/2005/11/23/residential-package051123.html>.

¹⁴⁶ *TRC Interim Report*, n2 at 8.

settler Canadian society to dismiss the claims of First Nations by saying that enough is being done, and, furthermore, claims that the government is using that view to justify inaction.¹⁴⁷ Many indigenous Canadians reject the payouts as being too little, too late, and are compiling a class action suit against the Canadian government in order to ensure that justice is done.¹⁴⁸

GOING FORWARD: OPTIONS AND AVENUES

Indigenous Australian and Canadian communities view “genocide” as the correct term for what happened to them and as a means of confronting societal apathy. However, it is unlikely that the Convention alone will be enough for Australian or Canadian Courts to hold their governments accountable. Although the Convention’s jurisdiction obviously extends to both states as ratifying parties, and enables it to oversee proceedings against “constitutionally responsible rulers”,¹⁴⁹ its power to be utilised in exercising that jurisdiction is dubious. Courts have already held that the Convention on Genocide will not be applied retroactively,¹⁵⁰ even if the impact is proven to be a continuing one. The Convention does not speak to the legacy of acts committed prior to its inception and is intended to preclude future acts of genocide.

A bigger obstacle is found in Article 6, which indicates that where a person [state] is found to be culpable under the Convention on Genocide, “they should be tried by a competent tribunal of the State in the territory of which the act was committed or by such an international panel as may have jurisdiction with respect to those contracting parties which have accepted its jurisdiction”.¹⁵¹ David MacDonald highlights the inherent conflict in the idea that a state would take itself to task on the issue of genocide.¹⁵² He also points out that indigenous groups are precluded from asserting genocide internationally because they are not internationally recognised states; therefore they do not have the ability to draw Canadian and Australian governments into their territory to be tried as an opposing party of the same kind under the Convention on Genocide.¹⁵³

Canada and Australia’s endorsement of the United Nations Declaration on the Rights of Indigenous Peoples [the Declaration] may, however, have provided two new avenues for pursuing genocide.

Article 7(2) of the Declaration establishes a right to live without being subjected to genocide. The term “genocide” is not expressly defined but subsection (e) of the Convention is explicitly incorporated:¹⁵⁴

¹⁴⁷ TRC Chairman Declares Residential Schools Genocide, n97.

¹⁴⁸ Association of Citizens Prosecutors Press Release, Toronto, July 1 2012 online at: <http://itccs.org/category/association-of-citizen-prosecutors>.

¹⁴⁹ Convention on Genocide, n3 Article 10.

¹⁵⁰ *Malbeouf v Saskatchewan* (2005) 273 R Sask. 265.

¹⁵¹ Convention on Genocide, n3 Article 6.

¹⁵² Macdonald and Hudson, n53 at 20.

¹⁵³ Ibid.

¹⁵⁴ Article 7(2) of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, A/61/L.67 (2007) [the Declaration].

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

Given the United Nations application of the Convention definition of genocide in the Rome Statute of the International Criminal Court 2002 [RSICC] and subsection (e) being incorporated into Article 7(2) of the Declaration, the same definition and qualifications that are set out in this discussion could apply in an analysis of culpability under the Declaration.¹⁵⁵

The first area in which the Declaration could aid indigenous claims is through the establishment of an international body that recognises stand-alone claims from indigenous peoples. If indigenous peoples from Canada and Australia could invoke the Declaration's provisions for dispatching a rapporteur to hear responses to claims, there could well be a strong international declaration of genocide having taken place. If the Convention on Genocide could be applied by such a body it would be a milestone in vindicating claims of genocide by indigenous groups, validating interim domestic reports, and would act positively as a catalyst for social redress efforts. Other implications of a Declaration being made by a body of this sort remain relatively unclear. Given the presumption against retroactive criminalisation entrenched in other United Nations instruments such as the RSICC, it is unlikely that punishments would be imposed.¹⁵⁶ A declaratory judgment would be valuable to the genocide debate, and increase international pressure for Canada and Australia to continue their efforts at redress through supporting their indigenous peoples. Other nations would also be forced to take notice of the pronouncement of an international body to which they are a party, much more so than they would to a foreign domestic report such as will be produced by the Truth and Reconciliation Commission.

The second potentially productive impact of the Declaration, if it is given force by domestic courts, is through the strength it lends towards self-determination claims, providing a potential solution to the problem raised by MacDonald concerning the barriers to indigenous groups accessing the Convention on Genocide. Article 3 enshrines the right to self-determination whilst other articles protect determination aspects, including the dictation of education requirements.¹⁵⁷ This is one of the reasons that Australia and Canada initially opposed the adoption of the Declaration. The Canadian delegate found the notion of self-determination was irreconcilable with a constitutional democracy.¹⁵⁸ Similar fears of the force the Declaration might lend to self-determination movements also led to prevarication by the Australian, United States and New Zealand governments.¹⁵⁹ While this option relies on future developments in the field of self-determination, it is an interesting international law point to examine. If the Declaration assists the development of some form of self-determination within indigenous communities in Australia and Canada, more doors will open by which governments could be held accountable. If an independent nation or nations with full self determination could be crafted out of the Declaration, they could become states

¹⁵⁵ Rome Statute of the International Criminal Court, 2002, Article 6. At present it is only enforceable by state bodies and not by individuals or groups.

¹⁵⁶ *Ibid*, Article 10.

¹⁵⁷ United Nations Declaration on the Rights of Indigenous People, Article 3.

¹⁵⁸ "Indigenous Rights Outlined by UN", *BBC News*, 13/9/2007: <http://news.bbc.co.uk/2/hi/6993776.stm>.

¹⁵⁹ *Ibid*.

with the ability to bring the governments into their own jurisdiction under Article 6 of the Convention on Genocide, for acts performed after its ratification. It could also open up doors for actions predicated on International Customary Law.

CONCLUSION

In my view, there is sufficient evidence to show that the indigenous peoples of Canada and Australia, the First Nations, Inuit, Metis, Aborigines and Torres Strait Islanders have all been the victims of “genocide”, through the operation of Residential Schools under their respective colonial governments. The difficulty has been establishing this conclusively in domestic courts, which favour government actions as being benevolently motivated rather than looking at the results of their actions on their victims at the time. Aboriginal groups asserting genocide have also met firm public opposition. Yet ongoing calls for recognition from indigenous groups in both countries shows the importance of continuing to use the term “genocide” because indigenous peoples still suffer the destructive effects of Residential Schools, and apathy within contemporary settler society needs to be confronted. Governments are obstinately avoiding placing the genocide mantle over their past actions and courts are also reasoning their way out of taking responsibility as demonstrated by *Kruger*. This means that the crippling psychological and social impact of the Residential Schools continues to perpetuate itself largely unchecked. Seeking international recognition reinvigorates redress efforts and stimulates conversations around the aboriginal/indigenous plight. The new avenues provided by the Declaration on the Rights of Indigenous Peoples, particularly, enables aboriginal/indigenous peoples to mobilise and ensure that their continued suffering and disadvantage is not simply ignored, or, worse still, reconstructed into a problem of their own making that is being used to hold the rest of Australian and Canadian society to ransom.