RECONCILIATION IN AN ERA OF GENOCIDE DENIAL

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Introduction

From the late 1800s to the closing of the last Indian Residential School in 1996, approximately 150,000 children were removed from their families and communities and placed in institutions[1] that were infamously built to "kill the Indian in the child" [2]. The Truth and Reconciliation Commission, as well as former Chief Justice Beverley McLachlin have referred to the atrocious acts carried out in the installment of Indian Residential Schools ("IRS") as a form of "cultural genocide" against Indigenous people.[3] The term cultural genocide, however, has been dubbed as simply a "mourning label"[4] with no real legal meaning under the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* ("*Genocide Convention*").[5]

This paper will conduct a legal analysis of Indian Residential Schools (IRS) as a form of genocide under Article II part (e) of the *Genocide Convention*. A legal analysis will demonstrate that the perpetrator, the federal government of Canada, committed genocide by forcibly transferring children from one group to another with the intent to destroy Aboriginals. This paper will also examine the implications of referring to the system as anything short of genocide. In an era where "reconciliation" has arguably become a trend and buzz word, denial of genocide in Canada is counterintuitive to the actual goal of reconciliation and empties the word of any real meaning to Survivors of IRS and to Indigenous people in Canada.

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[1] Truth and Reconciliation Commission, "Indian Residential Schools Truth and Reconciliation Commission", online: <http://www.trc.ca/websites/trcinstitution/index.php?p=39>.

[2] This phrase has commonly been attributed to as a quote from Duncan Campbell Scott, and referred to throughout the last decade in reconciliation efforts such as the Statement of Apology to former students of Indian Residential Schools as well as by the Truth and Reconciliation Commission, however a 2013 MacLeans article indicates that the quote belongs to an American military officer but still within the same context of the residential school system. Online: < https://www.macleans.ca/culture/books/conversations-with-a-dead-man-the-legacy-of-duncan-campbell-scott>.

[3] John Lehman, "Chief Justice says Canada attempted 'cultural genocide' on aboriginals', *The Globe and Mail* (28 May 2015), online: <https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>.

[4] Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?" (2016) 62:1 McGill LJ 243-270.

[5] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 221 (entered into force 12 January 1951) [*Convention*].

Methodology

This paper will employ a doctrinal approach to the crime of genocide by exploring the development of the *Genocide Convention*, its purpose and intent, and the elements of the crime of genocide. I have reviewed international case law as well as secondary sources (government reports, scholarly articles, educational resources, and news/media) on the topic of genocide and the IRS system as genocide. I have also researched secondary sources on genocide denial and its implications within society and for Survivors of genocide.

It is worth noting, that as a child and grandchild of Survivors of the IRS system, I am acutely aware that attempting to write a paper that involves the experience of my father and grandparents would take its emotional toll and affect my ability to write clearly and concisely. There are personal accounts shared with me throughout my life and direct observations that would surely corroborate my argument, however those are not my testimonies to share. I have learned in my experience as a frontline worker with Survivors of IRS that it is a privilege to be entrusted and bestowed with the stories of truth and survival. What happens with those accounts is up to Survivors themselves in their journey towards healing and reconciliation.

As a law student, I approach this topic with sensitivity to the realities of being an Indigenous legal scholar. My priority is to present the law and facts as they appear, and do my best to make a legally sound argument. Following that, I will undertake a criticism on the various aspects covered and provide my opinion on the effectiveness of Canada's reconciliation efforts. This will surely provide insight into the realities of transitional justice and Truth and Reconciliation Commissions.

What is Genocide?

The term "genocide" was first referred to by Raphael Lemkin in his *Axis Rule in Occupied Europe*[6] in 1944 and was instrumental in the drafting of the 1948 United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*. Lemkin was motivated by his outrage over

[6] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New Jersey: The Lawbook Exchange, Ltd 2005) [*Axis Rule*].

the unpunished crimes of the Ottoman Empire in their mass murder of Armenian people during World War I.[7] At the time of his early adulthood, Lemkin was entering law school and there was no legal precedent for such a horrific crime - thus the topic of naming the crime became a significant point of discussion in his studies and eventually his life's most notable work.[8] In 1933, he wrote a paper urging international leaders at the Madrid Conference to make a law against the destruction of religious or ethnic groups.[9] In 1939, World War II hit and amidst the Holocaust, Lemkin – being of Polish Jewish heritage – fled to the United States in 1941 to avoid Nazi persecution.[10] Lemkin lost 49 relatives to the Holocaust, with the only survivors being his brother, Elias, and his brother's wife and two sons.[11] For Lemkin, what was at first a topic motivated by moral outrage turned into incomprehensible real life circumstances. It is no wonder that finding world recognition of the crime became his life's work.

In *Axis Rule*, Lemkin coined the word genocide to describe the "destruction of a nation or ethnic group" by combining the ancient Greek word *geno* (race, tribe) and the Latin *cide* (killing).[12] In 1945, the word genocide was used by the International Military Tribunal in Nuremburg, Germany during the trials prosecuting Nazi acts against Jews and gypsies of World War II[13], although the term was not used in the final judgement.[14] This prompted efforts within the United Nations General Assembly, where in 1946 a draft resolution was presented by Cuba, Panama and India with the objectives of recognizing that genocide could be committed during peacetimes (which had not been recognized by the Nuremburg Tribunal) and that genocide was subject to universal jurisdiction.[15] A final version of this resolution was passed in December of 1946, which called for the preparation of a convention on the crime of genocide.[16]

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[7] Dan Eshet et al, *Totally Unofficial: Raphael Lemkin and the Genocide Convention* (Brookline: Facing History and Ourselves Foundation, Inc., 2007) at 19-20 (pdf) [*Totally Unofficial*].
[8] Lemkin was in his early twenties when he learned of the genocide during his university studies.
[9] *Totally Unofficial* at 15.
[10] *Ibid*.
[11] *Ibid* at 29.
[12] *Axis Rule* at 79.
[13] *Totally Unofficial* at page 14.
[14] William A. Schabas, "Convention for the Prevention and Punishment of the Crime of Genocide" (2008), *United Nations Audiovisual Library of International Law* at 1 <http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf> [*Schabas*].
[15] *Ibid.*
[16] *Ibid.*

