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Pursuing Justice: The Criminal Liability of the Christian Clergy in the Cultural Genocide of Indigenous Peoples in Canada and Australia

Case Studies on the Residential School System in Canada and the Stolen Generation Child Removals in Australia

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Abbreviations

ICC	International Criminal Court
ICJ	International Court of Justice
UNGA	United Nations General Assembly
ECOSOC	Economic and Social Council
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ECCC	Extraordinary Chambers in the Courts of Cambodia
NNCL	Nazi and Nazi Collaborators Punishment Law
ILC	International Law Commission
VCLT	Vienna Convention on the Law of Treaties
WGIP	Working Group on Indigenous Populations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
CRC	United Nations Convention on the Rights of the Child
IRSSA	Indian Residential School Settlement Agreement

Summary

Indigenous populations often bore the brunt of Christian settler colonization resulting in marginalization, assimilation, Christianization, and cultural elimination. Most perpetrators of colonial injustices go unpunished and wrongdoings unacknowledged, barring the possibility of genuine international and national reconciliation for indigenous peoples. Major settler colonizer states have dark colonial histories regarding the treatment of indigenous peoples, among which two renowned examples are the case studies of this thesis, the Canadian residential school system, and the Australian stolen generation child removals. These state-enacted assimilation policies prescribed forcible indigenous child removals to church-run educational and residential institutions.

This research aims to explore the criminal liability of the Christian clergy members in the two assimilationist systems, through the establishment of a culturally-permissive interpretation of the UN Genocide Convention's genocide definition. The thesis analyses the historical development of the codification of genocide, deciphers the elements and definitions of the crime and explores whether cultural genocide could be understood as part of the international criminal law framework on genocide. Additionally, it assesses whether the atrocities in Canada and Australia amount to a cultural genocide which could trigger the individual criminal liability of Christian clergy members who administered the destination institutions of the forcible child transfers.

The thesis concludes that the UN Genocide Convention's interpretation reasonably infers a cultural component to the definition of genocide and asserts that the atrocities in the Canadian residential school system and the Australian stolen generation child removals amount to cultural genocide. Further, the research suggests that the moral and practical assistance provided by the Christian clergy members in these two systems constitute aiding and abetting in the commission of cultural genocide, thereby triggering individual criminal liability. Lastly, the thesis advises that the best possible pathways for prosecuting members of the clergy would be through exercising universal jurisdiction in absentia.

Chapter I: Introduction

The colonization of indigenous people is a continuous, multifaceted, and widespread phenomenon with irrevocable transgenerational effects. Throughout human history, colonization of indigenous identity manifested in various forms including forcible assimilation, welfare policies, and physical, biological, and cultural annihilation of indigenous groups. These abusive measures trailed the 'desired aim' to eliminate indigenous lifeworlds and absorb indigenous peoples into repressive majority cultures.

Christian settler colonizer states legitimated occupation through the Doctrine of Discovery, a religious dogma that allowed religious pilgrims to take over 'newly discovered' non-Christian territories as long as they spread the faith among the inhabiting population.[1] 'Europeanism' was a related ideology positioning European colonizer states and their populations at a racial, moral, and cultural superiority, and correspondingly degrading the indigenous ways of life as barbaric and unworthy.[2] The arbitrary prerogatives of 'Europeanism' and Christianity designed unearned entitlements for missionaries and legitimized the genocidal exploitation and marginalization of indigenous peoples globally.[3]

This thesis will focus on two well-known examples of indigenous colonization in Canada and Australia. During the 19th and mid-20th centuries, the two major settler colonizer states systematically repressed and forcibly assimilated indigenous groups with the practical and moral assistance of Christian churches. Canada operated residential schools for indigenous children run by Christian staff, where pupils were underfed, overworked, sexually and physically abused, and denied their right to practice indigenous languages, culture, and traditions. On the other hand, Australia enacted welfare policies grounded on the moral underpinnings of the Christian faith, authorizing forcible indigenous child removals for placement in church-run foster care institutions, exploitative employment, or white-Christian foster homes.

[1] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada' (2015) IR4-7/2015E-PDF https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf accessed 10 March 2023.
[2] Thomas McMahon, 'Origins of White Supremacy: The Only 'Doctrine' That Actually Matters' (2022) Social Science Research Network https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4110207 accessed 10 March 2023.
[3] Ibid.

Since the end of the last century, a couple of national initiatives have been launched to hold state and Christian actors accountable for their involvement in wrongdoings against indigenous people. However, most of these proceedings were based on tort, administrative, and fiduciary claims, or the physical and sexual abuse of indigenous children, and not the cultural implications of these abusive policies.[4] This thesis aims to assess the criminal liability of the Christian clergy in aiding and abetting the cultural genocide leading to language and culture loss for indigenous peoples. It seeks to do so by proposing the hypothesis that cultural genocide is a form of genocide giving rise to criminal liability.

Cultural genocide has been a much-debated concept in academic, political, and indigenous spheres since the codification of the prohibition of genocide. However, it is not an internationally recognized crime and is often stamped as a solely emotive and political tool. The author aims to discredit these claims by exploring a culturally-permissive understanding of the UN Genocide Convention's genocide definition, underpinned by national and international jurisprudence, teleological and textual treaty reading and scholarly opinions. Consequently, the thesis seeks to establish a permissive interpretation of the prohibition and prevention of genocide that includes the crime of cultural genocide in the Genocide Convention definition. Since the Convention's meaning influences the definition and elements of other international law sources on genocide, the culturally-permissive treaty reading would entail a natural overspilling effect to the jus cogens and customary international law principles of the crime, thereby allowing an inclusive international genocide regime.

Establishing the notion of cultural genocide would allow for an acknowledgement of the oppression of indigenous populations and enable international and nationwide reconciliation. The thesis focuses on the recognition of this international crime to allow for the wider protection of indigenous cultures and acknowledge the past wrongdoings against them. Accepting the framework of cultural genocide in international law would open doors for holding perpetrators accountable and guaranteeing genuine access to justice to indigenous peoples around the world. Indigenous people bore the brunt of colonization for centuries and their rights are to this day, not adequately protected from Western economic, political, and

[4] Konstantine S. Petoukhov, 'Violence, compensation, and settler colonialism: Adjudicating claims of Indian Residential School abuse through the Independent Assessment Process' (Ph.D. Thesis, University of Ottawa 2021).

social interests. Genuine international accountability for perpetrators that carried out injustices is essential for the effective functioning of the international genocide framework and the pursuit of justice for indigenous peoples.

However, since colonization is an undeniably international phenomenon that overarches centuries of human suffering and human rights violations, there are limitations to this research. Due to the limited length of the study, the thesis will not entertain claims from earlier- or neo-colonization periods or other human rights violations suffered by indigenous peoples in the rest of the world. These two states' histories have been carefully selected as case studies due to the Christian churches' clear-cut involvement in their abusive practices and the states' international criminal obligations and status towards the International Criminal Court. Additionally, while the research anticipates encountering arguments against the inclusion of cultural genocide in the genocide international legal framework due to views on it potentially loosening and weakening the definition of genocide, resentment toward the idea of holding religious actors responsible, and temporal statutory limitations, it is motivated to strengthen indigenous justice by showcasing possible pathways of criminal liability for the violations committed against indigenous peoples.

The thesis seeks to analyse the answer to the following research questions to examine the criminal liability of the Christian clergy members for the cultural genocide committed in Canada and Australia: *What is cultural genocide and how does it fit into the current international legal framework on genocide?* followed by *Could the injustice committed against indigenous peoples in Canada and Australia amount to cultural genocide?* and *What was the role of the Christian Clergy in the cultural genocide?* finally, *How can cultural genocide against indigenous peoples in Canada and Australia can be remedied?*.

The research is conducted via a combination of doctrinal and applied legal research methodology via the method of desk research. The paper applies a doctrinal methodology, analysing legal concepts, provisions, and principles existent in the legal framework. It uses a specific type of doctrinal research, namely analytical legal research to focus on the precise meanings and interpretations given to the law by deciphering and examining rules. This methodology aims to understand the objectives and underlying purposes of the law. Additionally, the thesis utilizes applied legal research to inquire about the outcomes of specific applications of legal provisions and principles to a set of historical facts, in this case,

applying the international criminal framework on genocide to the Canadian residential school system and the Australian stolen generation child removals.

In the following chapter, the research will describe the legal and regulatory framework and the victim's experiences in the Canadian residential school system and during the Australian stolen generation child removals. Further, chapter three will provide a historical account of the codification of genocide and the drafting history of the UN Genocide Convention, which led to the explicit exclusion of the crime of cultural genocide. To understand the contents of genocide, the paper will provide a detailed overview of the traditional understanding of the elements and definitions under the treaty, customary international law, and jus cogens prohibition of genocide. In search of broader protection, the fourth chapter will discuss the notion of cultural genocide, starting with the opposing and proposing sentiments of this understanding, followed by a detailed account of the cultural aspects of the original genocide definition provided by Raphael Lemkin, the birthfather of the codification of the crime. The paper will then discover how the original conception of the crime of cultural genocide is currently resurfacing in jurisprudential decisions and scholarly opinions and how indeed the conventional methods of treaty interpretation allow for a cultural understanding of the Genocide Convention. After having established that the crime of cultural genocide could be argued under international criminal law, in the fifth chapter, the thesis will turn to ascertain whether the wrongdoings committed in Canada and Australia fit the elements and definitions of the crime and thus trigger individual criminal liability for perpetrators and contributors. Thereby, the research will analyse how the Christian clergy's aiding and abetting significantly contributed to the commission of cultural genocide and gave rise to individual criminal accountability. In the last subchapter, the paper explores potential avenues for the prosecution of the Christian clergy for their involvement in the crime of cultural genocide.

Chapter II: Injustices Faced by Indigenous Peoples in Canada and Australia

Settler colonialism doomed the prospects of salvaging indigenous culture in Canada and Australia. Abusive policies and practices were enacted in the two countries to civilize and Christianise indigenous inhabitants, and not least, to create a cheap workforce for the imperial states. The long decades of the 'indigenous project' resulted in multiple generations of indigenous children being sexually, physically, and psychologically abused, stripped from their culture, language, and spirituality, while being denied the relationship with their traditional land.[5] This chapter aims to clarify the colonial context in the two countries to allow for a deeper understanding of the contextual environment of the wrongdoings. Furthermore, the chapter will comprehensively account for the regulatory and legal framework and personal experiences relating to the Canadian residential school system and the Australian stolen generation child removal policies.

2.1. The Colonial Context in Canada and Australia

Without the contextual environment of colonialism and imperialism, wrongdoings committed against indigenous people in Canada and Australia during the 19th and mid-20th centuries cannot be fully understood. Colonialism in Canada and Australia took place in methodically divergent forms intruding into all aspects of indigenous life. Indigenous livelihoods have been affected by land grabbing, economic exploitation, and outlawing traditional practices, spirituality, and local political customs, with the imposition of European-style political, cultural, and belief systems and agriculture.[6] These invasive practices aimed to civilize and Christianize the inhabiting populations and create a vast, cheap, accessible agricultural workforce for the imperial powers. Christian colonial powers justified their cultural and territorial claims through the Doctrine of Discovery. The Doctrine of Discovery is a Christian legal principle emerging from various papal bulls enacted during the 15th century, which entitled Christian states to claim ownership over 'terra nullius', otherwise uninhabited lands, to enforce European civilization and spread the Christian faith.[7]

[5] Darlene Johnston, 'Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism' in Micheline Labelle et al, *Le Devoir de Memoire et les Politiques du Pardon* (Quebec University Press 2005).
[6] Ibid.
[7] Robert J. Miller, 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5(1) The Indigenous Peoples' Journal of Law, Culture & Resistance 35.

This doctrine was primarily used to substantiate colonialization efforts in the Americas but has also been invoked in other English colonies, including Australia.[8] However, these lands were far from uninhabited. Indigenous people lived on these lands with their cultures, beliefs, and political establishments deep-rooted in their values, territory, and surrounding natural environments.

Nevertheless, these worldviews did not align with Christianity's spiritual and political order and what imperial superpowers envisioned as universally desired. On the contrary, settler colonizer states viewed anything alternative to their universal world order as threatening socio-economic advancement and Christianity.[9] Therefore, Christian colonizers considered these lands 'terra nullius' since they were not inhabited by populations deemed suitable for ownership over territory. Missionaries entered Canada and Australia on alleged 'civilizing and converting missions', now understood as cloak practices, whitewashing the colonial efforts embedded in white supremacy, racism, and imperialism.[10] The missionaries preached that a social and cultural transformation is imperative to bring up indigenous peoples' lifeworlds to the level of European civilization and agriculture.[11] The specific policies and practices encompassed marginalizing and excluding indigenous groups to particular territories and diminishing their relationship to their lands and environment, enclosing them from the majority cultures through prohibitive familial relations laws, removing children from their parents to socially exclude them from indigenous social customs and prohibiting the use of traditional languages. It is essential to understand that these policies were enacted with the colonial mindset, that the European approach to culture and religion is absolute, and that indigenous civilizations were unworthy of protection and preservation and eventually destined for extinction.[12]

[8] Robert J. Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, Oxford 2010).
[9] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families' (1997) https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf accessed 10 March 2023.
[10] Thomas McMahon, 'Origins of White Supremacy: The Only 'Doctrine' That Actually Matters' (2022) Social Science Research Network https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4110207 accessed 10 March 2023.
[11] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[12] Ibid.

2.2. The Residential School System in Canada

The Canadian residential school system operated in an ad hoc manner since the 17th century and became an organized federal policy from the 1870s until the 1970s. Residential schools were government-funded educational institutions operated by Christian church denominations for indigenous children The schools were essentially re-education and re-socialization institutions for indigenous children, that intended to absorb them into mass Canadian culture and destroy their indigeneity. The residential school system has been nationally acknowledged to be a destructive assimilation policy against indigenous populations stemming from a colonial and Christian ideology.[13]

2.2.1. Regulatory and Administrative Framework of Canadian Residential Schools

The first residential school in Canada, a Roman Catholic school, opened in 1635 in Quebec City,[14] intending to civilize and Christianize indigenous young boys.[15] Nonetheless, it presented to be a failure due to a lack of attendance.[16] Church-run schools started to emerge since then, notably after the establishment of the Canadian state in 1847 when the federal government agreed to provide per-student grants to all church-run boarding schools.[17] Despite the widespread appearance of schools, indigenous groups never requested a centralized church-run education for their children during early agreements with the Crown. However, in the later years, the government pressured them to accept the residential school system during treaty-making processes.[18]

After the state establishment, assimilation policies started to crystallize in federal law-making. The first Federal Indian Act was passed in 1876 by the Department of Indian Affairs, the administrative authority managing indigenous and British relations through Canada's

[13] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada' (2015) IR4-7/2015E-PDF https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf accessed 10 March 2023.
[14] Ibid, 31-32.
[15] Indigenous or aboriginal peoples, in this context, refer to the original peoples residing in North America and their descendants, as defined on the website of the Government of Canada. In Canada, three culturally distinct groups are identified, namely Indians, Inuit, and Métis. In a 2016 survey, 1.67 million people identified themselves. The government website was accessed on 28, March 2023: https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303.
[16] Truth and Reconciliation Commission of Canada, 'Honouring the truth' (2015) (n 13).
[17] Ibid.
[18] Robert J. Miller, *Residential schools, and reconciliation: Canada confronts its history* (University of Toronto Press, 2017) ch 2.

colonial past that oversaw the administration of residential schools.[19] The Act defined the status of indigeneity and the loss of the right through enfranchisement into the non-indigenous Canadian society by marrying a non-indigenous man, attending university, or acquiring the right to vote.[20] The status correlated with indigenous land rights. Thus, the loss of rights consequently entailed the loss of entitlement to indigenous territories. The emergence of the Canadian federal state gave rise to a centralized assimilationist approach towards indigenous peoples, with the top-down legal imposition on defining their identity and rights in the name of 'protection'.

Numerous adjustments to the First Indian Act led to the establishment of the residential school system's legislative framework as we know it today, but the 1867 regulation built the basis for it by vesting power in the government to run schools for indigenous children.[21] By 1920, with an amendment to the 1867 Act, the state made school attendance compulsory for indigenous children between the age of 7 and 15 if there was no day school on their reserves.[22]

During the 19th century, two forms of schools existed for indigenous children, residential church-run boarding schools and industrial day schools, although this divide has scoured over the years. Later, all schools taught farming, mechanical education, primary education including reading, writing, bookkeeping, and, more importantly, Christian, and European morals and values. The government funded the schools in a per-student manner. However, the state wished to create self-sufficient institutions where the students would produce their own food and garment supply, leaving the financial contribution inadequately low.[23] This economic approach resulted in poorly constructed, unsanitary, and truly dangerous establishments filled with underfed and underdressed children.

Further, this approach gave rise to the half-day school systems, whereby indigenous children were exposed to 'vocational training' and half-day education. 'Vocational training' took the form of actual manual labour proceeding towards the school's profits through the disguise of applied practical teaching. The practical trading education was not only in place

[19] Federal Indian Act RSC 1876, c 18.
[20] Ibid, s 12.
[21] Ibid, s 114.
[22] Indian Act RSC 1920 c. 18, s. 114.
[23] Truth and Reconciliation Commission of Canada, 'Honouring the truth' (2015) (n 9).

to provide for in-school needs but also to encourage pupils to absorb into general Canadian communities and to participate in a market-based economy in their adult life. The federal government was concerned about economic collapse within the indigenous communities, not for reasons of compassion, but because during the early indigenous and Canadian treaty-making procedures, the government agreed to aid indigenous peoples in case of economic distress.[24] Therefore, the children in residential schools were forced to take up European-style agricultural practices and trading classes to avoid the government's need to step in with financial assistance in the future. The federal government subsidized schools to assimilate indigenous children politically and hoped that past their education, they would give up their indigenous status and grow up to join mass Canadian culture.

While the residential schools were (poorly) financed by the government, Christian church officials and missionaries, primarily from Anglican, Catholic Methodist, and Presbyterian churches, ran their operations.[25] At the Catholic schools, the Catholic Oblate order nominated the principals and priests and ministers appointed the staff, without much of a say by the state in the decision-making.[26] In the Protestant schools, the personnel mainly consisted of foreign preachers. Christian missionaries worldwide came to Canada to 'save' indigenous peoples from their 'savage' lifeways. In appointing educators, religiosity was a higher consideration than teaching ability or educator qualifications. This led to many children leaving their education without learning to read or write at the minimum.[27] Teachers aimed to civilize children and, sometimes through aggressive and physical methods, introduce the Christian faith into their systems. Unquestionably, the primary educational aim of residential schools rested on abolishing indigeneity.

In the 1950s, the state started transitioning from its assimilationist strategies amidst the growing understanding of the lack of funding and the horrible experiences of indigenous children into a so-called child welfare policy system.[28] According to the new system, some indigenous children were transferred to educational institutions, others to middle-class Euro-

[24] Ibid.
[25] 'An Overview of the Indian Residential School System' (2016) Union of Ontario Indians https://www.anishinabek.ca/wp-content/uploads/2016/07/An-Overview-of-the-IRS-System-Booklet.pdf accessed 16 March 2023.
[26] Truth and Reconciliation Commission of Canada, 'Honouring the truth' (2015) (n 9).
[27] Ibid.
[28] Ibid.

Canadian families or foster care institutions. Many of the foster homes were just repurposed residential schools. In 1969, the Department of Indian Affairs took over all responsibilities relating to the foster and residential institutions, ending the churches' overarching authority.[29] However, the education, the physical and psychological safety and the diet conditions remained below satisfactory. This policy shift nevertheless marked the begging of the elimination of the residential school system. By 1999 all schools were closed, denoting the end of an abusive, Euro-Christian educational system of 150 years.[30]

2.2.3. Residential School Experience of Indigenous Children in Canada

The Truth and Reconciliation Commission, established as part of the Indian Residential Schools Settlement Agreement ('IRSSA') in 2007 to reconcile the indigenous and national relationship, labelled residential schools in its final report as entities of institutionalized child neglect.[31]

Indigenous parents feared the day the authorities would take their child to this lonely, fearful, and foreign environment, and many tried to protest registration to residential schools.[32] However, denial of school attendance was met with punitive legal consequences for the parents. Children were taken away by police officers in organized pick-up vehicles from their homes to enter boarding schools.[33]

The destruction of the children's individuality began the moment they entered schools. Upon arrival, the staff removed their – in many instances – culturally significant clothing and allocated standardized garments with an identifying number sewn on them.[34] Teachers called children by their assigned numbers and sometimes even gave them Euro-Canadian names, replacing their culturally appropriate given ones.[35] Upon arrival, the school staff talked only in the languages of instruction, either English or French, causing confusion and a feeling of disconnect, as many children solely spoke indigenous languages in their

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Indian Act RSC 1927 c 98, s 1.
[34] Truth and Reconciliation Commission of Canada, 'Honouring the truth' (2015) (n 9).
[35] Douglas Quan, ''Assault' on residential school students' identities began the moment they stepped inside' *National Post* (Canada 2 June 2015), https://nationalpost.com/news/canada/assault-on-residential-school-students-identities-began-the-moment-they-stepped-inside accessed 3 March 2023.

communities.[36] Students were not allowed to use speak in their own language or enjoy traditional practices. Pupils were separated into different parts of the building based on sex. Siblings were taken apart and prohibited from communicating with each other, further severing family ties.[37]

Former pupils described days in the residential school as dark, isolated, and frightening, witnessing their peers crying themselves to sleep at night.[38] For those who disobeyed –or did not understand- the instructions given to them, heavy penalties were inflicted in the forms of physical abuse and public humiliation. Disciplinary measures were standard, especially if the students were caught talking in their own languages or exercising traditional practices. Several students escaped residential schools because they could not endure the continuous mental and physical abuse.

During school days, as per the half-day system, the children usually worked half of the day growing, preparing meals, and sewing and mending clothes to keep up the school revenues.[39] However, as with many other aspects of the schools, this vocational training was dangerous due to the poor oversight by educators, leaving many injured or, worse, dead.[40] While the students were growing enough food to feed the school properly, these were not distributed within the institution but sold for profit. Due to the underfunding and the profit orientation, most students were underfed and lacked essential nutrients, leading to several diseases circulating in these institutions and overwhelmingly poor health status among the pupils.

