

# A GENOCIDE BY ANY OTHER NAME: CULTURAL GENOCIDE IN THE CONTEXT OF INDIGENOUS PEOPLES AND THE ROLE OF INTERNATIONAL LAW. ©

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## INTRODUCTION

The goal of this essay is to highlight the atrocity that is cultural genocide and discuss the possibility of the crime being punishable under the genocide convention. This piece will offer two case studies to highlight the destruction caused by cultural genocide in varying forms by detailing acts perpetrated by the State in both Guatemala and Canada. This crime is evident in the histories of many States with indigenous populations yet it has generally remained unpunished and a very difficult case to prosecute.

## WHAT DOES CULTURAL GENOCIDE MEAN?

Cultural genocide builds on our existing understanding of the crime of genocide. This crime is especially applicable to the indigenous peoples of the world, who continuously face threats to their cultural survival. When discussing the cultural survival of indigenous peoples, it is important to remember that cultural identity is very much a defining element for these peoples. For this section, it will be argued that an attack on the cultural identity of a people is a direct attack on the survival of those groups - an act of cultural genocide. The issue, as it stands, is that there is no international agreement as to what exactly constitutes as cultural genocide. The Convention on the Prevention and Punishment of the Crime of Genocide 1948<sup>1</sup> restricts the definition of genocide to violence committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”<sup>2</sup>, the inclusion of the term violence is the excluding factor for the crime of cultural genocide to fit within the reach of

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<sup>1</sup> Referred to hereafter as The Genocide Convention.

<sup>2</sup> Article 2 Convention on the Prevention and Punishment of the Crime of Genocide 1948

the act. Kingston argues that “[m]any advocates of indigenous rights argue that this narrow approach fails to acknowledge the full impacts of cultural destruction and that there is insufficient international discussion of the particular cultural threats to the world's indigenous minorities”<sup>3</sup>. In his writing on the subject, Davidson defines cultural genocide as “the purposeful weakening and ultimate destruction of cultural values and practices of feared out-groups”<sup>4</sup>. If this definition is applied to the current understanding of the definition of the crime of genocide, could there be an opportunity to develop the international understanding and legal ramifications of the crime? This remains to be seen, and this section will build on this very idea.

The scope of this essay is in relation to the indigenous peoples of the world, who are most often victims of this crime. However, in recent years, there has been a transition of many of these indigenous communities from vulnerable peoples in need of protection to self-actualizing groups who rely on the instruments of international law to ensure their survival.

There are numerous articles found in international human rights instruments that recognize the importance of cultural heritage and identity for all the world's' peoples. The 1948 Universal Declaration of Human Rights<sup>5</sup> recognizes that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”<sup>6</sup>. Further examples of some of the notable rights to enjoy one's cultural life are as follows: The International Covenant on Economic, Social and Cultural Rights<sup>7</sup> refers to the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protections of scientific,

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<sup>3</sup> Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

<sup>4</sup> Davidson L. “*Cultural genocide*”. New Brunswick, N.J: Rutgers University Press; 2012. Pp. 18-19

<sup>5</sup> Referred to hereafter as UDHR

<sup>6</sup> UDHR Article 27(1) accessed at <<http://www.un.org/en/universal-declaration-human-rights/>> Last Accessed 25/11/2017

<sup>7</sup> Referred to hereafter as ICESCR

literary, or artistic works<sup>8</sup>; The United Nations Educational, Scientific and Cultural Organization's<sup>9</sup> Declaration on Cultural Diversity outlines the benefits of cultural diversity for international development and asserts that human rights standards protect the right to culture. The declaration maintains that "is an ethical imperative, inseparable from respect for human dignity"<sup>10</sup>. The recognition and respect for cultural life, heritage and values are of obvious importance, so much so that they are included in these international legal instruments, it is also valid to note that these rights are not limited to third-generation rights or group rights, they are also included in first and second generational rights instruments further highlighting their importance and significance for, and to, human life.

It would be no less valid to consider an attack on an individual or groups cultural life just as deadly as an attack on their physical life. Kristin Hon has given claim that cultural genocide is just as destructive as physical or biological genocide, perhaps with less bloodshed but alluded to the obliteration of a group identity through the process describing it as "nothing more or less than the total destruction of a culture so as to obliterate the identity of a people"<sup>11</sup>. Here lies the argument that has divided legal professionals and scholars: if the entire cultural heritage, identity and lineage of any given group is annihilated, and forced assimilation into mainstream society occurs, the group, as a cultural entity, separate from the mainstream population ceases to exist, and if this cessation occurred at the hands of a state who, for example, intended to eliminate this cultural group through assimilation, the group, whole or in part ceases to exist.

To begin to form an understanding, or perhaps appreciation of why the term cultural genocide is of importance for victims and survivors of such

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<sup>8</sup> ICESCR Article 15 accessed at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> Last Accessed 25/11/2017

<sup>9</sup> Referred to hereafter as UNESCO

<sup>10</sup> Article 4 of UNESCO Universal Declaration on Cultural Diversity 2001 accessed at <[http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html)> Last Accessed 25/11/2017

<sup>11</sup> Hon, K. 'Bringing cultural genocide in by the backdoor: victim participation at the ICC', *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 360

crimes, it is necessary to delve into the meaning of genocide as it is currently understood by the international legal community. Drawing upon the work of Nersessian, in this section “culture refers to the wider institutions that are central to group identity. These include (but are not limited to) language, religious practices and objects, traditional practices and ways, and forms of expression”<sup>12</sup>. It is also a well-known fact that for many indigenous peoples across the globe “markers of culture also include territory, modes of governance, and relationships to the natural environment, including plants and wildlife”<sup>13</sup>. Many of the world’s indigenous groups have lifestyles very different to mainstream populations, and their customs and traditions are what unite and hold these communities together and bestow an important sense of identity for the members of these groups, which has been passed down through countless generations.