The *Genocide Convention* was drafted with the guidance of three experts, including Lemkin. Of particular note, for reasons expressed later in this paper, experts had originally recommended that the definition of genocide include three categories – physical, biological and cultural genocide.[17] The Sixth Committee of the General Assembly voted to exclude cultural genocide, with an exception of allowing the "forcible transfer of children from one group to another" to stay as a punishable act.[18] It also voted to exclude a provision that in longer words made "ethnic cleansing" a punishable crime, and explicitly rejected the idea of universal jurisdiction.[19] Instead, the final draft of the *Genocide Convention* only recognized territorial jurisdiction.[20]

Article II of the *Convention* defined punishable acts of genocide, a crime of intentional destruction of a national, ethnic, racial or religious group, in whole or in part. The acts included:

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.[21]

Article III of the Convention goes on to delineate that any of the following are punishable:

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.[22]

[17] *Ibid* at 2.
[18] *Ibid.*
[19] *Schabas* at 2.
[20] *Ibid.*
[21] *Convention* at page 280.
[22] *Ibid.*

The *Genocide Convention* was adopted in the *Rome Statute of the International Criminal Court*[23] without change, despite having many calls for expansion of its narrow definition. Many critics of the *Convention* have called for the inclusion of the original category of cultural genocide and "ethnic cleansing", which of course were part of the original drafting.[24] Instead, the development of international law on such crimes have expanded the definition of crimes against humanity to include a growing list of punishable acts.[25] While this paper will look at the Indian Residential Schools system as an act of genocide under part (e) of the definition, it will also comment on how it could be considered genocide if those provisions were included.

As of January 2018, the *Genocide Convention* has been ratified by 149 States.[26] The International Court of Justice states that whether States have ratified the *Convention* or not is irrelevant – they are all bound by customary international law.[27]

Elements of the Crime of Genocide

The International Criminal Court developed a document to "assist the Court in the interpretation and application of articles 6, 7 and 8" of the *Rome Statute*[28]. The elements go on to state that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction o the Court only if the material elements are committed with intent and knowledge", and that "[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances."[29] Finally, the elements are "generally structured in accordance with the following principles:

> a) As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

[23] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[24] *Schabas* at 3.
[25] *Ibid*.
[26] United Nations Office on Genocide Prevention and the Responsibility to Protect, "Definitions: Genocide Background", online: <http://www.un.org/en/genocideprevention/genocide.html> [*Definitions*].
[27] *Ibid.*
[28] *Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statue of the International Criminal Court*, 1st Sess, (2002) [*Elements*].
[29] *Elements* at 1.

b) When required, a particular mental element is listed after the affected conduct, consequence or circumstance;

c) Contextual circumstances are listed last.[30]

The introduction to the elements of the crime of genocide indicates that,

> "[w]ith respect to the last element listed for each crime:
>
> a) The term "in the context of" would include the initial acts in an emerging pattern;
> b) The term "manifest is an objective qualification;
> c) Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."

To provide context for the above mentioned point c), Article 30 of the *Rome Statute* indicates that a person has intent where:

a) In relation to conduct, that person means to engage in the conduct;

b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[31]

The guide on elements of genocide by forcibly transferring children indicate the following:

1. The perpetrator forcibly transferred one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

[30] *Ibid.*
[31] *Rome Statute*.

> 3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
> 4. The transfer was from that group to another group.

On the matter of the first point, the term "forcibly" is not restricted to physical force and can include

> threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

In short, there are two elements required to meet the definition of the crime of genocide – intent and physical. In other words, the *actus reus* and *mens rea* components to the crime. While evidence can clearly demonstrate physical acts of genocide, the latter element of intent is more complex and inconsistently applied.

Specific Intent vs Knowledge-Based Approach

The mental element of intent has been described as the most difficult to prove, and has commonly been referred to as "special intent" or *dolus specialus*, which is what "makes the crime of genocide so unique" and sets it apart from other punishable acts such as crimes against humanity.[32] It has also been argued that it ensures individuals taking orders from higher authorities are not persecuted for partaking in a genocide because they were obeying orders.[33] Despite the term "special intent" never being used in the *Convention*, it has been "regularly associated with genocide" but more recently criticized as being too strict and that a "knowledge-based approach" should be employed instead.[34] In short, special intent has been defined as intent that

[32] *Definitions*.
[33] Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach" (2010) 5:3 Genocide Studies and Prevention: An International Journal 238-257 [*Goldsmith*] at 248.
[34] *Ibid* at 241.

> 'demands that the perpetrator clearly seeks to produce the act charged.' In relation to genocide, it means the perpetrator commits an act while clearly seeking to destroy the particular group, in whole or in part.[35]

This type of approach has received criticism on the basis that obtaining actual proof is a difficult feat, especially given that it would involve proving a perpetrators state of mind. In practice, this criticism is not uncalled for – what perpetrator would admit to such a horrendous intent of crime, either during the act or after? Marshalling evidence for a state of mind is difficult in and of itself. As well, the concept of special intent is not clearly defined nor is it generally accepted in Common Law countries.[36] For these reasons, it is argued that using specific intent goes beyond the purpose and intent of the Convention and the prevention of genocide.[37]

The application of special intent has led to what some authors describe as a miscarriage of justice. Kathleen Goldsmith writes that the UN International Commission of Inquiry on Darfur was a perfect example of how the application of special intent led to a situation of a coordinated plan to target and destroy a protected group as *not* meeting the establishment of genocide.[38] The Commission found that the physical act had indeed been committed, but as Goldsmith writes, "confused motive with intent" and that "[r]egardless of motive, [the perpetrators] still intended to destroy a substantial part of the group, and are, therefore committing genocide."[39] This case also demonstrated the difficulty of obtaining evidence, as the State governments in question did not fully disclose all related policy documents despite informing the Commission that such documents did exist. Instead, the lack of disclosure was simply acknowledged by the Commission and a final decision still made.

According to Goldsmith, a knowledge-based approach to genocide would mean "a person is guilty of genocide if they willingly commit a prohibited act with the knowledge that it would bring about the destruction of a group."[40] Goldsmith also notes that

[35] *Ibid* at 242.
[36] *Ibid* at 245.
[37] *Ibid.*
[38] *Ibid* at 242-244.
[39] *Ibid* at 242.
[40] *Ibid* at 245.