An estimated 150,000 children fell victim to the residential school system, resulting in separated family ties, loss of traditions, language and spirituality and trauma with intergenerational effects.[41] The loss of connection and identity is still prevalent in the children and grandchildren of former students.[42] After leaving the institutes, residential school-educated adults felt no true sense of belonging to their indigenous communities or the mass

[36] Masud Khawaja, 'Consequences and Remedies of Indigenous Language Loss in Canada' (2021) 11(3) Societies 89.
[37] Truth and Reconciliation Commission of Canada, 'Honouring the truth' (2015) (n 9).
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Christina Hackett et al, 'Canada's Residential School System: Measuring the Intergenerational Impact of Familial Attendance on Health and Mental Health Outcomes' (2016) 70(11) Journal of Epidemiology and Community Health 1096.

Canadian culture. Overall, the Christianization, civilization, and language policy enacted in the residential schools has led to a language and culture loss of indigenous peoples in Canada.[43]

2.3. Stolen Generation Child Removals in Australia[44]

The colonial framework in Canada and Australia were similar in terms of intentions, methods, and the involvement of the Christian churches, but there is one notable difference in the Australian context.

English colonizers arrived in Australia in the 1780s, laying the foundations for a painful and abusive period for the indigenous populations residing on the territory. During the early colonization period, lethal conflicts between the colonizer and the colonized were frequent, leaving indigenous people dead or in poor socio-economic and health conditions.[45] With the settlement came the notion of assimilation and civilization.

In the following years, the government introduced welfare and protectionist initiatives to accelerate the pace of destruction and eventually wipe out indigeneity from Australia. However, whereas the Canadian residential school policies applied to most indigenous children, there was a notable difference in Australia, namely eugenics.[46] Indigenous people were split into racist categories that are viewed today as derogatory and pejorative.[47] In Australia, so-called 'full-blood' indigenous groups were marginalized and discriminated against but were not subjected to removal policies.[48] The 'half-caste' children, where one parent is indigenous, and the other is non-indigenous, were the target of forcible removals to white foster homes, institutions, and church-run missions. 'Half-castes' were deemed to have

[43] 'Confronting Genocide in Canada' (Human Rights Canada) https://humanrights.ca/news/confronting-genocide-canada#:~:text=Canada's%20policies%20aimed%20at%20assimilating,of%20their%20way%20of%20life accessed 11 February 2023.
[44] The term 'stolen generation' refers to the forcibly removed indigenous children in Australia during the 1910-1970 period.
[45] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[46] Keila Mayberry, 'Searching for Justice for Australia's Stolen Generations' (2022) 22 Chicago Journal of International Law 661.
[47]Jens Korff, 'Aboriginal Identity: Who is 'Aboriginal'?' *Creative Spirits* (23 August 2021) https://www.creativespirits.info/aboriginalculture/people/aboriginal-identity-who-is-aboriginal accessed 31 March 2023.
[48] Anti-Discrimination Commission Queensland, 'Aboriginal people in Queensland: a brief human rights history' (2017) https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0013/10606/Aboriginal-timeline-FINAL-updated-25-July-2018.pdf accessed 4 March 2023, 17.

a certain amount of 'European blood' in them, thus they were deemed 'savable'. This divide was instituted because the broad population, including the government, believed the 'full-blood' population was naturally declining. They thought that God and evolution dictated the 'full-bloods'' disappearance, so they were beyond rescue. Thus, territorial exclusion was satisfactory in hastening their complete cultural elimination. Therefore, in Australia, colourist racism dictated integrationist policies.[49] The belief that planned breeding of 'half-caste' could guide indigenous improvement and eventually lead to complete whitening in cultural, social, and economic terms steered the Australian stolen generation policies.

Regarding the rationale behind these policies, it was like that in Canada. However, it is also essential to understand the power dynamics behind these strategies in the Australian context. The regulatory framework on child removals was masked as a policy to create a coherent unit of society, bettering the conditions and education of indigenous children and helping them escape their 'savage' lifeways. However, welfare was hardly the genuine reason for removals. The powerplay behind the stolen generation tragedy cannot be overlooked by naïve views on the benevolent intentions of the Australian government and churches to save these children. Indeed, the foster institutions and the missions did not solely house indigenous children but also neglected or orphaned non-indigenous children. However, the overrepresentation of indigenous kids was extremely telling.[50] The Australian government and the Christian churches had a co-dependent relationship in moulding the indigenous population to their own desires.[51] Their wishes involved creating a monoculturalist, homogenous, white, Christian society and more importantly, a cheap labour force they could exploit.[52] It is essential to note that without the moral justification of the churches, the government would not have been legitimized to enact legislation on the control and cultural coercion of indigenous peoples.[53] At the same time, the church would have been unable to run missions without governmental subsidies. These dynamics allowed for the emergence of

[49] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[50] Ibid.
[51] Christine Choo, 'The role of the Catholic missionaries at Beagle Bay in the removal of Aboriginal children from their families in the Kimberley region from the 1890s' (1997) 21 Aboriginal History 14.
[52] Ibid.
[53] Ibid.

a societal structure where a majority group aims to suppress and eliminate the cultural attributes of a minority group in the name of state-making and society-creation.[54]

2.3.1. Regulatory Framework of Australia's Assimilation Policy

The assimilationist mindset of the Australian non-indigenous population goes back to the 1790s and early 1800s when private individuals began removing children from indigenous families.[55] The first public institution, a school for indigenous children, was established in 1814 but proved unsuccessful due to the widespread acknowledgement that it sought to sever family ties and Europeanize.[56]

As the national discriminatory sentiment matured, it started informing regulations on the state level in the early 20th century. By 1919, most states had legislation granting excessive power over indigenous populations to Aboriginal Protectionist Boards, including marital rights, economic and employment rights, familial relations, and freedom of movement.[57] These government-administered institutions oversaw indigenous reserves and welfare policies and regulated all attributes of indigenous life. Chief Protectors sat at the top of the hierarchy, while enforcement was undertaken by local protectors, who were on-site police officers applying the commands of the boards. In most states, the Chief Protectors were permitted to take on legal guardianship over indigenous children without the parent's consent, granting them authority to decide on their future.[58] That future had three potential outcomes, none of them a bright one. Children were transferred to foster institutions, some of which were church-run civilizing and Christianizing missions, for exploitative employment or were adopted by non-indigenous foster families.

In many states' legislation on the notion of 'aboriginality' was changed to reflect the arbitrary categories of 'half-caste' and 'full-blood' people.[59] Persons with a specific amount of European blood were characterized as 'half-caste'. 'Half-castes' were doomed to be integrated into the white population, while the approach for 'full-bloods' was marginalization

[54] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 Oceania 125, 144.
[55] Keila Mayberry, 'Searching for Justice for Australia's Stolen Generations' (2022) (n 46).
[56] Aborigines Protection Amending Act 1915 (New South Wales 1915/002); Aborigines Act 1911 (South Australia 1911/1048); Aborigines Act 1905 (Western Australia 1905/014).
[57] Keila Mayberry, 'Searching for Justice for Australia's Stolen Generations' (2022) (n 46).
[58] Ramona Vijeyarasa, 'Facing Australia's History: Truth and Reconciliation for the Stolen Generations' (2007) 7 International Journal on Human Rights 127.
[59] Anti-Discrimination Commission Queensland, 'Aboriginal people in Queensland (n 48).

to the outskirts of Australian society and territory. Therefore, 'half-caste' indigenous persons were prohibited from living on reserves or continuing traditional cultural and family life. Meanwhile, 'full-bloods`' were only allowed on the designated territories.

In 1937, Australia held its first Commonwealth-State Native Welfare Conference, which paved the way for a federal socio-cultural assimilationist approach for both 'full-blood' and 'half-caste' people.[60] Under this framework, welfare policies allowed the removal of children based on their assumed status of neglect, destitution, or uncontrollability.[61] As one can imagine, these categories were defined lightly and bent in a manner favourable to the wishes of the Protectionist authorities. However, these legal changes resulted in increased child removals during the 50s and 60s, overcrowding the foster and church-run institutions. Consequently, this spike led to more adoptions due to the institutions' lack of space and facilities.

In 1967, the political climate changed in Australia, and a referendum was voted for to repeal all discriminatory provisions from the constitution and enact laws targeting solely indigenous peoples.[62] Throughout this period, the funding for welfare programs increased, and general awareness of the human rights violations and inhumane treatment endured by indigenous people spread.[63] By the end of the 1960s, most states repealed laws on protectionist child removal.[64] All states in Australia had a child-removal policy from the 1910s until the 1970s, designating a cultural elimination attempt of the Australian indigenous population. For several years, the Australian national legislation directly violated its international commitments regarding human rights law, rights of the child, and freedom from genocide.[65]

[60] 'Report of the Commonwealth-State Native Welfare Conference held in Canberra', (Canberra 26- 28 April 1937) (Commonwealth Government Printer, 1937).
[61] Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883-1969* (NSW Department of Aboriginal Affairs, 6th edn, 2006).
[62] Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press, 2nd ed, 2001).
[63] Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Fremantle Arts Centre Press, 2000).
[64] 'Remove and Protect' *AIATSIS* https://aiatsis.gov.au/collection/featured-collections/remove-and-protect accessed 7 April 2023.
[65] Maria O'Sullivan, 'Past Violations under International Human Rights Law: The Indigenous Stolen Generation in Australia' (2005) 23(2) Netherlands Quarterly of Human Rights 243.

2.3.2. The Experiences of the Stolen Generation Indigenous Children in Australia

From the early 1910s until the 70s, between one in ten and one in three indigenous children, have been affected by the forcible removal policies in Australia through placement in foster care, church missions, employment, or foster homes.[66]

The story of an Australian 'half-caste' child started like that of a Canadian indigenous one. Families in some states were protecting forcible removals or tried to use coal to darken their skin colour to fool the local protectorate into believing it was a 'full-blood' family.[67] However, due to the authoritarian structure of Australian society and the coerced transfer of power to the Protection Boards, indigenous families had no authority over their children's education or future homes.

Throughout the years, the procedures for removals were simplified, and merely being indigenous was a sufficient basis for separation. If the children were taken to foster institutions or church-run missions, their journey started with an appearance before a court deciding whether the child was neglected according to the state's welfare policy.[68] If the court found them neglected, a bus would wait for the children to transport them to the institutions. Shockingly like the Canadian experience, when the children arrived, their clothing was taken away, they received uniforms with a specific identifying number on them, and their heads were shaved.[69] Siblings were also separated in these institutions and discouraged from communicating with each other. Parents were rarely if ever, allowed to visit their children. Written communication in letters was limited or prohibited throughout these institutions. Being removed from familial ties also meant removing land rights because if children could not showcase their indigenous heritage, their entitlement to indigenous reserves was lost.[70] The sense of disconnect was further exacerbated by the ban on the use of their traditional languages. If pupils defied this, harsh physical disciplinary measures were used. Cruelty, sexual, physical violence, and mental abuse in these institutions were common.[71]

[66] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[67] Anna Haebich, *Broken Circles* (2000) (n 63), 235.
[68] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[69] Ibid.
[70] Peter Read, 'The Stolen Generations' (2006) (n 61).
[71] Ibid.

The government funded the institutions, but the financial contribution was insufficient for basic hygiene, medical facilities, food, and proper infrastructure.[72] The teaching level in foster institutions and missions was not standardized, but the educational output was generally inadequate, as children received no valuable knowledge.[73] Instead, institutions focused on creating cheap work for the pastoral stations, in the case of boys, and domestic work for non-indigenous middle-class families, in the case of girls. Numerous children were forced to leave foster institutions at an early age to pursue employment, or in many instances, when the court found children 'neglected' were sent away directly for work. For girls, the employment opportunities involved a heightened vulnerability to gender-based and sexual violence.[74]

The Catholic, Anglican, or Protestant churches ran most foster centres.[75] In those homes, children were exposed to religious education every day, and several were baptized and confirmed to the faith against their will.[76] These institutions disregarded and disparaged indigenous culture, spirituality, and practices. The children had no access to their personal and group identities as indigenous people and no connection to their heritage and history.[77]

Other children were placed in white non-indigenous foster homes, especially during the 1950s and 60s, when the foster institutions reached total capacity. Children were removed at differing ages, some at a few months old, often called 'stolen babies'. An overwhelming number of foster families were committed to the Christian faith and imposed their religion on the adopted children.[78] Adults adopted as children recall the deprecating manner their adoptive parents talked about indignity, linking it to racist ideologies and prejudices.[79] The birth parents were usually barred from visiting their children or having any form of communication with them. Several adopted children grew up with identity issues, unable to fit into the mass Australian or traditional indigenous cultures. The predominant aim behind

[72] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[73] Ibid.
[74] Victoria Haskins, 'A Better Chance'? — Sexual Abuse and the Apprenticeship of Aboriginal Girls under the NSW Aborigines Protection Board' (2004) 28 Aboriginal History 33.
[75] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).
[76] Ibid.
[77] Ibid.
[78] Peter Read, 'The Stolen Generations' (2006) (n 61).
[79] Ibid.

foster parenting was to encourage children to act European and remove indigeneity from their being.[80]

All the above approaches to indigenous child removal resulted in a generation detached from their culture, language, and spirituality. Indigenous children struggled to form their self-image and create bonds with social groups.[81] The effects of the stolen generation policies can be felt intergenerationally, like in the Canadian residential school system, affecting the victims' past and present familial relations. Therefore, the above-detailed practices have systemic and systematic effects of cultural destruction. Perpetrators, aiders, and abettors should be held accountable for upholding these abusive systems and contributing to the loss of indigenous cultures. The following chapters will look into the possibility of holding perpetrators and contributors accountable for the crime of cultural genocide against indigenous people.

[80] Ibid.
[81] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 9).

Chapter III: The Crime of Genocide

This chapter provides a brief historical account of the path to codifying the prevention and punishment of genocide in international law. The horrors of the Second World War prompted decision-makers around the world to outlaw certain acts which shook the foundations of humanity and the international community as a whole. A rocky road led to the codification of genocide in the UN Genocide Convention, but the negotiations and drafting process led to a much narrower version of the prohibition than initially envisioned by the birthfather of the conceptual notion of the crime of genocide, Raphael Lemkin, the lawyer who coined the term. This limitation unfortunately had consequences on the recognition of the crime of cultural genocide as well. To fully grasp the notions enacted in the Convention, subchapter two will elaborate on the definition and elements of the crime of genocide. While genocide is outlawed in public international treaty law since the adoption of the Convention in 1948, many international official documents and scholarly opinions point to the fact that genocide existed under customary international before its codification. Subchapter three will showcase the current legal views on the customary and jus cogens status of genocide under international law.

3.1. Tracing the Evolution and Codification of Genocide as a Crime in History

The notion and crime of genocide caught considerable international attention, mainly during the 20th century, especially during the Second World War and the Holocaust. However, the act of genocide is not a novel phenomenon. Unfortunately, numerous examples of mass annihilation, now labelled genocidal, can be found in human history. Just to name a few, the 1915 Armenian genocide, the treatment of indigenous peoples during the discoveries of North and South America, and the massacres commanded by totalitarian rulers across the globe, including Stalin and Pol Pot.[82]

The Second World War, an extensive period of wicked human destruction with a sense of globality, justly planted the seed in policymakers' heads that certain acts and policies underlying massacres of specific groups should be outlawed. Previously, states were

[82] William D. Rubinstein, *Genocide* (Routledge 2014), 3.

reluctant to make this commitment, acknowledging that such a ban would restrict their conduct in case of necessity.[83]

The Holocaust, one of the most unthinkable and cruel crimes against ethnic, racial, religious, and national groups, compelled a Polish lawyer to write a book titled *The Axis Rule in Occupied Europe,* detailing the horrors of mass annihilation in this period.[84] It is important to note that this hierarchical view of the Holocaust as the most outstanding example of genocide has inherently shaped the definition and interpretations of genocide.[85] In his book[86], Raphael Lemkin coined the term genocide and explained the notion in detail, referring to methods, means, and protected groups.[87]

In 1945 the Nuremberg trials prosecuting Nazi war criminals commenced in Germany, establishing the inception of international criminal law. In the Nuremberg Charter, genocide was not recognized as a standalone crime but mentioned as part of crimes against humanity.[88] In the following year, the International Court of Justice ('ICJ') was established in the Hague to adjudicate between states on international law. While, at this point, there was no legal basis for the prohibition of genocide, this institution will become an essential mechanism for clarifying the definition, underlying acts, and elements of genocide.

In 1946, on the 11th of December, the United Nations General Assembly ('UNGA') passed a resolution titled the 'Crime of Genocide'.[89] This piece of legislation was the first on the international plane that 'affirm(ed) that genocide is a crime under international law which the civilized world condemns, (…) whether the crime is committed on religious, racial, political or any other grounds - (the perpetrators) are punishable'.[90] This resolution requested the UN Economic and Social Council ('ECOSOC') to start working on a draft UN treaty on the topic. The drafting procedure took Lemkin's conception of the crime as a basis; however,

[83] Ibid.
[84] Martin Shaw, *What is Genocide?* (Polity Press, Cambridge 2007).
[85] Malin Isaksson, 'The Holocaust and Genocide in History and Politics: A Study of the Discrepancy between Human Rights Law and International Politics' (Ph.D. dissertation, University of Gothenburg 2010)
[86] Raphael Lemkin, *Axis rule in occupied Europe* (Columbia University Press, New York 1944).
[87] William D. Rubinstein, *Genocide* (2014) (n 82).
[88] United Nations Office on Genocide Prevention and the Responsibility to Protect, 'When to Refer to a Situation as 'Genocide'' https://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf accessed 20 April 2023.
[89] The Crime of Genocide, UNGA Res 96 (11 December 1946) A/RES/96.
[90] Ibid.

it went through numerous phases of redrafting at the request of national delegations. The process ended with the UN adopting the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[91] The course of negotiations and how the notion of cultural genocide got lost in the process will be explained in the following chapter.

In 1960, the Eichmann trial began in Israel, reinstating the gravity of the horrors of the Holocaust. Adolf Eichmann was an SS officer responsible for the deportations of the Jews, who significantly contributed to the realization of the Holocaust. The trial did not explicitly rely on the Genocide Convention. It was based on Israel's law, the Nazi, and Nazi Collaborators Punishment Law ('NNCL'), which specifically focused on the Holocaust and targeted Nazi perpetrators in the genocide of Jewish people in Europe.[92] The section on *Crimes against the Jewish People* of the NNCL mirrors the genocide definition enshrined in the Genocide Convention but with temporal, territorial, and personal limitations.[93] The trial is an important cornerstone in international criminal law and significantly in the law of genocide, as it highlights how the definition of genocide penetrates national criminal systems and could be used to hold perpetrators individually accountable.

For years after the WWII criminal trials, despite recognising a need for it, there was no permanent universal platform for individual international criminal accountability. Eventually, in 1998 the International Criminal Court ('ICC') was established in the Hague, Netherlands. The ICC's founding document, the Rome Statute, adopted the word-by-word definition of genocide stipulated in the Genocide Convention under Article 6.[94] Nevertheless, before the ICC, a few hybrid and international accountability mechanisms were established in response to devastating conflicts, such as the International Criminal Tribunal for the former Yugoslavia ('ICTY') (1993),[95] the International Criminal Tribunal for Rwanda ('ICTR') (1994),[96] and the Extraordinary Chambers in the Courts of Cambodia ('ECCC')

[91] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[92] Michael J. Bazyler and Julia Y. Scheppach, 'The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann' (2012) 34(3) Loyola of Los Angeles International and Comparative Law Review 417, 417.
[93] Ibid, 428.
[94] Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 6.
[95] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993) S/RES/827.
[96] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) S/RES/ 955.

(2004).[97] All these tribunals adopted the genocide definition as a whole from the Genocide Convention, thereby conferring the power upon themselves to criminally prosecute individuals for this offence. Setting up these tribunals was a monumental step toward international criminal accountability, especially for the crime of genocide. Despite the lack of *stare decisis* in international law, decisions from these tribunals shaped and clarified the elements of the prohibition of genocide, and some are still upheld today.

3.2. Unpacking the Definition and Elements of Genocide in the Genocide Convention

Following the 1946 Resolution on the Crime of Genocide, the UN ECOSOC tasked the Secretary-General to prepare an internationally binding document on the crime with oversight by the International Law Commission ('ILC'), responsible to research and analyse existing laws.[98] The initial draft adopted Lemkin's conceptualization and described genocide as 'destroying the essential foundations of the life of national groups' by economic, biological, physical, and cultural means.[99]

Lemkin believed that international protection from genocide should also be accorded to culture because in his view, 'our whole heritage is a product of the contributions of all nations'.[100] His way of thinking aligns with the wording of the 1946 Resolution, affirming that 'genocide (…) results in the great losses of humanity in the form of cultural (…) contributions represented by these human groups'.[101] He believed that cultural diversity enriches us internationally, while nationally, the existence of protected groups is incumbent upon their culture, or as he put it, their 'shared spirit and moral unity'.[102] Thus in his view, the cultural destruction of a group was just as devastating for a national group's essential foundations as physical annihilation.[103] Indeed, he saw genocide not as a single act, but a process of destruction simultaneously achieved by biological, physical, and cultural

[97] Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (adopted 27 October 2004) NS/RKM/1004/00627.
[98] Josef L. Kunz, 'The United Nations Convention on Genocide' (1949) 43(4) The American Journal of International Law 738.
[99] 'Cultural Genocide', *Facing History & Ourselves* (16 October 2019) https://www.facinghistory.org/en-ca/resource-library/cultural-genocide accessed 09 April 2023.
[100] Raphael Lemkin, 'Genocide' (1946) 15(2) American Scholar 227, 230.
[101] The Crime of Genocide, UNGA Res 96 (11 December 1946) A/RES/96, Preamble.
[102] Convention on the Prevention and Punishment of the Crime of Genocide, First Draft of the Genocide Convention (May 1947) UN Doc. E/447.
[103] Raphael Lemkin, 'Genocide' (1946) (n 100) 228.

obliteration.[104] As for the *mens rea* underlying the crime, Lemkin said that 'the intent of the offenders is to destroy or degrade an entire national, ethnical, religious or racial group by attacking the individual members of that group'.[105] He envisioned international protection for all groups subjected to genocide in the past, thus linguistic, political, cultural, national, ethnic, religious, and racial. The draft incorporating these understandings of genocide was sent for the consideration of the UNGA.

At the General Assembly, state representatives had the chance to alter and negotiate the future text of the Genocide Convention. Critical issues debated included the definition of genocide, the list of protected groups, and the ICJ's role in dispute settlement among states.[106] However, for this paper, the debate on the definition of genocide is the most important one to ponder.