#### CASE STUDY I: GUATEMALA

This section will examine the crime of cultural genocide as it relates to the history and continued plight of the indigenous peoples of Guatemala in the pursuit of their collective cultural survival. The measures, actions and inaction taken by the Guatemalan Government in their persecution of the Maya could certainly have amounted to cultural genocide. To apply a definition to the crime, the words used to describe genocide by the General Assembly in 1946 in resolution 96 must also be taken into consideration. It is entirely reasonable to suggest that cultural genocide was understood to be within the definition as “[g]enocide is the denial of

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<sup>12</sup> Nersessian, D. ‘Rethinking Cultural Genocide Under International Law’ accessed at <[https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/section\\_1/5139](https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139)> Last Accessed 12/12/2014

<sup>13</sup> Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

the right of existence of entire human groups”<sup>14</sup> and if a group’s culture and society is attacked and they are forcibly removed from their lands, homes and families it would be consistent with the understanding of genocide as the general assembly understood it, a group who have their entire way of life upended and destroyed. In the case of Guatemala, through extensive attacks on the Indigenous communities of the rural highlands, blatant persecution and an incitement of hatred and disdain for the Mayan lifestyle and customs were all acts of cultural genocide. It has been credibly documented that during the reign of Ríos Montt “[t]he army destroyed ceremonial centres, sacred places and cultural symbols. Language and dress, as well as other elements of cultural identification were targets of repression”<sup>15</sup>. That is, in essence, a denial of the existence of the group whether in whole or in part. There is a limitation of the definition of genocide within international law, however, “indigenous nations continue to face systemic, widespread threats to their fundamental human rights to culture. These identity groups are increasingly conceptualizing such rights violations as cultural genocide”<sup>16</sup>.

Cultural genocide was a part of the crimes committed by the state and military upon the indigenous communities of Guatemala. The goal, as envisioned by these parties, was complete destruction of the Mayan way of life, their culture, their history and their society. “The massacres, scorched earth operations, forced disappearances and execution of Mayan authorities, leaders and spiritual guides, were not only an attempt to destroy the social base of the guerrillas, but above all, to destroy the cultural values that ensured cohesion and collective action in Mayan communities”<sup>17</sup>. Even if some or all members of a group remained alive, attacks on their cultural lives and existence were just as brutal. This is a sentiment which is echoed by Kress, who reiterates the importance of and

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14 UN General Assembly Resolution A/RES/96/1946

15 Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). p. 35 accessed at <<http://www.aas.org/search/gss/guatemala>> Last Accessed 05/06/2016

16 Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

17 Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). p. 23 accessed at <<http://www.aas.org/search/gss/guatemala>> Last Accessed 05/06/2016

significance of cultural identity to any group and how it is a defining feature further arguing that “the primary goal of the international rule against genocide (is) to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal”<sup>18</sup> which is what happened in the instance of Dos Erres. An entire village was massacred with no lineage remaining except for the haunting memory which is depicted in many indigenous folk tales and songs. Kristin Hon has given claim that cultural genocide is just as destructive as physical or biological genocide, perhaps with less bloodshed but alluded to the obliteration of a group identity through the process describing it as “nothing more or less than the total destruction of a culture so as to obliterate the identity of a people”<sup>19</sup>. The Ríos Montt regime can be clearly seen through a similar lens, as much as senior officials deny any direct attacks against the indigenous Mayans, the history and mortality figures speak for themselves.

Additionally, the CEH documented high numbers of clandestine graves that meant many of the victims of the genocide did not receive a proper Mayan burial, which is of huge importance for all communities of Guatemala, but it is especially important for the Mayan population, who again were the most affected group, as they hold a “core belief in the active bond between the living and the dead. The lack of a sacred place where this bond can be attained is a serious concern that appears in testimonies from many Mayan communities”<sup>20</sup>. The tactics employed by the military and the civil patrols were physically and psychologically cruel. Whilst physical “[a]ggression was directed against elements of profound symbolic significance for the Mayan culture, as in the case of the

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<sup>18</sup> Kress, C. ‘The crime of genocide under international law’, *International Criminal Law Review*. 6(4). 2006. p. 461-502

<sup>19</sup> Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 360

<sup>20</sup> Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). p. 28 accessed at <<http://www.aaas.org/search/gss/guatemala>> Last Accessed 05/06/2016

destruction of corn and the killing of their elders”<sup>21</sup>, there were further elements of psychological disruption to the Mayan lifestyle and culture with the patrol’s overt defamation of the indigenous culture “through the use of Mayan names and symbols for task forces and other military structures”<sup>22</sup>.