> [i]ndividuals are unlikely to achieve the destruction of a group by themselves; they would have to work with others. Therefore, it is enough evidence if the individual commits an act knowing that it would contribute to other acts being committed against a particular group, which when put together, would bring about the destruction of that group, in whole or in part.[41]

A more lenient approach such as this was used in the *The Prosecutor v Jean-Paul Akayesu*[42], where, despite stating the use of special intent, the trial judges noted the difficulty of proving intent, and for this reason, "intent can be inferred from a certain number of presumptions of fact."[43] The judges found that it was

> possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.[44]

This appears to be more in line with the Rome Statute's delineation of the elements of the crime, given that Article 30, 2(b) states that a person has intent if they are aware that consequences will occur in the course of events.[45] It is important to keep in mind, however, that "the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."[46]

In keeping in line with the purpose and intent of the *Genocide Convention*, which as Lemkin argued, should punish all parties involved, regardless of their role or position within the act of genocide, this paper will employ a knowledge-based approach to intent. The final version of the

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[41] *Ibid*.
[42] *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Akayesu*].
[43] *Akayesu* at para 523.
[44] *Ibid.*
[45] *Rome Statute.*
[46] *Elements* at 1.

Convention clearly states in Article 4 that ‘‘Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’’[47] As Goldsmith writes,

> The people who commit the actus reus of genocide are not just aiding and abetting, or being complicit in the crime of genocide. These people are in fact at the center of the prohibited acts that constitute genocide, therefore, at the center of the crime. For this reason, they should not be allowed to escape punishment for that crime. All free persons are responsible for their own actions and should be held responsible for them. If someone willingly commits a prohibited act knowing of a coordinated effort by others against a targeted group, then they should know that this will threaten the survival of the group. If they continue to act, they do have the intent for the group to be destroyed, whether they choose to admit it or not. If they are of sound mind, then they are fully aware of their actions and what their actions could lead to. To plead ignorance is inappropriate.[48]

The intent in developing the *Genocide Convention* is an integral part to this paper’s argument. For this reason, an exploration of the intent behind adding the provision on forcible removal of children will be conducted.

Cultural Genocide and the Forcible Removal of Children

In *Axis Rule,* Lemkin wrote about genocide in the context of a “colonizing regime” and “not simply ‘obvious’ examples of killing.”[49] Genocide was presented as an attack on all aspects of life:

> coordinated plan of different actions aiming at the destruction of essential foundations of life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political

[47] *Convention.*
[48] *Goldsmith* at 252.
[49] Robert van Krieken, “Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation” (2004) 75:2 Oceania 125-151 at 133.

> and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[50]

Given this, in drafting the *Genocide Convention*, Lemkin recommended that "the policy of compulsory assimilation of a national element" be included as a rule of genocide, however this was excluded by the Secretariat in its final draft.[51] Lemkin also insisted on the inclusion of "cultural genocide" as one of three categories of genocide (physical, biological and cultural), citing that cultural genocide was "more than 'forcible assimilation', it was a 'policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.'[52] Within the definition of cultural genocide, the committee included the forcible transfer of children:

> The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a cultural and a mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.[53]

This point became one of contention within the United Nations and beyond.[54] In a second draft done by an Ad Hoc Committee of the Economic and Social Council, the three categories including cultural genocide were retained, but the provision on forcible removal of children was removed.[55] Member states then decided that they wanted to exclude cultural genocide but retain the forcible removal of children clause, which they achieved by re-framing the forcible removal clause being an example of physical genocide and ultimately removing cultural genocide altogether.[56] In doing so, the act was elevated to, as Greek delegate Mr Vallindas described,

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[50] *Axis Rule* at 79.
[51] Van Krieken at 134-135.
[52] *Ibid* at 135.
[53] *Ibid*.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

> 'an act far more serious and indeed more barbarous than the other acts enumerated in the first draft convention under the heading of cultural genocide.'[57]

Many delegates still called for the inclusion of cultural genocide despite this amendment, with the argument that "there was an intimate relationship between the destruction of culture, especially when linked to biological arguments about racial inferiority or degeneracy, and physical or biological annihilation."[58] The Pakistani delegate, Mr Bahadur Khan, argued that cultural genocide could not be separated from physical and biological genocide since they all worked together to achieve the same motive and object – destruction of a group.[59] Khan went on to note that he appreciated the need to assimilate immigrants for the sake of strong nation building, but that the Genocide Convention should "still be used to prevent those forms of assimilation which were 'nothing but a euphemism concealing measures of coercion designed to eliminate certain forms of culture.'"[60]

It should come as no surprise that the member states who most strongly opposed to the inclusion of cultural genocide in the *Convention* were those that had large immigrant populations and/or those with minority or majority Indigenous populations – "the USA and Canada, most of Latin American states, Australia, New Zealand, South Africa."[61] These member states argued that the inclusion of cultural genocide would provide protection to primitive groups with barbaric customs such as cannibalism, while others wondered whether conversion of Indigenous peoples to Christianity – a "normalized aspect of modern state-formation and nation-building" – would be considered cultural genocide.[62] Several opposing states argued that the problem of cultural genocide should be handled in the realm of human rights instead of international criminal law.[63]

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[57] *Ibid.*
[58] *Ibid.*
[59] Van Krieken at 136.
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid* at 137.
[63] *Ibid.*

Ultimately, the forcible removal of children clause was agreed upon in the *Convention* as a form of biological genocide. The United Nations Office of Genocide Prevention states that "[c]ultural destruction does not suffice" as a form of genocide.[64] The UN International Law Commission (ILC) wrote a commentary in which genocide was described as only including physical and biological destruction.[65] The International Court of Justice (ICJ) also expressed the same view in their ruling on the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* reiterating that cultural genocide was dropped out of the *Genocide Convention*.[66]

The debate on whether the forcible removal of children is simply a biological destruction persists in the context of whether genocide should be interpreted narrowly or broadly. This is reflected in several commentaries on genocide but also in case law. While some international cases uphold the majority member states view on the forcible removal of children clause, the case of the *Prosecutor v. Momcilo Krajisnik* deviates in its *obiter dicta* stating that destruction "is not limited to physical or biological destruction" and can include transferring children out of the group.[67] This clearly sets the removal of children as being distinct from physical and biological destruction.

This continues to beg the question of "what it means to 'destroy' a human group: whether it is necessary to physically kill them, or whether they can be 'killed' in more subtle and apparently civilized ways." As former UN prosecutor for The Hague, Payam Akhavan states, "[t]here is no conclusive authority categorically excluding the characterization of article II(e) as a form of cultural genocide."[68] For that reason, this paper will look at the forcible removal of children from both lenses – the biological and cultural.