The definition debate mostly revolved around the issue of cultural genocide, as the first draft included the notion, defined as:

'A criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying the specific characteristics of the group by:

a) *forcible transfer of children to another human group; or*
b) *forced and systematic exile of individuals representing the culture of a group; or*
c) *prohibition of the use of the national language even in private intercourse; or*
d) *systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or*
e) *systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship.'*[107]

The dispute on cultural genocide caused the formation of three blocs within the General Assembly. One with a strong view of including cultural genocide, another bloc opposing the possibility of cultural destruction, and the third with an undecided stance.

[104] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14 Journal of Human Rights 63, 75.
[105] Raphael Lemkin, 'Genocide - A Modern Crime' (1945) 4 Free World 39.
[106] Convention on the Prevention and Punishment of the Crime of Genocide, First Draft of the Genocide Convention (1947) (n 102).
[107] Ibid.

The first group included countries with reasons to protect cultural diversity, many of which were jurisdictions that have experienced socialist, forcible unification policies.[108] This group aimed to keep the cultural genocide definition with an apprehension of the importance of cultural diversity and preservation. The second and opposing block mostly comprised settler colonies, such as Australia, Canada, the United States, New Zealand, South Africa, and countries with vast immigration flows.[109] This block was vehemently opposing the inclusion of cultural genocide. They argued the danger of protecting abusive cultural practices, for example, cannibalism and emphasized the significance of social homogeneity.[110] They believed that states have the right to create an integrated unit of society through forced assimilation and civilization and were worried that if cultural genocide were included in this convention, their past national policies would be faced with legal action. Lastly, the undecided block was made up of Western European states, who viewed the question from a more theoretical perspective, raising the issue that adding cultural genocide to the genocide definition could weaken the crime and instead, cultural destruction should be dealt with by international human rights law. Eventually, after multiple rounds of negotiations, the above passage of cultural genocide was outvoted.

Acknowledging cultural annihilation as an international crime was challenging for states because they did not want to admit the wrongfulness of their Western ideologies of integrationist state-building, assimilation, and pursuit of monoculturalism. However, what they did instead, by removing cultural genocide, was to uphold and reinstate the power of colonizers.[111] On top of that, throughout the negotiations, the protection of cultural, linguistic, and political groups was also removed because state parties claimed that these groups should be safeguarded by different fields of international law, including human rights law, self-determination, and minority rights, rather than being subjects of the most serious international crime.[112]

Consequently, the Genocide Convention entered into force in 1951 with the narrow version of Lemkin's vision. The Convention defines genocide in Article 2:

[108] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 Oceania 125, 137.
[109] Ibid.
[110] Ibid.
[111] Ibid, 138.
[112] Ibid.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.[113]

As a result of the highly politicized debate before the General Assembly and the power position of settler colonizer states, the remaining acts entailing cultural destruction in the definition of genocide were 2(d) the imposition of measures to prevent births in a group and 2(e) the forcible transfer of children from one group to another.

Thus, this is the current definition of the crime of genocide. As for the protected groups, national, ethnic, racial, and religious groups enjoy protection from genocide. Individuals fall under these categories either by fulfilling the objective criteria of the group or by the subjective perception of themselves or the perpetrator.[114] Persons are protected by virtue of their membership in the abovementioned groups, not on an individual basis.[115]

The adopted crime's mental element is described as 'an intent to destroy in whole or in part' the protected group. The *mens rea* of genocide requires a special intent or *dolus specialis.* This special intent has proved to be one of the most challenging aspects of proving genocide. The mere intention to carry out the genocidal act is insufficient; every perpetrator must aim to contribute knowingly to the overall destruction plan.[116] The reason why genocide is at the top of the hierarchy of international crimes is precisely this high standard of intent-based approach, instead of a knowledge-based one, where the perpetrator's apprehension of contributing to the genocidal program would be enough.[117] The underlying acts are enlisted in Article 2 from (a) to (e), namely the (a)*Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group*

[113] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 102) art 2.
[114] Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) ch 10.
[115] *Prosecutor v. Sylvestre Gacumbitsi* (Trial Judgment) ICTR-01-64 (17 June 2004) para 255.
[116] Jessberger Florian, 'The UN Genocide Convention - A Commentary' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 106.
[117] Ibid, 105.

conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[118] These prohibited acts need to be carried out in a pattern of similar conduct since single acts cannot characterize as genocide regardless of whether they are committed in a time of peace or war. Accountability arises for the material acts through committing, conspiring, inciting, attempting, or being complicit in committing genocidal acts, as defined by Article 3 of the Convention.[119]

In sum, due to the different positions among states and the power inequalities inherent to adopting international conventions, only portions of the genocide definition envisioned by Lemkin made it to international law. Academics usually refer to the UNGC definition as the narrow definition of genocide, emphasizing the rigidity and limited reach of the provision in terms of protected groups and possible means of destruction.[120] The fear of state accountability for past abusive state-making, welfare, and colonialist practices, eventuated a genocide definition that explicitly only covers physical destruction and does not protect all groups previously subjected to this crime.[121] The broad definition, on the other hand, acknowledges the structural issues behind the adoption of this convention while shining a light on the power disparity in the institutions and negotiation processes of its drafting procedure.[122]

Since the final draft, the Genocide Convention has never been amended, notwithstanding the enormous volumes of international legal scholarship on its weaknesses. There is a general understanding among international criminal law academics that states would be reluctant to alter the convention for concern that their past and present actions would fall under the definition of genocide.[123]

3.3. Jus Cogens: Genocide as a Non-derogable Norm in Customary International Law

Whereas the Genocide Convention is the only codified legal basis for the crime of genocide, it is not the sole one. The full spectrum of international criminal law would define

[118] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 102) art 2.
[119] Ibid, art 3.
[120] Robert van Krieken, 'Rethinking Cultural Genocide' (2004) (n 108).
[121] Ibid.
[122] Ibid.
[123] M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd ed Martinus Nijhoff Publishers, Leiden 2013).

genocide as a single-instrument crime, an erga omnes jus cogens norm and a customary international law principle with universal jurisdiction.

International law scholars unanimously agree that the prohibition of genocide enjoys a customary international law status. Interpreting the preamble of the Crime of Genocide Resolution reminding us that 'many instances of such crimes of genocide occurred (…)', in harmony with Article 1 of the Genocide Convention reinstating that 'genocide is a crime under international law', leads to the conclusion that the prohibition of genocide as a customary international law has existed before its codification. Several international criminal law judgments stipulate that the prevention of genocide is a customary international principle, including the *Reservations to the Convention* ICJ case[124], the ICTY *Krstić* case[125] , and the ICTR *Akayesu* case from 1998.[126] As defined in the ICJ statute Article 38(b), customary international law refers to 'international custom, as evidence of a general practice accepted as law'.[127] Customary international law principles are binding on all states without any affirmative state actions. The only possibility to defy such principles would be for states to persistently object to the existence of the principle as law in both the international and national arena.[128] The fact that a convention was enacted on a customary international principle does not devoid the independent existence of that customary principle.[129] The codification of a customary norm would merely entail the emergence of a different legal basis with different practicalities and administrative actions added.[130] Consequently, if a state is not a persistent objector to genocide as customary international law and has not ratified the UNGC, it is still obligated to prevent and punish genocide.

[124] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 12.
[125] *Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33 (19 April 2004) para 25.
[126] *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4 (2 September 1998) para 495.
[127] Statute of the International Court of Justice (adopted 26 June 1946, entered into force 24 October 1945) 33 UNTS 993 art 38(b).
[128] James A. Green., *The Persistent Objector Rule in International Law* (Oxford University Press 2016).
[129] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US) (Judgment) [1984] ICJ Rep 392 para 73.
[130] ECOSOC Ad Hoc Committee on Genocide, 'Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other' U.N. Doc. E/AC.25/3 (2 April 1948).

Genocide is also a jus cogens norm.[131] Jus cogens or peremptory norms were first defined by the Vienna Convention on the Law of the Treaties in 1969 as 'norm(s) accepted and recognized by the international community of States as a whole (…) from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[132] Therefore, these principles are binding *erga omnes* - toward everyone- and are non-derogatory due to their crucial status in protecting the international community's interests as a whole.[133] There is no debate among international criminal law experts that the prohibition of genocide enjoys a jus cogens status.[134] The ICJ also reflected this stance in the *Case concerning armed activities,* explaining that the 'jus cogens nature of the prohibition of genocide (has been) established by recent doctrine and jurisprudence.'[135]

Lastly, genocide as a customary international law norm also enjoys universal jurisdiction. The legal notion of universal jurisdiction emerged from the *Eichmann trial*. During the trial, the Israeli court faced jurisdictional limitations to applying the Genocide Convention because of its narrow scope defined in Article 6: 'Persons charged with genocide (…) shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'[136] Therefore the Convention prescribes that alleged perpetrators can only be tried in the territorial State of the crime or an international criminal court to which the States are a party. However, since the crimes relating to the Holocaust did not occur in Israel (indeed, there was no Israel as such at that point) and the ICC was still just an idea during the sixties, Israel had no jurisdiction to prosecute Eichmann based on the Convention. Instead, the court established the notion of universal jurisdiction, which entails that national courts can prosecute the gravest customary

[131] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 46.
[132] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53.
[133] *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Judgment) [1970] ICJ Rep. 3.
[134] Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106(7) The Yale Law Journal 2259.
[135] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda*)* (Judgment) [2006] ICJ Rep 6.
[136] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 102) art 6.

international crimes (crimes against humanity, war crimes, genocide) without having territorial or personal jurisdictional links to the crime.[137] The rationale behind this concept is that these crimes fundamentally shake the international world order and the states with traditional jurisdictional links cannot be the only ones expected to punish and prevent them.[138]

Consequently, the jus cogens and customary international law status of the prohibition of genocide allows for a certain amount of jurisdictional flexibility. Relying on these two instead of the Genocide Convention could offer a more comprehensive framework of protection without the political limitations imposed by the Convention. Additionally, the possibility of universal prosecution for genocide could open doors for a more effective accountability mechanism, forgetting the jurisdictional shortcomings and Eurocentric and colonialist views behind the Convention's drafting history.[139] However, it is important to note, that while deviations from the Convention definition are possible under these alternative sources, the definitions in the Genocide Convention inform the widespread interpretations of the customary and jus cogens norms of the prohibition of genocide. Therefore, if the Convention could be interpreted to include the notion of cultural genocide, it would strengthen the plea of cultural genocide under all sources of international law. To this end, the following chapter will showcase how the historical notion of genocide and the Convention interpretation under internationally recognized treaty interpretation rules supports the inclusion of cultural genocide in the crime of genocide.

[137] Roger O'Keefe, 'Universal jurisdiction: clarifying the basic concept' (2004) 2(3) Journal of International Criminal Justice 735.
[138] Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) (n 134).
[139] Andrew Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples' (2009) 4(1) Genocide Studies and Prevention: An International Journal 75.

Chapter IV: The Crime of Cultural Genocide

Cultural genocide is a much-contested notion within the international criminal law arena. Many scholars believe that genocide should solely refer to the mass physical destruction of the protected groups to keep its unique hierarchical status as the most severe and heinous crime in international law.[140] On the contrary, other academics contend that from the outset, genocide was meant to encompass cultural means of group destruction.[141] The proponents of cultural genocide claim that physical extermination is not and historically has not been the sole means of annihilation of peoples.[142] They argue that genocidal acts can take heterogeneous forms to dissolve political, economic, and socio-cultural links that result in the elimination of a protected group's 'groupness'.[143]

In this chapter, the supporting and counter-arguments for including cultural genocide in the genocide definition will be laid out. Further, the Lemkinian definition of cultural genocide will be explained in detail to understand the teleological aims of protection. Later the chapter will elaborate on the culturally-permissive interpretation of the Genocide Convention to reflect cultural genocide.

4.1. Cultural Genocide: to be or not to be?

The stances on whether cultural genocide should or should not be recognized as an international crime is divided. This sub-chapter aims to paint a picture of the pro- and counter-arguments on including cultural genocide in the international legal framework on genocide.

Proponents of cultural genocide argue that the fact that the Genocide Convention only managed to keep one aspect of cultural destruction in the genocide definition must be understood in light of the political views and representation present at the negotiating tables.[144] During the 179th plenary meeting of the UNGA, 56 participating states voted to adopt the final draft of the Genocide Convention. One cannot help but wonder if this is still

[140] Jessberger Florian, 'The UN Genocide Convention - A Commentary' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 106.
[141] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 Oceania 125.
[142] Ibid.
[143] Ibid, 134.
[144] Ibid.

representative of the views of the 193 UN member states of today.[145] Note that this vote took place in the early years of decolonization when many countries today have yet to gain independence. They further argue that this failure to include cultural aspects in the Convention negatively impacts the recognition of the systemic and systematic eradication of a social group's culture.[146] Therefore, the current law on genocide disregards the obliteration of a group's cultural values and institutions as long as the massacre did not take place.[147] However, in many instances, the cultural and physical annihilation of groups go hand in hand. The perfect example of this would be the destructive processes of colonization. Indigenous populations have suffered decades-long genocides in the form of land grabbing, conflicts, the spreading of diseases, mass killings, and cultural devastation. It would be absurd to claim that the victims of these processes only deserve reparations for the physical aspects of the destruction. Therefore, recognising cultural genocide would reinforce and restate the importance of redress and accountability for wrongful acts. As for accountability, it is also morbid to see that under the current international criminal law framework, states have the freedom to commit genocide against their population, as long as it does not qualify as mass murder, with acknowledgement and protection from the UN allowing this to happen for political and practical reasons.[148] Many scholars argue that all forms of destruction are destruction and should be treated as such and that the notion of genocide and cultural genocide is only semantically different, but in essence, it refers to the same material content.[149] If states are not held accountable for cultural genocide, the deterrence effect of the whole project on the prohibition of genocide effect is deeply scarred. Not only that, but the lack of recognition of genocide would also harm its prevention, circling back to the abovementioned point that states have a free card in committing genocide without

[145] 'Convention on the Prevention and Punishment of the Crime of Genocide – Procedural History' (*United Nations Audiovisual Library of International Law)* https://legal.un.org/avl/ha/cppcg/cppcg.html#:~:text=The%20General%20Assembly%20adopted%20the,resolution%20260%20(III) accessed 12 April 2023.
[146] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14 Journal of Human Rights 63.
[147] Ibid.
[148] Robert van Krieken, 'Rethinking Cultural Genocide' (2004) (n 140).
[149] David B. MacDonald and Graham Hudson, 'The Genocide Question and Indian Residential Schools in Canada' (2012) 45(2) Canadian Journal of Political Science 427.

accountability.[150] In the context of this thesis, the recognition of cultural genocide is essential for the acknowledgement of wrongdoing against indigenous populations. After decades of cultural, biological, economic, and physical destruction of indigenous populations worldwide, reconciliation is critical in establishing a safe and stable future for these groups. Without the acknowledgements of accountability and reparations, reconciliation is nominal at best.

Opponents claim that cultural genocide is too far-reaching and too vague to be included in the definition of genocide.[151] Further, they argue that the recognition of cultural genocide would lead to the watering down of the status and significance of genocide in the international criminal arena.[152] In exchange, they propose that culture should be protected via international human rights law, especially minority rights and self-determination. Lastly, because the Genocide Convention's definition of genocide is based on the Holocaust as the threshold of severity for genocide, opponents of cultural genocide argue that assimilationist and welfare state-making policies cannot be labelled as genocidal against the backdrop of the severity of the mass annihilation of millions of Jews, Romani, people of colour, homosexuals, and others.[153]

On the note of watering down the significance of genocide, recognising cultural genocide as a crime would not lead to a too broad notion of genocide, but the current definition is too narrow. The very aim of the prevention and protection from genocide is the survival of a distinct group. A group is distinct and distinguishable because of its cultural uniqueness. Thus, eliminating the distinctive cultural factors of a group would lead to the destruction of a group by means different from physical extermination. Therefore, depriving the crime of genocide of the protection of culture leads to weaker protection of the group.

While the framework of international human rights law indeed overlaps the prevention of genocide on certain group rights, the multiplicity of protection would only strengthen cultural rights. However, the current international human rights law accountability framework is based on voluntary participation and fails to acknowledge perpetrators' criminal

[150] UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The UN Report on Genocide 1985 Excerpts from Paragraph 24 and the Armenian Genocide' (August 5-30 1985) U.N. Doc. E/CN.4/Sub.2/1985/6.
[151] Robert van Krieken, 'Rethinking Cultural Genocide' (2004) (n 140).
[152] Ibid.
[153] Ibid.

liability.[154] Therefore, the international human rights law accountability system is a less than satisfactory alternative to the recognition of cultural genocide.

4.2. The Lemkinian Notion of Cultural Genocide

In the current elements of genocidal acts under the Genocide Convention, only one underlying act made it from Lemkin's cultural genocide definition, the prohibition on the forcible transfer of children to other human groups.

In his vast academic penmanship relating to the crime of genocide, Lemkin emphasized that the cultural destruction of a human group is considered genocide. Lemkin defined cultural genocide as the 'policy of drastic methods aimed at the rapid and complete disappearance of the cultural, moral, and religious life of human beings'. He was adamant about including cultural destruction due to the very circumstances that gave rise to coining the notion of genocide.[155] The Holocaust shaped the Lemkinian version of genocide to its core. In his article, Genocide – A Modern Crime, he detailed cultural devastations committed during the Holocaust as an exemplary list, claiming that the 'Germans obliterated every reminder of former cultural patterns' via means of outlawing the use of local language, personal names and utilized schools to serve as a preservation mechanism for Nazi ideology.[156] To Lemkin, the international recognition for protection from cultural genocide equalled safeguarding the world order and human culture as a whole.[157] His expression on the preservation of world order tells that he did not view genocide as a single act but rather as a coordinated plan of acts and consequences carried out by various means, including biological, physical, economic, and cultural.[158] In this sense, all the above forms of genocide are interdependent upon and intertwined with each other.[159] According to this argument, and in line with the intervention of Pakistan in the UNGC draft negotiations process, 'cultural and physical genocide are indivisible, and it would go against all reason to make one a crime

[154] David Nersessian, 'Rethinking Cultural Genocide Under International Law' (2005) 2(12) Human Rights Dialogue https://www.carnegiecouncil.org/media/series/dialogue/human-rights-dialogue-1994-2005-series-2-no-12-spring-2005-cultural-rights-section-1-rethinking-cultural-genocide-under-international-law accessed 18 April 2023.
[155] Raphael Lemkin, 'Genocide' (1946) 15(2) American Scholar 227.
[156] Raphael Lemkin, 'Genocide - A Modern Crime' (1945) 4 Free World 39.
[157] Ibid.
[158] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) (n 146).
[159] Dirk Moses, 'Genocide and the Terror of History' (2011) 17(4) Parallax 90.

and not the other'.[160] Many scholars are still holding on to the Lemkinian version of genocide because it is purer than the UN Genocide Convention, reeking of the powerplay by settler colonisation and the inevitable international law-making consensus.[161] However, the Lemkinian definition is not perfect. It is overwhelmingly reliant on the Holocaust as the 'threshold of trauma' for genocide, limiting its application to other equally severe situations.[162] Among other political reasons, this is why many genocidal acts have yet to be characterized as genocide, thereby discrediting their gravity and eluding accountability.[163]

In the context of this thesis, it is also important to note that Lemkin argued that genocide is 'intrinsically colonial'.[164] In *Axis Rule in Occupied Europe,* he explains how genocidal processes unfold. Firstly, the 'destruction of the national pattern of the oppressed group' followed by the 'imposition of the national pattern of the oppressor' clarifying that this 'imposition (…) may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals'.[165] Therefore, Lemkin viewed the crime of genocide as inherently linked to the imperialist ideology of imposing cultural characteristics of oppressive groups on oppressed ones.

In sum, the Lemkinian notion of genocide encompasses cultural means of destruction and acknowledges the importance of protecting the culture of various human groups. To understand to what extent the Genocide Convention includes a cultural component, one needs to interpret the instrument according to international rules of treaty interpretation.

4.3. Deciphering the Genocide Convention: Treaty Interpretations

The Guidance note by the UN Office on Genocide Prevention and the Responsibility to Protect draws attention to the possible misuse of the term genocide and the political

[160] UNGA Sixth Committee 'Continuation of the consideration of the draft convention' (25 October 1948) UN Doc A/C.6/SR.83.
[161] Robert van Krieken, 'Rethinking Cultural Genocide' (2004) (n 140).
[162] Dirk Moses, 'Genocide and the Terror of History' (2011) (n 159).
[163] Raymond Evans, 'Crime Without a Name: Colonialism and the Case for Indigenocide' in Dirk Moses (ed), *Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History* (Berghahn Books, New York 2009).
[164] Dirk Moses, 'Empire, Colony, Genocide, Keywords and the Philosophy of History' in Dirk Moses (ed), *Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History* (Berghahn Books, New York 2009).
[165] Raphael Lemkin, *Axis rule in occupied Europe* (Columbia University Press, New York 1944).

sensitivities around its misinterpretation.[166] The note emphasizes the significance of the legal consequences of characterizing an incident as genocide and cautions against its emotive application.[167] To avoid such mischaracterization or misinterpretation this paper will apply the rules of treaty interpretation to the UN Genocide Convention. To this end, the following sub-chapter will decode the elements of treaty interpretation according to the 1969 Vienna Convention on the Law of Treaties ('VCLT') and apply it to the UN Genocide Convention. The underlying aim of interpretation lies in deciphering whether cultural destruction is or could be understood to be integrated into the genocide definition of the Convention.

Article 31 of the VCLT describes that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[168] The article notes that exploring the contextual circumstance of the treaty can include an interpretation of 'agreements relating to the treaty' and of 'any subsequent practice in the application of the treaty'.[169] The following paragraphs will interpret Article 2 of the Genocide Convention to see whether cultural destruction is an element in the article, potentially giving rise to the crime of cultural genocide.

Treaties shall be interpreted in good faith according to the VCLT. This imprecise notion has gained widespread acknowledgement by academia to signal that the overall textual meaning of the treaty is effective and is not redundant or contradictory.[170] Using this method of interpretation to compare underlying acts of Article 2 of the UN Genocide Convention makes it transparent that 2(e), 'forcibly transferring children of the group to another group', intended to carry additional considerations than just physical and biological destruction. If the removal of children were aimed at the biological destruction of a group by preventing reproduction only, it would be covered already by 2(d): 'Imposing measures intended to prevent births within the group'.[171] On the other hand, if it would target physical destruction,

[166] UN Office on Genocide Prevention and the Responsibility to Protect, 'Guidance Note on the UN's Role in the Prevention of Genocide' (August 2012) https://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf accessed 12 March 2023.
[167] Ibid.
[168] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(1).
[169] Ibid, art 31(2) and (3).
[170] Kurt Mundorff, *A cultural interpretation of the Genocide Convention* (Routledge 2022).
[171] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 2(d).

it would have been covered already by 2(a): 'Killing members of the group or 2(b): 'Causing serious bodily or mental harm to members of the group'.[172] Therefore, without acknowledging that 2(e) adds a cultural component to the notion of genocide, the textual effectiveness of the treaty would be rendered redundant.

