

TAKING 2(E) SERIOUSLY:

FORCIBLE CHILD TRANSFERS AND THE CONVENTION ON THE PREVENTION  
AND PUNISHMENT OF THE CRIME OF GENOCIDE.

by

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## ABSTRACT

The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Article 2(e) declares that the forcible transfer of children from a protected group to another group is an act that amounts to genocide when it is conducted “with intent to destroy” the group, “as such,” at least “in part.” Although listed co-equally with mass killing and forced sterilizations, and despite what appear to be repeated violations of this provision, forcible child transfers have received little attention. Utilizing various sources of international law, this thesis establishes the *prima facie* elements that must be satisfied in alleging an Article 2(e) violation. These sources include the emerging international case law on genocide, general legal principles, scholarly opinions, and the *Genocide Convention’s* preparatory materials. The preparatory materials indicate that the *Genocide Convention* was intended to provide robust protections to specific types of human groups, and that protecting the group’s right to retain custody and control over its children was considered central to those protections. Recent opinions from the International Court of Justice, as well as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda also recognize the *Genocide Convention’s* robust group protections. Accordingly, they recognize a group right of existence and protect groups not as mere collections of individuals who happen to share similar traits, but as functional “separate and distinct entities.” This implies broad and deep protections for the groups that have been targeted for forcible child transfers as it protects each functional subgroup, even where there is no larger intent to destroy the entire group, and protects against the targeting of a specific segment within a group, such as its leadership or its children. This thesis also considers the *mens rea* of genocide, finding that mixed intents or beneficent motivations will not excuse an otherwise genocidal act. Both the general principles of law and the existing case law on genocide generally prohibit consideration of the perpetrator’s motivation in assessing the criminality of proscribed actions. Finally, the forcible child transfer programs in question have been defended on grounds that they could not amount to genocide because they were actually “cultural genocide,” which is said to be excused from the *Genocide Convention’s* prohibitions, or because they were conducted to assimilate the children, and therefore cannot constitute genocide. International courts have ratified the International Law Commission stance that the *Genocide Convention* does not encompass acts of cultural genocide. However, applying existing law, it appears that these programs were not instances of cultural genocide, but instead amounted to physical or biological genocide, categories of genocidal destruction that the *Genocide Convention* certainly prohibits. Similarly, far from excusing these actions, the fact that they were committed in the context of a broader assimilation scheme may actually help prove genocide. This broader assimilative context is similar to the discriminatory treatment and acts of cultural destruction from which courts have inferred the specific intent to commit genocide.

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## **DEDICATION**

This thesis is dedicated to E. Nathaniel Gates (1954-2006), Professor of Law, friend and mentor, whose intellectual acuity, personal warmth, and overwhelming tenacity continue to inspire.

## CHAPTER 1: INTRODUCTION

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You first taught me the white man's road. I am now very poor and disconsolate. All you gave me is gone, and if you can send me any clothes or something to work in I will be thankful. I have no tools to work with, or plows to work the ground to make corn. Can you send me some? I am again a *Comanche*. I was compelled to go back to the old road, though I did not want to, but I had no pants and had to take leggings. I never have any money, for I cannot earn it *here*, and my heart told me to come to you for help, and perhaps you could send these things to me. I have no piece of ground for my own, and now when I want to work the white man's road and learn it, I have nothing to do it with. I am working first on this man's ground, then on somebody else's, and I am never settled in any place. I have made a great many rails so you see I have not forgotten what you told me. I haven't a horse of my own. I am very poor. When you come to see us I shall have nothing to show you – no corn – no house – nothing at all. A poor country and a bad ground. I don't sleep well. I am afraid.<sup>1</sup>

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The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)*, Article 2(e) declares that the forcible transfer of children from a protected group to another group is an act that amounts to genocide when it is conducted “with intent to destroy” the group, “as such,” at least “in part.”<sup>2</sup> Forcible child transfer is one of five acts declared to constitute genocide and is listed co-equally with killing and forced sterilization, among others.<sup>3</sup> Article 2(e) lay dormant for nearly fifty years and was generally regarded as a legal anachronism. However, the 1997

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<sup>1</sup> David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (Lawrence, Kansas: University Press of Kansas, 1995) at 281 citing a letter to Richard Henry Pratt, founder of the U.S. boarding school system from Quoyonah, one of his original students.

<sup>2</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*].

Article 2: 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:

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

<sup>3</sup> *Ibid.* Article 2, The other four prohibited actions are:

- (a) Killing the 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 birth within the group.

publication of the Australian Human Rights and Equal Opportunity Commission report, *Bringing Them Home: Report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children From Their Families (Bringing Them Home)*, brought new attention to this obscure provision. *Bringing Them Home* declared “[t]he policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labeled ‘genocidal’ in breach of binding international law. ...”<sup>4</sup> This report generated a firestorm of controversy in Australia. It also generated some scholarly interest on the international level where genocide scholars and legal experts began paying attention to the phenomenon of forcible child transfer. Still, despite the apparent closeness of fit between the practices alleged and the definition of genocide contained in the *Genocide Convention*, a decade after *Bringing Them Home* originally thrust the issue of mass child removal into the collective scholarly consciousness, outside of Australia the legal implications of genocidal child transfers have yet to be taken seriously.

### **1.1 A short survey of forcible child transfer**

This scholarly neglect is striking given the apparent pervasiveness of forcible child transfer programs. Accounts of such programs date at least to the biblical accounts of Moses’ childhood, but this practice probably reached its zenith with the age of modernity. Presaging modernist removal programs, in 1656 Oliver Cromwell’s occupying forces contemplated “taking Irish children away from their parents at the age

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<sup>4</sup> Australian 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* (Sydney: Sterling Press Pty. Ltd., 1997) at 275.

of ten in order to bring them up in industry and protestantism.”<sup>5</sup> In the mid-nineteenth century, Australia, Canada, and the United States each began programs that removed indigenous children to missions or schools where they were stripped of their group’s culture.<sup>6</sup> These programs continued into the 1970’s. From the mid 1930’s to the 1970s, the Swiss removed Roma children, who were institutionalized and similarly de-aculturated.<sup>7</sup> During World War II, Heinrich Himmler’s Nazi forces scoured the occupied eastern lands for “racially valuable” children to export back to Germany, where

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<sup>5</sup> Christopher Hill, *God’s Englishman: Oliver Cromwell and the English Revolution* (New York: The Dial Press, 1970) at 152.

<sup>6</sup> On the Australian programs see generally Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Fremantle: Freemantle Arts Centre Press, 2000); Antonio D. Buti, *Separated: Aboriginal Childhood Separation and Guardianship Law* (Sydney: Sydney Institute of Criminology, 2004). On the Canadian residential school system see generally J.R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: University of Toronto press, 1997); John S. Milloy, *A National Crime: The Canadian Government and the Residential School System: 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999); Roland D. Chrisjohn & Sherri L. Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, BC, Canada: Theytus Books, 1997); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1996); Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillicum Library, 1989); Dean Neu & Richard Therrien, *Accounting for Genocide: Canada’s Bureaucratic Assault on Aboriginal People* (Black Point, Nova Scotia: Fernwood Publishing, 2003). On the United States boarding schools see generally Adams, *supra* note 1; Brenda J. Child, *Boarding School Seasons: American Indian Families, 1900-1940* (Lincoln, Nebraska: Bison Books, 2000); K. Tsianina Lomawaima, *They Called it Prairie Light: The Story of Chilocco Indian School* (Lincoln, Nebraska: University of Nebraska Press, 1994); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians: 1880-1920* (Lincoln: University of Nebraska Press, 2001); Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904*, ed. by Robert M. Utley (New Haven: Yale University Press, 1964) (autobiographical account of the founding of the United States’ boarding schools). For a comparative perspective see generally Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995); Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco: City Lights Books, 2004) (comparing the Canadian and U.S. programs).

<sup>7</sup> Thomas W. Netter “Swiss Gypsies: A tale of vanishing children” *The New York Times* (9 June, 1986) p. 9; Caroline Moorehead “Spectrum: The ‘stealing’ of gypsy children – for almost 50 years, it is claimed the children of Swiss gypsies were forcibly taken from their families” *The Times* (London) 17 March 1988; Swiss to Compensate “Persecuted’ Gypsies / Pro Juventute Foundation charity to make amends for children of the Country Roads programme” *The Guardian* (London) (8 July 1986); Laurence Jourdan “Past Abuses: Gypsy Hunt in Switzerland: Long Pursuit of Racial Purity,” online: European Roma Rights Centre < [www.errc.org/cikk.php?cikk=1203](http://www.errc.org/cikk.php?cikk=1203)>.

they were either placed in Hitler Youth group homes or adopted by Nazi officials.<sup>8</sup> According to the warped Nazi logic, the aim of this program was to deprive the targeted groups of their most “racially valuable” children, which would render the group politically impotent as the group would have no natural leaders to oppose Nazi rule. In 1956, two relatively short-lived removal programs were directed against dissident religious groups in North America. In the first, Arizona state officials removed children from a polygamist Mormon group in the town of Short Creek.<sup>9</sup> This program is notable in that mothers were allowed to accompany their children into foster placement and because the program ended in less than two years. In the second program, provincial officials in British Columbia removed children from the Sons of Freedom, a dissident, terroristic faction of the Doukhobors, a Christian group of Russian origin that espoused the anti-materialist beliefs of Leo Tolstoy.<sup>10</sup> The Sons of Freedom children were held in a dormitory where they were prohibited from speaking Russian and practicing their group’s religious ceremonies. Forcible child transfer also does not appear to be peculiar to western liberal democracies. The Soviet Union began removing indigenous Siberian

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<sup>8</sup> See generally Isabel Heinmann, “Until the Last Drop of Good Blood” in A. Dirk Moses, ed., *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* trans. by Andrew H. Beattie (New York: Bergham Books, 2004) 244; Marc Hillel & Clarissa Henry, *Of Pure Blood* trans. by Eric Mossbacher (New York: McGraw Hill, 1976) at 150-203.

<sup>9</sup> See generally Martha Sontag Bradley, *Kidnapped From That Land: The Government Raids of the Short Creek Polygamists* (Salt Lake City, University of Utah Press, 1993).

<sup>10</sup> See generally Margaret Hill, “The Detention of Freedomite Children, 1953-59” (1986) 18:3 *Canadian Ethnic Studies* 47. John McLaren, “The State, Child Snatching, and the Law: The Seizure and indoctrination of Sons of Freedom Children in British Columbia, 1950-60” in John McLaren, Robert Menzies & Dorothy E. Chunn eds., *Regulating Lives: Historical Essays on the State, Society, the Individual and the Law* (Vancouver: University of British Columbia Press, 2002) 117; John McLaren, “The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State” in John McLaren & Harold Coward eds., *Religious Conscience, the State and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999).

children in the 1920's, to place them in distant boarding schools,<sup>11</sup> and the Chinese conducted child removals during their invasion of Tibet.<sup>12</sup> This list is not exhaustive and we could expect other programs to come to light as attention is focused on Article 2(e).

## 1.2 Definitions: Reconsidering genocide

These programs are now almost uniformly regarded as horrible mistakes, but are they genocide?<sup>13</sup> Certainly, the idea that large-scale child removals might amount to genocide does not accord with popular understandings of genocide. However, lay understandings of genocide are often at odds with genocide's legal definition, as codified in the *Genocide Convention*.<sup>14</sup> Popular conceptions commonly ignore the *Genocide Convention's* group orientation, associating genocide only with the most brutal incidents of mass killing, regardless of whether the killings were committed against a discernable human group. Most people are also unaware that the *Genocide Convention* prohibits not just mass killings, but a range of group-destroying actions – including the forcible transfer of children.<sup>15</sup> Instead, when they consider genocide they picture the dried corpses of Auschwitz, the meticulously stacked skulls of the Cambodian killing fields, or

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<sup>11</sup> See generally Alexia Bloch, *Red Ties and Residential Schools: Indigenous Siberians in a Post-Soviet State* (Philadelphia: University of Pennsylvania Press, 2004) at 94-146; Piers Vitebsky, *The Reindeer People: Living with Animals and Spirits in Siberia* (Boston: Houghton Mifflin, 2005).

<sup>12</sup> See Marjorie M. Whiteman, ed., *Digest of International Law* vol. 11 (Washington: U.S. Dept. of State Publication 8354, 1968) at 872; International Commission of Jurists, *The Question of Tibet and the Rule of Law* (Geneva, 1959) at 68-71, citing evidence that the Chinese “sent more than five thousand [Tibetan] boys and girls ... to China proper, ...” and that the aim of these transfers “was to get the children to ‘revolt against their own culture, traditions and religion.’”

<sup>13</sup> These practices may violate a number of other provisions of international law as well. See generally Sonja Starr & Lea Brilmayer, “Family Separation as a Violation of International Law” (2003) 21 Berkeley J. Int'l L. 213, arguing that a constellation of international law provisions combine to indicate an emerging norm against forced family separations.

<sup>14</sup> See Roger S. Clark, “Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor” (1981) 8 Ohio N.U.L. Rev. 321 at 327, distinguishing between “the two distinct ways” genocide is used, in everyday speech and as a legal term of art.

<sup>15</sup> *Genocide Convention*, *supra* note 2.

the more recent mass graves of the Srebrenica massacre.<sup>16</sup> Against these images it seems incongruous, perhaps even obscene, to place forcible child transfers in the same category of crime as these more horrific incidents. However, the *Genocide Convention* was established not only to punish the worst forms of violence, but to protect human groups. Although they may lack the power to seize our imagination in the manner of mass murder, forcible child transfers are an effective means of group destruction.

I will argue that although there is no equivalency between forcibly transferring 600 Roma children and killing 6,000,000 European Jews, both acts amounted to genocide. Both involved the intentional annihilation of a group, the latter through an immediate campaign of outright killing and the former through a sustained program of forcible child transfers spanning four decades. Designating both the forcible transfer of 600 Roma children and the murder of six million European Jews as genocide may rankle many who are concerned with inevitable comparisons within the continuum of human brutality. As Colin Tatz put it, though the *Genocide Convention* does not account for “grades or levels” of genocide, “for all of us, death is absolute: serious bodily or mental harm is something else; children forced into conversion may well become coerced Catholics or Muslims, but they live.”<sup>17</sup> In fact, once they had been transferred from their communities, the children detained in several of these programs suffered staggering

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<sup>16</sup> I have borrowed this imagery from Colin Tatz, “Genocide in Australia” (1999) 1 J. of Genocide Research 315 at 315.

<sup>17</sup> Colin Tatz, *With Intent to Destroy: Reflecting on Genocide* (Verso: London, 2003) at 146 [Tatz, *Intent to Destroy*]. At least two scholars have proposed amending the Genocide Convention to include “gradations” or a “scale” of genocide akin to the ranking of unlawful killings from aggravated murder to involuntary manslaughter. See Tatz, “Genocide in Australia,” *supra* note 16 at 316; Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights Books, 1997) at 431-37.

mortality rates, surpassing fifty percent in some facilities.<sup>18</sup> But, Tatz's point is apt. Whatever the effects of these programs, they were not constructed to kill individuals, an important distinction.

The purpose of this thesis is avowedly normative; to establish genocidal child transfer as a crime under international law so protected groups might prevent future interventions and affected groups might seek redress. The earliest draft of the *Genocide Convention* contained a provision that would have created a genocide tort, and would have assessed "redress of a nature and in an amount to be determined by the United Nations."<sup>19</sup> Although this provision was not included in subsequent drafts of the *Genocide Convention*, affected groups should be able to bring suit in national courts against the perpetrators of genocidal forcible child transfers.<sup>20</sup> The primary aim of this thesis is to establish and explain the basic elements that must be satisfied in bringing such

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<sup>18</sup> The indigenous programs in Australia, the United States, and Canada were characterized by poor conditions resulting in startlingly high mortality rates. See Miller, *supra* note 6 at 133, documenting Canada's under-funding of the First Nations residential schools system. At one point Canada's Deputy Superintendent General of Indian Affairs stated: "It is quite within the mark to say that fifty percent of the children who passed through these schools did not live to benefit from the education which they had received therein." (*ibid.*). See also *Draft Convention on the Crime of Genocide*, UN ESCOR UN Doc. E/447 (1947) ["Secretariat's Draft"]: "Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is thirty percent to forty percent, the intention to commit genocide is unquestionable."

<sup>19</sup> Secretariat's Draft, Article XIII, *supra* note 18. See also Pieter N. Drost, *The Crime of State: II Genocide* (Leyden: A.W. Sythoff, 1959) at 16-18; William A. Schabas, *Genocide in International Law* (Cambridge: University of Cambridge Press, 2000) at 54 [Schabas, *Genocide*]. According to Schabas, despite this rejection, the delegates demonstrated "widespread support for State civil liability" for acts of genocide (*ibid.* at 420-21).