Application of International Law on Genocide

[64] *Definitions*.
[65] *Report of the International Law Commission on the Work of its Forty-Eighth Session*, UNGAOR, 51st Sess, Supp No 10, UN Doc A/51/10 (1996).
[66] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, [2015] ICJ Rep 1 at para 136 [*Croatia*].
[67] *Prosecutor v Momcilo Krajisnik*, IT-00-39-T, Judgment (27 September 2006) at para 854 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.
[68] Akhavan at 258.

The Rwandan Genocide

The first finding of genocide under the 1948 *Convention* was *The Prosecutor v Jean-Paul Akayesu*[69], Akayesu was the "bourgmestre" or mayor of the Taba commune in Rwanda and was charged with genocide, complicity in genocide, crimes against humanity and incitement of genocide against the Tutsis. The prosecutor alleges that as mayor, Akayesu had to have known about the openly committed killings of the Tutsis from April to June of 1994, and despite having the "authority and responsibility to do so" never stopped the killings or even attempted to.[70] Akayesu was present when many crimes were being committed and actively facilitated the commission of such crimes by "allowing the sexual violence and beatings and murders to occur".[71]

The judges in *Akayesu* looked at the powers held by the accused in his role as a bourgmestre, the historical context of the events in Rwanda from pre-colonial period to 1994 (taking into consideration the makeup and development of certain lineage groups and conflicts between them). They then looked at the physical and mental elements required to prove genocide, finding that on the evidence presented, the physical element was undeniable. On the mental element, the judges wrote

> Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, […] stated as follows: 'on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that – as they said on certain occasions – their children, later on, would not know what a Tutsi looked like, unless they referred to history books.'[72]

[69] *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Akayesu*].
[70] *Akayesu* at para 12.
[71] *Ibid* at para 12B.
[72] *Akayesu* at para 118.

The Chamber also noted the use of propaganda campaigns where various news media "overtly called for the killing of Tutsi" by presenting the Tutsi people as extremists plotting to take over power lost.[73] The Chamber also found that the genocide was "meticulously organized" based on the existence of lists of Tutsi to be eliminated, an arms cache which had been attempted to be destroyed, the training of military and the "psychological preparation of the population to attack the Tutsi" – which was carried out through media.[74] The Chamber noted that despite there being conflicts in Rwanda during the time in question, that the against genocide Tutsi people was "fundamentally different" from the conflict.[75]

On the matter of complicity in genocide, the Chamber discussed various approaches to the elements of the crime and finally concluded that

> an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[76]

In their final judgement, the Chamber noted that the charges of genocide and complicity in genocide with respect to the acts listed in the indictment are mutually exclusive and that "it must rule on whether each of such acts constitutes genocide or complicity in genocide."[77]

The Chamber found without a doubt that the genocide had occurred. With regards to genocidal intent, the Chamber wrote

> Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda,

[73] *Ibid* at para 123.
[74] *Ibid* at para 126.
[75] *Ibid* at para 128.
[76] *Akayesu* at para 545.
[77] *Akayesu* at para 725.

> and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.

The Chamber also found that the rape and sexual violence committed against Tutsi women constituted genocide given that it was systemic and "an integral part of the process of destruction […] – destruction of the spirit, of the will to live, and of life itself."[78]

Given all of the aforementioned, the Chamber found beyond a reasonable doubt that Akayesu was individually criminally responsible for genocide, and therefore not the crime of complicity.

Application of Genocide on the Indian Residential Schools System

Similar to the way the Chamber in the International Criminal Tribunal for Rwanda did, this paper will determine whether the elements of the crime of genocide are met by looking at the context, conduct, circumstances and consequences of the Indian Residential School System, with a particular focus on the Anishinaabeg people living in what is now known as Kenora, Ontarion and the Cecilia Jeffrey and St. Mary's Indian Residential Schools.

> "When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that the Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training

[78] *Ibid* at para 731-732.

> industrial schools where they will acquire the habits and modes of thought of white men."[79]

Historical Context

Indigenous peoples have lived in what we now call North America since time immemorial. Although there are numerous theories about how Indigenous people came to be on this land, including migration theories from Siberia in to the Americas via land bridges[80], recent research has also shown that at least some Indigenous communities have existed for over 14,000 years.[81] This would make these settlements older than the pyramids in Egypt and the invention of the wheel.

Around the time of first European contact and well into the 19th century, the Anishinaabeg (plural of Anishinaabe) of the Kenora area lived in abundance off of the fruits of the land, including game, wild rice, agricultural produce, and fish.[82] The Anishinaabeg remained independent during the fur trade that was facilitated by the Hudson's Bay Company (HBC), which enabled them able to deal directly with American and HBC traders for higher prices than local traders for the furs they trapped.[83] The Anishinaabeg held a "powerful land position", and acted as gatekeepers to the West – Euro-Canadian exploration parties needed their permission before passing through their territory.[84] Culturally, they organized themselves by what is called the Midewewin society (also known as the "Grand Medicine Society"), and politically, they exercised their own government called the Grand Council of the Ojibwa.[85]

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[79] Prime Minister Sir John A. Macdonald, Official report of the debates of the House of Commons of the Dominion of Canada, 9 May 1883, 1107–1108.
[80] Commonly known as the Bering Land Bridge Theory.
[81] Nair, Roshini. "14,000-year-old archeological find affirms Heiltsuk Nation's ice age history", (30 March 2017), online: CBCnews <http://www.cbc.ca/news/canada/british-columbia/archeological-find-affirms-heiltsuk-nation-s-oral-history-1.4046088>
[82] Victoria Freeman, *Distant relations: how my ancestors colonized North America* (Toronto: McClelland & Stewart Ltd., 2000) at 366 [*Distant Relations*].
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

When Euro-Canadian missionaries first came to the Kenora area in 1839, the Anishinaabeg had no interest in world views alternative to their own.[86] They were, however, interested in knowledge sharing and the opportunity for the next generation to learn to read and write. Negotiations began between the missionaries and the Anishinaabeg to open schools, but those negotiations failed. The Anishinaabeg would only agree to sending their children to schools if teaching Christianity was out of the picture. This was not agreeable to the missionaries, as they insisted on conversionary activities and began plans for a school in Rainy River. By 1849, the Grand Council forbade any further missionary activities, threatened to dismantle any structures that were built, and forced them out of the area. [87]