On the other hand, good faith interpretation includes teleological effectiveness. It implies that the complete teleological aim of the treaty is reflected in every single word and all provisions together.[173] The ICJ described the teleological method as the 'principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes'.[174] In the same case, the Court noted that interpreters could not read their desired aims into the teleological interpretation and create rights this way.[175] To understand the underlying aim of the treaty and see whether the textual aspect has reflected this goal, we must turn to the interpretation of the object and purpose of the treaty.

The objects and purposes of a treaty are the very reason drafters sit down at the negotiations table in the first place, and it is the basis of the instrument's existence.[176] When looking at the objective of treaties, the Preamble can often provide initial guidance. The Preamble of the Genocide Convention refers back to the UNGA Resolution of 1946, thereby bringing this instrument into the realm of interpretation. The Resolution's Preamble denotes that genocide results in great losses to humanity in the form of cultural contributions.[177] This sentence represents the understanding that the prohibition and prevention of genocide have the objective to uphold and preserve cultural contributions, which are important to humanity.

The Resolution defines genocide as denying the right to the existence of entire human groups. Accordingly, it could be inferred that the prevention of genocide means the protection of the existence of entire human groups.[178] The ICJ affirmed this stance in the *Reservations Case*, explaining that '(the Convention's) object is to safeguard the very existence of certain

[172] Ibid, art 2(a) and 2(b).
[173] Kurt Mundorff, *A cultural interpretation of the Genocide Convention* (2022) (n 170).
[174] *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Judgment) [1966] ICJ Rep 6, para 91.
[175] Ibid.
[176] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, Dordrecht 2007) 206.
[177] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 171) Preamble.
[178] The Crime of Genocide, UNGA Res 96 (11 December 1946) A/RES/96.

human groups'.[179] Reading the ICJ's stance in light of the Resolution's Preamble shows that the teleological aim behind the UN Genocide Convention is the protection of human groups for reasons, including their cultural contributions to humanity.

Furthermore, Article 2 defines all underlying acts of genocide in a non-hierarchical manner. Thus, it equates the destruction of mass killings with the destruction resulting from the forcible removal of children. Therefore, it becomes clear that the objective and purpose of the treaty from a teleological and textual reading suggests that Article 2 is concerned with the protection of the existence of the group by means including the preservation of its cultural identity.

When it comes to the contextual understanding of the treaty's object and purpose, interpreters can turn to the historical background and the travaux preparatiore of treaties. The historical context of the UN Genocide Convention was the atrocities of the Second World War, especially the horrors of the Holocaust. The above chapter on the Lemkinian notion of genocide discusses his objective to prevent and penalize not only the physical and biological destructions, like the Holocaust, but cultural annihilation as well.

While the negotiations of the draft treaty were highly contentious, especially on the question of cultural genocide, participants generally acknowledged the view expressed by the Venezuelan state representative that the removal of children was tantamount to the destruction of the child's group, by mispositioning the child in a foreign culture, language, and environment.[180] This acceptance signals that the Convention outlaws some aspects of cultural destruction. Additionally, looking at the first draft of the UN Secretariat, we can see that Article 2(e) was explicitly under the sub-category of cultural destruction and was only moved up later to the general list of underlying acts, retaining a certain degree of protection from cultural destruction. In sum, looking at the preparatory work of the Convention concludes that aspects of cultural destruction remained in the treaty, reinforcing the view that its objective is not solely limited to protection from physical and biological annihilation.

Next to the contextual and purposive reading of the treaty, interpretation rules prescribe the importance of the text's ordinary meaning. The ordinary meaning of the text refers to the literal textual interpretation of a treaty. When looking at Article 2, one can

[179] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 12.
[180] David Nersessian, 'Rethinking Cultural Genocide Under International Law' (2005) (n 154).

convey that methods of group destruction are not defined in detail. The article only refers to physical destruction per se in one instance under 2(c): 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.'[181] While in the case of mass killings under 2(a), the requirement for physical destruction is apparent, for the other genocidal acts, a specific limitation for physical destruction is not stipulated. It is also essential to understand that the 'ordinary meaning of the word interpretation' merely includes what is in the text but does not exclude what is not.[182] If drafters had wanted to exclude cultural destruction from the scope and ambit of the Genocide Convention, they could have done so explicitly in the text.[183]

Concerning the interpretation of the treaty based on subsequent agreements, the 1996 ILC's commentary comes to mind. The commentary on the Draft Code of Crimes against the Peace and Security of Mankind stated that the Genocide Convention is only concerned with the 'material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group'.[184] The ILC based this position on the *travaux preparatiore* of the Convention incorrectly[185] since the fact that Article 2(e) made it into the final version of the treaty means that the Convention covers certain cultural aspects of destruction.[186] Unfortunately, in 2004 the ICTY, in its *Krstić* judgment, adopted the Commission's conclusion and stated that 'the Convention literally covered only the physical or material destruction of the group'.[187] Interestingly however, it flashed out that the Statute of the Nuremberg Trials did apply to acts destroying the cultural unit of groups and was not limited to physical or biological annihilation. Here, the court contextually interpreted the UNGC's Article 2 by relying on the *travaux preparatiore* and the ILC's conclusion.[188] However, it also hinted that the Nuremberg court -dealing with the same crime as the Genocide Convention- understood the

[181] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 171) art 2(c).
[182] Kurt Mundorff, *A cultural interpretation of the Genocide Convention* (2022) (n 170).
[183] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US) (Judgment) ICJ Rep 392 [1984] para 408.
[184] ILC, 'Report of the Commission to the General Assembly on the Work of its 48th session' (6 May - 26 July 1996) UN Doc A/51/10 para 12.
[185] Kurt Mundorff, *A cultural interpretation of the Genocide Convention* (2022) (n 170).
[186] Ibid.
[187] *Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33 (19 April 2004) para 575.
[188] Ibid.

destruction to include cultural means. The Court's hint about the Nuremberg Statute supports the interpretation that the objective behind the prohibition and punishment of genocide can include cultural destruction.

Regarding the teleological interpretation of the treaty, the above paragraphs have investigated the traditional inter-temporal understanding of the 'object and purpose'. All in all, the treaty interpretation of the Genocide Convention alludes that cultural destruction was part of the purpose and objective of preventing genocide and is reflected in the textual reading of the Convention. The following sub-chapter will discuss the national and international judgments relating to the crime of genocide under the Genocide Convention and investigate how the notion of cultural destruction was considered in these cases.

4.3.1. Judicial Interpretations of the Genocide Convention

National judicial actions alluding to cultural genocide emerged in Canada and Australia in the late 20th century. In 1997, the High Court of Australia heard the *Kruger v. Commonwealth* case, where the plaintiffs alleged that the national law relating to their forcible removal as indigenous children in the Northern Territory amounted to a genocidal policy.[189] The Court held that the Genocide Convention was not translated to the Australian domestic legislation at this time; therefore, it cannot be the legal basis of the case. It also clarified that, in any event, cultural genocide was not part of the Convention.[190] N*ulyarimma v Thompson*[191] and the *Buzzacott*[192] cases were decided jointly two years later in the Australian Federal Court. These cases claimed that the loss of connection with indigenous land during the stolen generation era was cultural genocide.[193] In line with previous judgments, the court acknowledged that 'the Genocide Convention did not deal with cultural genocide (….) thus, a claim of conduct committed with intent to destroy in whole, or in part the culture of a national, ethnic, racial, or religious group (…) would not fall within Article II of the Genocide Convention'.[194]

[189] *Alec Kruger and others v Commonwealth* [1997] HCA 27.
[190] Ibid, para 72.
[191] *Wadjularbinna Nulyarimma v. Ors v Phillip Thompson* [1999] 96 FCR 153.
[192] *Buzzacott & Ors v Minister for the Environment* [1999] FCA 1192.
[193] Ibid.
[194] Ibid, para 200.

It is interesting to see the Canadian legal system's approach because Canada also did not domestically codify the Genocide Convention until 2000 when it enacted the Crimes Against Humanity and War Crimes Act.[195] In *Re residential schools*, the applicants simply sought a declaration from the court that the residential school systems were contradictory to the Genocide Convention.[196] The Court failed to acknowledge the international customary law status of genocide, despite the explicit reference to it in the 2000 Act: 'an act (…) constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principals of law recognized by the community of nations'.[197] Therefore, the Court argued that because of the non-retroactivity of the UN Genocide Convention, the treaty could not be applied to acts before it entered into force. Therefore, the sole legal basis for genocide was the Canadian Criminal Code's prohibition on promoting genocide. Court stated that national law only concerned physical destruction and not cultural genocide, 'which appears to be the subject of the United Nations Convention.'[198] Even though Canada was relentlessly lobbying to remove cultural genocide from the Convention, this paragraph gives a slight hope for the viability of the crime of cultural genocide.[199] This hope was solidified by the statement of the Supreme Court Chief Justice of Canada in 2015, where she claimed that Canada attempted to commit cultural genocide against indigenous peoples.[200]

In 1997, a German Higher State court adjudicated a case of Nikola Jorgić for alleged abuses committed in Yugoslavia, including the crime of genocide. The Court interpreted the Genocide Convention and concluded that biological and physical annihilation is not a prerequisite, but destroying the social unity of a group suffices for the *mens rea* of genocide.[201] Three years later, the Constitutional Court of Germany reaffirmed the lower

[195] Crimes Against Humanity and War Crimes Act (2000 S.C., c. 24)
[196] David B. MacDonald and Graham Hudson, 'The Genocide Question' (2012) (n 138).
[197] Crimes Against Humanity and War Crimes Act (2000) (n 196).
[198] *Re Residential Schools* [2000] A.J. No. 638 (Alta. Q.B.) para 69.
[199] 'Canada threatened to abandon 1948 accord if UN didn't remove cultural genocide ban, records reveal' *National Post* (08 June 2023) https://nationalpost.com/news/canada/canada-threatened-to-abandon-1948-accord-if-un-didnt-remove-cultural-genocide-ban-records-reveal accessed 13 April 2023.
[200] Sean Fine, 'Chief Justice says Canada attempted 'cultural genocide' on aboriginals' *The Globe and Mail* (28 May 2015) https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/ accessed 10 April 2023.
[201] *Prosecutor v Nikola Jorgić* [1997] Higher State Court of Düsseldorf IV-26/96, 2StE 8/96.

court's position and explained that the claim that genocide is only concerned with physical and biological destruction is not reflected in the text of the treaty nor its drafting history.[202]

In 2013, the Guatemalan Criminal Court found the former head of the military, Rios Montt, guilty of genocide under Guatemalan law. The national law on genocide essentially follows the UN Genocide Convention.[203] Rios was proven to be guilty of genocide due to his 'promot(ion) of nationalist policy that undermined the cultural base of various peoples of the Guatemalan society' by the act of removing children and adults to other groups. The Court noted that the camps where group members were transferred imposed 'new cultural (…) practices foreign to their worldview', leading to the group being 'culturally destroyed in part'.[204] The explicit acknowledgement of cultural destruction in this judgment reflects a culturally-permissive approach to the crime of genocide.

All in all, concerning national cases in Canada and Australia, courts were reluctant to admit the cultural aspects of the Genocide Convention in the past. However, the Chief Justice's statement reflects that the public view seems to have changed. Concerning the Guatemalan and the German national cases, the courts took a revolutionary approach and opened the door to the idea that cultural destruction forms part of the genocide definition.

In the 2004 *Krstić* judgment, the International Criminal Tribunal for the Former Yugoslavia held that genocide only relates to a group's physical and biological destruction, referencing the ILC's conclusion.[205] However, Judge Shahabuddeen, in his dissenting opinion, claimed that 'intent certainly has to be to destroy, but, (…) there is no reason why the destruction must always be physical or biological'.[206] He recognized that cultural characteristics unify protected groups, and the destruction of these elements can qualify as genocide despite not being physical or biological.[207] In line with Shahabuddeen's opinion, in 2006, the Court in *Krajišnik* held that '"Destruction" (…) is not limited to physical or biological destruction of the group's members since the group (…) can be destroyed in other

[202] Ibid, 94-95.
[203] Codigo Penal de Guatemala, Decreto No. 17-73 (1973) http://www.oas.org/dil/esp/Codigo_Penal_Guatemala.pdf accessed 20 April 2023, art 376.
[204] 'Partial Judgment in the Trial of Jose Efrain Rios Montt and Jose Mauricio Rodriguez Sanchez' *Justice Initiative – Open Society* https://www.justiceinitiative.org/uploads/31856af0-2fc6-4383-a5c3-6689ed5d6a27/rios-montt-judgment-full-version-11072013_2.pdf accessed 8 April 2023, Translators note: page 84-87 of original judgment.
[205] *Prosecutor v. Radislav Krstić* (2004) (n 187) para 575.
[206] Ibid, Dissenting Opinion of Judge Shahabuddeen para 51.
[207] Ibid, para 50.

ways, such as by transferring children out of the group (…) or by severing the bonds among its members'.[208] Indeed in the footnote to this sentence, the ICTY also clarified that while a group is made up of physical and biological beings, the bonds among the members are cultural, and thus destruction cannot be understood to only mean physical and biological destruction.[209]

The International Criminal Tribunal of Rwanda addressed the question of rape as genocidal destruction in the *Akayesu* case in 1998. With regards to Article 2(d), genocidal measures intended to prevent births, the Court concluded that the rape of women in societies where membership of a group transferred on the child from the identity of the father constitutes a severance of group ties because the child the mother gives birth to, will not belong to her group.[210] Here, the ICTR acknowledged that rape not only carries physical and biological connotations but cuts cultural bonds, thereby contributing to the group's destruction.

In 2007, the International Court of Justice delivered a judgment on a case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. In the case, Bosnia claimed that the 'Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group'.[211] The Court found that the destruction of cultural heritage was widespread and deliberate; still, it cannot be understood to constitute a genocidal act under Article 2 of the Genocide Convention because cultural genocide was removed during the *travaux preparatiore* phase.[212] The Court referred to the *Krstić* case and the ILC report to support its position. The *Croatia v. Serbia* case in 2015 held similarly. While Serbia argued that the genocidal intent of group destruction also means the 'intent to stop it (a group) from functioning as a unit', the Court again referred to the drafting phase of the convention and reinforced the limited approach of physical and biological destruction.[213]

The ICC, to this day, has only adjudicated individual liability for the crime of genocide concerning the Darfur conflict in the case against Omar Al Bashir, the former

[208] *Prosecutor v. Momčilo Krajišnik* (Judgment) ICTY-06-39 (27 September 2006) para 854.
[209] Ibid, footnote 1701.
[210] *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4 (2 September 1998) para 507.
[211] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43 para 320.
[212] Ibid, para 344.
[213] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia) (Judgment) [2015] ICJ Rep 3 para 136.

president of Sudan. The Pre-Trial Chamber issued an arrest warrant against Al-Bashir for crimes against humanity and war crimes but not for genocide, as it did not find a sufficient basis to prove genocidal intent.[214] Therefore, case law has not clarified the ICC's interpretation of the destruction element.

It becomes clear from national and international case law that the question of cultural destruction within the genocide definition of the UNGC is still ambiguous. However, the cultural devastation of a group is acknowledged to play a significant role in establishing the crime of genocide when it comes to inferring genocidal intent or characterizing a protected group. The overall picture painted by the jurisdictional interpretation of the crime of genocide in the UN Genocide Convention reflects that the traditional limited view of destruction being only physical and biological is being contested in certain cases.

4.3.2. Cultural Genocide in International Declarations on Indigenous Rights

In deciphering the interpretation of a treaty, subsequent agreements relating to a specific crime in the international arena can be used to clarify and feed into the definition and underlying elements.

Since the early 1980s, indigenous activists and organizations have advocated for the international codification of their rights.[215] In response to their advocacy, in 1982, the UN ECOSOC established the Working Group on Indigenous Populations ('WGIP') to research existing laws relating to the rights of indigenous peoples and discuss the possibilities of enacting a declaration.[216] With this, the drafting process of the UN Declaration on the Rights of Indigenous Peoples ('UNDRIP') began.[217] The negotiation process took more than two decades, from 1985 to 2006. During the early years, indigenous stakeholders had extensive participation opportunities and significantly contributed to the initial draft of the Declaration. However, as the negotiation moved to the more bureaucratic UN procedures, member states became more influential in the decision-making bringing more politicised perspectives.

[214] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) [2009] ICC-02/05-01/09.
[215] Sandra Pruim, 'Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples' (2014) 35(2) Adelaide Law Review 269.
[216] Ibid.
[217] United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Res 61/295.

During the first meeting in 1982, the WGIP discussed the 1981 UNESCO San Jose Declaration on the struggle against ethnocide as an existing source of indigenous rights.[218] The San Jose Declaration relates to ethnocide and the loss of the culture of indigenous populations, especially in the Latin American region. The Declaration defines ethnocide as the denial of an ethnic group's 'right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity'.[219] In Article 1, the instrument proceeds to 'declare that ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948.'[220] Although the Declaration is a non-binding instrument drafted by a handful of participants at the Conference on Ethno-Development and Ethnocide in Latin America, it carries international legal significance.[221] While soft-law instruments cannot create binding obligations, they carry legal effects and can eventually crystallize into customary international law.[222] According to the WGIP, the San Jose Declaration was an essential piece of international law in the existing framework of indigenous rights. Arguably, the importance attached to this UNESCO declaration is also reflected in the fact that its language on ethnocide and cultural genocide made it to the first draft of the UNDRIP.

In 1993, the Working Group finalized the first draft and submitted the document to the UN Commission on Human Rights for Consideration. Article 7 of the draft instrument stated that 'Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide (…)'.[223] The article aimed to protect indigenous peoples' cultural values, ethnic identities, and lands by preventing population transfers, assimilation, and integration by other cultures or ways of life imposed on them by legislative,

[218] UNESCO 'Declaration of San José' (11 December 1981) UNESCO Doc. FS 82/WF.32.
[219] Ibid.
[220] Ibid, art 1.
[221] Jeff Benvenuto, 'What Does Genocide Produce? The Semantic Field of Genocide, Cultural Genocide, and Ethnocide in Indigenous Rights Discourse' (2015) 9(2) Genocide Studies and Prevention: An International Journal 26.
[222] Thomas Johansson, 'Cultural Genocide in International Law' (Bachelor Thesis, Örebro University 2019).
[223] UNCHR 'Report of the Working Group on Indigenous Populations' (23 August 1993) UN Doc E/CN.4/Sub.2/1993/29 art 7.

administrative, or other measures and any form of propaganda.[224] Indigenous representatives supported this article because it acknowledged the abusive effects of assimilation and land grabbing on indigenous cultures.[225] Unfortunately, the negotiators' perception changed in 1994 when the draft paper was sent before the Human Right Commission for consideration. The Commission established a Working Group on the Draft Declaration, mostly comprised of state representatives.[226] From then on, the draft declaration was primarily discussed among representatives of state interest, and the indigenous influence in the decision-making significantly dropped.[227]

Member states were reluctant to include ethnocide and cultural genocide in the Declaration because, in their view, these concepts did not represent internationally established norms. Initially, both terms were used to mean the cultural loss of peoples, but later the Chairperson-Rapporteur explained that ethnocide relates to the annihilation of culture itself, while cultural genocide means the destruction of the physical aspects of the culture.[228] Ultimately, due to state pressure, both were removed from the draft.[229]

In 2006, the draft Declaration was sent to the UN General Assembly for adoption.[230] The draft was met with dozens of amendment requests, of which nine were upheld.[231] One of the accepted amendments echoed the protectionist view over state sovereignty. It limited the language of the draft declaration to ensure that states retain authority over indigenous peoples and that the right to self-determination is not expanded. Thus, the language of the now Article 8, detailing the means of assimilation. 'by other cultures or ways of life imposed on them by legislative, administrative, or other measures' was removed, and it was displaced by a simpler version of the prevention of 'forced assimilation and integration'.[232] Thus, when the draft reached the more significant state influence stage, unsurprisingly, the language on

[224] Ibid.
[225] Sandra Pruim, 'Ethnocide and Indigenous Peoples' (2014) (n 215).
[226] Ibid.
[227] Ibid.
[228] UNCHR 'Report of the Working Group on Indigenous Populations' (1993) (n 223).
[229] Sandra Pruim, 'Ethnocide and Indigenous Peoples' (2014) (n 215).
[230] 'United Nations Declaration On The Rights Of Indigenous Peoples' (United Nations, Department of Economic and Social Affairs) https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples, accessed 18 April 2023.
[231] Rachel Davis, 'Summary of the UN Declaration on the Rights of Indigenous Peoples' (Briefing Paper, University of Technology Sydney 2007) https://www.uts.edu.au/sites/default/files/JIHLBP8_11_07_0.pdf accessed 19 March 2023.
[232] Sandra Pruim, 'Ethnocide and Indigenous Peoples' (2014) (n 215).

cultural genocide was buried. Despite its removal from the Declaration, Article 8 still carries a lot of weight for indigenous populations. It is especially significant in post-settler-colonial states, where these assimilationist and integrationist policies led to the loss of the culture of indigenous peoples.

On the 13th of September 2007, the UNGA adopted the Declaration with a non-unanimous majority.[233] Interestingly, despite the widespread acceptance of the text, this was the first instance that states voted against a human rights instrument in the UN.[234] Predictably, four colonial states, Australia, New Zealand, Canada, and the United States, voted against adopting the declaration.[235]

Despite the non-binding nature of the San Jose and UN Declaration on the Rights of Indigenous Peoples, they represent a milestone in protecting indigenous rights in international law. The language preventing assimilationist policies is especially important in the context of the residential school system in Canada and the stolen generation child removals in Australia, as both policies were based on forced assimilation against their indigenous populations.