<sup>20</sup> However, this is not to say that such cases will be unproblematic. Attempts by Aboriginal Australian victims of forcible child transfer to seek redress for genocide in the Australian national courts have been stymied. See *Kruger and Others v. Commonwealth of Australia* (1997) 146 A.L.R. 126 (H.C.A.) [*Kruger*] discussed below. Following *Kruger* cases based on the removal of Aboriginal children have been brought on grounds other than genocide and have been unsuccessful. See Ben Saul, "The International Crime of Genocide in Australian Law" (2000) 22 Sydney L. Rev. 527 at 570, discussing the "thousands" of civil suits resulting from Australia's forcible child transfers. See also Michael Legg, "Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations" (2002) 20 Berkeley J. Int'l L. 387 at 413-18; Robert Van Krieken, "Is Assimilation Justicable?" Case Note on *Lorna Cubillo & Peter Gunner v. Commonwealth*" (2001) 23 Sydney L. Rev. 239; Starr & Brilmayer, *supra* note 13 at 237-41 discussing the Australian cases.

a claim.<sup>21</sup> Additionally, the perpetrator states involved in most of the forcible child transfer schemes listed above, while admitting that these programs were often harmful, continue to deny the genocidal implications of such actions. A subsidiary aim of this thesis is to make such denials more difficult. It is, as Martha Minow points out, an exercise in remembering where the predominant urge is to forget.<sup>22</sup> This type of moral claim is typically pursued outside the legal system but, if successful, may still yield important benefits for the victimized group.

The *Genocide Convention* was framed to fulfill dual purposes, to stigmatize the worst forms of violence and to provide affirmative protections for group viability.<sup>23</sup> Stigmatization has drawn the better share of attention, as genocide scholars have been horrorstruck by the recent brutality humanity has repeatedly inflicted on itself. However, four of the five acts prohibited in Article 2 of the *Genocide Convention* deal not with mass killing, but with the nuts and bolts of preventing the destruction of human groups.<sup>24</sup> In fact, genocide can be successfully completed without killing even a single individual.

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<sup>21</sup> *Genocide Convention supra* note 2. See also *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes*, 2000 U.N. Doc. PCNICC/2000/INF/3Add.2 [*Elements of Crimes*]:

Article 6(e) Genocide by Forcibly transferring Children:

1. The perpetrator forcibly transferred one or more persons.
2. Such persons belonged to a particular national, ethnical, racial or religious group.
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.
5. The persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

<sup>22</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 119.

<sup>23</sup> *Reservations to the Convention on the Prevention of the Crime of Genocide* [1951] I.C.J. Reports 15 at 23 [*Reservations*]. "It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."

<sup>24</sup> *Genocide Convention, supra* note 2. Only one of the five prohibited acts addresses killing.

Throughout this thesis I will argue for a new reading of the *Genocide Convention*, one that looks beyond mass killing and centers instead on its deeper purpose, the protection of human groups. I will argue that the control of reproduction and child rearing is not foreign or peripheral to the *Genocide Convention*, as it was understood by the delegates who composed it and voted for it. Rather, I will point out that the protection of group viability occupies a central place in the *Genocide Convention* and that its framers realized that a racial, ethnic, religious, or national group's ability to reproduce depends on control of its children.

### 1.3 Outline

Interpretive debates frequently devolve into discussions of the intent of the *Genocide Convention's* framers, and a basic understanding of the ratification process is invaluable in parsing these arguments. The first chapter of this thesis covers the drafting process and is provided to ground the subsequent analysis in an understanding of the *Genocide Convention's* context and history. The crime of genocide is commonly understood as being comprised of two major components, the physical act, or *actus reus*, and the mental state accompanying that act, or *mens rea*.<sup>25</sup> The second chapter addresses the physical elements, while the third delves the murky issue of *mens rea*. *Mens rea* is pivotal in any discussion of genocide for it is intent to destroy the group that distinguishes genocide from all other crimes. However, in the discussion surrounding forcible child transfers the significance of genocidal intent has been frequently misunderstood or misrepresented. The third chapter attempts to correct these

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<sup>25</sup> But see George P. Fletcher, *The Grammar of the Criminal Law: Volume 1: Foundations* (Oxford: Oxford University Press, 2007) at 55 [Fletcher, *Grammar*], criticizing this division as resting "on an oversimplified Cartesian understanding of the mind/body problem."

inaccuracies by grounding the discussion of genocidal intent in an understanding of the role *mens rea* plays in the criminal law generally thereby demonstrating that “good” intentions toward children simply will not save an otherwise genocidal act of forcible child transfer from amounting to genocide. The fourth chapter addresses two arguments that have been invoked to absolve forcible child transfer programs from accusations of genocide. According to the first argument, most forcible child transfers cannot amount to genocide because the resultant destruction was of a cultural nature, a category of destruction the *Genocide Convention* is said not to cover. According to the second argument, forcible child transfers cannot amount to genocide because they were conducted as part of larger assimilation efforts, which are said to be similarly excused from the *Genocide Convention’s* prohibitions. However, as we will see, the fact that the perpetrators frequently intended to destroy the children’s group through culturally mediated processes does not excuse these programs from amounting to genocide. Similarly, far from negating culpability, the fact that perpetrators sometimes labeled these programs “assimilative” may actually help prove genocide.

#### **1.4 Interpretive hierarchies: A short note on methodology**

According to Theo van Boven, genocide is among the gravest violations of international human rights law and:

the obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principle right these victims are entitled to under international law is the right to effective remedies and just reparations.<sup>26</sup>

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<sup>26</sup> Theo van Boven, Special Rapporteur, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN CHROR,

However, while the right to remedy and reparation is established in international law, there is no international forum for adjudicating the type of claim envisaged in this thesis.<sup>27</sup> Therefore, the goal is to construct a claim that can be applied on the national level using international law,<sup>28</sup> and understanding the sources of international law and the manner in which they interact is central to this thesis. Article 38 of the *Statute of the International Court of Justice (ICJ Statute)* is regarded as providing the most “authoritative statement” on the sources of international public law.<sup>29</sup> Article 38(1) lists these sources as:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provision of Article 59, judicial decisions and the teachings of

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45<sup>th</sup> Sess., UN Doc. E/CN.4/Sub.2/1993/8 (1993) at para. 45. van Boven further states that, “[u]nder international law, a State that has violated a legal obligation is required to ... make reparation, including in appropriate circumstances restitution or compensation for loss or injury” (*ibid.* at para. 46).

<sup>27</sup> For instance, the International Court of Justice (ICJ) does not allow citizens to bring suit against states. (*Statute of the International Court of Justice*, Article 34 [*ICJ Statute*]). The International Criminal Court (ICC) can only adjudicate crimes committed following the court’s creation, addresses only individual criminal responsibility, and can order “a convicted person” to pay reparations, but cannot order a state to do the same. (*Rome Statute of the International Criminal Court* UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Articles 12(1), 25(4), 75(1) and 93(1)(k) [*Rome Statute*]). The ICC does establish a “victim’s fund,” to compensate victims, but it is unclear whether this will ever develop into an effective means of assistance (*Rome Statute*, Article 43(6)). See William A Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) at 149-50; Claude Jorda & Jerome de Hemptinne, “The Status and Role of the Victim” in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) vol. 2, 1387 at 1415, cataloguing the shortcomings of the victim’s compensation trust fund.

<sup>28</sup> Christian Tomeschat, “Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position of the General International law” in Albrecht Randelzhofer & Christian Tomeschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 1 at 11-16. Although individuals, and presumably groups, possess a primary right in international law to be free from acts of genocide, they possess no secondary right to redress against their own state at the international level. They also do not possess international legal personality and therefore “as a general rule, the individual has no standing to appear before international tribunals” (*ibid.* at 14).

<sup>29</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 75 [Schabas, *Criminal Tribunals*].

the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>30</sup>

Each of these sources of international law has proven important in interpreting the *Genocide Convention* and each will be utilized in the discussion below.<sup>31</sup>

**a) International conventions**

On most issues, interpretation of the *Genocide Convention* is governed by the *Vienna Convention on the Law of Treaties (Vienna Convention)*.<sup>32</sup> According to the *Vienna Convention*, treaties should be interpreted according to their “ordinary meaning” unless such a reading “leaves the meaning ambiguous or obscure.”<sup>33</sup> Therefore, the actual text of the *Genocide Convention* should be considered preeminent in assessing the criminality of forcible child transfers. However, like any statute, the *Genocide Convention* is unclear in parts and even where the language appears clear, is often subject to conflicting interpretations. As such, recourse to other interpretive sources, including the drafting materials, scholarly opinions, and genocide case law, is permitted in some

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<sup>30</sup> 26 June 1945, 3 Bevans 1179, T.S. 993, Article 38(1).

<sup>31</sup> See David L. Nersessian, “The Contours of Genocidal Intent: Troubling Jurisprudence for the International Criminal Tribunals” (2002) 37 *Tex. Int’l L.J.* 231 at 241, providing a detailed discussion of the hierarchy of interpretive sources relevant to an interpretation of the *Genocide Convention* [Nersessian, “Contours”].

<sup>32</sup> *Vienna Convention on the Law of Treaties* 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*Vienna Convention*]. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) No. 91 online: The International Court of Justice <[http://www.icjci.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy\\_ijudgment\\_20070226\\_frame.htm](http://www.icjci.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm)> at para. 161 [*Bosnia v. Serbia*]. According to the International Court of Justice (ICJ) the interpretive rules set out in the *Vienna Convention* “are well recognized as part of international law.” Therefore, the rules embodied in Articles 31 & 31 of the *Vienna Convention* guide interpretation of the *Genocide Convention*, though the latter predates the former by nearly twenty years. See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* [2006] I.C.J. Rep. 1 at 107-08 [*Congo v. Rwanda*]. According to the ICJ, Retroactive application of the *Vienna Convention* to the *Genocide Convention* is precluded except where the Articles in question are “declaratory of customary international law.”

<sup>33</sup> *Vienna Convention*, Article 31, *ibid.*

circumstances.<sup>34</sup>

## **b) International custom reflected in genocide case law**

The growing body of international case law on genocide serves as evidence of the customary international law of genocide. Little of the existing case law directly addresses Article 2(e) of the *Genocide Convention*.<sup>35</sup> In addition, this case law primarily involves criminal prosecutions while the primary aim of this thesis is to establish the elements necessary to bringing a civil or moral claim. Despite these drawbacks, the genocide case law emerging from the International Court of Justice (ICJ) as well as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) does add nuance to current scholarly interpretations of Article 2(e). It establishes broad principles of interpretation specific to the *Genocide Convention* that form general principles of international law and indicate how future courts might approach certain issues. Moreover, whether adjudicated in a civil, moral, or criminal context, the defining characteristic of genocide is “intent to destroy the group, as such.”<sup>36</sup> The basic elements that must be established to prove genocide also remain the same. Therefore, there is substantial overlap between these

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<sup>34</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 160. According to the ICJ, obligations under the *Genocide Convention* depend:

on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting for that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion (*ibid.*).

<sup>35</sup> But see *Kruger*, *supra* note 20, also discussed below, rejecting claims by Aboriginal Australians based on Article 2(e).

<sup>36</sup> *Genocide Convention*, *supra* note 2, Article 2. Because of the intent emphasis, it is unlikely that a successful genocide claim of any sort could be brought for negligent destruction of a protected group (see below §4.2). See also Schabas, *Genocide*, *supra* note 19 at 433, 443, discussing the difficulty of creating civil liability from a criminal statute.

types of claims, as each must satisfy the same basic elements and each must prove group-destroying intent.

ICJ decisions provide the most authoritative interpretations of the *Genocide Convention*. As David Nersessian points out, “[t]he ICJ is the only judicial body that can authoritatively interpret the Convention itself because the ICJ is the primary forum empowered under international law to directly interpret treaty obligations between states.”<sup>37</sup> The ICJ has issued several decisions that address the *Genocide Convention*, including the recently decided opinion in *Bosnia v. Serbia*, which shape the analysis presented below.<sup>38</sup> However, while the ICJ’s decisions are considered authoritative, they do not bind other courts, either national or international. In the words of one commentator:

At the international level, ... , there is no ... organized and centralized [judicial] structure; there is no “integrated judicial system operating in an orderly division of labour” among the tribunals. In international law and justice, every tribunal is a self-contained system (unless otherwise provided): there is no hierarchical relationship between the International Criminal Tribunals for the Former Yugoslavia ... and Rwanda ..., the International Criminal Court (ICC) and the ICJ. The statutes of the former do not provide for any such hierarchy, nor even for any formal relationship.<sup>39</sup>

The ICTR and ICTY continue to adjudicate accusations of genocide and have built a working body of case law on the subject. The statutes of the International Criminal Court

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<sup>37</sup> Nersessian, “Contours,” *supra* note 31 at 242.

<sup>38</sup> The cases most pertinent to the analysis in this thesis are: *Bosnia v. Serbia*, *supra* note 32; *Reservations, supra* note 23. The ICJ also commented on the *Genocide Convention* in *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, [1996] I.C.J. Rep. 226 at 37-38. See also *Congo v. Rwanda*, *supra* note 32. See also *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)* (Preliminary Objections, Judgment) [2004] I.C.J. Rep. 279 (Dismissing jurisdiction) and companion cases: *Yugoslavia v. Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom*.

<sup>39</sup> Yves Beigbeder, *International Justice Against Impunity: Progress and New Challenges* (Boston: Martinus Nijhoff Publishers, 2005) at 212.

(ICC),<sup>40</sup> the ICTY<sup>41</sup> and the ICTR<sup>42</sup> each incorporate relevant portions of the *Genocide Convention*, but in each instance its provisions form only part of a broader statutory scheme, providing jurisdiction and procedure to prosecute a variety of international crimes. This broader statutory context exerts subtle interpretive pressures on the *Genocide Convention* such that this case law cannot be said to directly interpret the *Genocide Convention* itself.<sup>43</sup> It should also be noted that like ICJ opinions, ICTY and ICTR opinions would not bind future courts.<sup>44</sup>

### c) General legal principles

General legal principles are the bedrock principles of law that are common between most of the world's major legal system.<sup>45</sup> They form the background against which international law is evaluated and aid in the interpretation of treaties such as the *Genocide Convention*.<sup>46</sup> In addition, since the *Genocide Convention* should be read according to its "ordinary meaning," these general principles become vital in establishing that meaning. I have considered the basic tenets of law of the major legal systems in explaining how concepts like *mens rea* function within the *Genocide Convention*. I have

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<sup>40</sup> *Rome Statute*, *supra* note 27

<sup>41</sup> *Statute to the International Criminal Tribunal for the Former Yugoslavia*, annexed to Resolution 827, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/927 (1993), Article 4.

<sup>42</sup> *Statute to the International Criminal Tribunal for Rwanda*, annexed to Resolution 955, SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (1994), Article 2.

<sup>43</sup> Nersessian, "Contours," *supra* note 31 at 276. According to Nersessian, "[t]he mission of the tribunals is to apply international law as it is, not to develop new principles of international law humanitarian law. The tribunals interpret their reciprocal provisions on genocide co-extensively with the clearest public formulation of customary international law, rather than according to the *Genocide Convention* itself."

<sup>44</sup> See generally Schabas, *Criminal Tribunals*, *supra* note 29 at 107-112, discussing the role of precedent in the Ad Hoc Tribunals. The Trial Chambers of the ICTY and ICTR treat Appeals Chamber decisions as authoritative. However, other courts including the ICJ or the ICC would regard them as merely persuasive.

<sup>45</sup> See M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (The Hague: Kluwer Law International, 1999) at 284-89.

<sup>46</sup> Rudolf Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations" (1957) 51 AJIL 734 at 736.

also cited legal dictionaries at several points in establishing the ordinary meaning of key phrases in the *Genocide Convention*.

#### **d) Scholarly opinion**

Scholarly opinions not only guide the interpretive debate surrounding provisions of international law, they are regarded “as subsidiary means for the determination of rules of law.”<sup>47</sup> Scholarly opinion is canvassed throughout this thesis and major areas of disagreement within the academic literature are discussed. Because scholarly opinion can play such an important role in forming international law, I have devoted extensive consideration to what I feel are important scholarly missteps.

#### **e) Preparatory materials**

The *Vienna Convention* prescribes limited circumstances under which preparatory materials may be relied upon in treaty interpretation.<sup>48</sup> Under Article 32 of the *Vienna Convention*:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning ..., or to determine the meaning when the interpretation ... leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.<sup>49</sup>

And according to an International Law Commission (ILC) commentary, an exception like this “must be strictly limited, if it is not to weaken unduly the authority of the ordinary

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<sup>47</sup> *ICJ Statute*, Article 59(1), *supra* note 27. See also Schabas, *Criminal Tribunals*, *supra* note 29 at 112, asserting that although the ad hoc tribunal judges rarely cite scholarly opinion, “the judges and their assistants [do] consult these authorities in the preparation of their opinions.”

<sup>48</sup> *Vienna Convention*, *supra* note 32, Articles 31 & 32.