For a short time, the Anishinaabeg lived in freedom from outside religious encroachment and attempted assimilation, however after the 1870 ceding of Rupert's Land to Canada, which was done without the consent of Indigenous habitants of the land, the Métis were provoked into the Red River Rebellion in a fight for their independence as a sovereign nation. Canada had a "real and legitimate fear" that the Anishinaabeg would join and so the numbered treaty negotiations began.[88] Treaty #3 was one of the longest and hardest fought negotiations of the numbered treaties, and was signed October 3, 1873.[89]

Later, the Anishinaabeg would find that what was discussed in oral negotiations differed from what was in the actual text of Treaty #3. They understood the agreement to be compensation in exchange for use and *sharing* of the land, not surrendering it. They were also assured that they would still live as sovereign nations – free, independent, and with their traditional way of life intact. Instead, they became subjects of the Crowns.[90] Many verbal promises were left out of the written treaty agreement, and as a result, *The Paypom Treaty* was brought forward and is referred

[86] *Ibid*.
[87] *Ibid* at 368.
[88] *Ibid* at 369.
[89] "In exchange for the surrender of 55,000 square miles the Ojibwa would receive reserves of no more than one square mile for each family of five, a one-time payment of $12 to each man, woman, and child, $5 per head to each family yearly, and $1,500 a year for each band for ammunition and twine nets, a one-time provision of agricultural tools, seed, and farm animals, the right to hunt and fish throughout unsettled surrendered land, and the provision of schools on the reserves". *Ibid* at 370.
[90] *Ibid*.

to as the original document. It is not known for certain why inconsistencies between the two exist, although historians say hastiness on the part of the treaty commissioners may be responsible.[91]

After the signing of Treaty #3, government civilization and assimilation policies were quickly rolled out in the last part of the 19th century, absorbing the "Indian race" into the general population. The *Indian Act* was adopted in 1876 giving the federal government control of every aspect of Aboriginal life.[92] They were no longer able to govern themselves, they were subject to a pass system, which meant that "Indians" were unable to leave the reserve without approval from an Indian agent. In 1879, politician Nicholas Davin conducted a study on boarding schools in the United States for Native Americans and recommended that Canada adopt a similar approach to "civilization". This would involve opening "industrial schools", a model used in Europe and North American for the children of the urban poor – which could be "dangerous and violent places".[93] As Davin wrote in the Report,

> '[…]the industrial school is the principal feature of the policy known as that of 'aggressive civilization'. Indian culture is a contradiction in terms […] they are uncivilized […]. The aim of education is to destroy the Indian.'[94]

As settlers moved into the area and exploited the land of its resources, the Anishinaabeg's reliance on wild rice and game was decimated. With the expansion of Canada into the west, and access to more potential converts, the missionaries moved back into the area. By the late 1980s, the Anishinaabeg were faced with a hard reality – in order to protect their livelihood, they had to learn the ways of the Euro-Canadian. Education was seen as a stepping stone in adapting to the changing world around, a more secure future for the next generation. [95] Leadership knew that education was

[91] Michelle Filice, "Treaty 3" (17 August 2016), *Historica Canada* (website), online: <http://www.thecanadianencyclopedia.ca/en/article/treaty-3/>.
[92] *The Indian Act, 1876.*
[93] Canada, Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (2004) [*TRC Report*] at 57.
[94] *Bakaan Nake'ii Ngii-izhi-gakinoo'amaagoomin: We Were Taught Differently – The Indian Residential School Experience* (Kenora, Ontario: Lake of the Woods Museum, Nechee Friendship Centre, Lake of the Woods Ojibway Cultural Centre, 2008) [*Bakaan*] at 4.
[95] *Distant Relations, supra* note 13 at 373.

vital in the learning about other cultures and in mutual understanding. As Chief Sah-katch-eway of Grassy Narrows and Wabauskang indicated,

> '…if you give what I ask, the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us; and in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. If you grant us what I ask, although I do not know you, I will shake hands with you. This is all I have to say.'[96]

The Anishinaabeg put their faith in the Euro-Canadian system, agreeing only to allow their children to attend any residential school on several grounds, namely that the schools would make no attempt to undermine their Anishinaabe practices, and that parents be still allowed to take their children to ceremonies. Cecilia Jeffrey Indian Residential School (Cecilia Jeffrey IRS) opened in 1902 on the Shoal Lake First Nation 40, but the agreement (made between the Anishinaabeg, the federal government, and the Presbyterian church running the school) was not honoured. Children were not allowed to speak their native language, their hair was cut, and their identities stripped. Where rules were not obeyed, corporal punishment was imposed on the children. Despite the best efforts of parents, they "could not prevent their receiving the constant message from the missionaries that aboriginal culture was inferior, savage, and backward."[97]

By the 1920s, it became Canadian policy that all aboriginal children ages seven to fifteen years must attend residential school. Duncan Campbell Scott, Deputy Superintendent General of the Department of Indian Affairs 1913-1932 said, in reference to the policy,

> 'I want to be rid of the Indian problem. That is the whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department, and that is the whole object of this Bill.'[98]

[96] *Bakaan* at 4.
[97] *Ibid* 379.
[98] *Bakaan* at 4.

The schools were poorly kept, with many students contracting tuberculosis and dying at the schools and after they had returned to their communities.[99] Children were not taught to achieve academically, but instead made to work long days in labour and trades.[100] Traditional religious practices had been outlawed not just in schools but amongst all aboriginal people. When plans to move Cecilia Jeffrey IRS from Shoal Lake into the Kenora area were discussed, Treaty #3 leadership met in Kenora in 1928 to share their concerns about the education of their children. Chief Gardner of Wabigoon, whose sons attended St. Mary's Residential School in Kenora, complained that his children were mainly taught to pray, instead of learning how to read and write.

> "*One son, who began attending school at the age of seven, still could not read or write well when he left at the age of seventeen, and had not been well prepared to find work in Kenora and make a living.*"[101]

Parents were also concerned about building Cecilia Jeffrey IRS much further away from parents living on reserve. There were no camping grounds or houses for them to stay during the winters.[102] Eventually, the government bought a property on the Kenora waterfront for camping, now known as Anicinabe Park, so that parents would send their children to the new school.[103] The new school was built in 1929, and Anishinaabe parents seemed content – but only for a short period of time as complaints of starving children, physical and sexual abuse, and allegations of misappropriation of government funds were abound. The dark history and legacy as present day society is only now beginning to acknowledge and understand, continued.