Articles 7 and 8 of the UNDRIP, in consideration of Article 1 of the San Jose Declaration, materializes genocide as the crime of forced assimilation and cultural destruction which deprives indigenous groups, as distinct peoples, of their identity and cultural values. Interpreting the UN Genocide Convention in light of these two international instruments makes it apparent that the genocide definition carries cultural aspects. The language of 'as distinct peoples' in Article 7 of UNDRIP is crucial to understanding the notion of cultural genocide.[236] The process of cultural annihilation results in the loss of the 'distinctness' of a group and losing that means the elimination of the group as a social unit. The very aim behind the UN Genocide Convention is to protect human social units. Thus, if the distinctness is eliminated by cultural destruction, protection is not realized.

[233] 'United Nations Declaration On The Rights Of Indigenous Peoples' (United Nations, Department of Economic and Social Affairs) (n 230).
[234] Sandra Pruim, 'Ethnocide and Indigenous Peoples' (2014) (n 215).
[235] 'United Nations Declaration On The Rights Of Indigenous Peoples' (United Nations, Department of Economic and Social Affairs) (n 230).
[236] UNCHR 'Report of the Working Group on Indigenous Populations' (1993) (n 223) art 7.

4.3.3. Cultural Genocide: Interpretative Conclusions

From the above paragraphs concerning the clarification of Article 2 of the Genocide Convention by treaty law, and jurisdictional and contextual interpretations, it can reasonably be concluded that the interpretation of the crime of genocide includes cultural components that go beyond the mere protection of the physical and biological existence of a group. A culturally-permissive approach towards genocide is gaining ground stemming from the scholarly trend of favouring individual rights expansion, and indigenous rights protection.[237] It is important to note that while the approach to genocide and dispossession of indigenous peoples have fortunately changed since the 1940s, this interpretation simply echoes the initial conception of the crime of genocide as coined by Lemkin. Thus, the judgments and scholarly opinions which allow for a more culturally inclusive understanding of the genocide definition are not solely bringing a new understanding based on the political, social, and human rights approaches of the time, rather they permit the original conceptualization of the protection framework to resurface. This acceptance was reflected earlier and more robustly in scholarly opinions, while international and national jurisprudence is more rigid, and change requires more time.

[237] Kurt Mundorff, *A cultural interpretation of the Genocide Convention* (2022) (n 170).

Chapter V: Examining Cultural Genocide and the Liability of Christian Clergy Members in Canada and Australia

After determining that the crime of cultural genocide, while contested, has viability in the international arena, this chapter will explore whether the residential school system in Canada and the stolen generation child removal policies in Australia amount to genocide with cultural connotations under the UN Genocide Convention. In the following paragraphs, the criminal liability of the Christian clergy will be investigated for aiding and abetting the crime of forcibly transferring children from one group to another as cultural genocide. In doing so, the chapter will first assess whether the events in Canada and Australia amount to cultural genocide. Thus, it will establish the elements of genocide without focusing on an identifiable perpetrator. Regarding accessory liability in international crimes, it is internationally accepted that accomplices can be prosecuted even if principal perpetrators are not identified.[238] Building on the findings of the genocidal acts and genocidal intent, the chapter will explore the extent of participation of the Christian clergy in both atrocities. Lastly, the possible legal avenues for holding the clergy accountable will be introduced. The following analysis will decipher the Article 2 skeleton definition of genocide through means of treaty- and jurisprudential interpretations to clarify the elements of the crime of genocide.

5.1. Examining the Crime of Cultural Genocide in the Context of Canada and Australia

The Article 2 definition of the Genocide Convention, as stated above, prescribes:

> *'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *(a) Killing members of the group;*
> *(b) Causing serious bodily or mental harm to members of the group;*
> *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *(d) Imposing measures intended to prevent births within the group;*
> *(e) Forcibly transferring children of the group to another group.'*[239]

[238] *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4 (2 September 1998) para 527.
[239] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 2.

Thus, genocidal acts need to prove that the context within which the act was committed was in a consistent pattern of similar conduct and that the act was targeted against a protected group member due to their membership in that social unit. The underlying act committed must fall under the *numerous clausus* of genocidal acts as recognized by Article 2(a)-(e). If this is proven, the most challenging aspect of the crime of genocide, the special intent, needs to be shown, where the perpetrator is demonstrated to have the intent to destroy in part or whole the protected group when committing the underlying act. In the case of criminal liability of accomplices, the person complicit to the crime must have known that they are contributing to the crime and awareness of the specific intent of the perpetrator.[240]

This paper aims to analyse whether the wrongdoings in Canada and Australia could correspond to the crime of cultural genocide based on the interpretation developed above and to highlight the extent of participation of the Christian clergy. However, accessory liability cannot be exhibited without proving the principal crime.[241] Therefore, this thesis will not go into detail establishing the principal perpetrator of the crime. Instead, it will proceed to establish that the atrocity fulfils all elements of the criteria of genocide and, building on that, showcase how the assistance of the clergy can be established based on their knowledge of contribution to widespread genocidal policies. Therefore, this thesis borrows the internationally recognized criminal law concept of the unidentified perpetrator to establish the special intent behind the broader program of genocide and highlight the criminal liability of actors other than the perpetrators. This notion has been explicitly mentioned by both the ICTR and the ICTY in the *Akayesu* and *Krstić* judgments, stating that accomplices can be prosecuted when the primary perpetrators may not face prosecution.[242] Further, the inference of genocidal intent can be established for an atrocity even if the perpetrator the intent is attributable to is not identified.[243]

5.1.1. Contextual Element: Manifest Pattern of Similar Conduct

Article 1 of the UNGC defines the broad contextual setting of the crime, declaring that genocide is a crime even if 'committed in time of peace or in war'.[244] To avoid

[240] *Prosecutor v. Blagoje Simic et al* (Judgment) ICTY-95-9 (17 October 2003) para 160.
[241] *Prosecutor v Akayesu* (1998) (n 238) para 527.
[242] Ibid, para 531.
[243] *Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33 (2 August 2001) para 34.
[244] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 1.

characterising singular, isolated acts as genocide, the ICC Elements of Crimes further clarified that genocidal acts are committed in a 'manifest pattern of similar conduct.'[245] The notion of 'similar conduct' is understood by international legal scholars as not only identical genocidal acts but any of the five underlying acts in Article 2.[246] This requirement entails a certain degree of consistency, organization, and coordination behind the overarching program of genocidal atrocity.[247]

Canada

Whereas during the earlier years of colonization, there were tumultuous conflicts between the colonizer and indigenous populations, the period within which the Canadian residential schools operated can generally be described as peaceful. However, the program behind the residential system was a coordinated and consistently applied national policy. Canada's regulatory and legal framework established the system's assimilationist objective and prescribed its application. There was even a specific governmental body assigned to indigenous matters, Indian Affairs, which oversaw the operation and regulatory environment of the institution's children were removed. Such a level of administrative organization behind the school system suggests that the atrocities suffered by the victims were coordinated, coherent, and deliberate. The fact that the genocidal acts were carried out in a pattern of similar conduct is exposed by the magnitude of children affected by residential school policies. An approximate estimation suggested that around 150,000 indigenous children were victims of the system.[248] The school policy was also geographically widespread. Residential schools were scattered around the country in almost all provinces of Canada.[249]

Australia

[245] International Criminal Court, 'Elements of Crimes' (2 November 2000) UN Doc. PCNICC/2000/1/Add.2 art 6(e).
[246] Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) para 11.
[247] UNSC 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004' (25 January 2005) Doc No S/2005/60, 116.
[248] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada' (2015) IR4-7/2015E-PDF https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf accessed 10 March 2023, 3.
[249] Ibid.

In Australia, the contextual circumstances were similar to Canada. The period of the stolen generation child removals was mostly peaceful. The regulatory and legal framework enacted for the child removal policies were numerous and consistent. The Protectorate system oversaw the implementation of all regulations regarding indigenous peoples. In 1937, during the Commonwealth State Native Welfare Conference, assimilation became a federal state welfare policy. Thus, the policy functioned with high-level coordination and planning. The deliberate conduct is illustrated in the 1915 amendment to the 1909 Aborigines Protection Act, which allowed child removals without parental consent. On top of that, in most states, the Chief Protectors took legal guardianship over indigenous children; therefore, the government had custody over indigenous children, which signals the consistency of the removal policy. Between 25,0000 to 100,000 indigenous children are estimated to have been part of the stolen generation from all states in Australia.[250]

5.1.2. Targeting Members of a Particular National, Ethnical, Racial, or Religious Group

The Genocide Convention offers protection for national, ethnical, racial, or religious groups.[251] Nor the Convention nor the ICC Elements of Crimes define these groups, but international jurisprudence elaborated on this question. There is a general understanding that there exists no internationally accepted definition of protected groups, thus, this evaluation needs always to be performed on a case-by-case basis,[252] 'in light of the particular social, historical, cultural context' they operate in.[253] According to the ICTR, the interpretation of the *travaux preparatiore* of the Convention suggests that protected groups should be understood as roughly corresponding to national minority groups.[254] In the Court's view, protected groups aim to describe a singular phenomenon of national minorities instead of separate ones, and trying to differentiate them would be inconsistent with the object and purpose of the Convention.[255] Therefore, from the jurisprudential interpretations, it is clear

[250] Map of Stolen Generation Institutions, (Healing Foundation) https://healingfoundation.org.au/map-stolen-generations-institutions/ accessed 20 April 2023.
[251] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 1.
[252] *Prosecutor v. Blagojevic and Jokic* (Judgment on Motions for Acquittal pursuant to Rule 98 Bis) ICTY-02-60 (5 April 2004) para 667.
[253] *Prosecutor v. Sylvestre Gacumbitsi* (Trial Judgment) ICTR-01-64 (17 June 2004) para 254.
[254] Ibid.
[255] *Prosecutor v. Laurent Semanza* (Judgement and Sentence) ICTR-97-20 (15 May 2003) para 317.

that these groups are not understood to be utilized as rigid grids of protected categories but rather as guidance on which social units deserve protection.

Searching for something more concrete, the *Akayesu* judgment offered a helping hand as it introduced vague definitions for each protected group. ' (…) a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.[256] An ethnic group is generally defined as a group whose members share a common language or culture.[257] The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors.[258] The religious group is one whose members share the same religion, denomination, or mode of worship.'[259]

However, in *Akayesu,* the Court went beyond and introduced a twist. It specified that not only the abovementioned explicit groups are to be protected by the Convention, but 'all stable and permanent groups', whose membership is continuous and introduced by birth.[260] By this line of reasoning, any group where individuals 'belong regardless of their desires' should be protected from genocide.[261] Some scholars stamped this view far-fetched, but the ICTY upheld it in the consecutive *Jelašić* judgment.[262]

Since in the crime of genocide, it is the group, not the person, that enjoys protection, individuals must be targeted because they are 'members of a protected group and specifically because they belong to this group'.[263] Membership in a group can be manifested by either a subjective or an objective criterion. The Court in *Jelisić* stated that membership could be demonstrated by a subjective criterion based solely on the perception of the perpetrator (identification by others).[264] The *Kayishema* judgment complimented this method of proof with the self-perception of the group (self-identification).[265]

[256] *Prosecutor v Akayesu* (1998) (n 238) para 512.
[257] Ibid, para 513.
[258] Ibid, para 514.
[259] Ibid, para 515
[260] Ibid, para 701.
[261] Ibid, para 511.
[262] *Prosecutor v. Goran Jelisić* (Trial Judgement) ICTY-95-10 (14 December 1999) para 69.
[263] *Prosecutor v Akayesu* (1998) (n 238) para 521.
[264] *Prosecutor v. Goran Jelisić* (1999) (n 262) para 70.
[265] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement) ICTR-95-1 (21 May 1999) para 98.

Canada

Canadian residential school system victims belonged to the First Nation, Inuit, and Métis indigenous groups.[266] Groups that are permanent and stable, according to the *Akayesu* definition, as children automatically become and continue being members of the group by virtue of their birthright. The existence of indigenous legal entitlements can also authenticate membership in these groups. First Nation, Inuit, and Métis are objectively identified as ethnic groups corresponding to the ICTR's criteria above, as these units have cultural links and their own language (Michif, Inuktitut, Ojibway, Cree, etc.). Thus, these indigenous groups fall under the protection of Article 2.

Members of the First Nation, Inuit, and Métis groups who fell victim to the residential school system, identified themselves as indigenous peoples, separate from the mass Canadian culture due to differing worldviews, traditions, and spirituality. This is evidenced by numerous testimonies in the Truth and Reconciliation Report, showcasing how indigenous children felt misplaced owing to the foreign culture, language, and religion exercised in the schools.[267] As for identifying the victim's membership in the protected group by others, both the state and religious actors at the school viewed the children as part of an indigenous ethnic group. The state specifically created the Indian Affairs governmental body and enacted laws that solely affect indigenous people, highlighting their 'otherness' from the mass Canadian society.[268] Christian missionaries and other staff addressed children in a degrading and othering manner, underlining their 'evil tendencies of (…) Indian nature',[269] which highlights that they were deemed to belong to a different group.[270] Perpetrators were singling out and stigmatizing children because of their perception of the children belonging to indigenous groups, recognized as a different social unit.[271] Here, indigenous groups were perceived to be different, applying negative criteria, because they were distinguished from 'the group that the perpetrators of the crime consider that they themselves belong' to, the white-Christian

[266] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[267] Ibid.
[268] Ibid.
[269] Canada, Indigenous and Northern Affairs, Department of Indian Affairs, Annual Report of the Department of Indian Affairs (Ottawa The Department, 1903) 342–343.
[270] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[271] *Prosecutor v. Goran Jelisić* (1999) (n 262) para 70.

'civilized' society.[272] Thus, the First Nation, Inuit, and Métis children viewed themselves and also have been viewed by the perpetrators as belonging to specific indigenous groups, which fall under the definition of ethnic groups in the Genocide Convention.

Australia

Australia's stolen generation child removals focused on so-called 'half-caste' indigenous children. These children belonged to Aboriginal and Torres Strait Islander peoples but were viewed by the government as 'half-European' because of their skin colour.[273] Among many others, Aboriginal groups included the Wiradjuri, Kamilaroi, Noongar, Ngaanyatjarra, Nunga, and Torres Strait Islander peoples. These social units share common cultures, languages, and traditions. While the government unjustifiably categorized indigenous people into arbitrary racial categories, objectively, these were not racial groups and subjectively not groups that the indigenous children felt they belonged to. Therefore, it is more accurate to view the victim groups in Australia as ethnic groups for the purposes of the UNGC protected group definition. These are stable and permanent units where membership, tradition, and knowledge are passed down by birthright. Additionally, they can be identified as roughly corresponding to that of a national minority due to their distinct ethnocultural heritage and historical connection to the territory.[274] Therefore, since there are several ways that group status can be established, despite the perpetrators singling out these groups subjectively on a racial basis, it is possible to view this group as a protected ethnic group under the UNGC grid. Indeed, *prima facie*, it can seem that 'half-caste' children were illogically targeted because of their skin colour or the skin colour of their parents, but these politically fabricated categories were still parts of the larger group of indigenous peoples, and this was the main reason of their selection.[275] The policy aimed to kill the indigenous in these children, thus, it was focused on their indigeneity. Therefore, it can be said that these children belonged to indigenous groups and were singled out because of their membership in

[272] Ibid, para 71.
[273] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families' (1997) https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf accessed 10 March 2023.
[274] *Prosecutor v. Juvénal Kajelijeli* (Trial Judgement) ICTR-98-44 (1 December 2003) para 811.
[275] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report (1997) (n 273).

this ethnic group. Thus, the stolen generation policy targeted ethnic groups of indigenous peoples in part.

5.1.3. Actus Reus: Forcibly Transferring Children of the Group to Another Group

During the early drafting phase of the Genocide Convention, the genocidal act of forcibly transferring children fell under the classification of cultural genocide according to Lemkin's vision. However, already in the early phases, the whole category of cultural genocide was voted out as it was found too vague, irrelevant to physical destruction, and generally different from the other genocidal acts enlisted.[276] With a turn of faith, the prohibition of transferring children forcibly from one group to another resurfaced in the final draft at the request of Greece.[277] Drafters tried to rationalize this new addition by forcing it into the sphere of biological and physical destruction.[278] During these exchanges, the notion of the intersection between a group's cultural integrity and the necessity of coming generations for a continued group existence gained wider acknowledgement, meaning that groups have a right to custody over children and cultural continuity in order to protect the group's physical existence.[279] However, this underlying act remains unclear and contested. Notably, it is often referred to as an afterthought that was not given enough attention and consideration.[280] While there has not been extensive jurisprudence on the genocidal act of forcible transfer, some cases briefly elaborate on the issue, which helps decipher the crime's elements.

The ICC Elements of Crimes enlists the criteria of genocide by forcibly transferring children.[281] As for the material elements, it enshrines that the victims, who are under the age of 18, must belong to a protected group from which they have been transferred to another group. Regarding the mental elements, the acts have been perpetrated with the intention to destroy in whole or in part that protected national, ethnical, racial, or religious groups as such. Lastly, in terms of context, the transfer must have occurred in a similar pattern of conduct.

[276] Kurt Mundorff, 'Taking 2(e) Seriously: Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide' (Master's Thesis, University of British Columbia 2007), 27.
[277] Akis Gavriilidis, 'Lemkin's Greek Friends: Abusing History, Constructing Genocide - And Vice Versa' (2016) 30 Holocaust & Genocide Studies 488.
[278] Kurt Mundorff, 'Taking 2(e) Seriously' (2007) (n 276) 32.
[279] Ibid.
[280] William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, New York 2000), 175.
[281] International Criminal Court, 'Elements of Crimes' (2000) (n 245) art 6(e).

The wording of Article 2(e) does not require a specific motivation for the act. As summarized by *Jelisić*, personal motives do not preclude the existence of genocidal intent.[282]

The material elements of the crime must be examined first to prove beyond reasonable doubt that the forcible transfer of children took place. The analysis thus will follow the examination of the temporality of the removal, the forcible nature of the act, the 'otherness' of the receiving group, and the verification that the victims were children.

The text of the convention does not prescribe a temporal threshold for the crime of transferring children. However, the longer children are removed from their original group environment, the less likely they will identify with and reproduce within the group.[283] Thus, while the provision has no temporal prescription, temporality can signify an intention to destroy the group by permanently alienating members.

Regarding the term 'forcible', the ICC Elements of Crimes clarifies that the notion is not restricted to physical force but can include threats, duress, or other forms of coercion.[284] The *Krstić* judgment notes the 'compulsory nature of the transfer',[285] while the ICJ refers to 'deliberate and intentional acts' when defining transfers.[286] Therefore, the requirement of 'forcibility' carries a sense of premeditation and compulsion induced by physical force or coercion.

The crime specifies that children are transferred from one group to another, meaning the original and receiving groups are fundamentally different. During the drafting phase of the Convention, delegates asserted that the transfer includes a forcible change of environment, language, and customs.[287] This approach suggests that the receiving group's cultural and linguistic characteristics are distinct from the original group's to the extent that children transferred will lose their original group identity. Thereby, the original group will lose its members and likely go gradually extinct as a group.[288]

[282] *Prosecutor v. Goran Jelisić* (Appeals Judgement) ICTY-95-10 (5 July 2001) para. 49.
[283] Kurt Mundorff, 'Taking 2(e) Seriously' (2007) (n 276) 47.
[284] International Criminal Court, 'Elements of Crimes' (2000) (n 245) footnote 5.
[285] *Prosecutor v. Radislav Krstić* (2001) (n 243) pp 186.
[286] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43 para 186.
[287] UNGA Sixth Committee 'Continuation of the consideration of the draft convention' (25 October 1948) UN Doc A/C.6/SR.83, 195.
[288] Kurt Mundorff, 'Taking 2(e) Seriously' (2007) (n 276), 28-29.

The provision outlaws the transfer of children; thus, the notion of 'children' needs to be examined closely. The internationally accepted approach to this is to follow the United Nations Convention on the Rights of the Child ('CRC') categorization, which prescribes that persons under the age of 18 are considered to be children under international law.[289]

Canada

The British North American Act of 1867 granted authority to Canada to legislate nationally over indigenous matters. The same year, Canada passed the First Indian Act enabling the government to run educational institutions for indigenous children. The 1920 amendment to the Act stipulated compulsory residential school attendance for indigenous children between the ages of 7 and 15 who did not have schools on their reserves. Due to the excessive authority vested in the government, indigenous parents had no agency to decide whether they would like to send their children to residential schools. The children were essentially stripped from their families against their will. If the parents resisted school attendance, they faced punitive actions. In some instances, the Indian Agents from the reserves were withholding money from parents.[290] In others, they faced jail time.[291] The legislative framework gave rise to the forcible transfers of children; thus, it was a premeditated and intentional system of removals. Further, the compulsory nature of schools and the punitive actions against parents established a coercive environment, which signifies that there was no real choice, but to let the authorities transfer indigenous children.[292]

Now the analysis turns to the duration of transfers. The compulsory school attendance legislation prescribed the age range of 7 to 15, but other scholarly sources gathered that some indigenous children attended residential schools from the age of 4 to 17.[293] The schools lasted for ten months every year, with a two-month break. Indigenous children spent a substantial amount of their transformative years in residential schools. While the Convention does not

[289] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[290] Andrea Smith, 'Indigenous Peoples and Boarding Schools: A Comparative Study' Permanent Forum on Indigenous Issues, 8th session (26 January 2009) E/C.19/2009/CRP. 1, 8.
[291] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[292] Ibid.
[293] Andrea Smith, 'Indigenous Peoples and Boarding Schools' (2009) (n 290).

prescribe a temporal threshold, long-term transfers such as these indicate that the removals were deliberate and intentional.

Indigenous children in Canada were transferred from indigenous ethnic groups to groups with Christian and European beliefs and values. The residential school staff mainly consisted of Christian missionaries from Roman Catholic, Anglican, United, Methodist, and Presbyterian churches, who aimed to civilize and Christianize the pupils. The languages used in these institutions were foreign to indigenous children who spoke traditional languages back in their communities. Indigenous customary and spiritual practices were not allowed on school premises either, but Christian practices were mandatory.[294] Therefore, the fundamental 'otherness' of the receiving group in terms of culture, linguistics, and spirituality was evident in Canadian residential schools.

Lastly, the target of the policy was school-aged kids under 18, as enshrined in the compulsory attendance legislation. Thus, according to the categorization of the CRC, the victims of transfers were children.