Within the model villages<sup>23</sup>, inhabitants were forced into accommodation rather than be allowed to choose their own. Having witnessed first-hand these model villages, Rebecca Clouser attested that “the location of their houses were chosen at random by the military, villagers were separated from their relatives”<sup>24</sup>, this unquestionably disrupted patterns of kinship which is often instrumental in indigenous populations. This inevitably created a massive disturbance of the transmission of indigenous cultural identity and heritage from generation to generation as a result of the hostilities and violence directed towards them and the evolving need to conceal their ethnicity. The forced militarised resettlement of people played a significant role in the destruction of the Mayan culture. Forms of amnesty were given to those civilians who opted to move into these military controlled communities, where the inhabitants would be subject to “psychological operations to re-educate the people”<sup>25</sup>. The scorched earth policies of the Ríos Montt regime and the forced transfer of indigenous populations from the traditional villages to the newly conceptualised model villages were causing irreparable damage to the cultural property of Guatemala.

What is important to note is that Guatemala has a long history of protecting the cultural property of the country. “The first steps to preserve Guatemala’s were taken in 1946 when the Ministry of Culture’s Instituto

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21 Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). p. 30 accessed at <<http://www.aaas.org/search/gss/guatemala>> Last Accessed 05/06/2016

22 Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). P. 30 accessed at <<http://www.aaas.org/search/gss/guatemala>> Last Accessed 05/06/2016

23 Military built compounds to house Mayan peoples.

24 Clouser, R. ‘*Remnants of terror: landscapes of fear in post-conflict Guatemala*’. *Journal of Latin American Geography*. 8(2). 2009. p. 13

25 Report of the Commission for Historical Clarification, *Guatemala; Memory of Silence* (1999). p. 31 accessed at <<http://www.aaas.org/search/gss/guatemala>> Last Accessed 05/06/2016

de Antropología e Historia was founded”<sup>26</sup>. Guatemala’s cultural heritage is divided into two groupings: tangible and intangible cultural heritage. Under the heading of intangible cultural heritage it has a breakdown of the time periods from which cultural property is protected and it explicitly states “the pre-Hispanic period which includes Mayan heritage.”<sup>27</sup> The report also states that the urban layout of towns and villages are forms of cultural property, which was not taken into consideration nor was it in any way protected, nor preserved at the time of the internal displacement of the indigenous population displaying how the government and military ignored the national law in place at the time.

In writing about the Mayan movement after the war, Burrell has claimed “much of this destruction was performed in an ongoing spectacle of terror, one that was particularly successful because the military assiduously cultivated parties already engaged in local conflicts, and forcibly inducted indigenous men and boys into military service, harvesting their insider knowledge while producing some of the fiercest killers in Latin America”<sup>28</sup>. After being initiated into the patrol units these men and boys would be forced to make their own people their enemy and join the military in their ongoing genocidal attacks on the indigenous populations of Guatemala. “The combination of random violence, mass displacement and militarized resettlement severely affected indigenous cultural and religious practices”<sup>29</sup>, the military, not only attacked livestock, crops and water supply of the indigenous population, they also “destroyed sacred sites, ceremonial spaces and cultural artefacts. Indigenous language and dress were repressed”<sup>30</sup>.

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<sup>26</sup>International Committee of the Red Cross Report on the Protection of Cultural Property 2000 p. 93 accessed at <[file:///X:/Downloads/cutural-property-report-icrc\\_002\\_0805.pdf](file:///X:/Downloads/cutural-property-report-icrc_002_0805.pdf)> Last Accessed 05/06/2016

<sup>27</sup> International Committee of the Red Cross Report on the Protection of Cultural Property 2000. p. 94 accessed at <[file:///X:/Downloads/cutural-property-report-icrc\\_002\\_0805.pdf](file:///X:/Downloads/cutural-property-report-icrc_002_0805.pdf)> Last Accessed 05/06/2016

<sup>28</sup> Burrell, J L. *Maya after war: conflict, power, and politics in Guatemala*. 1st ed. Austin: University of Texas Press. 2013. p. 24

<sup>29</sup> Sieder, R in Biggar, N. *Burying the past: making peace and doing justice after civil conflict*. Washington, D.C: Georgetown University Press. 2003. p. 213

<sup>30</sup> Burrell, J L. *Maya after war: conflict, power, and politics in Guatemala*. 1st ed. Austin: University of Texas Press. 2013. p. 24

There were very few international or domestic legal instruments that could be relied on for the protection and preservation of the Mayan cultural property. The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954<sup>31</sup> only applies to destruction of cultural property during the time of armed conflict<sup>32</sup>. As will be discussed in the following chapter, the aforementioned Convention only entered into Guatemala by accession in 1985. Further to this, there are intergovernmental organisations that work towards the protection of cultural property, like UNESCO<sup>33</sup>, who drafted the World Heritage Convention 1972<sup>34</sup>, however this is non-binding and the organisation has to abide by domestic laws: “[i]t (UNESCO) has no mandate to provide criminal protection or custody of materials, not to mention to impose sanctions directly against delinquent national authority”<sup>35</sup>. Jennifer Otterson Mollick, writing for the Carnegie Council, has said the following about the importance of cultural property and why it is so often targeted: “[i]t is often collateral damage during battles and bombings, the object of theft for those seeking to sell valuable objects, or the target of destruction in an attempt to destroy a people’s culture or evidence of a culture’s existence”<sup>36</sup>. An attack with the intent to destroy a group through eliminating their culture, history and existence is an act of genocide. Destroying cultural property is a tactic employed by many groups as a means to gain control over a group, by way of eliminating the group’s heritage, history and cultural practice and effectively destroying the ties that bind a group of people together. While attacks on cultural property are harming objects rather than people it can be a quick escalation when in the hands of a warlord who is working toward their own agenda and vision. Cryer suggests that attacks on cultural property as an act of cultural genocide is important as it can be viewed and provide evidence of