<sup>49</sup> *Ibid.* Article 32.

meaning of the terms.”<sup>50</sup> However, like any statute, the *Genocide Convention* is unclear in parts and even where the language appears clear, is often subject to conflicting interpretations. Because the *Vienna Convention* permits recourse to preparatory materials only under very limited circumstances, these materials are covered below with the caveat that they will rarely be dispositive in establishing or adjudicating the law of genocide. The documents and proceedings from the earlier stages of the drafting process, while conceptually interesting, were frequently criticized and ignored in subsequent stages. Therefore, although I will present an overview of the entire drafting process, when interpreting the *Genocide Convention's* ambiguities, I will rely on the later stages, especially the U.N. Third Session Sixth (Legal) Committee proceedings,<sup>51</sup> which produced the unanimously adopted final draft.<sup>52</sup> However, as will be clear from the discussion below, the Sixth Committee debates were fraught with conflict and compromise and as a result, the preparatory documents are often ambiguous and are likely to cause their own interpretive controversies. While I will use the preparatory materials to add texture to various interpretive issues, I will continue to stress the actual text of the *Genocide Convention* as the primary interpretive source in defining the crime of genocidal forcible child transfer.

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<sup>50</sup> International Law Commission, “Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries” in *Report of the International Law Commission on the Work of its Forty-Eighth Session* (1996) at 45 at 223 [ILC, “Draft Commentary”].

<sup>51</sup> Sixth Committee, *Summary Records of Meetings* UN GAOR, 3d Sess. UN Doc. A/C.6/SR.63-134 (1948) [6<sup>th</sup> Comm. Summary Records].

<sup>52</sup> *Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee*, UN GAOR, 3<sup>rd</sup> Sess., UN Doc. A/760 (1948).

## CHAPTER 2: ANTECEDENTS AND LEGISLATIVE HISTORY

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The *Genocide Convention* was born abruptly of the historical rupture that followed World War II, but its antecedents can be found in much earlier provisions of international law. Although the atrocities of World War II focused new attention on the dangers internal minorities faced from the states within which they lived, international protections for internal minorities actually date to the 1648 *Treaty of Westphalia*.<sup>53</sup> This treaty, and subsequent treaties, granted rights of religious freedom to internal religious minorities.<sup>54</sup> More extensive protections of minority group autonomy were codified following World War I.<sup>55</sup> The minority treaties of Versailles, signed between 1919 and 1920, required many of the conquered states to guarantee certain rights to internal religious, linguistic and ethnic minorities.<sup>56</sup> Among these were protections against state discrimination based on group membership, as well as provisions placing an affirmative burden on the state to provide resources that promote group viability. For instance, Article 9 of the treaty with Poland stated:

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<sup>53</sup> *Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies* (24 Oct. 1648). Natan Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 7.

<sup>54</sup> *Ibid.* According to Lerner:

The history of the international protection of groups – domestic protection is to a large extent the result of international protection – can be divided into three major periods: (1) an early period of non-systematic protection consisting mainly of the incorporation of protective clauses, particularly in favor of religious minorities, in international treaties; (2) the system established after World War I, within the framework of the League of Nations; and (3) developments following World War II, in the United Nations era.” Early treaties protecting minorities included “the Treaty of Olvia (1660), in favor of the Roman Catholics in Livonia, ceded by Poland to Sweden; the treaty of Nimeugen (1678), between France and Spain; the Treaty of Ryswick (1697), protecting Catholics in territories ceded by France to Holland; and the Treaty of Paris (1763) between France, Spain and Great Britain, in favor of Roman Catholics in Canadian territories ceded by France.

<sup>55</sup> Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* (Princeton, Princeton University Press, 2002) at 119-37.

<sup>56</sup> *Ibid.* at 120.

Poland [must] provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language.<sup>57</sup>

These Minorities Treaties were “forerunners of the modern international human rights legal system,” providing a rough prototype for those who would later advocate the international criminalization of genocide.<sup>58</sup>

## 2.1 The Genocide Convention: A short legislative history

Working in the dark shadow of Nazi atrocities, the United Nations began debate on the issue of genocide in 1946 and unanimously ratified the *Genocide Convention* on 9 December 1948.<sup>59</sup> The *Genocide Convention* stands out among international human rights provisions in that its origin can be traced to the work of just one individual; the Jewish, Polish expatriate legal scholar Raphael Lemkin.<sup>60</sup> In 1933, Lemkin had submitted a proposal to the League of Nations’ International Conference for the Unification of Criminal Law “arguing that the destruction of any racial, social, or religious collectivity should be declared a ‘crime of barbarity’ under the Laws of

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<sup>57</sup> The Treaty with Poland, June 28, 1919 chap. 1 art. 2, 225 Consul T.S. 412 (entered into force 10 Jan 1920) cited in *ibid.* at 121. In this provision we see early recognition that group viability depends on acculturation of its children.

<sup>58</sup> See Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Howard Fertig, 1973) (reprint) at 90-92 [Lemkin, *Axis Rule*].

<sup>59</sup> Raphael Lemkin, “Totally Unofficial Man: The Autobiography of Raphael Lemkin” in Steven L. Jacobs & Samuel Totten eds., *Pioneers of Genocide Studies* (New Brunswick, NJ: Transaction Books, 2002) 371 at 386 [Lemkin, “Unofficial Man”]. Lemkin declares that the Legal Committee, in discussing the ratification of Res. 96(1) was, “swimming in a sea of humanitarian enthusiasm. They were trying to outdo one another. ...”

<sup>60</sup> See Samantha Power, *A Problem From Hell: America and the Age of Genocide* (New York: Harper Perennial, 2002) at 17-78 documenting Lemkin’s tireless struggle in pursuit of an international prohibition on genocide.

Nations.”<sup>61</sup> Fleeing the Nazi advance that eventually killed most of his family,<sup>62</sup> Lemkin left Poland in 1941 for the United States where he published *Axis Rule in Occupied Europe*<sup>63</sup> in 1944, coining the word “genocide.”<sup>64</sup> For Lemkin, genocide was not a crime committed against individuals because they belonged to a particular group, but was instead a crime committed against the group itself. Lemkin viewed this phenomenon as “an old practice in its modern development,” that has always been a factor in human existence.<sup>65</sup> To Lemkin, “[g]enerally speaking, genocide does not necessarily mean the immediate destruction of a nation, ....” but, “is intended rather to signify a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>66</sup> In addition to destroying the group’s social and political institutions, genocide might also destroy “the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”<sup>67</sup> To Lemkin, genocide was not restricted to incidents of mass killing,

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<sup>61</sup> Leo Kuper, *Genocide: Its Political Uses in the Twentieth Century* (New Haven: Yale University Press, 1981) at 22. See also Lemkin, “Unofficial Man,” *supra* note 59 at 372. In 1933 Lemkin also submitted a report to the secretariat of the Bureau for the Unification of Criminal Laws, outlining two crimes, “barbarity” and “vandalism.” Vandalism: “consisted in destroying works of culture, which represented the specific genius of (these) national and religious groups. Thus, I wanted to preserve both the physical existence and the spiritual life of these collectivities.”

<sup>62</sup> See Power, *supra* note 60 at 49. The only members of Lemkin’s family to survive were his brother, his brother’s wife, and their two children. Forty-nine others were killed. Lemkin described the *Genocide Convention* as an “epitaph on his mother’s grave” (*ibid.* at 60).

<sup>63</sup> Lemkin, *Axis Rule*, *supra* note 58 ; Lemkin, “Unofficial Man,” *supra* note 59 at 373-79, recounting his harrowing flight from Poland as the German army advanced.

<sup>64</sup> Lemkin, *Axis Rule*, *supra* note 58 at 79. “[T]his new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).” See also Steven Leonard Jacobs, “Genesis of the Concept of Genocide According to its Author From the Original Sources” *Hum. Rts. Rev.* (Jan.-March, 2002).

<sup>65</sup> Lemkin, *ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

but also included non-lethal acts that would erode group viability.<sup>68</sup> Among these “techniques of genocide,” Lemkin described acts of “political, social, cultural, economic, biological, physical, religious and moral” genocide.<sup>69</sup> Under Lemkin’s broad protections, nearly any step taken with the aim of destroying a protected group would amount to genocide.

Genocide is also unique for the speed with which it developed from one man’s conception to become fixed within the popular lexicon<sup>70</sup> and codified in international law. On 11 December 1946, the first session of the United Nations General Assembly unanimously adopted Resolution 96(I) condemning genocide, a mere two years after Lemkin had coined this neologism. The United Nations General Assembly Resolution 96(1) affirmed:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.<sup>71</sup>

The resolution is notable in that it does not include a list of proscribed genocidal acts, but seems to include any act that denies the “right of existence” to a human group.<sup>72</sup>

At this point, the framers began a speedy but convoluted process of formulating

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<sup>68</sup> *Ibid.* According to Lemkin: “Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”

<sup>69</sup> *Ibid.* at 82-90; Lemkin, “Unofficial Man,” *supra* note 59 at 391. Acts of political genocide should not be confused with acts taken against political groups, which Lemkin opposed protecting under the *Genocide Convention*.

<sup>70</sup> See Power, *supra* note 60 at 40-45 tracing international acceptance of the concept of genocide.

<sup>71</sup> United Nations General Assembly, *Fifty-Fifth Plenary Meeting*, Resolution 96(1), (11 December 1946) at 188-189. [*Res. 96(1)*]

<sup>72</sup> *Ibid.*

and ratifying an international convention against genocide.<sup>73</sup> Resolution 96(I) instructed the Economic and Social Council to conduct studies on a draft convention on the crime of genocide.<sup>74</sup> In its fourth session, the Economic and Security Council, in turn, instructed the Secretary General to seek assistance from a group of international law experts in preparing a draft convention.<sup>75</sup> The Secretary General instructed the Director of the Secretariat's Division of Human Rights to consult with experts in preparing the draft convention and to submit comments on that draft convention.<sup>76</sup> In conjunction with the Secretariat's staff, three international law experts, including Raphael Lemkin, compiled and submitted a draft convention with substantial commentary.<sup>77</sup> In his instructions, the Secretary General requested that genocide be defined so that it remained conceptually distinct from other international instruments, including existing prohibitions on "crimes against humanity," as well as proposed measures including the *Universal Declaration of Human Rights*.<sup>78</sup> He also requested that the draft convention be broad enough to "embrace all points likely to be adopted, it being left to these [United Nations]

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<sup>73</sup> See *Yearbook of the United Nations: 1947-1948*, (Lake Success, NY: United Nations Department of Public Information, 1949) at 216-20 (addressing ratification of U.N. Res. 96(1) and addressing the early stages of drafting the *Genocide Convention* (*Ibid.* at 595-99)); *Yearbook of the United Nations: 1948-1949*, (Lake Success, NY: United Nations Department of Public Information, 1950) at 953-961. See also Drost, *supra* note 19 at 1-7, providing a concise overview of the ratification process; Schabas, *Genocide, supra* note 19 51-101; Mathew Lippman, "The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (1984) 3 B.U. Int'l L.J. 1 [Lippman, "Drafting"].

<sup>74</sup> Res. 96(1) *supra* note 71

<sup>75</sup> Drost, *supra* note 19 at 2, citing UNESCO Res. 47(IV) (1947).

<sup>76</sup> Lippman, "Drafting" *supra* note 73 at 9.

<sup>77</sup> "Secretariat's Draft," *supra* note 18 at 15. The other two experts were Mr. Donnedieu de Vabres, Professor at the Paris Faculty of Law and His Excellency, Professor Pella, President of the International Association for Penal Law.

<sup>78</sup> Schabas, *Genocide, supra* note 19 at 52. *Universal Declaration of Human Rights* GA Res. 217 (III) UN GAOR 3d Sess. Supp. No. 13 UN Doc.A/810 (1948) 71.

organs to eliminate what they wished.”<sup>79</sup>

Following completion of the Secretariat’s Draft, the issue of genocide was taken up by the United Nations General Assembly, Sixth Committee, which requested that the Economic and Security Council provide a report and draft convention to the third regular session of the General Assembly.<sup>80</sup> The Economic and Social Council appointed an Ad Hoc Committee comprised of representatives of China, France, Lebanon, Poland, the United States, the Soviet Union, and Venezuela.<sup>81</sup> The Ad Hoc Committee was the scene of vigorous debate, but eventually produced a draft convention, which was submitted to the General Assembly’s Sixth Committee for consideration.<sup>82</sup> The Sixth Committee also held spirited and contentious debates, rejecting most of the Ad Hoc Committee’s work and compiling its own draft. This report was submitted to the General Assembly where it was considered in two plenary meetings.<sup>83</sup> The General Assembly unanimously approved it without change on 9 December 1948.<sup>84</sup>

Several issues recurred regularly throughout the debates, inspiring fervent advocacy and vehement opposition. Possible protections for political groups were debated at several points, but were finally cut.<sup>85</sup> There was general disagreement over

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<sup>79</sup> “Secretariat’s Draft,” *supra* note 18 at 16. “In doing so the Secretary-General did not intend to recommend one political solution rather than another, but wished to offer a basis for full discussion and bring out all the points deserving of notice.”

<sup>80</sup> Drost, *supra* note 19 at 3-4 citing GA Res. 180 (II).

<sup>81</sup> *Ibid.* at 4.

<sup>82</sup> Ad Hoc Committee on Genocide, *Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, From 5 April to 10 May 1948* UN ESC 3d Sess., Supp. No. 6. UN Doc. E/794 (1948) [Ad Hoc Committee Draft].

<sup>83</sup> UN GAOR 3d Sess. 178<sup>th</sup> and 179<sup>th</sup> Plen. Mtg. (1948).

<sup>84</sup> *Convention for the Prevention and Punishment of the Crime of Genocide* GA Res. 260(III) A, UN GAOR. 3d Sess., 179<sup>th</sup> plen. Mtg. At 174, UN Doc. A/810 (1948).

<sup>85</sup> See Schabas, *Genocide*, *supra* note 19 at 134-45. According to Schabas, “[r]igorous examination of the *travaux* fails to confirm the popular impression in the literature that the opposition to inclusion of political genocide was some Soviet machination.” See also Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham: Duke University Press, 1991) at 74 [LeBlanc, “*The United States*”]: “The

jurisdictional matters including whether to create an international criminal court to prosecute genocide.<sup>86</sup> A Soviet proposal to place a statement in the Preamble linking genocide to Nazism-Fascism was voted down by a wide margin.<sup>87</sup> Instead, the Preamble continued to state that genocide had long historical roots and that “international cooperation is required” to “liberate mankind from such an odious scourge.”<sup>88</sup>

Whether or not to include prohibitions on cultural genocide also deeply divided the delegates. According to the UN *Yearbook (1947-1948)*: “[t]he Canadian, French, United States and United Kingdom representatives opposed the inclusion in the Convention of a provision relating to ‘cultural’ genocide, holding that this crime was not on par with physical genocide and should be dealt with separately, and that too wide a definition of genocide would render the Convention meaningless.”<sup>89</sup> Cultural genocide is generally considered to consist of prohibitions on the use of a protected group’s language, restrictions on religious practice, and destruction of cultural institutions including places of worship and libraries.<sup>90</sup> Physical genocide, on the other hand, is generally regarded as entailing the extermination of the group by killing its individual

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Soviet delegation did oppose listing political groups among those to be protected under Article II, but other delegations advanced much more persuasive and widely accepted arguments than the Soviets.”

<sup>86</sup> See Lippman, “Drafting,” *supra* note 73 at 52-54. See also, LeBlanc, *The United States* at 151-74 (*ibid.*). While the United States was a primary proponent of an International Criminal Court throughout the drafting process, this proposal met with considerable opposition in the U.S. Senate ratification debates and was one of the key issues in leading to the U.S. delay in ratification.

<sup>87</sup> Mathew Lippman, “Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium” (2001) 23 *Hous. J. Int’l L.* 467 at 472 [Lippman, “Crime of the Century”].

<sup>88</sup> *Genocide Convention*, Preamble, *supra* note 2. The second paragraph reads: “Recognizing that at all periods of history genocide has inflicted great losses on humanity.” See also Mathew Lippman, “The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later” (1994) 8 *Temp. Int’l & Comp. L.J.* 1 at 18 [Lippman, “1948 Convention”]. By rejecting the language directly linking genocide to the Nazis, the parties indicated their intention to “prevent and punish the repetition of such state-sponsored genocide. ...”

<sup>89</sup> *Supra* note 73 at 598. The legislative history of the proposed cultural genocide provisions is discussed below.

<sup>90</sup> *Ibid.*

members, while biological genocide consists of measures intended to prevent births within the group, including forced sterilizations and separation of the sexes.<sup>91</sup> The *Genocide Convention's* final draft did not attempt to categorize genocide at all, but simply listed the five prohibited acts.<sup>92</sup> As compared with the original draft, the result was a rather narrow definition of genocide, coupled to a very difficult enforcement scheme.

## 2.2 Protected Rights and Interests

The *Genocide Convention* has been interpreted as protecting several rights or interests.<sup>93</sup> First, it protects the community of nations' traditional interest in international stability by prohibiting acts that might provoke inter-state hostilities where one state is aligned with a victimized group within another state's borders and might feel the need to defend that group against host-state aggressions. Additionally, it protects individuals from being singled out for mistreatment of the type proscribed in Article 2, paragraphs (a) – (e) due to their identification with a protected group. But it also protects two more innovative sets of interests and rights; the right of protected groups to their continued

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Genocide Convention, supra* note 2.