Australia

In Australia, unorganized forcible transfers of indigenous children started in the early days of colonization.[295] By the end of the nineteenth century, numerous states' legislation crystallized the conditions and requirements for indigenous child removals. Aborigines Protected Boards across the country gained extensive authority over indigenous people, including children, regarding their rights to education, custody, and welfare.[296] The Chief Protectors in many states assumed legal guardianship over indigenous children, granting themselves the opportunity to coercively order the transfer of children. If indigenous children defied transfers or escaped their assigned custody, they faced state-prescribed punishments.[297] Thus, boards had the authority to remove indigenous children against their or their parents will if they were deemed neglected, destitute, or uncared for. These categories, however, were equivalent to being indigenous due to the racist views of the

[294] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 245).
[295] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report (1997) (n 273).
[296] Keila Mayberry, 'Searching for Justice for Australia's Stolen Generations' (2022) 22 Chicago Journal of International Law 661.
[297] Aborigines Protection Amending Act 1915 (New South Wales 1915/002).

general population in Australia at the time.[298] Based on these statuses, indigenous children were removed to foster homes, foster care, and church-run schools.

Therefore, governmental authorities enacted these transfers based on court orders in consonance with national legislation. The Bringing Them Home Report conceptualized this phenomenon as a compulsion.[299] Similarly, as in the case of Canada, Australian parents and children had little authority to decide on their own futures and custody because the environment in which these transfers took place was undeniably coercive. As the transfers were carried out according to national legislation and court decisions, besides being coercive and compulsory, the removals can be characterized as premeditated and intentional.

Depending on state legislation, Protection Boards had custody over indigenous children until the age of 18 or 21.[300] Kids who were removed based on neglect had to stay in the foster institution or church-run school custody until their late teenage years, usually between 16 to 18.[301] Regarding children who were given up for abortion from very early ages, the length of legal guardianship varied from case to case, but indisputably, the removal intended a permanent change in their lives and familial ties.[302] Other children were sent to employment from the age of 12 while remaining under the legal custody of the Boards.[303] Child removals to foster institutions, foster homes, and employment intended to be permanent, as children were assigned different familial connections under the law and were rarely able to see their families, stay in contact, or get in touch with their group identities.[304]

The children of the stolen generation era in Australia came from indigenous ethnic groups who exercised their own languages, traditional customs, and spirituality. These identities of the groups were the very reason they became the target of forcible removals. The receiving groups in foster institutions were mainly made up of members of Christian denominations, who were very vocal about the differences in the values and lifestyles of Christian and indigenous peoples. Adoptive parents were overwhelmingly white and

[298] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[299] Ibid.
[300] Aboriginals Act 1910 (Northern Territory 1910/1024) para 9; Industrial Schools Act 1874 (Western Australia, 1874/011) para 5.
[301] Ruth Amir, 'Killing Them Softly: Forcible Transfers of Indigenous Children' (2015) 9(2) Genocide Studies and Prevention: An International Journal 41.
[302] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[303] Ibid.
[304] Ibid.

Christian, who aimed to degrade indigenous lifeworlds and show the adopted child the civilized way of life.[305] The 'otherness' of the two groups was made very clear to indigenous children subjected to the stolen generation policies.

From the above paragraph, it is clear that the target of forcible removals were children from the age of 0 to 18. Removal legislation texts also explicitly refer to children. An example is Western Australia's Act of 1905, which prescribed the Aborigines Department's duty 'to provide for the custody, maintenance, and education of the children of aborigines'.[306] Another would be the New South Wales 1915 amendment to the 1909 Act detailing that 'The Board may assume full control and custody of the child of any aborigine if after due inquiry it is satisfied that such a course is in the interest of the moral or physical welfare of such child. The Board may thereupon remove such child to such control and care as it thinks best.'[307]

In sum, this subsection analysed the underlying conditions of the removals in Canada and Australia and established that in both scenarios, the removals were forcible transfers of children from their group to another.

5.1.4. Mens Rea: The Unidentified Perpetrator Intended to Destroy, in Whole or in Part, that National, Ethnical, Racial or Religious Group, as Such

The establishment of *dolus specialis*, the intent to destroy a protected group, needs to be done on a case-by-case basis.[308] All perpetrators of individual genocidal acts need not only to know that it will further the genocidal program but possess the specific genocidal intent.[309] This method is referred to as the purpose-based approach as opposed to the knowledge-based, looser criteria, where the perpetrator's knowledge that the act will likely result in the furtherance of destruction would suffice.[310] However, in the case of an unidentified perpetrator, it is possible to conclude the genocidal intent of the atrocity as a whole, even 'when the individual to whom the genocidal intent is attributable is not precisely

[305] Andrea Smith, 'Indigenous Peoples and Boarding Schools' (2009) (n 290), 8.
[306] Aborigines Act 1905 (Western Australia, 1905/014).
[307] Aborigines Protection Amending Act 1915 (New South Wales) (n 297).
[308] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 26.
[309] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (1999) (n 265) para 97.
[310] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 International Review of the Red Cross 833.

identified'.[311] Hence, to evaluate accessory liability, the principal act of genocide must be proved beyond doubt first.[312] To that end, the genocidal intent behind the residential school system and the stolen generation child removal program will be evaluated to ascertain whether these events fulfil the elements of genocide.

Whether genocidal intent solely means physical and biological destruction or cultural destruction would be sufficient for certain underlying acts is contested. The textual and teleological interpretation of the Genocide Convention suggests that restricting destructive intent to physical and biological means is inconsistent with the Convention's object and purpose.[313]

The jurisprudential interpretation is contradictory, as some cases insist on the traditional narrow approach, while others acknowledge the destructive effect of severing social bonds, such as culture and language. However, there seems to be a larger room for interpretation when the underlying genocidal act is transferring children from one group to another. This is because, during the *travaux preparatiore* phase of the treaty, this offence was explicitly characterized as cultural genocide.[314] The *Blagojević* case asserted that because of the very consequence of this act –the dissolution of the group- destruction can be achieved by other means apart from the death of group members.[315] Further, as already stated above, the *Akayesu* judgment recognized that not only killings but other acts like sexual violence, prohibition of marriages, and rape could contribute to the destruction of a group and thereby constitute genocide.[316] On the national level, the German Constitutional Court upheld that physical and biological destruction is not necessary for genocidal intent.[317] Nonetheless, *mens rea* is fulfilled if the act intends to destroy 'the group as a social unit in its specificity, uniqueness, and feeling of belonging'.[318] Therefore, with regards to the genocidal act of transferring children, the intent of destroying the group in whole or in part will be explored in terms of both cultural and physio-biological means.

[311] *Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33 (19 April 2004) para 34.
[312] *Prosecutor v Akayesu* (1998) (n 238) para 530.
[313] See Chapter IV.3.
[314] Convention on the Prevention and Punishment of the Crime of Genocide, First Draft of the Genocide Convention (May 1947) UN Doc. E/447.
[315] *Prosecutor v. Blagojevic and Jokic* (Trial Judgment) ICTY-02-60 (17 January 2005) para 666.
[316] *Prosecutor v Akayesu* (1998) (n 238) para 507.
[317] *Prosecutor v. Nikola Jorgić* [2000] FCC 2 BvR 1290/99.
[318] Ibid, 25.

Proving genocidal intent without direct testimony can be challenging, but international jurisprudence established some guidance. Genocidal intent can be inferred from the general political climate, the scale of atrocities, and the deliberate targeting of victims due to their membership in a protected group.[319] 'Other culpable acts systematically directed against the same group',[320] statements or declarations,[321] circumstances[322], the general political doctrine[323] , and policies[324] in place can corroborate the existence of *dolus specialis.* The ICTR in *Akayesu* and the ICTY in *Mladic* stated that genocidal intent could also be deducted from the commission of non-genocidal acts, which do not per se fall under Article 2(2), but were committed with the aim to 'violate the foundation of protected groups'.[325]

Canada

The general political climate regarding indigenous people was inherently discriminatory and intrusive in Canada. Various regulations and practices attempted to restrict indigenous peoples' right to marry, for example, by arranging marriages within schools.[326] This restriction aimed to ensure that only properly 'whitened' indigenous people would get married, so their culture, language, and traditions will not be passed on to their children.[327] Further restrictions were enacted concerning the rights to employment, land resources, and culture.[328] The general political doctrine aimed at the destruction of the foundations of indigenous culture by restricting in-group marriages, limiting indigenous resources and prescribing the use of lands, banning traditional ceremonies, and severing cultural ties.

The very intention behind the residential school system was 'to continue until there is not a single Indian in Canada that has not been absorbed into the body politic' as declared

[319] *Prosecutor v Akayesu* (1998) (n 238) para 523-4; *Sylvestre Gacumbitsi* (Judgment) ICTR-01-64 (7 July 2006) para 252.
[320] *Prosecutor v Akayesu* (1998) (n 238) para 523.
[321] *Prosecutor v. Vujadin Popovic* (Appeals Judgment) ICTY-05-88 (30 January 2015) para 471.
[322] *Prosecutor v. Athanase Seromba* (Trial Judgement), ICTR-2001-66 (13 December 2006) para 310.
[323] *Prosecutor v. Milomir Stakic* (Trial Judgement) ICTY-97-24 (31 July 2003) para 538.
[324] *Rigoberta Menchu et al. v Ríos Montt et al.* [2013] Constitutional Court of Guatemala.
[325] *Prosecutor v. Tharcisse Muvunyi* (Trial Judgment) ICTR-00-55 (12 September 2006) para 29.
[326] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248), 85.
[327] Indian Act RSC 1920 c. 18.
[328] Ibid.

before the Parliament by the Deputy Minister of Indian Affairs in 1920.[329] On numerous occasions, it was made clear that the purpose of the system was to assimilate all indigenous children in Canada forcibly.[330] Looking at the interpretation of the UNGC in light of UNDRIP and the San Jose declaration, forcible assimilation would already amount to cultural genocide. However, this reading is not widely accepted yet. Nevertheless, declarations can help demonstrate the genocidal intent behind residential schools because it showcases the aim to establish a national policy that 'violates the foundation of a protected group'.[331] Absorbing all indigenous Canadians in the mass culture intends to eliminate the indigenous groups' distinctiveness to the point where the social unit no longer exists, corroborating the existence of *dolus specialis* according to international case law.

The residential school system constituted a mechanism to deliberately separate ties within indigenous communities by banning contact with relatives, traditional languages, and traditional celebrations. Family ties were severed even on the school premises because siblings of different sexes were prohibited from interacting.[332] The education in these institutions focused on Christianization and, accordingly, on demeaning and eliminating one of the essential aspects of indigenous cultures, spirituality. Therefore, the system aimed to remove children from indigenous cultures and languages to the extent that substantial fragments of the group could not be reconstituted. The residential school system's intention to destroy the group can be reasoned based on the findings of the *Muvunyi* judgment. It stated that genocidal intent might be inferred by the commission of acts that 'violate the very foundation of the group', in this case, the culture and the language, which are the essentials of an ethnic group.[333]

The genocidal intent behind the Residential School System would be extremely clear-cut if the crime of cultural genocide gained international recognition, as all evidence points to the underlying act of forced assimilation with the goal of cultural annihilation. This

[329] Ibid.
[330] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[331] *Prosecutor v. Vujadin Popovic* (2015) (n 321) para 471.
[332] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[333] *Prosecutor v. Tharcisse Muvunyi* (2006) (n 325) para 29.

characterization is in line with the findings of the Truth and Reconciliation Commission, which claimed that the Residential School System was a policy of cultural genocide.[334]

Australia

The political climate in Australia between 1910 and 1970 can be characterized as systematically discriminatory and embedded in racist ideologies.[335] Indigenous rights were heavily regulated concerning indigenous status, right to marry, right to employment, and freedom of movement.[336] Most states changed the definition of indigeneity in their legislation to reflect racist categories of 'half-cast' and 'full-blood' indigenous people. This categorization aimed to strip indigenous identity of a substantial part of the group, 'half-castes', who were deemed to have 'European blood in them'.[337]

Protection Boards were set up to control all aspects of indigenous life to achieve the program's overall aim, marginalization of 'full-bloods' and civilization of 'half-castes'.[338] These goals were publicly conveyed by the Chief Protector of Western Australia in 1937 when he stated that 'within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore, their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago (…) there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying.'[339] The statement also echoes the attitude of the general population at the time.[340] Non-indigenous people and missionaries supported the national forced assimilation and segregation policies to eliminate 'the problem'. The problem itself was indigenous cultures and lifeworlds. Thus, the stolen generation policies were enacted in a political climate that aimed to eliminate indigenous people culturally by segregating some members and fully marginalizing others.

[334] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248), 133.
[335] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Ibid.

The intent to destroy the group's cultural existence in part is also evidenced by the declaration made at the first Commonwealth-State Native Conference that 'efforts of all State authorities should be directed towards the education of children of mixed aboriginal blood at white standard.'[341] Thus, the conference envisioned a federal assimilationist policy to whiten indigenous children. This objective was undeniably felt by the experiences of the stolen generation victims as described in testimonies of the Bringing Them Home Report.[342] Children removed to foster institutions, homes, or early employment faced demeaning comments about their traditional cultures, practices, and languages.[343] Indeed, they were taken away based on their alleged uncontrollability and neglect, statuses solely assumed because they were indigenous.[344] In the institutions, pupils were banned from using their own languages. Familial contact was not allowed; in many cases, the foster care staff or adoptive families told children that their parents had died to ensure they would not seek contact.[345] On numerous occasions, children were given new European names to remove all indigenous identity marks from their personalities.[346] Many of these children were placed in foster homes at a very young age, some even when they were babies.[347] Such severe environmental change at an early stage in life can completely alter one's self-identity and sense of communal belonging. Since Article 2 prohibits acts designed to prevent births within the group, it must have also intended to outlaw taking away babies, which is consequentially very similar. The intention behind removals was to alienate indigenous children, disrupt family structures, and absorb them into the mass Australian culture. The anticipated long-term consequence of these policies was to reduce the number of indigenous-identifying people and extinguish the group as such, as reflected above in the statement of the Chief Protector.

This assessment makes it apparent that the stolen generation policy intended to destroy indigenous ethnic groups by demolishing cultural links and linguistic heritage. The policy was a blatant case of forcible assimilation, a practice previously equated with genocide

[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] Colin Tatz, 'Genocide in Australia' (199) 1(3) Journal of Genocide Research 315.
[345] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 Oceania 125, 133.
[346] 'Indigenous Names' *AIATSIS* https://aiatsis.gov.au/family-history/you-start/indigenous-names accessed 20 April 2023.
[347] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).

in the UN sphere.[348] Therefore, it can be inferred from the declarations, political doctrine, and testimonies that the scheme intended to annihilate indigenous groups culturally.

5.1.5. Mens Rea: Destruction of a Group in Whole or in Part

Genocidal acts are committed with the intent to destroy in whole or in part a protected group. This contextual aspect of the *mens rea* characterizes not the scale of the crimes committed but the intention to destroy.[349] Intending to 'destroy in part' refers to a 'considerable number of individuals'[350] or 'a substantial part of a group'.[351] While there is no quantitative threshold of a 'considerable number of people', a 'substantial part' describes roughly a portion of the group whose destruction would significantly impact the group as a whole.[352] As for the geographical reach of atrocities, this component does not impose a specific threshold, but evidence showcasing widespread acts can support the existence of the genocidal intent to destroy in whole or in part.[353]

Canada

In the case of the residential school system, a substantial number of 150,000 indigenous children were affected.[354] Thus, an estimated 30% of children were removed from their homes and forced to attend these schools.[355] The legislation requiring compulsory school attendance indicates that the intention was to send a significant portion of indigenous children to residential schools. Additionally, while the exact numbers are unclear due to Canadian authorities' systemic destruction of records, the Truth and Reconciliation Commission approximates that around 6000 indigenous pupils died in these institutions.[356] These figures confirm that a substantial part of these groups was intended for cultural

[348] United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Res 61/295 art 7; UNESCO 'Declaration of San José' (11 December 1981) UNESCO Doc. FS 82/WF.32.
[349] *Prosecutor v. Radislav Krstić* (2001) (n 243) para 542.
[350] Prosecutor v. Clément Kayishema and Obed Ruzindana (1999) (n 265) para 97.
[351] *Prosecutor v. Vujadin Popovic* (Trial Judgment) ICTY-05-88 (10 June 2010) para 831.
[352] Ibid, para 832.
[353] *Prosecutor v. Radislav Krstić* (2001) (n 243) para 590.
[354] National Centre for Truth and Reconciliation, 'Residential School Overview (3 April 2015) https://web.archive.org/web/20160420012021/http://umanitoba.ca/centres/nctr/overview.html accessed 10 April 2023.
[355] Ibid.
[356] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).

elimination in the form of forcible assimilation, which destroyed the cultural foundations and thereby the existence of the group, as a whole.

Australia

The Australian Human Rights Commission estimated that nationally, between one in three and one in ten indigenous people were removed during the stolen generation era.[357] Since the removals disturbed not only the children but also their kinships, it was reported that most families had been affected by the system for one or multiple generations.[358] The geographical coverage of the atrocities was extensive, as foster institutions, missions, and foster homes existed in all Australian states. Federal legislation encouraged states to enact laws on the welfare, custody, and education of indigenous children, and state legislation made the removals practically possible.[359] These factors suggest that the forcible assimilation policy, which intended to destroy the cultural identity of future generations and thereby threatened the group's continuous existence, affected a substantial part of the indigenous groups in Australia.

5.2. Criminal Liability of Christian Clergy Members in the Cultural Genocide

This subchapter aims to critically analyse clergy members' contributions to the cultural genocide committed in Canada and Australia. To analyse the criminal liability of the clergy, firstly, an assessment of possible modes of individual liability relating to assistance in international criminal law needs to be carried out to understand which notion of participation reflects the contribution of the clergy.

International crimes are often too complex and widespread for someone to commit, acting alone. The *Tadić* judgment endorsed that contribution from others is usually essential to the commission of crimes.[360] Accordingly, international criminal law distinguishes multiple modes of criminal liability for participation in crimes.[361] These labels display the gravity and the nature of the individual's involvement. Since the Genocide Convention is an international convention, not a code of conduct, it does not prescribe modes of individual

[357] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[358] Ibid.
[359] Ibid.
[360] *Prosecutor v. Duško Tadić* (Appeal Judgement) ICTY-94-1 (15 July 1999) para 191.
[361] Boas Gideon and others, *International Criminal Law Practitioner Library: International Criminal Procedure* (Cambridge University Press 2011).

liability but solely includes other ancillary crimes, like conspiracy, attempt, incitement, and complicity.[362] In this regard, the ICC's core document can be more helpful because the statute was specifically designed to stipulate methods of holding individuals accountable for international crimes. The Rome Statute includes a list of acts triggering individual criminal liability in Article 25(3), including methods of facilitation, aiding, abetting, or assisting in committing a crime.[363] Interestingly, it does not refer to complicity as a mode of liability or a stand-alone crime. The ICC, to this day, has not adjudicated individual criminal liability for genocide and has not offered further guidance in this regard.

Whether complicity is a stand-alone crime or a mode of liability has been heavily disputed in the jurisprudence of the ICTY and the ICTR.[364] Readers might wonder why it matters if it is a crime or a mode of liability if perpetrators are held accountable either way. This question is vital in recognizing the perpetrator's level of involvement and action. Further, international law usually prescribes different elements for modes of liability and standalone crimes.[365]

The Statutes of ad hoc tribunals, such as the ICTY, ICTR, and the ECCC, include Articles 2 and 3 of the Genocide Convention verbatim. Thus, complicity in genocide is recognized as a 'punishable act'.[366] However, they also contain a comprehensive provision on individual criminal liability identifying persons who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime'.[367] Because both complicity and aiding and abetting enjoy a liability status in the statutes, the courts had to define the elements of and the boundaries between the two.

Initially, the ICTR in *Akayesu* held that complicity and aiding and abetting require different mental elements. The Court stated that for complicity in genocide, the accomplice's knowledge of the perpetrator's *mens rea* is sufficient, but for aiding and abetting the

[362] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 3.
[363] Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 25(3).
[364] Daniel M. Greenfield, 'The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters' (2008) 98 Journal of Criminal Law and Criminology 921.
[365] Boas Gideon and others, *International Criminal Law Practitioner Library: International Criminal Procedure* (2011) (n 361).
[366] Ibid.
[367] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) S/RES/827 art 7(1) and UN Security Council, Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) S/RES/ 955 art 6(1).

commission of genocide, a heightened *dolus specialis* of the aider is required.[368] In later cases, both the ICTY and the ICTR clarified that the *Akayesu* judgment erred in its findings concerning the *mens rea* for complicity in genocide, arguing that accomplices do not need to share the *dolus specialis*, rather the knowledge of the genocidal intent of the perpetrator is enough.[369] This conclusion came about because the courts started conflating the two notions claiming that they are overlapping and redundant.[370] In the *Bagaragaza* judgment, the court found that aiding and abetting can also be a form of complicity in genocide, emphasizing that complicity is a crime and aiding and abetting is a mode of liability.[371] Eventually, in later judgments, the ad hoc courts seem to have agreed that aiding and abetting can be considered assistance in the commission of genocide but can also be a narrow mode of complicity in genocide.[372]

Regarding state responsibility for complicity and aiding and abetting, the ICJ faced this question in the *Application of the Convention* case. The ICJ stated that 'complicity, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of state responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State'.[373] The court further noted that in any case, accomplices need to have full knowledge of the facts to the extent that they know that the support is given to committing an act of genocide.[374] Thus the ICJ also viewed complicity as similar in substance to aiding and abetting when it comes to state responsibility for genocide.

Consequently, the boundaries between aiding and abetting and complicity in genocide have not been explained comprehensively by international criminal jurisprudence. Nevertheless, reaching a thorough conclusion on the status and relationship of these notions is not essential for this thesis. It is adequate to understand the elements required to establish the criminal liability of persons assisting in the commission or complicity of genocide. As of now, the international criminal legal sphere seems to agree that legal liability arising from

[368] *Prosecutor v Akayesu* (1998) (n 238) para 485.
[369] *Prosecutor v. Blagojevic and Jokic* (2005) (n 315) para 727.
[370] Daniel M. Greenfield, 'The Crime of Complicity in Genocide' (2008) (n 364).
[371] *Prosecutor v. Michel Bagaragaza* (Sentencing Judgment) ICTR-2005-86 (17 November 2009) para 23.
[372] Daniel M. Greenfield, 'The Crime of Complicity in Genocide' (2008) (n 364).
[373] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] (n 286) para 419.
[374] Ibid, para 420.

aiding and abetting in complicity and aiding and abetting in genocide requires the same material elements and the standard *mens rea* for specific intent crime, where the aider must know the genocidal intent of the principal perpetrator but is not required to share it.[375]

The characterization of the participation of the clergy, whether it is aiding and abetting the commission of genocide, or aiding and abetting as complicity in genocide, will depend on the promulgations of the specific legal basis of prosecution, be it the Rome Statute, jus cogens norm of genocide, or national law. Therefore, the following assessment will only label the mode of liability of aiding and abetting and will not determine the crime as the commission or the ancillary act of complicity in genocide. To this end, the following chapters will establish that clergy members aided and abetted in the execution of the forced transfer of children through practical assistance, encouragement, and moral support, with knowledge of the genocidal intent behind the child removal programs as a whole.