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31 <<https://www.icrc.org/ihl/INTRO/400>> Last Accessed 20/05/2016

32 Had this been ratified at conception the Mayan landscape would look very different today

33 United Nations Educational, Scientific and Cultural Organisation

34 <<http://whc.unesco.org/en/conventiontext/>> Last Accessed 20/05/2016

35 Nafziger, James A.R. et al ‘*Cultural Law: International, Comparative and Indigenous*’. New York: Cambridge University Press. 2014. p.295

36 <[https://www.carnegiecouncil.org/publications/ethics\\_online/0085](https://www.carnegiecouncil.org/publications/ethics_online/0085)> Last Accessed 21/05/2016

the intended destruction of a group<sup>37</sup>. This viewpoint is very logical and the very reason why the crime of destruction against cultural property is so grave yet underrated. As mentioned previously, Guatemala had not ratified many of the international legal instruments which were in place at the time and the reason for this is perhaps due to the level of protection said instruments would have afforded the indigenous peoples during the internal armed conflict.

### CASE STUDY II: CANADA

This section will address some the most important socio-legal and political questions that arose from the Truth and Reconciliation Report;<sup>38</sup> assess what the meaning of cultural genocide is in the context of the Residential School System; and discuss whether cultural genocide did take place. The main question in this instance is simple: did the Canadian government and church commit an act of genocide through the forced assimilation of indigenous children through the residential school system? Can the Convention on the Prevention and Punishment of the Crime of Genocide be interpreted to include cultural genocide and to corroborate the plight suffered by the victims of the Canadian Residential School System? This section will offer further insight into what social, legal and political implications arose from the Truth and Reconciliation finding of Cultural Genocide.

At the time in question, the late nineteenth and first half of the twentieth centuries, Canada operated quite an aggressive campaign against the livelihoods of its indigenous populations. Over the course of more than one hundred years “the central goals of Canada’s Aboriginal policy were to eliminate aboriginal governments; ignore aboriginal rights; terminate the treaties and, through a process of assimilation, cause aboriginal peoples to cease to exist as distinct legal, social, cultural, religious and

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<sup>37</sup> Cryer, R et al. *Introduction to International Criminal Law and Procedure* 2<sup>nd</sup> Edition. Cambridge: Cambridge University Press. 2010. p. 225

<sup>38</sup> Referred to hereafter as TRC

racial entities in Canada”.<sup>39</sup> Some opinions of the system have drastically changed over the years resulting in acknowledgment of the crimes and injustices committed against the first peoples of Canada. In some aspects, the country of Canada and the institutions that represent it have changed their views quite dramatically. For instance, in a statement issued by Duncan Campbell Scott, then Deputy Superintendent for Indian Affairs, he made the startling claim that “Indian children... in the residential schools... die at a much higher rate than in their villages. But this does not justify a change in the policy of this department, which is geared towards a final solution for our Indian problem,”<sup>40</sup> a sentiment echoed by a fellow cabinet Minister at the time who somewhat proudly maintained that “[t]he great aim of our legislation has been to do away with the tribal system... and to assimilate the Indian people in all respects.”<sup>41</sup> This wording alone should have been cause for concern with the inclusion of “a final solution”. This is contrasted heavily by the current Canadian Prime Minister Justin Trudeau who publicly acknowledged the harm caused by the residential school system; a sentiment mirrored by Chief Justice Beverly McLachlin of the Canadian Supreme Court who declared in a public lecture that “the indigenous peoples of Canada were victims of cultural genocide”.<sup>42</sup> Under this system “the establishment and operation of residential schools were a central element of this policy, which can be best described as “cultural genocide.”<sup>43</sup>

Holding the above argument in mind, as it is applied to the residential school system in Canada, it must be questioned whether this could, and possibly more importantly, should be considered an act of cultural genocide? If some of the statements from government and religious

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39 Akhavan P. Cultural Genocide: Legal Label or Mourning Metaphor? *McGill Law Journal*. 2016;62(1):243-70.

40 Statement made by Duncan Campbell Scott accessed at < <https://www.youtube.com/watch?v=vdR9HcmiXLA>> Last Accessed 02/12/2017

41 Sir John A. MacDonald 1887 accessed at < <https://www.youtube.com/watch?v=vdR9HcmiXLA>> Last Accessed 02/12/2017

42 Fine, S. “Chief Justice Says Canada Attempted ‘Cultural Genocide’ on Aboriginals”. *The Globe and Mail* (28 May 2015) see <[www.theglobeandmail.com](http://www.theglobeandmail.com)>

43 Akhavan P. Cultural Genocide: Legal Label or Mourning Metaphor? *McGill Law Journal*. 2016;62(1):243-70.

officials at the time are to be taken at face value, then yes indeed there is a case to be made for the term to be used. There was clear intent that lay behind this system of forced assimilation, and this intent was public knowledge as it was both endorsed and promoted by the Canadian state. In a public statement, a Canadian cabinet minister made the following claim: “in order to educate the children properly we must separate them from their families. Some people may say that this is hard but if we want to civilize them, we must do that”<sup>44</sup>. This would now be in direct violation of article 2(e) of the Genocide Convention. The goal of the residential school system was never to merely educate these children, it was a blatant mission to eradicate Indian heritage, culture and lineage: “their education must consist not merely training of the mind, but of a weaning from the habits and feelings of their ancestors, and the acquirements of the language, art and customs of civilized life”<sup>45</sup>.