<sup>93</sup> *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674 (1994) para. 88 [*Expert's Report*]. According to the commission: "The convention was manifestly adopted for humanitarian and civilizing purposes. Its objectives are to safeguard the very existence of certain human groups and to affirm and emphasize the most elementary principles of humanity and morality." See also Gerhard Werle, *Principles of International Criminal Law* (The Hague: T M C Asser Press, 2005) at 193, determining that the *Genocide Convention* protects two rights, the right of the group to continued existence and the right of individuals of protected groups to be free from genocidal attacks, which constitute "serious violations of ... human dignity" and depersonalize the individual, reducing them "to a mere object." See also Helmut Gropengi ber, "The Criminal Law of Genocide: the German Perspective" (2005) Int'l Crim. L. R. 329 at 333-335, discussing the German concept of "rechtsgut," which roughly translates as "protected interest," and its importance in German criminal law. Gropengi ber, cites Kre , who finds "three different interests, the existence of the group, the 'Rechtsgut' of the individual (for example his or her life) and international peace" (in Wolfgang Joecks & Klaus Miebach, eds., *M nchener Kommentar zum Strafgesetzbuch* (2003) § 220.a StGB/ § VStGB para. 1).

existence<sup>94</sup> and humanity's interest in maintaining unique human groups. United Nations Resolution 96(1), which holds its own status as international law<sup>95</sup> and has been incorporated by reference into the *Genocide Convention*,<sup>96</sup> states that the loss of any human group "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."<sup>97</sup> In endorsing the inherent value of all human groups, the General Assembly again reflected the views of Lemkin who wrote, "[t]he world represents only so much culture and intellectual vigor as are created by its component national groups."<sup>98</sup> Lemkin viewed the phenomenon of genocide as a struggle between nations – organic collections of like individuals – and states. He went on to say:

[e]ssentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world. ... Among the basic features which have marked progress in civilization are the respect for and appreciation of the national characteristics and qualities contributed to world culture by the different nations – characteristics and qualities which, as illustrated in the contributions made by nations weak in defense and poor in economic resources, are not to be measured in terms of national power and wealth.<sup>99</sup>

In Resolution 96(1), the UN ratified Lemkin's views that the loss of any human group works to the detriment of the whole of humanity and that the international community may intervene not only to protect the rights held by a protected group – to continue its existence as a group – but may intervene on its own behalf to protect humanity's interest

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<sup>94</sup> *Reservations*, *supra* note 23 at 23. See also David Alonzo-Maizlish, Note: "In Whole Or In Part: Group Rights, the Intent Element of Genocide, and the 'Quantitative Criterion'" (2002) 77 N.Y.U.L. Rev. 1369 at 1376, discussing the right of existence and its evolution during the inter-war period.

<sup>95</sup> See Schabas, *Genocide*, *supra* note 19 at 4, referring to Res. 96(1), *supra* note 71, as an "important positive [source] of the law of genocide."

<sup>96</sup> See *Genocide Convention*, Preamble, *supra* note 2. See also *Bosnia v. Serbia*, *supra* note 32 at para. 161.

<sup>97</sup> *Supra* note 2.

<sup>98</sup> See Lemkin, *Axis Rule*, *supra* note 58 at 91.

<sup>99</sup> *Ibid.*

in maintaining diverse human groups.

### 2.3 An “enigmatic” provision

The contracting parties acceded to Article 2(e)’s inclusion with very little discussion and even less realization that their longstanding practices might violate this provision. All three experts collaborating on the Secretariat’s Draft agreed that the *Genocide Convention* should prohibit forcible child transfers.<sup>100</sup> Despite this unanimity, prohibitions on the forcible transfer of children were temporarily swept away in the early stages of drafting, only to be added again by Greece to the final draft of the convention.<sup>101</sup> A number of objections were made to the amendment. According to Mr. Lachs of Poland, “though the transfers carried out by the Germans during the Second World War were certainly to be condemned, ...” the word “transfer” might also be taken to mean evacuations during a time of war.<sup>102</sup> Mr. Morozov of the U.S.S.R. asserted that there was no historical evidence “of forced transfer constituting genocide, ...”<sup>103</sup> He also insisted that the amendment went beyond the scope of the other offenses enumerated in Article 2.<sup>104</sup> The Belgian representative felt the amendment was too vague and additionally objected on grounds that population transfers did not necessarily entail the

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<sup>100</sup> “Secretariat’s Draft,” *supra* note 18:

The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents’. This process tends to bring about the destruction of the group as a cultural unit in a relatively short time. The experts agreed that this point should be covered by the convention on genocide, but their agreement did not go further than that.

<sup>101</sup> *Greece: Amendment to the Enumeration in Article II on the Draft Convention (E/794) UNGAOR C6, 3<sup>rd</sup> Sess., U.N. Doc. A/C.6/242 (1948).*

<sup>102</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.82 *supra* note 51.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

group's destruction.<sup>105</sup>

Because the Secretariat's Draft had originally categorized the prohibition on forcible child transfers as cultural genocide,<sup>106</sup> the Sixth Committee delegates favoring this provision attempted to dissociate it from the ill-fated cultural genocide provisions. The Greek delegate asserted that forcible child transfer was: "not primarily an act of cultural genocide. Although it could in certain cases be considered as such, it could be perpetrated rather with the intent to destroy or to cause serious physical harm to members of a group."<sup>107</sup> The Uruguayan delegate concurred, stating that, since measures to prevent live births had been included, "there was also reason to condemn measures to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people."<sup>108</sup> Mr. Maktos of the United States stressed (twice) that, "in the eyes of a mother, there was little difference between the prevention of a birth by abortion and the forcible abduction shortly after its birth."<sup>109</sup> He pointed out that forcible child transfers seemed to be out of place when considered alongside the other measures of cultural genocide, which concerned the preservation of religion, language, and monuments.<sup>110</sup> He also felt the Greek amendment "should stand on its own merits and not be too closely associated with cultural genocide," asserting that, "a judge considering a case of the forced transfer of children would still

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<sup>105</sup> *Ibid.* (Mr. Kaeckenbeeck).

<sup>106</sup> *Supra* note 18, at Article 1(3).

<sup>107</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.82 *supra* note 51 (Mr. Vallindas).

<sup>108</sup> *Ibid.* (Mr. Manni y Rios, Uruguay).

<sup>109</sup> *Ibid.* (Mr. Maktos, U.S.) also asked "the Committee to consider what difference there was from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth."

<sup>110</sup> *Ibid.*

have to decide whether or not physical genocide were involved.”<sup>111</sup> The Greek delegate supported this stance, emphasizing that his proposed amendment “was not connected with cultural genocide, but with the destruction of a group – with physical genocide.”<sup>112</sup> It is significant that the United States, France, and the other states that had opposed the cultural genocide provisions, did not oppose the prohibition on forcible child transfers.<sup>113</sup>

Later, while debating the proposed cultural genocide provisions, Perez Perozo, a Venezuelan diplomat who was influential in the ratification debates, gave Article 2(e) yet another gloss:

Sub-paragraph 5 of article II had been adopted because the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization and living conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such a case there would be no question of mass murder, torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.<sup>114</sup>

The Greek amendment was adopted by twenty votes to thirteen, with thirteen abstentions.<sup>115</sup> Many of those voting against the amendment stated that they did so because it was vague, and the intervening years have done little to clarify this very short debate.<sup>116</sup>

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.* (Mr. Vallindas).

<sup>113</sup> *Ibid.*

<sup>114</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.83 *supra* note 51

<sup>115</sup> *Ibid.* UN Doc. A/C.6/SR.82.

<sup>116</sup> *Ibid.* Prince Wan Wiathayakon of Siam, Mr. Stephen of Haiti, Mr. Kaeckenbeeck of Belgium, and Mr. Zourek of Czechoslovakia each voted against the amendment because they found it to be vague. Mr.

William A. Schabas calls Article 2(e) “enigmatic,”<sup>117</sup> pointing out that, “[p]aragraph (e), ‘[f]orcibly transferring children of the group to another group’ was added to the Convention almost as an afterthought, with little substantive debate or consideration.”<sup>118</sup> According to LeBlanc:

It is the one provision that seems strangely out of place in the convention. This is not to say that the acts Article II (e) aims to prevent and punish are not reprehensible. Surely they are. But it is debatable whether or not they should be considered to fall within the meaning of genocide. Experience suggests that perpetrators of genocide will not consider children of groups worthy of survival any more than adults.”<sup>119</sup>

However, although Article 2(e) received little debate, it was formulated in the direct aftermath of World War II, when awareness of the importance of groups remained high and memories of Himmler’s campaign to steal children for the Reich had not yet faded.

Several recent trials had drawn attention to the Nazi child-stealing scheme specifically and to issues of child custody and group viability more generally. The war crimes trial of *United States v. Greifelt* (the RuSHA case) involved numerous defendants

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Bartos of Yugoslavia voted against it because he felt it to be an issue of cultural genocide. Mr. Lachs of Poland “voted against the amendment because he considered that the way in which it had been presented suggested implications which he deemed out of place.”

<sup>117</sup> Schabas, *Genocide*, *supra* note 19 at 175 finds 2(e) “enigmatic, because the drafters clearly rejected the concept of cultural genocide.” He also mistakenly claims that Himmler’s vows to kidnap racially valuable children to raise them as Germans “were, apparently only threats” (*ibid.* at 178). See also Robert van Krieken “Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation” (2004) 75 *Oceania* 125 at 136 [van Krieken, “Cultural Genocide”] criticizing Schabas for considering forcible child transfers enigmatic and arguing that it had been re-framed as “biological” genocide before it was included in the final draft.

<sup>118</sup> William A. Schabas, *Genocide*, *supra* note 19 at 175. Henry Reynolds, *Indelible Stain: The Question of Genocide in Australia’s History* (Victoria, Australia: Viking, 2001) at 173 [Reynolds, *Indelible Stain*]. Reynolds and Schabas cite roughly the same evidence, but Reynolds states: “The practice of removing children from one group and transferring them to another was taken very seriously during the debates that led up to the Genocide Convention.” See also 6<sup>th</sup> Comm. Summary Records, *supra* note 51. Although the debates run to more than 500 pages, only six pages address forcible child transfers.

<sup>119</sup> LeBlanc, *supra* note 85 at 115.

associated with Himmler's RuSHA and Lebensborn organizations.<sup>120</sup> Several defendants were convicted of genocide for, among other actions, removing "racially valuable" Polish children from their families and placing them in German orphanages, until old enough to serve in the German army, or with German families, to be raised as Germans.<sup>121</sup> In *In re Greiser* the Supreme National Tribunal of Poland convicted the defendant of genocidal acts including the "germanization of Polish children racially suited to it."<sup>122</sup> And, in the *Velpke Children's Home Case*, the British Military Court convicted several defendants of separating children from their Polish worker mothers "to advance the work on nearby farms in order to maintain the supply of food in the year 1944."<sup>123</sup> Following the removal, the children were kept in a state of extreme deprivation, causing eighty of the children to die within six months.<sup>124</sup>

Moreover, at the time of drafting, the Greek government was involved in an intractable diplomatic struggle to repatriate Greek children from the Balkans. According to LeBlanc, "the Greek amendment ... addressed the abduction of thousands (by some estimates 28,000) of Greek children by communists at the close of World War II and their transfer to several countries in Eastern Europe under communist control."<sup>125</sup> The

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<sup>120</sup> *United States v. Greifelt* (the RuSHA case) 10 March 1948 reprinted in *Trials of War Criminals Before the Nuernburg Military Tribunals Under Control Council Law No. 10: October 1946 – April 1949* vol. 5 (Washington: United States Printing Office, 1950) at 1-173.

<sup>121</sup> *Ibid.*

<sup>122</sup> *In re Greiser* the Supreme National Tribunal of Poland (7 July 1946) reprinted in *Annual Digest and Reports of Public International Law Cases: Year 1946* Sir John Fisher Williams & H. Lauterpacht, eds., (London: Butterworths & Co., Ltd., 1951) at 387 – 91.

<sup>123</sup> *Trial of Heinrich Gerike and Seven Others* (the Velpke Children's Home Case) 3 April 1946 British Military Court, Brunswick, reprinted in *Law Reports of Trials of War Criminals, The United Nations War Crimes Commission* vol. VII (London, HMSO, 1948).

<sup>124</sup> *Ibid.* These actions would not be considered genocidal because the removals were conducted for reasons of expediency and not with intent to destroy the group, but this case does demonstrate that the Allies were paying attention to issues of children and their custody as they sought justice following the war.

<sup>125</sup> Lawrence LeBlanc, *The United States*, *supra* note 85 at 114.

Greeks hoped to use the genocide charge in this struggle to retrieve children from the Balkans and the political agenda behind this amendment was clear.<sup>126</sup> Therefore, while the origins of Article 2(e) may now seem “enigmatic,” the Nazi abduction cases and the Greek repatriation struggle indicate that the delegates must have been aware of intersecting issues of group viability and child custody.

It is curious that several parties involved in drafting the *Genocide Convention* clearly understood forcible child transfers to be genocidal, but apparently failed to realize that their own longstanding practices might violate Article 2(e). For instance, the United States, which rallied parties against the cultural genocide provisions, lobbied for including forcible child transfers among the prohibited actions without seeming to realize that this might implicate its American Indian residential school program, which by 1948 had been operating for eighty years. The United States objected to Paragraph 3, Article 2 of the Secretariat’s Draft (the cultural genocide provision) “except to paragraph (a) “forced transfer of children to another human group.”<sup>127</sup> In its own draft convention, the United States included forcible transfers under a broader provision addressing “compulsory restriction of births.”<sup>128</sup> Other potentially culpable states also apparently

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<sup>126</sup> *Ibid.* at 114. See also 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.82 *supra* note 51. According to Mr. Vallindas: “the Greek delegation had in mind not only a specific case such as the forced transfer of Greek children. History recorded cases in which Christian children were abducted and taken to the Ottoman Empire. A discussion of the Greek case was not, however, appropriate in a committee engaged in drafting a convention.” See also Mr. Lachs, Poland: “By referring to the abduction of Greek children, the Greek representative had given the matter a rather distinct political bent” (*ibid.*).

<sup>127</sup> See *Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat*, UNGAOR C6, 3<sup>rd</sup> Sess., U.N. Doc. E/623 (1948) at 35. Opposing the cultural genocide provision in the Ad Hoc Committee meetings, the United States stated: “The prohibition of the use of language, systematic destruction of books, and destruction and dispersion of documents and objects of historical or artistic value, commonly known in this Convention to those who wish to include it, as ‘cultural genocide’ is matter which certainly should not be included in this Convention” (Ad Hoc Committee Report, *supra* note 82 at 7).

<sup>128</sup> Ad Hoc Committee Report, *Ibid.*

failed to notice their ongoing violations and opposition to Article 2(e) was tepid.<sup>129</sup> In the Sixth Committee debates, Mr. De Beus of the Netherlands did question whether compulsory attendance at schools, which would immerse children in a “different language or religion”, would constitute genocide, but the other delegates did not respond to his inquiry.<sup>130</sup>

## 2.4 Chapter summary

Although Article 2(e) is “enigmatic,” in that the framers left little material by which to interpret this provision, it is easily locatable within the context of the *Genocide Convention*. While the *Genocide Convention* represents a broad expansion of international human rights law, it also taps several hundred years of increasing international protections for internal minority groups. Affirmative protections for group viability are central to the *Genocide Convention* and the framers recognized that assuring a group’s right of custody over its children is important to those protections. The *Genocide Convention’s* framers also believed that a convention prohibiting measures intended to prevent live births within the group, could not then allow perpetrators to forcibly remove children shortly after birth. In addition, contemporaneous events, including the Nazi abduction trials and the Greek child repatriation struggle, would have informed the framers’ understanding of the importance of child custody in assuring group viability. Thus, although some may now consider Article 2(e) to be out of place alongside the other acts prohibited by the *Genocide Convention*, the delegates would have seen it as a logical step in protecting groups.

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<sup>129</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.82 *supra* note 51.

<sup>130</sup> *Ibid.*

## CHAPTER 3: MATERIAL ELEMENTS

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For organizational reasons I have divided the analysis of genocide into act and intention, but the line between the two is indistinct. Genocide's status as a specific intent crime means that there is in fact no clear dividing line between act and intention. While each of the material elements must be satisfied, it must also be proved that each element was carried out with a further intent of destroying a protected group, at least in part. For instance, if a perpetrator does not realize that the targeted group is one of the types of groups protected by the *Genocide Convention*, or if the perpetrator mistakenly believes that the transferred are not children but adults, then they lack the intent toward that particular element and genocide will not be found. For this reason, in any analysis of genocide, the issue of intent is never far away, but for now we will consider the more concrete material elements.