5.2.1. Actus Reus: Aiding or Abetting in the Commission of the Crime

The ICTY defines aiding and abetting as 'a form of liability in which the accused contributes to the perpetration of a crime that is committed by another person.'[376] The concept of personal culpability arising from knowing assistance impacting the perpetration of the crime also exists under customary international law.[377] While often referred to as a single mode of liability, aiding and abetting raise different contribution methods. Aiding means providing practical assistance while abetting requires explicit or tacit approval,[378] encouragement, or moral support.[379] Mere encouragement or sympathy for the perpetration of the crime may trigger criminal liability for abetting in certain circumstances.[380] These two signify separate forms of liability and are 'sufficient alone to render a perpetrator criminally liable'.[381]

[375] Nina Jørgensen, 'Complicity in Genocide and the Duality of Responsibility', in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford Academic, Oxford 2011).
[376] *Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18 (24 March 2016) para 574.
[377] *Prosecutor v. Duško Tadić* (1999) (n 360) para 666.
[378] *Prosecutor v. Grégoire Ndahimana* (Appeals Judgment) ICTR-01-68 (16 December 2013) para 147.
[379] *Prosecutor v. Juvénal Kajelijeli* (2003) (n 274) para 765.
[380] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu* (Trial Judgment) ICTY-03-66 (30 May 2005) para 516.
[381] *Prosecutor v Akayesu* (1998) (n 238) para 484.

The *actus reus* of aiding and abetting describes practical assistance, encouragement, or moral support, which has a substantial effect on the commission of the crime.[382] These forms of assistance can be accorded to the primary perpetrator before, during, or after the execution of the act.[383] Direct proof indicating the existence of a plan or agreement between the aider and the perpetrator of the crime is not essential, but evidence can be established by circumstantial corroboration.[384] Further, the lack of physical presence of the aider at the crime scene does not preclude criminal liability.[385] Thus, aiders and abettors can be removed in terms of location and time.

The second element relates to the causal link between the support provided by the aider and the commission of the crime. The aid does not need to signify the main action, without which the crime would not have occurred.[386] Therefore, the cause-effect relationship between the two is not requisite.[387] Even so, the perpetrator's knowledge of the aider's assistance is not required.[388] The contribution merely needs to have a substantial effect on the commission of the crime. This requirement is assessed factually on a case-by-case basis to determine each contributor's exact extent of criminal liability.[389] Criminal liability for aiding and abetting can only arise if the primary crime was committed. As put by the *Brđanin* case, the criminal conduct of the principal perpetrator for which the aider and abettor are held responsible must be proved first.[390] However, the perpetrator does not necessarily need to be identified or held accountable by a court.[391]

In the above chapter, the paper found that the residential school system and the stolen generation child removals amount to cultural genocide by transferring indigenous children to another group. Thus, the primary acts of genocide were committed, and the analysis can proceed to showcase how members of the Christian clergy aided and abetted these crimes. The following subchapters will illustrate that the clergy provided practical assistance,

[382] *Prosecutor v. Vujadin Popovic* (2015) (n 321) para 1783.
[383] Ibid.
[384] *Prosecutor v. Radovan Karadžić* (2016) (n 376) para 576.
[385] *Prosecutor v. Tharcisse Muvunyi* (2006) (n 325) para 471.
[386] Ibid.
[387] *Prosecutor v. Tihomir Blaškić* (Appeals Judgement) ICTY-95-14 (29 July 2004) para 48.
[388] *Prosecutor v. Pauline Nyiramasuhuko et al.* (Appeals Judgment) ICTR-98-42 (14 December 2015) para 3332.
[389] *Prosecutor v. Charles Ghankay Taylor* (Appeals Judgment) SCSL-03-01 (26 September 2013) para 391.
[390] *Prosecutor v. Radoslav Brdanin* (Trial Judgment) ICTY-99-36 (1 September 2004) para 271.
[391] Ibid.

encouragement, or moral support, which had a substantial effect on the perpetration of the crime, with knowledge of the genocidal intent of the systems.

Canada

Before the legal and regulatory promulgation of the residential school system, Christian denominations were already involved in educational services in Canada.[392] Local churches, including the Roman Catholic, Anglican, and Presbyterian Church, ran day schools for indigenous children with the help of overseas missionaries.[393] Following the adoption of the 1867 Indian Act, the government gained excessive power over the education and custody of indigenous children, and section 114 of the Act allowed for contracting out this authority to provinces, territories, and religious institutions.[394] Since the religious institutions already had a school framework, the government entered into -often verbal and nonwritten- agreements with Christian denominations to operate schools for indigenous children.[395] The government granted authority to these denominations to implement and execute the governmental policy of residential schools.[396] According to estimations, 60% of the schools were run by the Roman Catholic, 30% by the Anglican church, and 10% by other denominations.[397]

Some of the ministers and other religious staff in residential schools were present during the transfers of children.[398] Once the transfer was completed, children were met with clergy members on the school premises. Christian staff were the ones who cut the children's hair, stripped them of their cultural clothes, and gave identifying numbers to the pupils upon arrival.[399] While the government funded the institutions, these religious actors were the ones

[392] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[393] Ibid.
[394] Assembly of First Nations, 'Fact Sheet: Canada's Colonial Over-Education and the Creation of the Residential School System' (2014) https://www.afn.ca/uploads/files/events/fact_sheet-ccoe-6.pdf accessed 10 April 2023.
[395] David MacDonald, 'Genocide in the Indian Residential Schools: Canadian history through the Lens of the UN Genocide Convention' in Alexander Laban Hinton, Andrew Woolford, Jeff Benvenuto (eds.), *Colonial Genocide in Indigenous North America* (Duke University Press, 2014).
[396] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248), 135.
[397] Stephen J. McKinney,''…and yet there's still no peace' Catholic Indigenous Residential Schools in Canada' (2022) 70 Journal of Religious Education 327, 331.
[398] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248), 37.
[399] Ibid.

who ran, administered, and operated every aspect of residential schools. Some clergy members who worked at the schools were not physically present at the transfer but ran the day-to-day business of the schools essentially assisted by a substantial contribution to the realization of these transfers. While the aider's assistance doesn't need to be the sole underlying factor without which the crime would not have occurred, in this case, without the operation of residential schools by the Christian denominations, the transfers would not have taken place in the same prevalent and organized manner.

Effectively, the Christian denominations fabricated the very essence of the 'otherness' of the recipient group for transferred children. They were doing so, believing that these efforts go towards evangelization, civilization, and the betterment of indigenous children. Indeed, Christian workers later defended themselves, emphasizing that they believed they were participating in a welfare system and supporting the upbringing of indigenous children for their advancement.[400] Regardless of the truthfulness behind these statements, individuals who did not actively assist the transfers but contributed to the school system can be characterized as encouragers or 'silent spectators'.[401] The moral justifications and motives often used to escape accountability do not preclude criminal liability for genocidal intent generally and neither for aiding and abetting.[402] While the sheer physical presence does not trigger criminal liability, if the presence is knowing[403] and has a 'significant encouraging or legitimizing effect', it amounts to encouragement as abetting the commission of the crime.[404] Since the Christian churches provided the moral justifications behind the assimilation policy, giving rise to the forcible transfer of children, the presence of clergy members was an encouraging factor in carrying out the civilizing crusade. Christianity at the time was viewed as the head of the universal world order and the carrier of knowledge in creating civilized, functional societies. Missionaries thought Christianity was the only available tool to save 'savages' from their ways, ways which could only lead to destruction.[405]

[400] Ibid, 122.
[401] *Prosecutor v. Augustin Ngirabatware* (Appeals Judgment) MITC-12-29 (18 December 2014) para 150.
[402] *Prosecutor v. Anto Furundžija* (Trial Judgement) ICTY-95-17/1 (10 December 1998) para 232.
[403] *Prosecutor v. Duško Tadić* (1999) (n 360) para 689.
[404] *Prosecutor v. Milorad Krnojelac* (Trial Judgment) ICTY-97-25 (15 March 2002) para 89.
[405] Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).

Additionally, due to the Doctrine of Discovery, Christians had the right to colonize territories as long as they converted indigenous populations.[406] These alleged doctrines provided a certain higher moral status to church members. Acknowledging that without the moral legitimation of the Christian church, the Canadian government would not have had the legitimacy to carry out the assimilation policy against indigenous people, which resulted in the forcible transfer of children, leads to the conclusion that the legitimizing physical presence of clergy members was a factor of moral support and encouragement.

Thus, while some clergy members actively and practically assisted the transfers as aiders, others silently encouraged and provided moral support to the perpetrators with their physical presence as abettors. However, despite the additional layer of encouragement and moral support, it can be established that since all religious actors present assisted with the operation of residential schools, the very destination of the forcible removals, all of them aided with practical assistance, the genocidal act of transfer of indigenous children in Canada.

Australia

The Australian stolen generation children were transferred to foster care institutions, missions, employment, and adoptive parents. Church denominations ran a significant number of missions and foster homes; nonetheless, not all of them, as the government and other organizations, were also involved in the operation of these institutes. It is difficult to put an exact number or percentage of the church-run establishments because records were often incomplete or destroyed.[407] However, estimations show that at least 50 church-led institutions existed in the 1940s.[408] Church apologies, which recognize the role played in the stolen generation child removals, attest to a considerable number of church-operated missions and other forms of accommodations, orphanages, and foster care.[409] Thus, as in Canada, Australian churches, including the Roman Catholic, Anglican, Uniting, and Presbyterian Churches, and smaller dominations such as the Sisters of Mercy and St. Joseph,

[406] *Prosecutor v. Milorad Krnojelac* (2002) (n 418) para 58.
[407] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[408] Andrea Smith, 'Indigenous Peoples and Boarding Schools' (2009) (n 290), 8.
[409] Australian Human Rights Commission, 'Social Justice Report 1998: Chapter 3: Church Responses' https://humanrights.gov.au/our-work/social-justice-report-1998-chapter-3-church-responses accessed 10 April 2023.

implemented the governmental policy on indigenous child care, which led to forcible removals.[410]

The practical assistance in running residential and foster services had a substantive effect on the crime of cultural genocide against indigenous children.[411] Church representatives and missionaries were responsible for the care of the children. They enforced the assimilation policy, converted them to Christianity, stripped them of their traditional clothes, distanced them from their families, and organised their everyday lives.[412] Without the provision of accommodation and educational services by members of these denominations, the forcible transfer of children would not have been carried out in the same manner, nor would it have been so successfully fulfilling the goals of assimilation and civilization as required by the national legal framework of the time.

Christianizing efforts in Australia followed the Canadian civilizing mission, which stemmed from the assumed moral superiority of the faith.[413] Precisely like for residential schools in Canada, the church provided the moral justification for the transfers in Australia. Clergy members administering the institutions supplied practical assistance and embodied moral support for the policy behind the removals. Their mere physical presence carrying Christian pride and all honourable justifications with it translated into the -not always silent- encouragement to remove indigenous children forcibly. This moral support legitimated the Christianizing and civilizing effort behind the transfers, signifying a substantial contribution to the underlying crime in the form of abetting.

On other occasions, members of these denominations provided practical assistance concerning foster home placements. In the Torres Strait Island, church representatives gave intelligence to the Native Department on new indigenous pregnancies to facilitate and speed up removals.[414] In South Australia, the denominations collected the names of non-indigenous families keen to foster indigenous children and supplied them to the authorities.[415]

[410] Linda Briskman, 'Beyond Apologies: The Stolen Generations and the Churches' (2001) 26 Children Australia 4.
[411] Ibid.
[412] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[413] Christine Choo, 'The role of the Catholic missionaries at Beagle Bay in the removal of Aboriginal children from their families in the Kimberley region from the 1890s' (1997) 21 Aboriginal History 14.
[414] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273).
[415] Ibid.

Undeniably, this furnishes practical assistance in the genocidal act of forcible removals of children to adoptive homes.

In sum, this evidence concludes that in Australia, the present clergy members' practical assistance and moral support offered a substantial contribution to the commission of forcible transfers of indigenous children.

5.2.2. Mens Rea: Intending to Aid or Abet in the Commission of the Crime

The mens rea requirement of aiding and abetting in the commission of genocide is two-fold.[416] Firstly, the aider must have known or foreseen that the assistance they provided contributed to the commission of the crime by the primary perpetrator.[417] Secondly, the aider must have been aware of the essential elements of the crime committed, including the *mens rea* possessed by the primary perpetrator.[418] Nevertheless, the aider does not need to share the perpetrator's *mens rea*, even in the case of special intent crimes.[419]

The evidence of assistance must point to the conclusion the aider had knowledge of their contribution and consciously participated.[420] As the bare minimum, the aider must have understood that the assistance in the perpetration of the crime will be 'a possible and foreseeable consequence of his conduct.'[421] This intention and knowledge can be corroborated by circumstantial evidence.[422]

On the other hand, establishing that the aider was aware of the *mens rea* of the primary perpetrator requires proof that the aider understood the essential elements of the crime.[423] This prerequisite involves the contextual, material, and mental elements of the crime the aider was assisting with. However, for criminal liability of aiding and abetting, the assister is not required to share the perpetrator's *mens rea*.[424] Therefore, the person liable for aiding and abetting the crime of genocide must have been aware that the principal perpetrator intended

[416] Boas Gideon and others, *International Criminal Law Practitioner Library: International Criminal Procedure* (2011) (n 361).
[417] *Prosecutor v. Tihomir Blaskic* (Trial Judgment) ICTY-95-14 (29 July 2004) para 286.
[418] *Prosecutor v. Vojislav Šešelj* (Trial Judgment) ICTY-03-67 (31 March 2016) para 353.
[419] *Prosecutor v. Zlatko Aleksovski* (Appeals Judgment) ICTY-95-14/1 (23 March 2000) para 162.
[420] *Prosecutor v. Zlatko Aleksovski* (Trial Judgment) ICTY-94-14/1 (25 June 1999) para 61.
[421] *Prosecutor v. Tihomir Blaskic* (Trial Judgment) ICTY-95-14 (3 March 2000) para 286.
[422] *Prosecutor v. Pavle Strugar* (Trial Judgment) ICTY-01-42 (31 January 2005) para 350.
[423] *Prosecutor v. Grégoire Ndahimana* (Appeals Judgment) (2013) (n 378) para 157.
[424] *Prosecutor v. Zlatko Aleksovski* (2000) (n 433) para 162.

to destroy in whole or in part, a national, ethnical, racial, or religious group, as such.[425] Proof in this regard can be deducted from the relevant circumstances.[426]

In sum, the mental element for aiding and abetting in genocide presupposes an awareness of the elements of the primary crime, awareness of the mental state of the primary perpetrator, and knowledge that the assistance will consequentially lead to aiding in the commission of the crime.

Canada and Australia

As evidenced in the above subchapter, the clergy members' practical assistance and moral support were similar in Canada and Australia. Thus, the analysis will focus on the mental element of aiding and abetting for the two case studies conjunctly in the below paragraphs.

In both jurisdictions, clergy members run residential or foster accommodations and educational institutions for indigenous children who were removed. The removal of the children directly resulted in placement in these establishments. Operating the institutions inherently presupposes an acceptance on the staff's side that their actions facilitate the removals program. At the least, clergy members must have foreseen that their continued assistance in running the institutions would result in perpetual transfers of children. This awareness can also be inferred from the legislative and regulatory framework around removals in Canada and Australia. Both countries promulgated laws that naturally led to the consequence of forcible removals. Canada established the compulsory nature of residential schooling, while Australia created a coercive legal environment leaving no choice to parents and children but to allow the transfers. Therefore, the religious staff must have known that transfers would happen. The knowledge of transfers was coupled with an awareness that their assistance in administering the schools and homes substantially contributed to the transfers. In many instances, zealous missionaries and religious staff explicitly intended to assist with removing indigenous children from their families because they aimed to transform fully and

[425] *Prosecutor v. Elizaphan Ntakirutimana et al.* (Appeals Judgment) ICTY-96-17 (13 December 2004) para 364.
[426] *Prosecutor v. Zlatko Aleksovski* (1999) (n 434) para 65.

Christianize indigenous children under their care.[427] These actors also must have been aware of the moral justifications and legitimation their presence provides in the re-education institutions, which essentially contributed to the aims of assimilation. The very aims underlying the acts of forcible transfers. Thus, there was both an intention and an awareness to assist with the removals in practical and moral terms to kill indigeneity from the children and society.

The *mens rea* of the aider and abettor requires an awareness of the crime's essential elements and the primary perpetrator's mental state.[428] Members of the clergy must have known that the fundamental aim of the transfers was to culturally destroy indigenous ethnic groups in whole or in part. It was impossible not to understand this goal due to the general political doctrine, discriminatory national legislation, and declarations made by authoritative actors. Religious staff in the two countries knew that children were stripped. They have seen the mental state of children who arrived at these establishments. Indeed, they often assisted with the practical aspects of transfers. Staff understood that the transfers were forcible and witnessed how children felt out of place, did not understand the language, and how they asked about their parents when they arrived at the institutions.[429]

Further, members of these denominations knew that indigenous children, or 'half-castes', were separated from the rest of the indigenous or 'full-caste' populations. They must have been aware of the removals' aim of separating familial, cultural, and linguistic ties. Thus, it can be inferred from the abovementioned that the assistance provided by clergy members was knowledgeable of the fact that the crime committed by primary perpetrators was in furtherance of the intention to destroy indigenous ethnic groups.

5.2.3. Conclusions on the Criminal Liability of the Members of the Clergy

As showcased in the above paragraphs, in Canada and Australia, the cultural genocide of forcible transfers of children belonging to particular indigenous ethnic groups has taken place. The cultural genocide was committed with the intent to destroy ethnic indigenous

[427] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273); Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).
[428] *Prosecutor v. Vojislav Šešelj* (2016) (n 432) para 353.
[429] Human Rights and Equal Opportunity Commission, 'Bringing them home: Report' (1997) (n 273); Truth and Reconciliation Commission of Canada, 'Honouring the truth, reconciling for the future' (2015) (n 248).

groups in whole or in part, culturally. Forcible transfers eradicated the group's distinctiveness by severing linguistic, cultural, and familial ties to the extent that the unit struggles to reconvene. Since these crimes were carried out in a large-scale, widespread, and organized manner, perpetrators likely enjoyed significant assistance from numerous contributors. Many of the staff, if not all, were clergy members running the destination accommodations and education institutions of the forcible removals. It could be reasonably deducted from the above analysis that these members of the Christian denominations practically assisted, encouraged, and morally supported the primary perpetrators in a manner that substantially contributed to the forcible transfers of indigenous children. Clergy members aided with the knowledge and purpose that their assistance will further the cultural genocide committed with the intention to destroy indigenous ethnic groups in part or in whole by the primary perpetrators.

5.3. Avenues for Prosecuting the Christian Clergy for Cultural Genocide

Determining the best-fitting platform for individual criminal accountability requires thorough considerations of the admissibility criteria and limitations imposed by the tribunals. The answer can be straightforward in some scenarios, while in others, the crime's temporal, territorial, and material elements can complicate the solution. International criminal law offers international, hybrid, and national avenues for individual liability. Whether a case can be brought to any of these courts will depend on the factual circumstance of the crime and the national and international obligation of the adjudicating state. This subchapter aims to briefly analyse the most-suited criminal avenue for prosecuting Christian clergy members who operated schools and foster institutions in Canada and Australia.

5.3.1. International Criminal Court Jurisdiction

The impulse response to the question of where to prosecute individuals on the international level for aiding and abetting genocide is the International Criminal Court. The Genocide Convention sets out in Article 6 that territorial jurisdiction states should prosecutive and investigate genocide, or hand perpetrators over to a competent international criminal tribunal.[430] The ICC was established to deal with individual criminal liability regarding the four gravest crimes in international law, crimes against humanity, genocide,

[430] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 6.

war crimes, and aggression. In its funding document, the Rome Statute, the court set out the admissibility requirements, which are the essential criteria determining whether the court can entertain a case.

First and foremost, the ICC is a complementary court.[431] The drafters of the Rome Statute underscored the importance of national adjudication, acknowledging that national courts are usually best placed to adjudicate matters in the local context and that geographical proximity leads to the accessibility of witnesses, locations, and victims. Therefore, the Rome Statute stipulates that the court entertains cases solely when the national authorities are unable or unwilling to investigate or prosecute crimes.[432] The following subsection showcases the Canadian and Australian courts' inability and unwillingness to prosecute individuals for the genocidal acts of child transfer. Thus, this criterion would be fulfilled for the two cases.

The ICC further imposes a territorial limitation. The court has jurisdiction over certain crimes as long as they were committed on the territory of one of its state parties or the perpetrator was a national of the state party.[433] Canada and Australia are both state parties to the Rome Statute. Since the crimes took place on states' territories, this admissibility requirement is met.

The ICC's material jurisdiction extends to the four most severe international crimes, including genocide. Due to the very nature of these crimes, the court requires a certain gravity threshold. In Article 17(d), the Rome Statute excludes all cases which are 'not of sufficient gravity to justify further action by the court'.[434] Judging from the number of victims affected, the geographical coverage, and the temporality of the crimes committed in Canada and Australia, the atrocities can be considered sufficiently grave.

Last but certainly not least is the temporal limitation of the court. The ICC can only prosecute crimes committed after the 1st of July, 2002.[435] Temporality is a strict standard due to the criminal principle of non-retroactivity, guaranteeing that criminal legislation and

[431] Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) ch 2.
[432] Rome Statute of the International Criminal Court (n 363) art 17(1).
[433] Ibid. art 12(2).
[434] Ibid, art 17(1)(d).
[435] Ibid, art 11.

treaties do not have an *ex-ante* application.[436] Non-retroactivity goes hand in hand with the principle of legal certainty, ensuring that criminal perpetrators are only held accountable for crimes that were criminalized before the commission.[437] Regarding the genocide committed in Canada and Australia, the temporal limitation precludes any investigative or prosecutive action by the ICC. Most of the atrocities committed happened decades before 2002, falling out of the scope of this admissibility requirement.