Government Underfunding and Neglect

[99] Students contracted tuberculosis (TB) from living in overcrowded, poorly ventilated dormitories. According to a 1907 report by Dr. Peter H. Bryce, 24 per cent of the children at fifteen residential schools in Canada had died of TB, which would have been 42 per cent if survivors had been monitored for three years after returning to their reserves. *Ibid* at 380.
[100] "Across Canada, the standard of aboriginal education was shockingly low: more than one-third of all residential-school pupils were in Grade 1; in 1930, three-quarters of Native pupils were in Grades 1 to 3, and only three in every hundred moved past Grade 6. By contrast, well over half the children in provincial public schools in 1930 were past Grade 3, and almost a third beyond Grade 6." *Ibid* at 385.
[101] *Distant Relations, supra* at 398.
[102] *Ibid.*
[103] *Ibid* at 435.

In rolling out the Indian Residential School system, the government thought it could achieve its goal a very minimal cost, if not free, basis.[104] Cutting funds from other Indian departmental needs, schools were given a "modest budget" of $44,000 a year. The churches and their supporters were relied on heavily to absorb the costs of running a school.[105] As a result, schools attempted to make up the deficit by putting children to work. Children in the care of residential schools performed chores, made clothes, grew vegetables and cared for animals, and carried out the daily tasks associated with the day-to-day operation of the schools.[106]

When the government realized children weren't receiving the quality education they had intended for, instead of adequately responding to this realization, they implemented a "per capita grant" funding model. In turn, a competitive atmosphere was created among schools and churches, where principals were encouraged "to accept students who should have been barred from admission because they were too young or too sick."[107] Even then, there wasn't enough money to pay for new staff or salaries, building repairs, or to feed children. The conditions in schools became dangerous with reports of "dilapidated buildings, shortages of fuel for heating, poor and insufficient diet, unsanitary living conditions, widespread illness, and above all, the general unhappiness of indigenous students."[108]

The 1907 Bryce Report, written by Dr. Peter H. Bryce, Medical Inspector to the Department of the Interior and Indian Affairs, was submitted to Duncan Campbell Scott with damning statistics showing that between approximately 25% and 50% of the children enrolled in residential schools were dead after a single year, largely attributed to rampant tuberculosis.[109] Bryce recommended that the schools be taken into government control and made into sanatoria under his control.[110] At

[104] *TRC Report* at 59.
[105] James R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 2009) at 125.
[106] "Building the Indian Residential Schools System" (2018) *Facing Ourselves and History*, online: < https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/historical-background/building-indian-residential-schools-system> [*Facing Ourselves*].
[107] *TRC Report* at 59.
[108] *Facing Ourselves*.
[109] *Bakaan* at 20.
[110] *TRC Report* at 96.

this point, churches were calling for the closure of schools.[111] The government response was one of little concern, where such statistics were framed as "the price that Aboriginal people had to pay as part of the process of becoming civilized"[112]. As Duncan Campbell Scott wrote in reply,

> 'It is readily acknowledged that Indian children lose their natural resistance to illness by habituating so closely in these schools, and that they die at a much higher rate than in their villages. But this alone does not justify a change in the policy of this Department, which is geared towards the final solution of our Indian Problem.'[113]

The ultimate government response to the damning Bryce report was a negotiated contract between the churches and Indian Affairs increasing their per capita grant and imposing "standards for diet and ventilation".[114] The improvements were only short term however, given inflation and cuts to grants during The Great Depression.[115] Children with illness were still being admitted to schools and infecting healthy children.[116] As the TRC report indicates, "the 1910 contract proved to be no solution for the tuberculosis crisis."[117]

> 'If I were appointed by the Dominion Government for the express purpose of spreading tuberculosis, there is nothing finer in existence than the average Indian residential school.' – The Indian Affairs Superintendent in 1948[118]

The Commission goes on to point out that while the 1910 contract was at least a small effort to address the high death rates in schools, overall, there has never been "the type of sustained investment in Aboriginal health, in either the communities or the schools, that could have addressed the crisis".[119] Measures such as the introduction of life-saving drugs, improvement in

[111] *Ibid.*
[112] *Ibid* at 99.
[113] *Bakaan* at 20.
[114] *TRC Report* at 97.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *Bakaan* at 20.
[119] *Ibid* at 99.

diet, housing, sanitation, and medical attention could have reduced the death rates in communities and schools.[120] The government was aware of death and life-threatening circumstances and failed to take adequate measures to prevent them.

Abuse in Every Form

In Indian Residential Schools, discipline took the form of corporal punishment, as well as verbal, emotional, physical and sexual abuse.

There was no clear national policy on whether corporal punishment was permitted in the schools, and as a result of the government's failure to enforce such a policy, "students were subject to disciplinary measures that would not […] be tolerated in schools for non-Aboriginal children." A mother of two children from St. Mary's IRS in Kenora wrote to Duncan Campbell Scott in 1924,

> 'In regard to the management of this Indian Industrial school that you maintain here, I think it is time some investigation into the management of the Institution should be made. From complaints that come to me, it seems to me that the mode of punishment that is being adopted is inhumane and barbarous, and should not be tolerated in any civilized community.'[121]

The principal of that school wrote to the Indian Agent in the same year dismissing claims of inhumane punishment and maintaining the right to "'punish pupils […] whenever we think it necessary or useful to do so'".[122]

In 1895, an Indian Agent who brought a runaway student from Red Deer industrial school in Alberta noticed bruises on the student's head from being hit on the head with a stick by a teacher, and subsequently recommended to Indian Affairs that the teacher be dismissed given that "'his actions in this and other cases would not be tolerated in a white school for a single day in any part

[120] *Ibid.*
[121] *Ibid* at 21.
[122] *Ibid.*

of Canada'".[123] Indian Affairs still provided no clear direction despite several other instances brought to Indian Affairs and as the TRC indicates, no evidence of a nation-wide policy on discipline was employed until 1953.[124] The consequences are despairing:

> Some staff at some of the schools exercised excessive and brutal punishment. Children were severely beaten, or had their heads slapped or punched until they were dizzy. Others were forced to eat their own vomit or had their faces rubbed in human excrement. There were many cases of children having their hands and feet tied and being locked away in a cellar for several hours. Other children were humiliated by being made to come to the dining hall during meal time dressed only in their underwear.[125]

Complaints of sexual abuse towards children were ignored by the government. The TRC wrote, "[w]hen it came to taking action on the abuse of Aboriginal children, early on, Indian Affairs and the churches placed their own interests ahead of the children in their care and then covered up that victimization."[126] Churches and government alike were hesitant to take matters to the police and as a result, prosecutions were rare.[127]