### **3.1 The group's the thing: The Genocide Convention as a protector of group viability**

For Article 2's prohibited acts to amount to genocide, they must be carried out against a discernable, protected human group, not merely against a number of individuals who belong to a protected group.<sup>131</sup> Under the *Genocide Convention*, actions taken against a number of individuals belonging to a protected group precisely because of their membership in that group still would not amount to genocide unless these actions were accompanied by intent to destroy their group, at least in part. For instance, selectively killing individuals because of their race is certainly homicide and may well be a hate

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<sup>131</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 193. According to the court, for a group to be protected under the *Genocide Convention*, it "must have particular positive characteristics – national, ethnical, racial, or religious ..."

crime, but only becomes genocide when the perpetrator possesses the requisite group-destroying intent.<sup>132</sup>

The *Genocide Convention's* preparatory materials indicate a clear intention by the framers to establish robust protections for human groups. United Nations Resolution 96(1) states: "Genocide is a denial of the right of existence of entire human groups, ..."<sup>133</sup> The pivotal Sixth Committee debates also indicate that the delegates assumed the instrument they were drafting would protect groups, not merely individuals who happened to be members of protected groups. Mr. Amado of Brazil believed "[g]enocide should be defined *stricto sensu* that is, it should be considered as a specific crime against groups of human beings. ..."<sup>134</sup> According to Mr. Azkoul, of Lebanon, "while genocide, like the other crimes, resulted in the physical destruction of one or more individuals, it involved a new factor, namely, the intention to destroy a group as such."<sup>135</sup> Mr. Bartos of Yugoslavia stated his belief that: "[t]he main characteristic of genocide lay in the intent to attack a group. That particular characteristic should be brought out, as in it lay the difference between an ordinary crime and genocide."<sup>136</sup> Mr. Chaumont of France held a

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<sup>132</sup> *Kristic, infra* note 154 (Trial Chamber) at para. 553. See also ILC, "Draft Commentary," *supra* note 50 at 45: "the intention must be to destroy the group 'as such', meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group."

<sup>133</sup> *Supra* note 71 [emphasis added].

<sup>134</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.63 *supra* note 51. He went on to state, "in view of the vagueness about the concept of crimes against humanity, it would be well to define genocide as a separate crime committed against certain groups of human beings as such."

<sup>135</sup> *Ibid.* He went on to say:

[t]he draft convention had the further advantage that, for the first time in an international or constitutional document, mention was made in it of the protection of the human group as such and not only of the individual, whether or not he belonged to a minority. The inherent value of the human group had at last been recognized as well as its contribution to the cultural heritage of the human race.

<sup>136</sup> *Ibid.* UN Doc. A/C.6/SR.63. See also (Mr. Manini Y Rios, Uruguay) genocide was "a special crime consisting in the destruction of an entire group, ..." (*ibid.*); (Mr. Kaackenbeeck, Belgium) "[t]he main feature of genocide was the intent to destroy a certain group" (*ibid.*); (Mr. Abdoh, Iran) similarly stated, "the crime consisted in the destruction or attempt at destruction of a group of human beings ..." (*ibid.*).

contrary view, that “[t]he group was an abstract concept; it was an aggregate of individuals; it had no independent life of its own; it was harmed when the individuals composing it were harmed.”<sup>137</sup> However, the French delegate appears to have been in the minority, with most delegates clearly expressing their assumption that group destruction is the hallmark of genocide.

International tribunals have also recognized the *Genocide Convention’s* group orientation. In *Akayesu*, the ICTR determined:

the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.<sup>138</sup>

In *Prosecutor v. Niyitegeka* the Trial Chamber similarly determined that, “the victim is the group itself, not merely the individual.”<sup>139</sup> In *Prosecutor v. Rutaganda*, the tribunal stated “the victim of the crime of genocide is the group itself and not the individual alone.”<sup>140</sup> The ICTY in *Brdjanin* stated “[t]he ultimate victim of genocide is the group, although destruction necessarily requires the commission of crimes against its members, that is, against the individuals belonging to that group.”<sup>141</sup> And, the ICJ recently weighed in, declaring that, “[t]he words ‘as such’ emphasize the intent to destroy the protected

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<sup>137</sup> *Ibid.* UN Doc. A/C.6/SR.73.

<sup>138</sup> *Prosecutor v. Akayesu* (1998) Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda, Trial Chamber 1) at para. 521 [*Akayesu*].

<sup>139</sup> *Prosecutor v. Niyitegeka* (2003) Case No. ICTR-96-14 (International Criminal Tribunal for Rwanda, Trial Chamber) at para. 410.

<sup>140</sup> *Prosecutor v. Rutaganda* (1999) Case No. ICTR-96-3-T (International Criminal Tribunal for Rwanda, Trial Chamber) at para.165.

<sup>141</sup> *Prosecutor v. Brdjanin* (2004) Case No. IT-99-36-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) Judgment at para. 698 citing *Prosecutor v. Sikirica* (2001) Case No. IT-95-8-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

group. ...”<sup>142</sup>

Finally, but most importantly, Article 2 of the *Genocide Convention* states, “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.”<sup>143</sup> Individual “members of the group” are mentioned, but only in connection with the enumerated acts, only by means of measuring the loss to a group through its members’ mistreatment.<sup>144</sup> Taken together, the preparatory materials, the case law from the ICJ, ICTR and ICTY, and the *Genocide Convention* itself, clearly establish the group as one of two possible victims of genocide. Therefore, although the *Genocide Convention* has yet to be explicitly interpreted in this manner, the victimized group, and not merely its constituent members, should be regarded as a primary rights holder and should have standing to sue on the grounds of genocidal acts. In addition, because genocidal acts affect the group’s long-term viability, the group should have standing to seek redress after the directly affected individual members of the group have passed away.<sup>145</sup>

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<sup>142</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 187. See also *Reservations supra* note 23 at 23. “The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups. ...”

<sup>143</sup> *Genocide Convention*, Article 2, *supra* note 2 [emphasis added].

<sup>144</sup> *Ibid.* paras. (a) and (b). See also ILC, “Draft Commentary”, *supra* note 50: “The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.”

<sup>145</sup> The recognition accorded to group rights and group standing should help victim groups escape the hurdle presented by traditional standing doctrine. (See *In re African-American Slave Descendants Litigation* 2006 U.S. App. LEXIS 30524 (7<sup>th</sup> Cir.) denying standing to descendants of American slavery because: “there is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants” (*ibid.* at 5). To achieve standing under the *Genocide Convention*, the aggrieved group, rather than an individual, would need to show harm. And, there should be no time limitation on genocide claims. (See *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* 26 November 1968, 754 U.N.T.S. 73; van Boven, *supra* note 26 at para. 135). It is also worth noting that in *Mississippi Band of Choctaw Indians v. Holyfield* 490 U.S. 30 (1989) the United States Supreme Court recognized that group rights can be statutorily created, that such rights exist independent of

### 3.2 From organism to entity

Robyn Charli Carpenter points out that, to the framers, “human grouping[s] came to be seen as analogous to an individual organism, which could come under attack or be deprived of life itself.”<sup>146</sup> It would have been unremarkable for the delegates to view groups in this manner. According Bertrand Russell, in the late nineteenth century:

The conception of organism came to be thought the key to both scientific and philosophical explanations of natural laws, and the atomic thinking of the eighteenth century came to be regarded as out of date. ... In politics it leads naturally to emphasis on the community as opposed to the individual. This is in harmony with the growing power of the State; also with nationalism, which can appeal to the Darwinism doctrine of survival of the fittest applied not to individuals, but to nations.<sup>147</sup>

The “organismic analogy”<sup>148</sup> is probably best expressed by Durkheim, who determined that “advanced” societies are characterized by increasing divisions of labor, which in turn increases interdependence and social (“organic”) solidarity.<sup>149</sup> According to Durkheim, the strength of the societal whole far exceeds the sum of its parts, each constituent part

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the rights of individual group members (*ibid.* at 49), and that “massive” removal of a group’s children can harm the group and trigger rights protections (*ibid.* at 34).

<sup>146</sup> Robyn Charli Carpenter, “Forced Maternity, Children’s Rights and the Genocide Convention: A Theoretical Analysis” (2000) 2 *J. Genocide Research* 213 at 216.

<sup>147</sup> Bertrand Russell, *The History of Western Philosophy* (New York: Simon & Schuster, 1945) at 727.

<sup>148</sup> See Paul A Erickson & Liam D. Murphy, *A History of Anthropological Theory* 2<sup>nd</sup> ed. (Peterborough, Ontario: Broadview Press, 2003) at 100. According to the organismic analogy, societies, like biological organisms, had both structures and functions. The scientific study of society should therefore include both social morphology and social physiology.

<sup>149</sup> See generally Emile Durkheim, *The Division of Labor in Society* trans. by W. D. Halls (New York: The Free Press, 1984). This is not to say however, that Durkheim would have been an advocate of the Genocide Convention or its goals. Rather, he, like his contemporaries, viewed the destruction of “less advanced” groups as inevitable, stating:

It is indeed a general law that the partial aggregates that make up a more extensive aggregate see their individuality as growing less and less distinctive. At the same time as the family organization, local religions have disappeared forever, yet local customs continue to exist. Gradually these merge into one another and unify, at the same time as dialects and patios dissolve into a single national language ... (*ibid.* at 136).

becoming important to the organism's (society's) continued function.<sup>150</sup> In *The Division of Labor in Society*, he writes that "advanced" societies:

are constituted, not by the replication of similar homogenous elements, but by a system of different organs, each one of which has a special role and which themselves are formed from differentiated parts. The elements in society are not of the same nature, nor are they arranged in the same manner. They are neither placed together end-on, as are the rings of an annelida worm, nor embedded in one another, but co-ordinated and subordinated to one another around the same central organ, which exerts of the rest of the organism a moderating effect.<sup>151</sup>

Thus, to Durkheim, group solidarity is achieved through intra-group role specialization. However, while this grounds group cohesion, it also makes the group vulnerable as an attack on a key "different organ," which played a specialized and vital role, would weaken the group making it susceptible to outside attack.

In *Axis Rule*, Lemkin wrote that, "[g]enocide is directed against the national group as an entity...."<sup>152</sup> Following Lemkin's lead, interpreters of the *Genocide Convention* have been drawn to the "entity" language and protection has been extended to groups as "separate and distinct entities."<sup>153</sup> According to the Trial Chamber in

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<sup>150</sup> *Ibid.* at 132.

<sup>151</sup> *Ibid.*

<sup>152</sup> Lemkin, *Axis Rule*, *supra* note 58 at 79.

<sup>153</sup> See *Prosecutor v. Blagojevic & Jokic* (2005) Case No. IT-02-60-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 665 [*Blagojevic*]: "The Trial Chamber recalls that the specific intent for the crime of genocide must be to destroy the group as a separate and distinct entity." See also *Prosecutor v. Jelusic* (1999) Case No. IT-95-10-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) Judgment at para. 79 [*Jelusic*]; *Brdanin*, *supra* note 141; *Prosecutor v. Bagilishema* (2001) Case No. ICTR-95-1A-T (International Criminal Tribunal for Rwanda, Trial Chamber) Judgment at para. 64 [*Bagilishema*]. See also ILC, "Draft Commentary" *supra* note 50 at 45, "as such" in Article 2 of the Genocide Convention taken to mean "as a separate and distinct entity." Interestingly, "entity" possesses a highly relevant definitional duality. In its original, abstract sense, entity meant: "Being, existence, as opposed to non-existence; the existence, as distinguished from the qualities or relations, of anything." (*Oxford English Dictionary Online* 2d 1989 *s.v.* "entity"). But, in modern usage, "entity" has come, as well, to mean: "[s]omething that has a separate and distinct existence and objective or conceptual reality; an organization (as a business or governmental unit) that has an identity separate from those of its members." (*Merriam-Webster's 11<sup>th</sup> Collegiate Dictionary*, *s.v.* "entity"). Thus, "entity" seems

*Kristic*,

[t]he intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.<sup>154</sup>

This focus on the group as an entity again emphasizes the *Genocide Convention's* aim to protect not only individual lives, but also human groups.

Protecting the group as an entity has meant protecting groups from the selective killing of important group members, including cultural, political, or religious leaders, or military-aged men.<sup>155</sup> Applying Durkheim's terms, these group members would be considered "different organs," which have a "special role" in forming the whole.<sup>156</sup> It has also meant protecting small, geographically isolated segments of a larger group, even where there is no intent to destroy the larger group.<sup>157</sup> Finally, it has meant that protection does not stop at categories of persons, but covers "the prohibited acts when committed with the necessary intent against members of a tribal group."<sup>158</sup> This accords with the *Genocide Convention's* purpose of protecting the unique cultural resources possessed by each human group, but is often contrary to dominant group perceptions,

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apropos to the discussion of genocide as it encompasses both the emphasis on existence and the group-orientation of genocide.

<sup>154</sup> *Prosecutor v. Kristic* (2001) Case No. IT-98-33-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) Judgment at para. 590 [*Kristic*].

<sup>155</sup> *Kristic*, (Trial Chamber) *supra* note 154 at para. 595; *Jelusic*, (Trial Chamber) *supra* note 153 at para. 82. See also discussion below.

<sup>156</sup> Durkheim *supra* note 149 at 132.

<sup>157</sup> See *Brdanin*, *supra* note 141 at para. 703; *Kristic*, (Trial Chamber) *supra* note 154 at paras. 589-590; *Prosecutor v. Kristic* (2004) Case No. IT-98-33-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 13; *Prosecutor v. Stakic* (2003) Case No. IT-97-24-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) Judgment at para. 523-24 [*Stakic*]; *Jelusic*, *supra* note 153 at para. 83.

<sup>158</sup> ILC "Draft Commentary," *supra* note 50 at 45.

which tend to lump discrete groups into meta-groups of, for instance, “Indians,” or “Aboriginals.”

A. Dirk Moses refers to this lumping tendency as a “homogenizing discourse,”<sup>159</sup> and, as he points out, allowing a perpetrator to escape culpability by broadly defining the targeted group would heap perversity on top of atrocity. According to Moses:

If somehow Aborigines had colonized Europe and attempted to exterminate, say, the Slovenians, every subsequent European scholar of genocide would visit ridicule and scorn on the proposition that no genocide had in fact taken place, and that it was just an isolated incident because no intention could be identified to exterminate *all* Europeans.<sup>160</sup>

Therefore, in assessing allegations of Australian genocide, it is proper to inquire not whether all of Australia’s indigenous inhabitants were targeted, but whether any of the discrete tribal groups had been targeted, at least in part.

Despite the clear emphasis on group protection, Russell McGregor asserts that because the perpetrators of Australia’s post-war Aboriginal policies lauded Aboriginal population increases, their behavior was “incompatible with genocidal intent.”<sup>161</sup> However, there is simply no requirement that a perpetrator intend for the number of individual descendants of the group to decline. Rather, the group is the victim and while a decline in the number of its individual members is of evidentiary interest, an increase in these numbers does not negate genocidal intent. Accordingly, the ICTR and ICTY have determined that systemic rape and forced deportations can amount to genocide when

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<sup>159</sup> A. Dirk Moses, “An Antipodean Genocide? The Origins of the Genocidal Moment in the Colonization of Australia” (2000) 2 J. Genocide Research 89 at 93.

<sup>160</sup> *Ibid.*

<sup>161</sup> Russell McGregor, “Governance, Not Genocide: Aboriginal Assimilation in the Post War Era” in A. Dirk Moses, ed., *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (New York: Berghahn Books, 2004) 290 at 296.

carried out with intent to destroy the group, though neither is necessarily lethal to group members.<sup>162</sup>

In *Kruger v. Commonwealth of Australia*, the High Court of Australia similarly misunderstood the *Genocide Convention's* group protections.<sup>163</sup> According to the High Court of Australia, allegations of post-1951 Article 2(e) violations fail because powers under *1918 Aboriginals Ordinance*,<sup>164</sup> which authorized the forcible child transfers, “were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally.”<sup>165</sup> Under this logic, any acts intended to harm Aboriginals were committed outside the authority of this legislation and therefore the Commonwealth bears no responsibility for those acts. According to Justice Toohey:

each of the “acts” which spells out genocide is qualified by the opening words “with intent to destroy.” There is nothing in the Ordinance, according to the ordinary principles of construction, which would justify a conclusion that it authorized acts “with intent to destroy, in whole or in part” the plaintiffs’ racial group.<sup>166</sup>

However, as we have seen, the *Genocide Convention* extends protections not just to individuals or to the racial groups to which they belong, but also to groups “as separate

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<sup>162</sup> See below §5.1.2.

<sup>163</sup> *Kruger*, *supra* note 20.

<sup>164</sup> The Northern Territory of Australia, *An Ordinance Relating to Aboriginals* No. [9] of 1918 [*1918 Aboriginals Ordinance*].

<sup>165</sup> *Kruger*, *supra* note 20, Dawson J p. 31.

<sup>166</sup> *Ibid.* p. 44; See also Gaudron J. at 58:

Although it may be taken that the Ordinance authorised the forcible transfer of Aboriginal children from their racial group, the settled principles of statutory construction ... compel the conclusion that it did not authorise persons to remove those children “with intent to destroy, in whole or in part, ... [their] racial ... group as such” (*ibid.*).