Consequently, while the ICC would be the natural choice for international criminal prosecution of genocide, due to its limited temporal reach, the cultural genocides committed in Canada and Australia cannot be investigated or prosecuted on this platform.

5.3.2. National Jurisdiction

The complementary nature of the ICC was codified in the Rome Statute following the deliberation of the state parties emphasizing that national jurisdiction should always be the first recourse for criminal jurisdiction.[438] Chapter IV.3.2. already discussed national cases in Canada and Australia relating to the crime of genocide against indigenous peoples. Hence, this subsection will merely offer a brief review of the stance of national courts to analyse the states' willingness, ability, and effectiveness in prosecuting the genocide of the residential school system and the stolen generation child removals.

Canada

In 2000, in the *Re Residential Schools* case, the applicant requested the Canadian judiciary to declare that the residential school system was contrary to the Genocide Convention's aims and objectives.[439] The Court argued that in national law, the 'only statutory reference to genocide' was the Criminal Code prohibition of promoting genocide. Nevertheless, that provision was not in force during the residential school system, therefore, cannot be used as a legal basis for the claim. The Court also could not apply international legal sources due to the principle of non-retroactivity of the Genocide Convention and the judiciary's complete disregard for customary international law.[440] Thus, the Court passed on

[436] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn Oxford University Press, Oxford 2019).
[437] Ibid.
[438] Douglas Guilfoyle, *International Criminal Law* (2016) (n 445) ch 2.
[439] *Re Residential Schools* [2000] A.J. No. 638 (Alta. Q.B.) para 69.
[440] Ibid.

the opportunity to identify national and international legal grounds for the crime of genocide relating to the period of the residential school system.

In 2005, the Supreme Court of Canada ruled on the *Mugesera* case regarding the deportation of a Rwandan politician charged with inciting genocide.[441] The judgment referred back to the ICJ's 1951 *Reservations to the Convention* judgment, underlining that the crime of genocide existed before the Convention under customary international law.[442] The judgment was assessed on national criminal law provisions, and ergo it did not clarify the temporary aspects of the customary principle. However, the Court's appreciation for the customary law status is a refreshing change in attitude towards the application of genocide. It is curious that Canada readily pronounced the crime as applicable under international custom for another country claiming genocide while it hesitates to endorse the principle towards its own jurisdiction.

The same year, while not grounded on the claim of genocide, the Supreme Court decided on a case involving claims of culture and language loss suffered in the Alberni Indian Residential School. *Blackwater v. Plint* promulgated that the United Church of Canada is vicariously liable for the sexual assault committed by the supervisor of two residential schools operated by the Church.[443] The former students who brought the case also claimed damages for other injuries as an aggravating factor in the physiological abuse they endured including harm to their indigenous culture and community. However, the Court could not establish the loss of culture and language as compensable damage.[444]

Between the late 1990s and early 2000s, thousands of applicants requested damages for abuses suffered during the residential school system.[445] The volume of cases proved impossible to adjudicate promptly and effectively. Indeed, the government estimated an average of 53 years to settle all civil cases through separate litigations.[446] The government offered a more timely and cost-effective solution to this issue and established the Indian

[441] *Mugesera v. Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100, SCC 40.
[442] Ibid, para 82.
[443] *Blackwater v. Plint* [2005] 3 SCR. 3, SCC 58.
[444] Carole Blackburn, 'Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation' (2012) 35(2) Political and Legal Anthropology Review 289.
[445] Independent Assessment Process Oversight Committee, 'Independent Assessment Process Final Report' (2022) https://www.residentialschoolsettlement.ca/IAPFinalReports.html accessed 8 May 2023.
[446] Treasury Board of Canada, 'Indian Residential Schools Resolution Canada' (2003) Performance Report for the period ending March 31 https://publications.gc.ca/pub?id=9.538406&sl=0 accessed 8 May 2023.

Residential School Settlement Agreement in 2007.[447] The IRSSA created a standardized out-of-court settlement mechanism through which victims who suffered 'sexual, physical, or other wrongful abuses' during the residential school system could claim compensation.[448] The Settlement Agreement recognized the significance of culture and language concerning access to justice and victim-centred approaches but did provide compensation for culture and language loss resulting from the residential system. The compensation chart solely focuses on physical and sexual abuse. This limitation is not surprising since, during the settlement negotiation phase, the government intentionally avoided the notion of genocide.[449] Victims applying to the compensation scheme must sign a release form stating that they 'fully, finally and forever release and discharge, separately and severally' the Canadian state and the defendant church organizations from any future legal action.[450] The Agreement definition of church organizations includes the Anglican, Catholic, Presbyterian, and United churches.[451] Thus, it is questionable whether victims who claimed their compensation awards under this system will be able to bring claims against individuals of the church organizations regarding culture and language loss under the crime of genocide.

In sum, Canadian courts entertained a limited number of cases relating to genocide *per se.* The judgments reflect that national courts are uneasy about endorsing the existence of the crime of genocide under international customary law and sustain a strict position on the non-retroactivity of the national genocide law and the Genocide Convention. Moreover, the IRSSA provides complications to prosecute causes of actions relating to culture and language loss for those victims who have participated in the settlement scheme.

Overall, this assessment ascertained that the Canadian judiciary is unable and unwilling to prosecute the genocide of the residential school system.

Australia

In 1997, the *Kruger* case delivered the first judgment relating to the crime of genocide after the findings of the Bringing Them Home Report, which detailed the horrors of the stolen

[447] Canada, 'Indian Residential Schools Settlement Agreement' (8 May 2006) https://www.residentialschoolsettlement.ca/settlement.html accessed 5 May 2023.
[448] Ibid.
[449] Konstantine S. Petoukhov, 'Violence, compensation, and settler colonialism: Adjudicating claims of Indian Residential School abuse through the Independent Assessment Process' (Ph.D. Thesis, University of Ottawa 2021), 174.
[450] Canada, 'Indian Residential Schools Settlement Agreement' (2006) (n 461) Schedule 'P'.
[451] Ibid.

generation era. The applicants argued that the Northern Territory Aboriginals Ordinance Act of 1918, regulating indigenous child removals, authorized genocide. The High Court of Australia contended that the Ordinance did not have genocidal intent but was created with a welfare mindset in the best interest of indigenous peoples.[452]

The same year, the High Court of Australia adjudicated the *Thorpe* case, questioning whether the government owed a fiduciary duty to indigenous peoples and whether that duty was violated during the stolen generation era to the extent that it constituted genocide. The Court dismissed the case and found that 'the claim was 'frivolous and vexatious' in so far as allegations of genocide'.[453] Seemingly Australian judges found it outright impossible that genocide could have occurred.

Two years later, in 1999, in two decisions held together, *Nulyarimma v Thompson* and *Buzzacott v Hill*, the Federal Court was again presented with stolen generation-related genocide litigation.[454] The cases respectively argued that genocide was committed through the restrictive legislation of the Native Title Amendment Act of 1998 and through the failure to recognize the Arabunna people's traditional land as world heritage. The court dismissed the cases based on its inability to establish a legal basis for the crime. Despite acknowledging that genocide is a customary international law and jus cogens crime, the Court argued that the enforcement method for prosecution is at the discretion of national jurisdiction.[455] Therefore, it held that since the Genocide Convention was not implemented and the customary international law prohibition of genocide was not automatically received in the national legislation of Australia at the time of the commission, no liability arose. The Court claimed it had no authority to create new crimes by directly accepting customary international law into national law. Instead, it upheld that in common law jurisdictions, customary principles, such as the crime of genocide, must be legislated into national law.[456]

Australian national courts took the stance that stolen generation-era legislation, land grabbing, and removals constituted a broader welfare policy created with the best interest of

[452] *Alec Kruger and others v Commonwealth* [1997] HCA 27.
[453] *Thorpe v Commonwealth of Australia (No. 3)* [1997] HCA 21.
[454] *Wadjularbinna Nulyarimma v. Ors v Phillip Thompson* [1999] 96 FCR 153; *Buzzacott & Ors v Minister for the Environment* [1999] FCA 1192.
[455] Douglas Guilfoyle, 'Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?' (2001) 29(1) Federal Law Review 1.
[456] Ibid.

indigenous people in mind. The judiciary established precedence on finding non-genocidal intent behind the stolen generation policy. Consequently, the judiciary clarified its unwillingness to prosecute the crime of genocide concerning these atrocities. Further, national courts were unable to establish a legal basis for genocide claims, precluding the direct applicability of the customary international law and jus cogens crimes of genocide in Australia.

Therefore, it is clear that national courts are both unable, due to the lack of legal basis, and unwilling, due to the politicized nature of the issue, to prosecute genocide.[457] For that reason, alternative platforms should be considered.

5.3.3. Universal Jurisdiction

In 1951, ICJ held that the legal principles underpinning the Genocide Convention exist in international law and binds all states, even without 'conventional obligations'.[458] Customary international law dictates that states have a duty to punish genocide, hand in hand with treaty law enshrined in Article 6 of the Genocide Convention requiring 'persons charged with genocide (…) (to) be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.'[459] Regarding the genocide committed in Canada and Australia, national tribunals proved incapable of holding perpetrators accountable and the international penal tribunal does not have jurisdiction to prosecute. Following the principle of criminal jurisdiction, in the absence of a hybrid or internationalized tribunal, universal jurisdiction remains the last resort.[460]

In chapter III.3. the thesis touched upon the jus cogens and erga omnes nature of the prohibition and prevention of genocide. Genocide is considered to be one of the gravest crimes of international law, with consequences shaking the foundations of human consciousness and affecting the international community as a whole.[461] For this reason,

[457] Shirley Scott, 'Why Wasn't Genocide A Crime in Australia?: Accounting For the Half-century Delay in Australia Implementing the Genocide Convention' (2004) 10(2) Australian Journal of Human Rights 22; David MacDonald, 'Canada's hypocrisy: Recognizing genocide excepts its own against Indigenous Peoples' *The Conversation* (4 June 2021) https://theconversation.com/canadas-hypocrisy-recognizing-genocide-except-its-own-against-indigenous-peoples-162128 accessed 12 May 2023.
[458] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 12.
[459] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 6.
[460] Douglas Guilfoyle, *International Criminal Law* (2016) (n 445) ch 2.
[461] Larry May, *Genocide: A Normative Account* (Cambridge University Press, 2010).

international customary law obliges all states to take responsibility for holding perpetrators accountable, including via means of universal jurisdiction. Universal jurisdiction for genocide is an internationally recognized notion, both in jurisprudence and among legal scholars. The *Pinochet* and *Reservations to the Convention* cases stipulate that national authorities shall take measures to prosecute the crime of genocide even without territorial links.[462] Additionally, the International Law Association and the Commission of Experts investigating human rights in the former Yugoslavia both concluded that universal jurisdiction over genocide is an international norm.[463]

Consequently, national courts can assume the responsibility to prosecute the Christian clergy members for aiding and abetting genocide, all around the world. However, in practice, there are certain legal limitations to universal jurisdiction. Usually, reliance on universal jurisdiction requires domestic legislation permissive of this type of criminal jurisdiction. Many countries are reluctant to implement universal jurisdiction legislation, but there are a few more advanced in this regard.[464] Domestic laws can either prescribe conditional or unconditional universal jurisdiction, relating to the establishment of a minimum link of the presence of the perpetrator on the domestic territory or the permissibility of prosecution in absentia, respectively.[465] Very few states allow prosecution in absentia and courts have not been in favour of it over the years, even though it might be the most beneficial with regards to the specific crime in question.[466]

If a state prescribing conditional universal jurisdiction would decide to go forward with universal prosecution regarding the genocide committed in Canada and Australia, concerning perpetrators on the territory of these states, the forum state would need to secure extradition from these two countries. The Genocide Convention in Article 8 alludes to the norm of unconditional extradition not limited to states of territorial jurisdiction.[467] Some

[462] *Pinochet case (R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte*) [2000] AC 61; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] (n 472).
[463] ILA, Res. 9/2000 (69th Conference, London 25-29 July 2000); Final Report of the Commission of Experts (27 May 1994) U.N. Doc. S/1994/674 (Annex) para. 42.
[464] Mikael Schantli, 'Accountability for International Crimes in Syria: Universal Jurisdiction and its Application' (Master's Thesis, New York University School of Law 2020).
[465] Ibid.
[466] *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3.
[467] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (n 239) art 8.

scholars view that Article 8 in conjunction with the customary law to prosecute and prevent genocide renders the obligation to extradite customary international law.[468] Interestingly, the Australian *Nulyarimma* case asserted that an 'obligation imposed by customary law on each nation state to extradite or prosecute any person found within its territory (…) reflects the concept of genocide as understood in customary international law'.[469] Therefore, some view extradition as a customary international law principle accompanying the prohibition of genocide.

However, extradition is questionable regarding the temporal aspects of dual criminality. Extradition law generally prescribes that both the sending and the forum state should have criminal acts outlawing the actions of the person being extradited, thus double criminality.[470] With regards to the temporal aspect of double criminality, there is a general debate among scholars as to whether the crime should have existed in both countries at the time of commission or at the time of the extradition.[471] The former approach lies in the principle of non-retroactivity.[472] This question will depend on the existing obligations prescribing extradition rules between the forum state and Canada and Australia. However, if the extradition will require the crime to have existed during the perpetration of the offence, it is unlikely that Canada and Australia will suddenly recognize the existence of the prohibition of genocide during these periods. In this regard, countries that allow for universal jurisdiction in absentia would be best placed to prosecute the genocide, to avoid the complications of double criminality relating to extradition.

Universal jurisdiction is usually not based on treaty law, and for this reason, it does not carry the UN Genocide Convention's shortcomings. In some states, universal jurisdiction is recognized to enjoy freedom from non-retroactivity clauses and statutes of limitation, due to the grave nature of the crimes it aims to address.[473] In this regard, universal jurisdiction

[468] Amnesty International, 'Universal jurisdiction: The duty of states to enact and enforce legislation' https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530102001en.pdf accessed 9 May 2023.
[469] *Wadjularbinna Nulyarimma v. Ors v Phillip Thompson* [1999]; *Buzzacott & Ors v Minister for the Environment* [1999] (n 468).
[470] Colin Warbrick et al, 'Extradition Law Aspects of Pinochet 3' (1999) 48(4) The International and Comparative Law Quarterly 958.
[471] Ibid.
[472] Jeremy Horder, *Ashworth's Principles of Criminal Law* (2019) (n 450).
[473] Amnesty International, 'Universal jurisdiction: The challenges for police and prosecuting authorities' (2005) https://www.amnesty.org/fr/wp-content/uploads/2021/07/ior530072007en.pdf accessed 12 May 2023.

could be based on the customary international principle of genocide and accommodate the notion of cultural genocide. Alternatively, domestic criminal law -in most cases informed by the Convention- can also be the legal ground for prosecution, equally allowing room for a culturally-permissive interpretation. The abovementioned *Jorgić* judgment is the best example in this regard. The German case tried a Bosnian-Serb paramilitary leader through universal jurisdiction based on the national criminal code's provision on genocide.[474] The court considered different international and national sources to determine the elements of genocide. Disregarding the historical rigidity of international decisions based on the Genocide Convention, the Court asserted that genocidal intent under the national legislation could be established through the goal of cultural destruction.[475]

While this thesis focused on the possible interpretations of the Genocide Convention, the prosecution is best carried out on a customary law basis. The Convention is generally accepted to inform the content of the customary law norm of genocide, thus the permissive view on the definition of genocide including cultural destruction, translates into the customary definition of genocide.

It is important to note, that universal jurisdiction is not exactly a flawless shining knight saving the remaining untried genocide cases from impunity, but it carries some practical limitations. Trial in another country often results in a lack of access to witnesses, victims, and information. Especially if the territorial state of the crime is not collaborating wilfully on these matters. The forum state must ensure that access to justice, fairness, and linguistic capabilities are respected by the national court prosecuting the crimes committed abroad. Other considerations include the importance of the contextualization of the trial.[476] If the crimes committed in Canada and Australia would be prosecuted in a country which has some outstanding obligations towards its own colonial past or treatment of indigenous peoples, it could hijack the effectiveness of justice.[477]

All in all, universal jurisdiction is the best fitting mechanism for prosecuting the Christian clergy for the genocide in Canada and Australia. This is for reasons that universal

[474] *Prosecutor v Nikola Jorgić* [1997] Higher State Court of Düsseldorf IV-26/96, 2StE 8/96.
[475] Ibid, 94-95.
[476] Kona Keast O'Donovan, 'Convicting the Clergy: Seeking Justice for Residential School Victims Through Crimes Against Humanity Prosecutions' (2022) 45(4) Manitoba Law Journal 42, 87.
[477] Ibid.

jurisdictions lack the jurisprudential, textual, and temporal limitations imposed by the Genocide Convention, which are currently precluding efficient and meaningful justice for the victims of cultural genocide in Canada and Australia.

5.4. Beyond Cultural Genocide: Alternative Characterizations

While there are possible interpretative doors that can be opened to accommodate the notion of cultural genocide, the road there is rocky. There are possible alternative characterizations for the wrongdoings committed against indigenous people during the residential school system and the stolen generation child removals.

The wrongful acts could also be labelled crimes against humanity because they were 'committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack'. The notion widespread refers to the scale of atrocities, and systematic to the organized nature of the crime.[478] Both crimes were geographically and temporally widespread and systematically planned in national legislation. As for the *mens rea,* the perpetrator need not have a special intent like for genocide, but the mere intent to commit the act and knowledge of the attack's contribution or likely contribution to the commission of a greater plan of crimes against humanity suffices.[479] Under crimes against humanity, the injustices resulting in language and culture loss could fall under the *actus reus* of forcible transfer of population or persecution, defined as the deprivation of the fundamental rights of individuals due to their personal or group identity belonging to – among others- an ethnic group.[480]

Ethnocide or ethnic cleansing are other connected alternative labels which could be used for the pertinent crimes committed. Ethnocide was described by the San Jose Declaration as the denial of an ethnic group's right to 'enjoy, develop and transmit its own culture and its own language'.[481] On the other hand, the notion of ethnic cleansing gained attention amidst the consistent targeting of ethnic groups during former Yugoslavian wars. The Commission of Experts tasked with investigating the human rights violations in the region explained that ethnic cleansing refers to the practice of 'rendering an area ethnically

[478] *Prosecutor v. Augustin Ndindiliyimana et al. (*Appeal Judgment) ICTR-00-56 (11 February 2014) para 260.
[479] *Prosecutor v. Duško Tadić* (1999) (n 360) para 248.
[480] International Criminal Court, 'Elements of Crimes' (2000) (n 245) art 7(1)(h).
[481] UNESCO 'Declaration of San José' (1981) (n 348).

homogenous by using force or intimidation to remove persons of a given ethnic group from the area'.[482] While both seemingly reflect the very crime committed in Canada and Australia, neither of these characterizations has a recognized international criminal law status. Thus, ethnocide and ethnic cleansing could be used to a send strong message about the injustices faced by indigenous people, their contribution to reconciliation and justice is only nominal.

Therefore, the actions of the perpetrators and the assistance provided by the Christian clergy members could alternatively fall under the categories of crimes against humanity -a crime easier to prove than genocide-, ethnocide, and ethnic cleansing. However, this paper aimed to showcase and establish the viability of the crime of cultural genocide for indigenous justice, hence it focused solely on the genocide profile.

[482] UNSC, 'Letter from the Secretary-General to the President of the Security Council' (May 24 1994) U.N. Doc. S/1994/674 https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf accessed 10 May 2023 Annex IV.

Chapter VI: Conclusion

This thesis aimed to establish that injustices against indigenous peoples during the Canadian residential school system and Australian stolen generation child removal policies amounted to cultural genocide, a crime understood to form part of the genocide definition by a culturally-permissive interpretation of the Genocide Convention.

Understanding the policy framework of the two case studies helped decipher the elements leading to abusive practices against indigenous peoples. The colonial context and the entitlements stemming from the Christian religion morally legitimized the actions of both state and church actors in the commission of cultural genocide against indigenous peoples in Canada and Australia.

A deeper understanding of the drafting phase of the Genocide Convention shines a light on the structural issues and powerplay behind the negotiations that lead to the adoption of the narrow definition of genocide. This narrow definition has been traditionally understood to merely focus on the physical and biological destruction of certain groups. However, interpreting the treaty according to the rules of the Vienna Convention on the Law of the Treaties led to a more culturally nuanced definition. The textual and teleological interpretation of the Genocide Convention concluded that the prohibition on cultural destruction of groups is in line with the object and purpose of the treaty. National and international jurisprudence and UN secondary sources also allude to the view that cultural destruction plays a role in the determination of the crime of genocide. There seems to be a general trend in moving away from the traditional physio-biological matrix of destruction and entering a slightly more permissive definition that provides broader protection to the groups the Convention vows to secure.

The assessment of whether the Canadian residential school system and the Australian stolen generation child removal policy fit the framework of this more permissible, culturally informed genocide definition, ascertained that the atrocities amounted to cultural genocide. Therefore, perpetrators and contributors must be held individually criminally liable for their actions. Members of the Christian clergy substantially assisted the programs of cultural genocide in Canada and Australia by the practical means of operating residential and foster institutions and providing moral support through legitimization by the faith.

The accessory liability of Christian clergy members could not be prosecuted in a national court in Canada and Australia due to the unwillingness and inability of the judiciary to recognize that genocide was a crime under customary international law during the relevant periods and the reluctance to recognise that atrocities were enacted with genocidal intent. The following option would be the International Criminal Court; however, the Rome Statute's temporal limitation disallows prosecution. Leaving the last alternative pathway to be universal jurisdiction. The jus cogens status and the erga omnes character of genocide is widely accepted in international jurisprudence, thus it is a crime over which universal jurisdiction can be exercised. There are legal limitations to the universal jurisdiction prosecution of the Christian clergy members, as it would only be possible if the accused is already on the territory, extradited to the forum state, or the forum state exercises jurisdiction in absentia. The questions of extradition could raise further complications due to certain temporality limitations on the duality of the crime, therefore the best fitting judicial pathway would be the universal jurisdiction in absentia.

The prosecution of Christian clergy members for aiding and abetting in cultural genocide committed in Canada and Australia is a challenging exercise. Nevertheless, with a culturally-permissive interpretation of the Genocide Convention, and consequently customary international law, exercising universal jurisdiction is a possibility. The conviction and recognition of wrongdoings on the part of the Christian clergy would go a long way in national and international reconciliation and indigenous justice around the world.

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