The time period in which this happened and the widespread lack of understanding and appreciation for multiculturalism was an aggressive factor behind this residential school programme. Many harmful and callous statements which mirrored this warped mentality were issued publicly across the nation. Nicholas Flood<sup>46</sup> was cited as saying “Indian culture is a contradiction in terms... they are uncivilized... the aim of education is to destroy the Indian.”<sup>47</sup> In the 1879 David Report and Duncan Campbell, who at the time was the Deputy Superintendent for the Department of Indian Affairs, made the following statement of the intent within said department: “our objective is to continue until there is not a single Indian in Canada... that has not been absorbed into the body politic...and there is no Indian question and no Indian department”<sup>48</sup>. The

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44 Statement from a Federal Cabinet Minister 1883. Accessed at < <https://www.youtube.com/watch?v=vdR9HcmiXLA>> Last Accessed 02/12/2017

45 Egerton Ryerson, 1847 Report for Indian Affairs accessed at < <https://www.youtube.com/watch?v=vdR9HcmiXLA>> Last accessed 02/12/2017

46 Flood was the man who produced the 1879 Davin Report on ‘Half-Breeds’ in Canada’s school system

47 Nicholas Flood David Report 1879 transcript accessed at < <https://www.youtube.com/watch?v=vdR9HcmiXLA>> Last Accessed 02/12/2017

48 Statement made by Duncan Campbell Scott – Deputy Superintendent for Indian Affairs 1920

intent behind the system was and remains transparent. It was to disrupt the passage of cultural knowledge and heritage from one generation to the next. The end goal being to have no surviving Indian population in the Canadian State. The mass annihilation of a group, without any physical deaths<sup>49</sup>. In 'The Genocide Question' the hypothesis was put forward:

What would constitute proof of a *dolens specialis* for the UNGC<sup>50</sup> to apply? Evidence would need to be adduced of specific intent to eradicate Aboriginal people as a group, not just culture and traditions but the very lives of group members qua members and their ability to perpetuate the group's physical existence. For example, a very high death rate in the IRS system that could be proven to be intentional, such as the deliberate spread of disease with the intention of killing large numbers of Aboriginal children, would qualify. Proof of an intentional policy of forced sterilization targeting Aboriginal women would also qualify, coupled with evidence of the widespread use of this practice. Forced removal as a means of intentionally destroying the group would also be convincing<sup>51</sup>.

It is a fair observation to make that what occurred through the residential school system was in fact an act of genocide, under certain interpretations of the crime in international legal instruments.

#### WHAT DOES THE CRIME MEAN TO VICTIMS AND SURVIVORS?

There is no doubt for indigenous peoples the world over that there exists an unquestionable bond between themselves, their land and their culture. Their physical being is defined by their cultural heritage and identity and these are special bonds that indeed make the group who they are. Davidson has argued that “[c]ultural genocide is more accurate than “forcible assimilation,” because groups with clearly defined identities were

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<sup>49</sup> Although there were no intentional physical deaths, many of the children who were part of this volatile system died (approximately six thousand) through lack of immunity to common pathogens

<sup>50</sup> United Nations Genocide Convention

<sup>51</sup> MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

targeted as groups, rather than as individuals”<sup>52</sup>. It is reasonable to conclude that an attack of the cultural lives of any group is an attack on the group itself. In a hearing before the sub-commission of the Western Hemisphere an indigenous man from Brazil made one simple statement that embodies this special connection he claimed, in the case of indigenous peoples that “culture is life for us”<sup>53</sup> thus allowing for an understanding that an attack on culture is an attack on life in many indigenous communities.

While there is a limitation of the definition of genocide within international law, “indigenous groups continue to face systemic, widespread threats to their fundamental human rights to culture. These identity groups are increasingly conceptualizing such rights violations as cultural genocide”<sup>54</sup>. Meaning that even if some or all members of a group remained alive, attacks on their cultural lives and existence were just as brutal. This is a sentiment which is echoed by Kress, who reiterates the importance and significance of cultural identity to any group and how it is a defining feature further arguing that “the primary goal of the international rule against genocide (is) to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal”<sup>55</sup>.

The term genocide holds an important meaning especially for those who suffered the crime but also it displays a particular view of a state to the international community. Survivors applauding at the finding of the crime is a powerful scene, mirroring that of the Maya in Guatemala. Why is the word so significant and so important for the survivors and communities

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52 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

53 *Indigenous Peoples and the Natural Environment of Brazil: Hearing before the Subcomm. On the Western Hemisphere, House Comm. On Foreign Affairs*, 103<sup>rd</sup> cong., 2<sup>nd</sup> sess. 69 (1994). p.69

54 Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

55 Kress, C. ‘The crime of genocide under international law’, *International Criminal Law Review*. 6(4). 2006. p. 461-502

affected? It is not simply due to the acts being a crime, it represents the severity of the abuses that were inflicted upon them, their families, their wider communities and their ancestors. It is an acknowledgement by an official body that something awful occurred. More importantly for the survivors of these historic abuses “cultural genocide is above all a song of bereavement, a metaphor for mourning, rebuilding a shattered self-conception through the power of words. It is for us to hear those words, heal those wounds, and to reclaim our shared humanity”<sup>56</sup>. When discussing what happened to these generations of children in Canada, what they suffered, what their parents suffered and the painful burden felt by the wider indigenous communities, the declaration of the finding of cultural genocide by the TRC was of paramount importance due to the fact that “terms like cultural genocide... convey the essence of what the [Indian Residential School] system was about: the attempted destruction of Aboriginal languages, religions and cultures in Canada”<sup>57</sup> and with the official acknowledgment of the crime, it allows the long journey to a reconciliation of the peoples involved to begin.