But see Desmond Manderson, “Apocryphal Jurisprudence” (2001) 23 *Studies in Law, Politics and Society* 81 at 106, critiquing *Kruger* for, among other things, imposing a “radical separation of meaning and practice.” See also Mathew Storey, “*Kruger v. The Commonwealth: Does Genocide Require Malice*” (1998) 21 *U.N.S.W.L.J.* 224 at 230, arguing that, “[a] beneficial motive can coexist with a genocidal intent.”

and distinct entities.”<sup>167</sup> Therefore, it should extend to each separate and distinct tribal group, not just to Aboriginals as a “racial group.” Group-destroying actions like removing children from their communities could be thought, according to the standards of the times, to be in the interests of Aboriginal individuals, or even the Aboriginal “population” or “racial group” as a whole. According to this thinking, Aboriginals were harmed by contact with their group culture and actions that removed the individual from the group, thereby destroying the group, were thought to be in the individual’s, or even the population’s, interest.<sup>168</sup> However, group destruction can never be in the interests of the affected group itself, which according to the *Genocide Convention* holds a right of and interest in its own existence. The *1918 Aboriginals Ordinance* does not require that actions under its authority must be carried out in the interests of the many Aboriginal groups indigenous to Australia. In fact, it authorizes actions that obviously threaten the group.<sup>169</sup>

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<sup>167</sup> *Supra*, note 93.

<sup>168</sup> See Stuart Bradfield, “From Empires to Genocide Chic: Coming to Terms with the Stolen Generations in Australia” in Colin Tatz, Peter Arnold & Sandra Tatz eds., *Genocide Perspectives II: Essays on Holocaust and Genocide* (Sydney: Brandl & Schlesinger, 2003) 243 at 254. As Bradfield points out: “Paradoxically, the destruction of Aboriginality was seen to be ‘in the best interests of Aboriginal people. ... Removing Aboriginal children with some ‘European blood’ was to ensure their ‘emancipation’ from the prison of Aboriginality.”

<sup>169</sup> The *1918 Aboriginals Ordinance*, *supra* note 164, gave Australia’s Administrator and Chief Protectors wide powers over Aboriginals. Those specifically facilitating the forcible transfer of Aboriginal children include:

§ 7.- (1.) The Chief Protector shall be the legal guardian of every aboriginal and half-caste child, notwithstanding that the child has a parent or other living relative, until the child attains the age of eighteen years, ...

§ 67. – (1.) The Administrator may make regulations, not inconsistent with this Ordinance ... in particular -

- (b) providing for the care, custody and education of the children of aboriginals and half-castes;
- (c) enabling any aboriginal or half-caste child to be sent to and detained in an Aboriginal Institution or Industrial School;
- (d) providing for the control, care and education of aboriginals or half-castes in aboriginal institutions and for the supervision of such institutions;

### 3.3 In whole, or in part?

A perpetrator may commit genocide even though they lack the intent to destroy a protected group *in toto*; so long as a perpetrator acts with intent to destroy the group at least “in part,” genocide can be found. The phrase “in whole or in part” was added to the convention as the result of a Norwegian initiative.<sup>170</sup> According to Schabas, “[w]hat the [term does] is undermine pleas from criminals that they did not intend the destruction of the group as a whole.”<sup>171</sup> As he points out, during the Armenian genocide the Turkish government only intended to destroy Armenian groups within its borders, not the entire Diaspora, and not even the Nazis were deluded enough to believe they could eliminate every Jew on Earth.<sup>172</sup> Although there is wide agreement that perpetrators need not intend an entire group’s destruction, the passage is vague and has generated controversy.<sup>173</sup> During ratification debates in the United States Senate, many expressed fear that “in part” might include cases where “a single individual was attacked as a member of a group.”<sup>174</sup> But according to the dominant interpretation, “in part” requires the targeting of a substantial part of the group. Special Rapporteur Benjamin Whitaker stated that: “[i]n part’ would seem to imply a significant number, relative to the group as

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(f) prescribing the conditions on which aboriginal and half-caste children may be apprenticed to or placed in the service of suitable people;

Note, § 7 was amended under the 1953 *Welfare Act* to read, “The Director is the legal guardian of all aboriginals.”

<sup>170</sup> Lippman, “Crime of the Century,” *supra* note 87 at 475 citing 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.73 (Mr. Wikborg, Norway) *supra* note 51.

<sup>171</sup> Schabas, *Genocide*, *supra* note 19 at 235.

<sup>172</sup> *Ibid.* See also *Kristic* (Appeals Chamber) *supra* note 154 at para. 13.

<sup>173</sup> See *Kristic*, (Trial Chamber) *supra* note 154 at paras. 581-599 summarizing the ongoing controversy and finding that this controversy left it with “a margin of discretion in assessing what is destruction ‘in part’ of the group” (*ibid.* at 590).

<sup>174</sup> See Lawrence LeBlanc, “The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding” 78 *Am J. Int’l L.* 369 (1984) [LeBlanc, “Groups”].

a whole, or else a significant section of a group such as its leadership.”<sup>175</sup>

### 3.4 Limiting protections to “biological” groups illuminates the central role of children

Whether protected groups should be enumerated and, if so, which ones should be protected was one of the most divisive issues the framers faced.<sup>176</sup> The groups mentioned in this thesis, as having been targeted for forcible child transfers, have all fallen into the final list of protected groups and their right to protection is not in doubt. However, exploring the rhetoric in the debate over which groups should be protected clarifies the central, if often implied, role that children play in the *Genocide Convention*.

While all previous documents including Resolution 96(1), the Secretariat’s Draft, and the Ad Hoc Committee Draft had provided protection to political groups, after long debate, the Sixth committee limited protections to “national, ethnical, racial or religious” groups, leaving political groups unprotected.<sup>177</sup> Delegates favoring exclusion argued that the *Genocide Convention* should only protect those groups possessing immutable characteristics, those in which membership tended to be hereditary and involuntary.<sup>178</sup>

Mr. Abdoh of Iran explained the rationale for excluding political groups, asserting

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<sup>175</sup> Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* UNESCOR, 38<sup>th</sup> Sess. UN Doc. E/CN.4/Sub.2/1985/6 (1985) at 16. See also ILC, “Draft Commentary,” *supra* note 50 at 45. “It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”

<sup>176</sup> William A. Schabas, “Groups Protected by the Genocide Convention: Conflicting Interpretations From the International Criminal Tribunal for Rwanda” (1999) 6 *ILSA J, Int’l & Comp. L.* 375 [Schabas, “Groups”]; Beth Van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot” (1997) 106 *Yale L.J.* 2259 at 2264. The United States was a main proponent of inclusion while the Soviet Union fervently opposed. The eventual excision of political groups was viewed as a political compromise, without which the convention would not have been ratified.

<sup>177</sup> Compare, Res. 96(1), *supra* note 71; Ad Hoc Committee Draft, Article 2, *supra* note 82; *Genocide Convention*, *supra* note 2, Article 2.

<sup>178</sup> See also Lemkin, “Unofficial Man,” *supra* note 59 at 391. Lemkin also vehemently opposed the inclusion of political groups.

that because:

there was a distinction between those groups, membership of which was inevitable, such as racial, religious or national groups, whose distinctive features were permanent; and those, membership of which was voluntary, such as political groups, whose distinctive features were not permanent, it must be admitted that the destruction of the first type appeared most heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together.<sup>179</sup>

Mr. Wikbourg of Norway was also: "opposed to the inclusion of political groups on the ground that such groups were never so clear-cut or stable as national, racial, or religious groups. Membership of a religious group could be renounced, but with much greater difficulty than that of a political party."<sup>180</sup> Mr. Lachs of Poland similarly asserted that: "[t]he object of the convention was to outlaw genocide. That was the crime consisting in the destruction of groups of human beings which were the product of circumstances beyond the control of their members," and that those needing "protection the most were those who could not alter their status."<sup>181</sup> According to Mr. Perozo, the Venezuelan delegate, the convention could not encompass "any and every group; if that were the case, other groups of workers, artists, scientists, etc. should also be taken into consideration."<sup>182</sup> He also pointed out the *realpolitik* of the situation; a number of states were so deeply opposed to including political groups that inclusion would threaten

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<sup>179</sup> UN Doc. A/C.6/SR.74, *supra* note 51; see also Schabas, "Groups," *supra* note 176 at 382, asserting that "three of the four categories in the Convention enumeration, national groups, ethnic groups, and religious groups seem to be neither stable nor permanent."

<sup>180</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.69, *supra* note 51. See also UN Doc. A/C.6/SR.74 (Mr. Morozov, U.S.S.R.), drawing a distinction between objective and subjective markers of group membership (*ibid.*). According to Morozov, only groups bearing objective markers were likely to be subjected to genocide and therefore there was no need to include the other types of groups. Religious affiliation was not an objective marker, but was supported by the U.S.S.R. because in their estimation all incidents of religious genocide has also been motivated by race or nationality.

<sup>181</sup> *Ibid.* UN Doc. A/C.6/SR.75.

<sup>182</sup> *Ibid.* UN Doc. A/C.6/SR.69.

ratification.<sup>183</sup>

Those arguing for inclusion were just as adamant and divisions deepened along geopolitical lines. Sir Shawcross of Britain emerged to lead inclusion efforts, acknowledging, “no one should be persecuted because of the accident of his birth within a certain group.”<sup>184</sup> He went on to question “whether a fascist state, for instance, should be able to destroy the lives of persons because they happened to be members of a communist group. ...”<sup>185</sup> He also pointed out that while political groups clearly “did not have the same stable characteristics as racial or national groups,” this would not stop “certain States” from attacking them as if they did.<sup>186</sup> Mr. Medeiros of Bolivia agreed, asserting that all of the proposed groups were held together by a common ideology or belief and there was therefore no logical reason for excluding political and economic groups.<sup>187</sup> Mr. Demesmin of Haiti argued that all genocide is political and that one must: “realize that strife between nations had now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial or religious hatred, but in the name of ideas and the faith to which they gave birth.”<sup>188</sup> Ultimately these powerful arguments failed and political groups were voted out of the convention.<sup>189</sup>

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<sup>183</sup> *Ibid.* See also UN Doc. A/C.6/SR.74 (Mr. Abdoh, Iran), arguing that only those matters on which consensus had been reached should be included in the final draft (*ibid.*).

<sup>184</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.69 *supra* note 51.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.* UN Doc. A/C.6/SR.74. Bolivia proposed a non-restrictive group approach whereby: “the word ‘genocide’ meant the destruction of a group without implying any distinction between various groups.”

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.* UN Doc. A/C.6/SR.75. In favor: Netherlands, New Zealand, Norway, Panama, Paraguay, Philippines, Saudi Arabia, Siam, Sweden, Syria, Turkey, United Kingdom, United States, Yemen, Australia, Bolivia, Burma, Canada, Chile, China, Cuba, Denmark, Ecuador, Salvador, France, Haiti, Iceland, India, Luxembourg. Against: Poland, Ukrainian Soviet Socialist Republic, Union of South Africa, Unions of Soviet Socialist Republic, Uruguay, Venezuela, Argentina, Belgium, Brazil, Byelorussian Soviet Socialist Republic, Czechoslovakia, Dominican Republic, Iran. Abstaining: Nicaragua, Peru, Yugoslavia, Afghanistan, Egypt, Ethiopia, Greece, Lebanon.

By focusing on immutable characteristics, the framers distinguished “biological” groups, those that propagate through vital “biological” processes (i.e. childrearing), from ascriptive groups, which tend to reproduce through recruitment. Through this distinction, they highlighted the central role children play in the *Genocide Convention* as only those groups reproducing themselves through child rearing were accorded protection.<sup>190</sup> Admittedly, the line between ascriptive groups and those that propagate through recruitment is oftentimes fuzzy. As Helen Fein points out, “[b]eing an Italian Communist Party member may be just as heritable a characteristic as being an Italian church-going Roman Catholic.”<sup>191</sup> And not surprisingly, this exclusion has generated considerable controversy as activists and scholars have argued that any proper definition of genocide should include political and social, as well as the disabled and the elderly – all targets of exterminatory policies at some point.<sup>192</sup> However, by excluding political, economic, and age-specific groups, as well as those coalescing around issues of sexual orientation, which do not perpetuate themselves directly through child rearing, the delegates elevated issues of children and their custody to a place of central importance in the consideration of genocide.

### **3.5 There is no minimum duration requirement**

Article 2(e), which simply prohibits “forcibly transferring the children of the

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<sup>190</sup> *Genocide Convention*, *supra* note 2. Two of the five prohibited acts directly address children. In addition to Section 2(e), Section 2(d) prohibits “Imposing measures intended to prevent births within the group.”

<sup>191</sup> Helen Fein, “Genocide: A Sociological Perspective” in Alexander Laban Hinton, ed., *Genocide an Anthropological Reader* (Malden, Mass.: Blackwell, 2002) at 81.

<sup>192</sup> Schabas, *Genocide*, *supra* note 19 at 148-49; See Van Schaack, *supra* note 19; See also David L. Nersessian, “The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention” (2003) 36 *Cornell Int’l L.J.* 293, discussing how the protected groups have been defined in international case law.

group to another group,” contains no apparent minimum duration requirement for the period of time for which children are separated from their group.<sup>193</sup> However, where the *Genocide Convention* is silent on the issue of duration, Gerhard Werle implies a *permanency* requirement. Werle states that this provision “encompasses permanent transfer done with the specific intent of destroying the group’s existence.”<sup>194</sup> According to Werle, the group’s “social existence” is threatened when children are “estranged from their cultural identity” and are alienated from their language and traditions.<sup>195</sup> Additionally, the group’s biological existence becomes threatened because the children involved are unlikely “to reproduce within their own group.”<sup>196</sup> However, principles of statutory interpretation argue against implying a restrictive term where none is readily apparent.<sup>197</sup> There also is nothing in the convention’s preparatory materials that would imply such a restriction.<sup>198</sup> The better approach would consider the perpetrator’s intent, finding genocide where children were forcibly transferred from one group to another, for any length of time, so long as the perpetrator intended the separation to destroy the group.

### 3.6 Children

Although it does not define “children,” the *Genocide Convention* is commonly assumed to protect children to eighteen years, the age range designation established by

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<sup>193</sup> *Genocide Convention*, Article 2 (e) *supra* note 2.

<sup>194</sup> Werle, *supra* note 93 at 203.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Vienna Convention*, *supra* note 32, Articles 31 & 32.

<sup>198</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.82, *supra* note 51.

the *Convention on the Rights of the Child (CRC)*.<sup>199</sup> Following the *CRC*, international treaties covering children have increasingly recognized eighteen years of age as the transition point from child to adult and this standard appears to be gaining status as an international norm.<sup>200</sup> Despite this growing consensus, some have asserted that Article 2(e) was actually intended to protect against the practice of transferring children for purposes of re-acculturation and therefore older teens should not be protected because they are not as susceptible to such influences.<sup>201</sup> However, this stance seems to overlook historical context. The children removed in several prominent forcible child transfer schemes – including those in the Swiss, Nazi, and Australian programs – were prevented from returning home at any age. When conducted in this manner, forcible child transfers mirror Article 2(d), which prohibits “[i]mposing measures intended to prevent births within the group.” In these cases, the age of removal is irrelevant; the removal of older children is just as harmful to the group as the removal of young children – both are permanently stripped from the group, affecting its ability to reproduce. Finally, the *Genocide Convention* does not specify that forcible child transfers must be carried out for purposes of re-acculturation, or for any purpose other than to destroy the group.

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<sup>199</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Article 1 [*CRC*]: “For the purposes of the present convention, a child means every human being below the age of eighteen years unless under the applicable law to the child, majority is attained earlier.”

<sup>200</sup> See the following recent international treaties setting the age range for childhood at eighteen years; *ILO Convention (182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, Art. 2, 27 June 1999, ILO No. 182, 38 I.L.M. 1207; *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UN G.A. Res. 54/263 UN GAOR 2000, Supp. No. 49, UN Doc. A/54/49 (2000); *African Charter on the Rights and Welfare of the Child* Art. 2, July 1990, Organization of African Unity, CAB/LEG/153/Rev.2; *Convention on Contact Concerning Children* Art. 2, 15 May 2003, Eur. T.S. 192.

<sup>201</sup> See Schabas, *Genocide*, *supra* note 19 at 176. See also, Valerie Oosterveld, “The Elements of Genocide” in Roy S. Lee ed., *The International Criminal court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001) 41 at 54, discussing the controversy surrounding the definition of children in the offense of forcible child transfer during the *Rome Statute* ratification debates. Proposed age-range designations ranged from fifteen to twenty-one years of age and the delegates finally compromised on eighteen.

Therefore, because the provision itself contains no age-range or purpose restrictions and because the removal of older children has in certain instances been just as harmful to the group as the removal of younger children, there seem to be no grounds for restricting the provision and the better approach would adhere to the internationally accepted standard of eighteen years of age.

### **3.7 Chapter summary**

As we have seen, those who framed the *Genocide Convention* intended it to provide robust group protections, and assurances of the group's right to custody of its children were intended to play a central role in assuring such protection. Under the *Genocide Convention*, groups are not treated as mere collections of individuals sharing particular traits, but are instead considered entities, whose existence hangs on the continued function of its constituent parts. The framers also understood that the ability of a protected group to continue its existence as an entity depends on control of its children, for it is through the process of childrearing that these ascriptive groups perpetuate themselves. This group emphasis means that there may at times be a perceived divergence between the interests of the individual group members and the group itself. However, where such divergence is perceived, the *Genocide Convention* seems to require those operating in the interests of individual group members to adjust their strategies to intervene in a manner that is not intended to threaten the group's existence.