The extent to which sexual abuse occurred in IRS is brought to light through the Independent Assessment Process (IAP), the out-of-court claims process for physical and sexual abuse at residential schools. As of September 2018, 38,257 applications for abuse claims were submitted through the IAP.[128] The TRC notes that "the number of claims for compensation for abuse is equivalent to approximately 48% of the number of former students who were eligible to make such claims" – not including the number of former students who died prior to May 2005.[129] This does not reflect the number of students ineligible to apply for an IAP because their IRS was not included

[123] *TRC Report* at 101.
[124] *Ibid* at 102.
[125] *Bakaan* at 21.
[126] *TRC Report* at 105.
[127] *Ibid* at 106.
[128] Indigenous and Northern Affairs Canada, "Indian Residential Schools: Independent Assessment Process" (11 June 2018), online: <https://www.aadnc-aandc.gc.ca/eng/1100100015576/1100100015577>.
[129] *Ibid* (this number of former students was based on the number of students eligible for the Common Experience Payment based on who had a record of attending an approved school under the Indian Residential School Settlement Agreement).

in the Indian Residential School Settlement Agreement. Still, the numbers show that sexual abuse was rampant in the IRS system. Little was done by Indian Affairs, until 1968 when they circulated a list of former staff members who were not to be hired.[130]

Loss of Culture, Language and Identity

The government had a "hostile approach" to Aboriginal languages, instructing schools that students were to be instructed in the classroom and even during mealtimes to only speak English, and that every "'every effort must be made to induce pupils to speak English'".[131] This ultimately led to the prohibition of speaking Aboriginal languages, even during recreation – some schools were so strict on this rule that if broken, children would be severely punished.[132]

Aboriginal culture was condemned and students were taught that "the only good people on earth were non-Indians and, specifically, white Christians."[133] Students were discouraged from participating in their traditional cultural activities, with some being threatened with corporal punishment if they attended activities over the summer months.[134] Some officials would restrict student vacations for fearing of "backsliding" and even go as far as involving police force to keep Aboriginal visitors off IRS grounds.[135]

The overall impact of this was severe language loss and the alienation of students from their siblings, parents and other family members if they returned home.[136] As David MacDonald writes, "[c]ertainly language was crucial to the ontology of the child, and destroying it was a key means by which the child's cultural inheritance could be broken."[137] The loss of language was detrimental to the survival of many Aboriginal cultures, although a period of revival from the 1960s and onwards has managed to recuperate some loss.

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[130] *Ibid* at 106.
[131] *Ibid* at 80.
[132] *Ibid* at 81.
[133] *Ibid* at 83.
[134] *Ibid.*
[135] *Ibid.*
[136] David B. MacDonald, "Genocide in the Indian Residential Schools: Canadian History Through the Lens of the UN Genocide Convention" in Alexander L Hinton et al, eds, *Colonial Genocide in Indigenous North America* (Duke University Press, 2014) 306-324 at 315.
[137] *Ibid.*

Death

Although not a major focus of this paper, it is worth noting that the TRC indicated that the number of students who died in the IRS system can never be fully known due to the incomplete record.[138] Thousands of school records were destroyed, many deaths were improperly reported and there is no certainty that deaths were actually reported to Indian Affairs.[139] Nonetheless, it is estimated that 6,000 children died while in the IRS system.[140]

Applying the Law to the Facts

The first question comes down to whether Indigenous people in Canada were a protected group by the *Genocide Convention.* Indigenous people would fall under the category of a racial group, which, outlined in *Akayesu* is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[141]

Secondly, it cannot be reasonably refuted that thousands of children were forcibly removed from their families and placed in residential schools. Policy was put in place that enforced attendance and made it mandatory. This argument will turn on whether the transfer of children was done with the intent to destroy, in whole or in part, that racial group. As previously stated, this paper will use a knowledge-based approach to intent to reflect the purpose and intentions of the *Genocide Convention*. Recall that it is enough evidence if the individual commits an act knowing that it would contribute to other acts being committed against a particular group, which when put together, would bring about the destruction of that group, in whole or in part.

[138] *TRC Report* at 90.
[139] *Ibid.*
[140] APTN National News, "Number of Indian residential school student deaths may never be known: TRC" *APTN* (2 June 2015), online: < https://aptnnews.ca/2015/06/02/number-indian-residential-school-student-deaths-may-never-known-trc/>.
[141] *Akayesu* at para 514.

The system of IRS was implemented with the goal of getting rid of the "Indian problem"[142] and to "destroy the Indian".[143] This goal was sought after by whatever means necessary by the government, with the exception of actually spending adequate funding. This meant letting schools operate in deplorable conditions despite being made aware of the many reports on health risks, scarcity of food, understaffing, dilapidated buildings, rampant abuse, illness, physical and sexual abuse, and deaths.

The federal government should have known that such conditions would lead to the destruction of Aboriginal life, in a physical, biological, and cultural sense. Children were physically separated from their communities with the intent to sever ties with their parents and families. The attack on their language, culture, and identity alienated children from their communities. Students would find difficulty in returning to their communities after leaving the IRS system, not only because they were alienated, but because the conditions in the IRS system would have instilled so much shame in their identity as Indigenous people that it would have taken away their spirit and their will to live as they were born.

This was absolutely the intended result of the IRS system.

Genocide Denial

Gregory H. Stanton, the president of *Genocide Watch*, developed the "8 Stages of Genocide", where "denial" is the eighth and final stage. Goldsmith summarizes the significance of this stage in genocide, because it is

> a crime that aims at completely removing the memory of a group's existence. Perpetrators 'deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crime, and continue to govern until driven from power by force, when they flee into exile.' The perpetrators always

[142] *Supra* note 98.
[143] *Supra* note 94.