#### WHY IS THERE SUCH A LACK OF INTERNATIONAL AGREEMENT ON A DEFINITION OF THE CRIME?

There remains the issue of a complete lack of prosecution for such crimes at present because there is a lack of international legal and political will to tie down a definition of the term. To apply a definition to the crime, the words used to describe genocide by the General Assembly in 1946 in resolution 96 must also be taken into consideration. It is entirely reasonable to suggest that cultural genocide was understood within the definition as “[g]enocide is the denial of the right of existence of entire human groups”<sup>58</sup>. Thus, meaning if a group’s culture and society is attacked and they are forcibly removed from their lands, homes and families it would be consistent with the understanding of genocide, as the

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<sup>56</sup> Akhavan P. Cultural Genocide: Legal Label or Mourning Metaphor? *McGill Law Journal*. 2016;62(1):243-70.

<sup>57</sup> MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

<sup>58</sup> UN General Assembly Resolution A/RES/96/1946

General Assembly understood it, a group who have their entire way of life upended and destroyed. Andrew Woolford argues that, particularly in the case of cultural genocide in Canada “this sort of “hybridic assault” on indigenous populations is no less severe than other social strategies of elimination, such as physical destruction of a group, and that current understandings of genocide allow colonizing states to avoid responsibility for cultural destruction”<sup>59</sup>. It is also important to note that Indigenous peoples, not always however, usually occupy lands that are vast and rich in natural resources, for which there has been long-term and systematic maltreatment at the hands of colonizing powers. This adds to the lack of political will to apply an agreed definition of the crime.

#### IS THERE ROOM FOR INTERPRETATION OF THE GENOCIDE CONVENTION?

For as long as the Genocide Convention has been in place, there have been numerous interpretations of what exactly the definition of the crime is and what acts the convention can protect against. If the understanding Lemkin gave to genocide is applied, that would mean “[g]enocide does not necessarily mean the immediate destruction of a nation... [but] is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”<sup>60</sup>. It would appear that the importance for Lemkin, the man that named the crime, was the intent that lay behind the actions, the intent to destroy the very existence of a group both physically and culturally. Akhavan argues that, “it is important to appreciate that genocide is a crime against groups – in particular against a national, ethnical, racial or religious group or as such. The question of its specific expression as physical, biological or cultural is thus secondary to the intent to destroy a group”<sup>61</sup>.

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<sup>59</sup> Woolford A. Ontological Destruction: Genocide and Canadian Aboriginal Peoples. *Genocide Studies and Prevention*. 2009; 4(1):81-97

<sup>60</sup> Lemkin R. “*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*” Washington: Carnegie. 1944 pp. 79

<sup>61</sup> Akhavan P. Cultural Genocide: Legal Label or Mourning Metaphor? *McGill Law Journal*. 2016;62(1):243-70.

Furthermore, there are some very curious interpretations of the crimes that can be deemed as genocide under the current legislation and this is something the TRC alluded to in their findings. The Commission attested that “it is difficult to understand why the forced assimilation of children through removal from their families and communities to be placed with people of another race for the purpose of destroying the race and culture from which the children come – can be deemed an act of genocide under article 2(e) of the UNs Convention on Genocide but is not a civil wrong”<sup>62</sup>.

In recent years, the international community has placed a greater emphasis on the protection of cultural life and property. What is possibly the biggest breakthrough in this field was in the Krstić case heard before the International Criminal Tribunal for Yugoslavia<sup>63</sup>. The Tribunal recognized that “genocide encompassed the destruction of a group as a distinct social identity, and that group destruction through purposeful eradication of culture and identity was conceivable”<sup>64</sup>. There were numerous criminal charges faced by Krstić, a Bosnian Commander, which included “complicity to commit genocide and extermination as a crime against humanity, included the deliberate destruction of mosques and houses belonging to Bosnian Muslims”<sup>65</sup>. The crucial factor in this charge was that the ICTY implicitly “recognized that physical attacks are often accompanied by destruction of cultural property and symbols; such acts of cultural destruction may be considered as proof of the specific intent to physically destroy an identity group”<sup>66</sup>.