## CHAPTER 4: “WITH INTENT TO”: UNRAVELING THE INTENTION DIMENSION

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The current debate on forcible child transfer often devolves to one basic argument; the transfers were conducted with benevolent intentions and therefore, “by definition,” cannot constitute genocide.<sup>202</sup> Of course, the issue of intention is pivotal to any discussion of genocide, as an action must be animated by intent to destroy the group if it is to amount to genocide under the *Genocide Convention*. This issue becomes even thornier in the debate surrounding forcible child transfers, where genocidal actions have often been infused with the earnest belief that these actions were in the interest of the targeted group’s children. It is therefore perhaps unsurprising that the debate surrounding forcible child transfers has been characterized by significant misunderstandings of the role intent plays in the legal analysis of genocide. Throughout this chapter, I will attempt to clarify the parameters of genocidal intent in arguing that mixed intents and benevolent motivations will not save an otherwise genocidal act from amounting to genocide. I will also argue that while designating genocide a specific intent offense does make it more difficult to classify acts as genocide, this task is made easier by the ability to infer genocidal intent from circumstantial evidence.

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<sup>202</sup> Tatz, “Confronting Australian Genocide,” *supra* note 16 at 25, summing up “an issue in the current debate about the Stolen generations. ...” See also Reynolds, *Indelible Stain*, *supra* note 118 at 174:

The argument [surrounding Australia’s program of forcibly transferring Aboriginal children] would benefit from a consideration of the critical matter of intent; we should ask the question: ‘What did the participants believe they were doing?’ When they were quite consciously trying to breed out the colour in the name of White Australia, the charge of genocide has to be taken very seriously. When the motives were much more mixed and the emphasis was on what was thought – often erroneously – to be in the best interests of the child, we move much further away from genocidal intention.

## 4.1 Defining mens rea

Intent and motive are parts of a broader concept, *mens rea*, which is one of the most contested concepts within criminal law.<sup>203</sup> Crimes are commonly considered to consist of two primary parts, the act, known as the *actus reus*, and the mental element, known as the *mens rea*.<sup>204</sup> To prove a crime, the prosecutor must generally prove both elements; that the act was committed and that it was committed with the requisite *mens rea*. *Mens rea*, in turn, encompasses all of the disparate elements that compose the mental part of the crime, including intent and motivation. Though there is considerable overlap and frequent confusion, these terms signify discrete concepts within criminal law. We commonly understand criminal intent to mean the purposive state of mind accompanying or animating a prohibited action.<sup>205</sup> Motive is distinguished from intent and is commonly defined as “a desire prompting conduct.”<sup>206</sup> Because this distinction is key to understanding genocidal intent, these terms will be more fully explained below.

## 4.2 Intent

To begin with, the legal definition of intention must be distinguished from the way intention is used in ordinary language. In discussing common law *mens rea*, Jerome Hall defines intent by distinguishing it from negligence. Regarding intent, “the actor seeks the forbidden end; he directs his conduct toward that end or knows that it is very

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<sup>203</sup> Francis Bowes Sayre, “Mens Rea” (1931) 45 Harv. L. Rev. 974. “No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the definition of the precise mental element or mens rea necessary for crime.” See also Rollin M. Perkins, “A Rationale of Mens Rea” (1938) 52 Harv. L. Rev. 905, recounting the many ways in which intent and *mens rea* have been conflated and misunderstood.

<sup>204</sup> See Wayne R. LaFare, *Criminal Law*, 3rd ed. (St. Paul, Minn.: West, 2000) at 206. “Bad thoughts alone cannot constitute a crime; there must be an act, or an omission where there is a legal duty to act.”

<sup>205</sup> *Blacks' Law Dictionary*, 7<sup>th</sup> ed., s.v. “intent”.

<sup>206</sup> Walter Harrison Hitchler, “Motive as an Essential Element of Crime” (1930) 35 Dick. L. Rev. 105.

likely to occur. ... Intended harm includes all harms that resulted because they stood in the way of the actor's objective – to his knowledge."<sup>207</sup> Negligence on the other hand, "implies inadvertence, i.e., that the actor was completely unaware of the dangerousness of his behavior although actually it was unreasonably increasing the risk of the occurrence of a proscribed harm."<sup>208</sup> As Hall illustrates, intent in its technical, legal meaning is broader than our understanding of this term in ordinary language.<sup>209</sup> For instance, in most jurisdictions results are generally held to be intended where the actor knows that their actions were likely to cause the forbidden result, though the actor was ambivalent to, or may even have regretted, that result. Fletcher provides this example: "If a prisoner in an effort to escape blows up the prison wall with knowledge that guards are present and one of the latter dies in the explosion, we would not say that the prisoner intentionally killed the guard."<sup>210</sup> However, as Fletcher points out, "in legal systems across the Western world, the concept of 'intention' is interpreted broadly to include these probable side-effects of intentional conduct."<sup>211</sup>

In French law, intention is referred to as *dol general* and is distinguished from *dol special*, which will be discussed below. These terms are roughly equivalent to *dolus generalis* and *dolus specialis* in other civil law jurisdictions. Catherine Elliot provides nineteenth century criminal lawyer Emile Garcon's classic definition of *dol general*, according to which, "[i]ntention in its legal sense, is the desire to commit a crime as

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<sup>207</sup> Jerome Hall, *Principles of Criminal Law* (Indianapolis: The Bobbs-Merrill Company Publishers, 1947) at 215.

<sup>208</sup> *Ibid.* at 216.

<sup>209</sup> George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) at 443. [Fletcher, *Rethinking*].

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

defined by the law; it is the accused's awareness that he is breaking the law."<sup>212</sup> However, as Elliot points out, the requirement that the accused be aware that they are breaking the law is negated by the presumption in French law, as in the common law, "that people know the law."<sup>213</sup> In French law, people are presumed to know the law, unless their mistake as to the content of the law "was induced by a misrepresentation emanating from public officials."<sup>214</sup> In common law this presumption is typically formulated as, "ignorance of the law is no excuse," and in both systems of law it enforces a fundamental assumption that the accused did indeed know the content of the law at the time it was violated.

Like common law intent, *dol general* is broader than ordinary understandings of intent, encompassing several levels of intent including *dolus directus*, *dolus indirectus*, and *dolus eventualis*. *Dolus directus* probably conforms best to lay understandings of intent, denoting situations "in which ... the wrongful consequences of the act were foreseen and desired by the perpetrator."<sup>215</sup> *Dolus indirectus* encompasses situations in which an act's consequence is foreseen, but not desired by the perpetrator.<sup>216</sup> For instance, where a perpetrator poisons a dish at a meal for the purpose of killing one of the diners, but with the knowledge that other guests will eat that dish, the perpetrator is deemed to have intended to kill all those who eat the tainted dish, though the perpetrator

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<sup>212</sup> Catherine Elliot, *French Criminal Law* (Uffculme Cullompton, Devon, UK: Willan Publishing, 2001) at 66 [Elliot, *French Law*].

<sup>213</sup> *Ibid.*, "nemo censetur ignorare legem."

<sup>214</sup> Catherine Elliot, "The French Law of Intent and its Influence on the Development of International Criminal Law" (2000) 11 *Crim. L. Forum* 35 at 37.

<sup>215</sup> Johan D. van der Vyver, "Prosecution and Punishment of the Crime of Genocide" (1999) 23 *Fordham Int'l L.J.* 286 at 307.

<sup>216</sup> *Ibid.*

had only desired the death of the primary victim.<sup>217</sup> *Dol eventualis* is roughly equivalent to recklessness and is said to include situations where the perpetrator is “indifferent to” or “reconciled with’ the result as a possible cost of attaining one’s goal.”<sup>218</sup> For instance, where a perpetrator shoots into a car containing the intended victim, aware that there may be other occupants in the car as well, that perpetrator will be considered to have intended the deaths of any fellow passengers that are shot.<sup>219</sup>

The German law also distinguishes *vorsatz*, intention, from *fahrlässigkeit*, or negligence.<sup>220</sup> According to Mohamed Elewa Badar,

“[i]t is generally accepted in German case law that there are three different forms of *vorsatz*: *Absicht* or purpose (intent in the narrow sense or *dolus directus* of the first degree); knowledge (*dolus directus* of the second degree); and *bedingter vorsatz* (*dolus eventualis*), ...” which “is similar to ... common law recklessness, but is more restricted in a way that the perpetrator need not only be aware of the risk but must also accept the possibility that the criminal consequence occurs.”<sup>221</sup>

Like the common law and French law, *fahrlässigkeit* will not generally ground criminal liability.<sup>222</sup> On the other hand, unlike common law and French law, in German law the actor is not assumed to know the law and may avoid responsibility if they are mistaken about the unlawfulness of their act.<sup>223</sup> However, the actor must prove that the mistake as to the law was “unavoidable,” and because the accused must surpass a very strong

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<sup>217</sup> *Ibid.*

<sup>218</sup> Fletcher, *Rethinking*, *supra* note 209 at 446. But see Gropenpeißer, *supra* note 93 at 338 cautioning that “*dolus eventualis*’ should not be confused with the concept of ‘recklessness,’ a category alien to German law.”

<sup>219</sup> van der Vyver, *supra* note 215 at 307.

<sup>220</sup> Mohamed Elewa Badar, “*Mens rea* – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals” (2005) 5 Int’l Crim. L. Rev. 203 at 215.

<sup>221</sup> *Ibid.* See also Fletcher, *Rethinking*, *supra* note 209 at 447-48, conducting a comparative analysis of *dolus eventualis*.

<sup>222</sup> Badar, *supra* note 220 at 232.

<sup>223</sup> *Ibid.* at 241.

assumption that the content of the law was discernable, successful mistake of law defenses are rare.<sup>224</sup>

### 4.3 Forcible

“Forcible” raises issues of both act and intention. It is a material element, as the transfers must be accompanied by some real element of force to be considered genocidal. However, insofar as “forcible” describes one part of the *mens rea* specific to genocidal forcible child transfers, it is also considered a mental element. The legal implications of “forcible” have not been directly addressed in the genocide case law, though several courts and committees have opined on the issue. From these statements, it appears that, under the *Genocide Convention*, “forcible” means not only direct force, but encompasses acts of non-direct force as well. It also appears that “forcible” is not generally treated as a mental element of the crime of genocide, but as a material element. As the ICTR stated in *Prosecutor v. Akayesu*:

With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that ... the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.<sup>225</sup>

In *Prosecutor v. George Rutaganda* the Trial Chamber similarly determined that, “the provisions of Article 2(e) of the Statute ... are aimed at sanctioning not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead

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<sup>224</sup> *Ibid.* at 241-43.

<sup>225</sup> *Akayesu*, (Trial Chamber) *supra* note 138 para 509. See also Schabas, *Genocide*, *supra* note 19 at 176-77.

to the forcible transfer of children from one group to another group.”<sup>226</sup> These statements by the ICTR indicate a broad understanding of force, going so far as to sanction non-direct acts leading to the transfer of children.

The Preparatory Commission for the ICC proposes an even broader standard, stating:

[t]he term “forcibly” is not restricted to physical force, but may 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.<sup>227</sup>

Therefore, according to the Preparatory Committee for the ICC, “forcibly” sanctions omissions as well as acts. It also prohibits child transfers even where those conducting them did not create the conditions of force that led to the transfers. The Preparatory Committee for the ICC standard incorporates the ICTR pronouncements mentioned above and harmonizes them with the existing international law on the issue of force.<sup>228</sup> Much of this law surrounds issues of force in the commission of sex crimes where “force” is given a broad interpretation, including acts that render the victim helpless as well as acts or threats committed against third parties.<sup>229</sup> Taken together, these sources endorse a broad and purposive understanding of the force element and may go so far as to prohibit taking advantage of a coercive situation to transfer children, regardless of the circumstances under which that coercion had been established.

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<sup>226</sup> *Rutaganda* (Trial Chamber) *supra* note 140 at para 54.

<sup>227</sup> *Elements of Crimes*, *supra* note 201 at n. 5.

<sup>228</sup> Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 82-83.

<sup>229</sup> *Prosecutor v. Furundzija* (1998) Case No. IT-95-17 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 180. See also *Prosecutor v. Kunarac* (2001) Case No. IT-96-23 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at paras. 458-60, surveying the general sources of law on sexual violence and finding “force” in all situations in which the victim did not consent.

The ICJ recently announced a narrower standard when it declared, “forcible transfer ... requires deliberate and intentional acts.”<sup>230</sup> The ICJ reaches this conclusion by regarding “forcible” as the mental element that is particular to the act of forcibly transferring children. The ICJ partitions genocidal *mens rea* into two discrete inquiries, the first concerning the prohibited act and the second concerning the overall “intent to destroy.”<sup>231</sup> In adjudicating an Article 2(e) violation, the court first determines whether the transfers had been conducted forcibly and then whether they had been conducted with “intent to destroy.”<sup>232</sup> By comparison, adjudicating an Article 2(c) violation requires the court to determine whether the group was deliberately subjected to “conditions of life” that were “calculated to bring about its physical destruction, ...” and then whether these conditions had been imposed with “intent to destroy.” Where Article 2(c) requires actions to be “calculated” and “deliberate,” Article 2(e) requires them to be conducted “forcibly.” However, where Article 2(e) seems to imply a much lower level of culpable intent than Article 2(c) the ICJ reads them as roughly equivalent, requiring forcible child transfers to be deliberate and intentional.

The ICJ appears to overreach in determining that “forcibly” necessarily entails deliberate and intentional action, or denotes any mental state at all. According to *Black’s Law Dictionary* “deliberate” actions are those that are “[i]ntentional; premeditated; fully considered,” while “forcible” means only, “[e]ffected by force or threat of force against opposition or resistance.”<sup>233</sup> And “force” means only, “[p]ower, violence or pressure

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<sup>230</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 186.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Supra* note 2.

<sup>233</sup> *Black’s Law Dictionary*, 7<sup>th</sup> ed. s.v., “forcible”.

directed against a person or thing.”<sup>234</sup> From these common legal definitions, it appears that “force” and “forcible” do not imply a mental element. For instance, a perpetrator might act recklessly, with knowledge, or perhaps even negligently, to establish conditions that result in the forcible transfer of children. Alternatively, as the Preparatory Committee to the ICC pointed out, a perpetrator might take advantage of a coercive environment that was not of their creation to transfer children.<sup>235</sup> Finally, a perpetrator might make a deliberate or intentional omission that forces the group to transfer its children. In each instance, children have been forced from their group, satisfying the ordinary meaning of Article 2(e). The ICJ is correct in its observation that the mental elements for the crimes listed in Article 2 paragraphs (a) – (d) are “made explicit,” while the mental element for Article 2(e) is not.<sup>236</sup> In the absence of an explicit statement, it is not clear why the ICJ would jump to such a restrictive interpretation of Article 2(e), an interpretation that appears to be at odds with the *Genocide Convention’s* ordinary meaning. Given that, under the general principles of law, criminal culpability generally attaches only to intentional action, there may be grounds for reading an intent requirement into criminal prosecutions of Article 2(e) violations. However, as the discussion above illustrates, legal standards of intent are broad and encompass knowing and reckless acts, not merely deliberate acts. The better approach is the purposive standard set out by the ICTR and the Preparatory Commission for the ICC, which does not seem to regard forcible as denoting any mental element. Instead, force is regarded as a physical element and culpability is recognized where a perpetrator takes advantage of

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<sup>234</sup> *Black’s Law Dictionary*, 7<sup>th</sup> ed. s.v., “force”.

<sup>235</sup> *Elements of Crimes*, *Supra* note 21.

<sup>236</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 186.

conditions of force to transfer children.

This has important implications for the analysis of forcible child transfers. While many historical forcible child transfer programs were directly coercive, and there is no question of groups being “forced,” the circumstances surrounding some programs were more ambiguous. For instance, the United States’ American Indian boarding school system abandoned compulsory off-reservation schooling early in the program’s history.<sup>237</sup> Despite the official policy of “voluntary” attendance, many parents continued enrolling their children in off-reservation residential schools. They did so for a number of reasons. Parents often enrolled their children in distant boarding schools because those schools represented the only chance for their children to gain the skills needed for survival in a rapidly changing world, or simply because conditions on the reservations were so horrible that many parents could not afford to keep the children at home.<sup>238</sup> These children were not deliberately and intentionally transferred outside the group, but their group was subjected to conditions that forced the children’s transfer.

#### 4.4 Specific intent

According to prevailing interpretations, the “with intent to destroy” language contained in Article 2 makes the crime of genocide a “special,” or “specific intent”

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<sup>237</sup> See Adams, *supra* note 1 at 65. From 1893 on, “full consent” was required from Native American parents before their children could be sent to an off-reservation school. Importantly, parents could still be compelled to enroll their children in on-reservation schools, which had similarly harsh conditions and which were similarly restrictive.