> state that they are not committing genocide. Their denial is in fact part of the crime.[144]

One of the most pertinent examples of genocide denial is the case of the Armenian Genocide and its 100 year denial by the Turkish government. The Turkish government refuses to acknowledge the genocide of over one million Armenians, instead attributing it to forces out of their control, killings made in self-defense, and that deaths were inadvertent.[145] Stanton highlights two other tactics of denial, "claim that current peace and reconciliation are more important than blaming past perpetrators for genocide" and don't tell the truth because it would not be in the interest of certain state interests.[146]

The costs of denying genocide harm all involved – victims and their survivors, perpetrators and their successors, and bystanders (including other member state parties to the *Genocide Convention*).[147] A victim cannot find healing if it is not first acknowledged and recognized that a harm occurred. When a perpetrator does not take responsibility for harm caused, it does a disservice to its country and its inhabitants. Children are not taught the truth of their nation's past and brews ignorance to the detriment of themselves and victims. Stanton claims that,

> [s]tudies by genocide scholars prove that the single best predictor of future genocide is denial of a past genocide coupled with impunity for its perpetrators. Genocide Deniers are three times more likely to commit genocide again than other governments.[148]

In the case of bystanders, complicity in the denial that a genocide occurs compromises that bystander's own principles. In the case of the Armenian genocide, the United States is reluctant to

[144] Goldsmith at 253
[145] Gregory Stanton, "The Cost of Denial" *Genocide Watch,* online: <http://www.genocidewatch.org/aboutus/thecostofdenial.html>.
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*

back a resolution recognizing the Armenian genocide for fear of the impact on US relations with Turkey – a move not reflective of the moral and intellectual views it stands for.[149]
The United Nations in their guidance paper on when to refer to a situation as genocide discourages genocide denial:

> Notwithstanding, discussions about the nature of events that may constitute genocide and other atrocity crimes, past or present, should not be avoided. This means acknowledging serious violations of international human rights and humanitarian law that may have been committed in the past or are ongoing, including where there has not yet been a legal determination of the type of international crime that may have been committed.[150]

Given all of this information, and the obvious notion that genocide denial is extremely harmful for all involved, one is left with the question - why does the denial of genocide occur in Canada?

The concept of genocide occurring within Canada is not a new one, however the government and general public alike are unwilling to label the IRS system as anything beyond "cultural genocide". Woolford notes that the concern in using "genocide" can be ascribed to "the pollution of scholarly research by moral sentiment as well as with a tendency towards sweeping claims and oversimplification."[151] Most of the world associates the term "genocide" with the Holocaust being the iconographic standard, and consequently, "one often needs to provide the reminder that a people can be placed in precarious conditions that threaten its survival as a group without gas chambers or concentration camps."

The denial of genocide in Canada may also be explained by the need to maintain international reputation as one of the "best places in the world to live". Canada prides itself on a being a leader in human rights and a land of opportunity to which many seek refuge. It would be no wonder that admitting genocide would taint that reputation and bring public shame in national identity.

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[149] *Ibid.*
[150] "When to Refer to Situation as 'Genocide'" <http://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf>.
[151] Andrew Woolford & Jeff Benvenuto, "Canada and colonial genocide" (2015) 17:4 Genocide Research 373-390.

Denial could also simply come down to an inability or unwillingness to consider remedies in the situation of genocide. Considering the multi-billion dollar costs of the Indian Residential Schools Settlement Agreement, including $1.9 billion for the Common Experience Payments, $3.1 billion paid in Independent Assessment Process claims, $60 million for the Truth and Reconciliation, $20 million for Commemorative projects, and $25 million for health and healing projects, it would be a hard sell to Canadians for the government to embark on a similar justice process for genocide.[152]

Regardless of the reasons for denial, the impacts of denying that genocide occurred in Canada will impose harm for generations to come. To purport that residential schools were simply "cultural genocide" is to deny the truth - that children were forcibly transferred from their homes with the intention to "destroy the Indian". This alone is enough to meet the definition of genocide according to international law.

Conclusion & Closing Thoughts

This paper set out to prove that genocide occurred in Canada through the forcible transfer of children from one group to another, with the intention to destroy, or whole or in part, a racial group – Indigenous people. Much of the work involved clearing a path in what is a muddled landscape of theories and intentions on genocide. The law and rules on genocide are not clearly set out, however this paper directed a broader approach, keeping in mind the intention and purpose of the *Genocide Convention*, engaging a knowledge-based approach to intent and considering that cultural, physical and biological genocide are of the same significance. Substantial effort was also put into gathering and presenting the factual evidence in a way that would follow international case law and legal analyses carried out by judges.

In the end, what was found was that there is no denying that children were removed from their homes and placed into schools. This argument turned on the issue of whether the act met the

[152] Tabitha Marshall, "Indian Residential Schools Settlement Agreement" (11 July 2013) *The Canadian Encyclopedia*, online: <https://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement>.

requirement of intent. Applying the knowledge-based approach, the facts presented demonstrated that the federal government had knowledge of the impacts of the act and intended to "kill the Indian in the child."

Finally, this paper poses the question of whether reconciliation is possible in an era of genocide denial. As cited above, much has been done in the way of reconciliation in Canada, however the process is not without its flaws. Records have been destroyed or not released in a timely manner[153]. Survivors have been exploited and re-traumatized by participating in claims processes.[154] We will never fully understand the breadth and impacts of Residential Schools, especially given that the most atrocious accounts are often never told, or are confidential.[155]

On the other hand, Canada has seen commendable efforts towards healing and reconciliation for survivors, Indigenous people, and Canadians alike. The Indian Residential Schools Settlement Agreement is the largest class action lawsuit in the history of the country, and compensated thousands of survivors and families for their suffering. The legacy of IRS system is now a part of our education curriculum, starting as early as elementary school. There are several funding initiatives across the country that encourage institutions, businesses and individuals across all realms of work and life to take action and make a meaningful contribution to reconciliation with Indigenous people in Canada.

Perhaps Canada is not quite ready to face the hard truth of its historical role in genocide – and this would be understandably so. The implications of admitting genocide are an attack on national pride and international reputation. But at what cost is this denial? Reconciliation is not about balancing the interests and fears of state authority and general public – it is about facing the truth. Admitting that truth and acknowledging the harms caused is what sets Survivors and their families on the

[153]Gloria Galloway, "Ottawa ordered to find and release millions of Indian residential school records" (30 January 2013), *The Globe and Mail*, online: <https://www.theglobeandmail.com/news/politics/ottawa-ordered-to-find-and-release-millions-of-indian-residential-school-records/article8001068/>.
[154] Paul Barnsley and Kathleen Martens, "Judge punishes lawyer for 'loan scheme' targeting residential school survivors" (6 June 2012) *APTN National News*, online: <https://aptnnews.ca/2012/06/06/judge-punishes-lawyer-for-loan-scheme-targeting-residential-school-survivors/>.
[155] Consider the many survivors who do not have the emotional strength to share their stories, who died before they could make testimony, and also the 38,000+ IAP claims that are completely confidential.

path towards healing. Until that truth is told, healing and reconciliation remains further down the path for all.