There is more protection afforded to the cultural identity of groups at present with “cultural characteristics used to define the contours of protected groups, since there are no universally accepted definitions of racial, ethnic, religious, or national groups protected by the Genocide

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62 TRC Summary Supra note 2 pp. 258

63 Referred to hereafter as ICTY

64 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 373

65 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 374

66 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 374

Convention. Cultural considerations, including a group's social, historical, and linguistic characteristics, help to determine whether a given group is protected under the Convention"<sup>67</sup>. The original draft of the Genocide Convention in 1947 included a very clear component for cultural genocide. This is unsurprising as this was drafted by Lemkin and two others, who included Cultural Genocide in his own understanding of the crime of genocide. Under Article Three of the Draft Convention, the following five cases of cultural genocide were included in the UN definition of the crime of genocide:

- (a) The forcible transfer of children to another human group; or
- (b) The forced and systematic exile of individuals representing the culture of a group; or
- (c) The prohibition of the use of the national language even in private intercourse; or
- (d) The systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- (e) The 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.<sup>68</sup>

Of the above-listed instances relating to aspects which would be deemed Cultural Genocide, only sub-article A was voted through the General Assembly for inclusion in the final convention. Similar to the views held by MacDonald and Hudson in their writings on cultural genocide of indigenous peoples, there is a very valid reason why the remaining four articles were not included in the final wording of the convention and that

<sup>67</sup> Kingston, L. *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

<sup>68</sup> UN Secretariat Draft Convention accessed at <<http://www.preventgenocide.org/law/convention/drafts/>> Last Accessed 10/12/2017

being that they “would have applied to Aboriginal people”.<sup>69</sup> MacDonald and Hudson’s arguments for the necessity of the inclusion of cultural genocide within the Genocide Convention are mirrored by many others in the field, many of whom have been calling for this extension of definition for over forty years: “[i]n 1973, Davis and Zannis called for a wider definition to include not just “mass homicide” but cultural destruction, characterized by warping and mutilating the lives of groups of people”<sup>70</sup>. Moreover, the expansion on the definition of genocide within the 1948 Convention has been called for more and more in recent years. “Chrisjohn and Young in 1997, as well as Neu and Therrien in 2003, see the differences between “genocide” and “cultural genocide” as semantic rather than substantive, arguing instead for the original 1947 draft to be considered as the real standard by which genocide should be judged”<sup>71</sup>.

If changes to the definition of genocide under the Convention occurred, what would this mean for Canada and the victims and survivors of the Residential School System? One possibility would be “reducing the impact of *dolens specialis* would have a marked impact on how Aboriginal history in Canada would be reinterpreted, both legally and morally. These changes would provide wider legal scope for reassessing the IRS system and the nature of truth and reconciliation”<sup>72</sup>.

### WHAT NEXT?

The question that remains at the forefront is, could it be time for the international community to reconsider the original definitions included in the Draft Genocide Convention? If the growing international recognition of the importance of cultural preservation is taken into account, it would seem like the inclusion of cultural genocide might be welcomed. Chin has written about this exact inclusion and the logic behind it and stated that

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69 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

70 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

71 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

72 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

“[t]he reason why cultural destruction has been declared a war crime is because of its overlap with genocide, in that it is an attack on a specific group of human beings defined by their religion or ethnicity with the intention of erasing their culture. The devastation of precious artefacts or religious and historical monuments is significant because of the role these objects occupy in a specific community’s collective identity. It is a crime against humanity and an attack on human dignity, not merely an attack on physical things”<sup>73</sup>. Even if this argument was set aside, in the case of Canada and the residential school system, could physical genocide be prosecuted based on the serious mental harm caused to the children placed in the care of the residential schools?

It is somewhat sad but unsurprising that Canada was one of four States who rejected the United Nations Declaration on the Rights of Indigenous Peoples. This lack of unity and recognition of the right of indigenous peoples in Canada is a hurdle along the road to reconciliation. Justice Sinclair affirmed that “survivors need to know, before they leave this earth, that people understand what happened, and what the schools did to them”<sup>74</sup>. For this recognition to be cemented, further recognition of past abuses and injustices need to be formally acknowledged and firm measures for the prevention of any similar occurrences have to be put in place. The lack of motivation behind this, to reiterate Kingston’s belief on the subject, is that “[c]ulture is often viewed as a residual category of human rights that has not been credited with much importance within the international community, and the full implications of cultural rights as human rights requires further exploration”<sup>75</sup>. For the crime of cultural genocide to be prevented in the future, jurisdiction needs to be given to international courts.

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73 Chin, K. ‘Cultural Destruction: A Crime Against Humanity’. 2016 accessed at <<http://www.brownpoliticalreview.org/2016/10/cultural-destruction-crime-humanity/>> Last Accessed 06/12/2017

74 Justice Sinclair at TRC findings hearing accessed at <<https://www.youtube.com/watch?v=MVIpgBKH07U>> Last Accessed 02/12/2017

75 Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

That being said, a new feature in the Rome Statute of the International Criminal Court<sup>76</sup> offers the potential to “inject a cultural perspective into the proceedings”<sup>77</sup>. Although the crime is not specifically mentioned within the Rome Statute, there does exist a provision allowing victim participation in a legal capacity for the duration of the investigation and trial. Kingston writes of the hope this provision provides for the field of international law and the recognition of the importance of the cultural lives and survival of the world’s peoples. This echoes the sentiment of Hon who believes that the inclusion “was justified by the belief that victims are in a prime position to help the ICC achieve its truth-finding goals, and that their participation ensures that the ICC will address their needs for both accountability and justice”<sup>78</sup>. Hon believes that cultural genocide should be internationally recognized, and further to that, that prosecutors within the International Criminal Court and other legal representatives of the victims and survivors of cases of cultural genocide “should pay special attention to the impacts of a more “culturally-nuanced” approach to the prosecution of genocide”<sup>79</sup>.

It is incredible that so many forms of opposition to the definition of the crime exist at an international level. It is blatantly clear that “[c]ultural genocide is a “unique wrong” that warrants independent recognition by the international community and should not be limited to a subsidiary role in cases of physical genocide.”<sup>80</sup> The lack of flexibility within international human rights jurisprudence to address the issue causes grave concern, especially when paired with the fact that “narrow legal definitions of genocide fail to address the intentional and systematic eradication of a group's cultural existence”<sup>81</sup>. Hon is of the belief that with pressing for the

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76 Referred to hereafter as ICC

77 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 363

78 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 381-832

79 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 408

80 Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

81 Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.

inclusion of “the cultural background of a conflict and a mechanism for addressing cultural harms, the ICC could provide a new avenue for addressing the issue of cultural genocide”<sup>82</sup>. The international legal community has displayed some positive change in the face of prosecuting attacks of the cultural lives of a group. In describing the events that led to the arrest and charges against al-Mhadi, Chin affirms “the world must not forget that these are attacks on a people. The obliteration of artefacts and temples are only as significant as their physical, psychological, and human effects, and a symbolic victory is not true restoration... [w]ars may look like they are being fought in culture and ideology but repairing artefacts without addressing human losses is merely catching little fish and declaring grand victories in restorative justice”<sup>83</sup>.

In relation to Canada, and particularly the residential school system, “[t]he idea of cultural genocide is particularly important... because few mass killings or instances of direct physical destruction occurred in Canadian history. But, there are many cases of policies whose indirect intent was to destroy culture at the very least, and First Nations would argue the upshot was the same—the end of them as a people. Tacking on the word “culture” somehow signals something was less than real genocide. Instead, scholars are arguing that destroying a group’s culture amounts to genocide plain and simple, with no need for a qualifier that softens the blow”<sup>84</sup>. Welch made a fitting argument in a nuanced interpretation of the definition of genocide and argued that “if genocide should be understood as the “destruction of group life rather than lives within a group,” then in the case of Canada’s indigenous peoples, that means understanding what makes them a group, what defines their cultural cohesion, such as a profound attachment to the land and nature. So, in Canada’s colonial past,

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82 Hon, K. ‘Bringing cultural genocide in by the backdoor: victim participation at the ICC’, *Seton Hall Law Review*. 43(1). 2013 pp. 359-409 ,p. 363

83 Ibid.

84 Welch, M. A “[The Genocide Test](https://www.winnipegfreepress.com/breakingnews/the-genocide-test-266849891.html),” *Winnipeg Free Press*, July 12, 2014, accessed at <<https://www.winnipegfreepress.com/breakingnews/the-genocide-test-266849891.html>> Last Accessed 06/12/2017

systematically depriving First Nations of access to their land so European pioneers could settle and railways could be built, is genocidal”<sup>85</sup>. If this is the case, as put forward, then “the federal government of Canada bears primary responsibility for adopting and implementing an explicitly genocidal policy”.<sup>86</sup> As MacDonald and Hudson have argued, “the parallels between IRS survivors and genocide survivors in other contexts are often striking.”<sup>87</sup> MacDonald and Hudson have argued extensively of the possible benefits for indigenous Canadians, should an official finding of genocide be reached “[i]t would make a stronger moral and legal case for treaty rights to be upheld, for forms of Aboriginal self-determination and for better political representation as suggested by the Royal Commission on Aboriginal People”<sup>88</sup>. Furthermore, “[i]t might promote a second apology, greater reparations and a stronger sense of national responsibility. It might promote real attempts at reconciliation on the part of many Canadians”<sup>89</sup>.

However, there are concerns that claims of genocide might be dismissed by Canada's mainstream population who may view the claims as an exaggeration or a problem for the churches and the government to deal with. This mentality is a dangerous obstacle facing the reconciliation process. As discussed previously, a finding of genocide holds a different meaning among those closest to it, victims and survivors of the crime, those held accountable for the crime, academics researching and analysing the crime, for the different institutions hearing cases about said crimes, be they domestic courts or international tribunals.

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85 Welch, M. A “The Genocide Test,” *Winnipeg Free Press*, July 12, 2014, accessed at <<https://www.winnipegfreepress.com/breakingnews/the-genocide-test-266849891.html>> Last Accessed 06/12/2017

86 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

87 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

88 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

89 MacDonald DB, Hudson G. “The Genocide Question and Indian Residential Schools in Canada. *Can J Political Science*. 2012 45(2) 427

To echo Kingston's sentiment, it is fitting to conclude this section with a plea to the international legal community to take note of the irreparable damage and threats caused by cultural genocide: "Although the distinct recognition of cultural genocide—either via a separate international treaty or through the amendment of existing frameworks such as the UDHR—does not currently have widespread political support within the international community, it should nevertheless remain a goal that is actively, perhaps incrementally, pursued by human rights advocates."<sup>90</sup> While the goal of righting historical wrongs remains a primary concern for many stakeholders affected and involved with the Residential School System and the persecution of the Maya in Guatemala, it also opens a new channel of investigation, one that is hugely topical at this very moment in time and that is the education of indigenous children around the world. The pressing issue is that the mentality needs to be to educate and not eradicate and this is a new and worrying phenomenon.

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<sup>90</sup> Kingston, L. The Destruction of Identity: Cultural Genocide and Indigenous Peoples. *Journal of Human Rights*. 14(1). 2015. pp.63-83.