<sup>238</sup> See Child, *supra* note 6 at 15. A number of factors including economic depression and high death rates on the reservations pushed American Indian families to enroll their children in boarding schools. According to Child: “The presence of so much disease on reservations widowed women and men before their time, and, ironically, many Indians began to use the boarding school as a refuge for their children during a family crisis” (*ibid.*).

crime.<sup>239</sup> For instance, the Trial Chamber in *Akayesu* found:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".<sup>240</sup>

The trial chamber's approach was recently ratified by the ICJ in *Bosnia v. Serbia* where the court held that proving genocide requires the prosecutor to prove that the perpetrator possessed an "additional intent" above the mental elements listed for each of the offenses listed in Article 2.<sup>241</sup> According to the ICJ:

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<sup>239</sup> But see Otto Triffterer, "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such" (2001) 14 *Leiden J. of Int'l L.* 339 at 404, finding that although all definitions of genocide require "intent to destroy" none mention "an additional adjective like specific, special, particular, or general intent." Triffterer asks whether the perpetrator "[w]ho kills a group or part of it by a massacre for sadistic motives, but knowing it may eliminate the group by the act, and who merely agrees to this additional consequence, does he not fulfill the minimum requirements for genocidal intent?" See also Alexander K.A. Greenwalt, Note: "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation" (1999) 99 *Colum. L. Rev.* 2259 at 2265 arguing that, despite the accumulated weight of expert commentaries and judicial opinions, the actual text of the *Genocide Convention* contains no specific intent requirement. Instead, Greenwalt proposes, "principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions" (*ibid.* at 2259). See also William A. Schabas "The *Jeliscic* Case and the *Mens Rea* of the Crime of Genocide" (2001) 14 *Leiden J. Int'l L.* 125 at 129 [Schabas, "*Jeliscic* Case"], arguing that *dolus specialis* and specific intent have only confused the matter, and that rather than importing these concepts "from national systems of criminal law" it would be better to rely on the meaning of "the plain words of the definition of the international crime of genocide." Therefore, "for killing to constitute the crime of genocide, it must be accompanied by the 'intent to destroy,' .... This presumably is all that is meant by the *dolus specialis*, or the special intent, or the specific intent of the crime of genocide." But see Kai Ambos, "Some Preliminary Reflection on the *Mens Rea* requirement of the Crimes of the ICC Statute and of the Elements of Crimes" in Lai Chand Vorah, Fausto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking & Nicholas Robson, eds., *Man's Inhumanity to Man: Essays on International Law In Honor of Antonio Cassese* (The Hague: Kluwer International, 2003) 11 at 21-22, critiquing proposals to broaden the intent standard, but rejecting them because they would "radically change" the nature of genocide.

<sup>240</sup> *Akayesu*, *supra* note 138 at para 497. See also *ibid.* at para. 518:

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.

<sup>241</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 187.

Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, ...[the protected] group as such.” It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; ... It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with the intent to destroy the group as such in whole or in part.<sup>242</sup>

Designating genocide a specific intent crime implies a two-step intention inquiry<sup>243</sup> whereby the fact finder first determines whether the perpetrator intended to carryout the prohibited action and then inquires whether that action was intended to achieve some “further consequence ... *beyond the conduct or result that constitutes the actus reus of the offense.*”<sup>244</sup> LaFave demonstrates the increased burden of proving

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<sup>242</sup> *Ibid.*

<sup>243</sup> Roberta Arnold, “The Mens Rea of the ICC” (2003) 14 *Crim. L. Forum* 127, also implies a two-step intention inquiry by which the act must have been intended and that the actor must also have intended to destroy a protected group as such. See also Nina H. B. Jorgensen, “The Definition of Genocide” (2001) 1 *Int’l Crim. L. Rev.* 285 at 308 citing *Akayesu* (at para. 122) finds a:

three- rungged ladder of proof for the *mens rea* of genocide by killing: (a) it must be proved that a national, ethnical, racial or religious group was selected and targeted (or persecuted) by the accused; (b) the accused must have formed a specific intention to eradicate all or part of the group; ... (c) it must be proved that the accused intended to kill the individual members of the group that he did in fact kill.

<sup>244</sup> Joshua Dressler, *Understanding Criminal Law* (New York: Mathew Bender & Company, 2001) at 136. According to Dressler there are two instances in which a crime is considered to be one of “specific intent” rather than a “general intent.” First, when the crime requires proof of an intent to do some future act or achieve some future consequence beyond the *actus reus* of the crime. And second, where the crime’s definition provides “that the actor must be aware of a statutory attendant circumstance,” for instance, when a statute prohibits receiving stolen goods with the knowledge that they are stolen. Violations of the Genocide Convention fall into the first of Dressler’s two specific intent categories. But see Fletcher, *Rethinking* at 453. Specific intent:

can mean any of the three following: (1) a well-defined, particular intent (e.g., an intent to deprive the owner permanently of this property), or (2) an intent to realize a particular objective (if the intent is specific in this sense, undesired side-effects are not included), or (3) an intent that affects the ‘species or degree’ of a crime and therefore may be negated by a claim of intoxication.

See also, Perkins, *supra* note 203 at p. 924: “[T]he phrase ‘specific intent’ is used to connote something more than the intentional doing of the *actus reus* itself – an intent which is specifically required for guilt in a particular offense, as in assault with intent to murder, burglary, using mails with intent to defraud, or criminal intent.”

specific intent by explaining:

common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an "intent to steal" the property. Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental states connected with these acts it must also be established that the defendant acted "with intent to commit a felony therein."<sup>245</sup>

Thus, in common law jurisdictions, proving a specific intent crime requires proving two mental states, an intent to commit the primary act and a further intent as specified by the nature of the crime. In French law, *dol special* is similarly said to require proof of an additional mental element. For instance, "[i]f one takes the offense of theft, the general intent required is the desire to take property belonging to another ... ; while the special intent required is the intent to behave as the owner of the property belonging to another."<sup>246</sup> German law contains a similar category of crimes, including theft, which requires the further "intention of appropriation," and fraud, which requires "the intention to benefit unjustly."<sup>247</sup> Otto Triffterer refers to this further intent as an *erweiterter vorsatz*.<sup>248</sup>

#### 4.5 Mixed intents are irrelevant

The nature of specific intent offenses means that they are commonly assumed to require the highest degree of intent – *Absicht*, in the German law, *dolus directus* in civil

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<sup>245</sup> LaFave, *supra* note 204 at 240.

<sup>246</sup> Elliot, *supra* note 214 at 38-39.

<sup>247</sup> Badar, *supra* note 220 at 223.

<sup>248</sup> Triffterer, *supra* note 239 at 403. See also Badar, *supra* note 220 at 223 referring to the "extended mental element" as *überschiessende Innentendenz*.

law, and purposeful action in the common law.<sup>249</sup> This does indeed burden the prosecutor in any genocide prosecution, as this more exacting standard must be proved. However, it is notable that the intent in question is the perpetrator's intent toward the group's existence; any additional intentions regarding individual group members are irrelevant. Here we see some friction between the perceived interests of individual group members and the interests of the group as an entity. As we have seen, however, the *Genocide Convention* provides robust group protections and contains no apparent exception for acts deemed to benefit individual group members.

Although the specific intent designation certainly elevates the prosecutor's burden, given the current discourse surrounding forcible child transfers, it is at least as significant for what it does not do. The "with intent to destroy" language in the *Genocide Convention* does not indicate the volume of culpable intent, but rather its specificity. Put differently, this means that the court is not required to find that the perpetrator had a very bad or morally reprehensible intention, merely that they possessed the very narrow intent to destroy the group. Returning to the analogy with burglary, we see that designating a crime as a specific intent offense, or one requiring *dolus specialis*, does not by itself indicate that the crime requires an especially awful intent any more so than the "intent to behave as the owner of property belonging to another,"<sup>250</sup> is somehow more reprehensible than the intent to rape, murder, or torture. In addition, designating genocide as a specific intent crime does not allow mixed intentions to defeat a charge of

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<sup>249</sup> Nersessian, ["Contours"] *supra* note 31 at 264. "Decisions from the international criminal tribunals explicitly reject a knowledge standard for acts of genocide."

<sup>250</sup> Elliot, *supra* note 214.

genocide.<sup>251</sup> In the criminal law generally and in the law of genocide specifically, mixed intentions do not excuse culpable behavior that is otherwise animated by a proscribed intention. According to LaFave, “[i]t may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have some other intention.”<sup>252</sup> As applied to the *Genocide Convention*, the fact finder would determine whether the prohibited action was carried out with the requisite intent specific to each prohibited act and then whether it was carried out with the “further” intent of destroying the group.<sup>253</sup> Under this analysis, whether the perpetrators of forcible child transfers also intended to benefit the group’s children is irrelevant, what matters is whether they intended the transfers to destroy the children’s group.

#### 4.6 Establishing specific intent

Adjudication of a specific intent offense raises obvious questions of proof. How is the prosecutor to objectively prove the accused’s internal processes? Few perpetrators

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<sup>251</sup> See Nersessian, “Contours,” *supra* note 31 at 268: “provided the requisite intent exists, it matters not whether that intent was fueled by animus toward the group, by hope of financial gain, by a personal grudge against individual group members, by ideological or wartime resistance, by misguided beneficence (i.e., mass euthanasia), or indeed by any reason at all.”

<sup>252</sup> LaFave, *supra* note 204 at 237. See also *Prosecutor v. Kayishema & Ruzindana* (2001) Case No. ICTR-95-1-A (International Criminal Tribunal for Rwanda, Appeals Chamber) at para. 149 [*Kayishema*]. The defendant asserted that his efforts to save seventy-two children were incompatible with intent to destroy. However, the Appeals Chamber observed “that in the light of the overall evidence, the fact that the 72 children *may* have been taken to the hospital pursuant to Kayishema’s instructions has little direct bearing on the question whether he possessed the requisite *mens rea*.”

<sup>253</sup> See Triffterer, *supra* note 239 at 403. See also John R.W.D. Jones, “Whose Intent is it Anyway? Genocide and the Intent to Destroy a Group” in Lai Chand Vorah, Fausto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking & Nicholas Robson, eds., *Man’s Inhumanity to Man: Essays on International Law In Honor of Antonio Cassese* (The Hague: Kluwer International, 2003) 467 at 278-79, proposing a two-part test for determining culpable *mens rea* on the individual level. First, the court would assess the context of the individual’s actions, “whether ... a nationwide, or in any event organised and widespread plan existed to exterminate a [protected] group.” Under his proposal the existence of such a plan would need to be proved only by a “balance of the probabilities. Finding such a plan, the court would “turn to the issue whether the accused participated in the implementation of that plan by committing any of the [prohibited] acts, ... with the intent and knowledge that the commission of those acts would further the implementation of the genocidal plan” (*ibid.*).

offer, as Hitler did, a declaration of their intentions to commit genocide and a blueprint for its completion. Therefore, it is not surprising that where direct evidence is lacking in genocide prosecutions, courts have permitted prosecutors to infer this intent from available facts and have granted them substantial latitude in doing so.<sup>254</sup> For example, in *Prosecutor v. Karadzic and Mladic* the tribunal addressed the evidentiary issues surrounding genocide and specific intent stating “[t]he intent which is peculiar to the crime of genocide need not be clearly expressed, ... [but] may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts. ...”<sup>255</sup> Among other facts establishing intent, the ICTY listed ethnic cleansing, rape, and actions typically considered to be cultural genocide, stating that, “[t]he destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population.”<sup>256</sup> In *Jelusic*, the Appeals Chamber determined that:

in the absence of direct or explicit evidence, [specific intent may] be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.<sup>257</sup>

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<sup>254</sup> See generally *Bosnia v. Serbia*, *supra* note 32, Vice President Al-Khasawneh, dissenting at paras. 40-47, discussing the standard for inferred intent that has developed in the ICTY and ICTR. *Prosecutor v. Karadzic and Mladic* (1996) Case No. IT-95-5-R61, IT-95-18-R61 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 94 [*Karadzic*]. See also Alonzo-Maizlish, *supra* note 94 at 1386; Guglielmo Verdirame, “The Genocide Definition in the Jurisprudence of the ad hoc Tribunals” (2000) 49 I.C.L.Q. 578 at 585.

<sup>255</sup> *Karadzic*, *ibid.* at para. 94.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Prosecutor v. Jelusic* (2001) Case No. IT-95-10-T (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) (5 July 2001) Judgement at para 47.

And according to the Appeals Chamber in *Kristic*, “[w]hen direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.”<sup>258</sup>

The ICTR also recognizes that the specific intent to destroy the group can be inferred from circumstantial evidence. In *Akayesu* the ICTR stated that it:

considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is 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. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.<sup>259</sup>

In *Prosecutor v. Kayishema*, the tribunal similarly found that, “explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances.”<sup>260</sup> And in *Rutaganda*, the Appeals Chamber determined that while, “making anti-Tutsi utterances or being affiliated with an extremist anti-Tutsi group

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<sup>258</sup> *Kristic* (Appeals Chamber) *supra* note 157 at para. 34. See also *Brdjanin*, *supra* note 141 at para. 704; *Stakic*, *supra* note 157 at para. 526: “It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred from the facts, the concrete circumstances, or ‘a pattern of purposeful action.’”

<sup>259</sup> *Akayesu*, *supra* note 138 at para. 523.

<sup>260</sup> *Prosecutor v. Kayishema* (1998) Case No. ICTR-97-23-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) *supra* note \_\_ at para. 159, *aff’d* *Kayishema*, *supra* note 252 (Appeals Chamber) at para. 159. See also *Prosecutor v. Semanza* (2003), Case No. ICTR-97-20-T (International Criminal Tribunal for Rwanda, Trial Chamber) at para 313; *Bagilishema*, *supra* note 153 at para. 63.

is not a *sine qua non* for establishing *dolus specialis*, ... establishing such a fact may, nonetheless, facilitate proof of specific intent.”<sup>261</sup> Therefore, according to the ICTR and ICTY, it is proper to consider the wider context of the crimes; systematic discrimination based on group affiliation, methodical planning, the political doctrine that animates the crimes, anti-group slurs, and acts normally considered to be instances of cultural genocide may all be evidence of the specific intent to commit genocide.<sup>262</sup>

#### 4.6.1 The ICJ inferred intent approach

The ICJ recently reaffirmed the determination in *Kristic* that, “attacks on the cultural and religious property and symbols of the targeted groups,” when conducted in tandem with “physical” or “biological” attacks, “may legitimately be considered as evidence of an intent to destroy the group.”<sup>263</sup> However, the judgment in *Bosnia v. Serbia* also substantially raised the standard of proof required to prove genocide, especially when inferring genocidal intent.<sup>264</sup> According to the ICJ:

The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.<sup>265</sup>

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<sup>261</sup> *Prosecutor v. Rutaganda* (2003) Case No. ICTR-96-3-A (International Criminal Tribunal for Rwanda, Appeals Chamber) at para. 525.

<sup>262</sup> See also Verdirame, *supra* note 254 at 579. In fact, the case law generated through the ad hoc tribunals demonstrates a general willingness to transcend the strict definitions contained in the Genocide Convention, favoring instead what Verdirame terms “a purposeful approach to the definition.” Under this approach, systematic rape and ethnic cleansing, which are not specifically prohibited, have been found to violate the convention and the tribunals have indicated some elasticity in the notion of protected groups.

<sup>263</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 343 citing *Kristic* (Trial Chamber) *supra* note 154 at para. 580.

<sup>264</sup> *Bosnia v. Serbia*, *supra* note 32 at paras. 370-78. See also, Dissenting Opinion of Vice President Al-Khasawneh (*ibid.*) at paras. 40-47, criticizing the judgment for departing from the considerable ICTY case law on inferred intent.

<sup>265</sup> *Ibid.* at para. 373.

However, to the extent this new standard appears more restrictive, it must be read in conjunction with an earlier passage, in which the court established the standard of proof in inter-state disputes.<sup>266</sup> According to the ICJ, it “has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”<sup>267</sup> The “fully conclusive” standard leaves no room for doubt, reasonable or otherwise, and seems to require near certitude. This may be an appropriate standard for adjudicating delicate inter-state disputes, but it is even more exacting than the “beyond a reasonable doubt” codified in the *Rome Statute of the International Criminal Court* for adjudicating individual culpability for genocide,<sup>268</sup> which, in turn, is more exacting than standards of proof typically required in the type of tort or moral claims envisaged in this thesis.

In most historical forcible child transfer programs we see both types of evidence, direct and constructive. In many cases, the perpetrators were proud of these acts and left statements and plans indicating their group-destroying intentions. Each also occurred in a social and political context laden with the ideology of racial or cultural superiority, each targeted victims because of their particular group membership, and each occurred as

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<sup>266</sup> At least one tribunal in the ICTY set a similar standard. See *Brdjanin* (Trial Chamber) *supra* note 141 at para. 970: “Where an inference needs to be drawn, it needs to be *the only reasonable inference available on the evidence.*”

<sup>267</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 209.

<sup>268</sup> *Rome Statute*, Art. 66, *supra* note 27. See also “Interview: ICJ Chief on Bosnia Genocide Case” (31 May 2006), online: Institute for War & Peace Reporting <[http://iwpr.net/index.php?apc\\_state=henptri&s=o&o=tribunal\\_rh\\_int.html](http://iwpr.net/index.php?apc_state=henptri&s=o&o=tribunal_rh_int.html)> Discussing the burden of proof especially as concerns the *Genocide Convention*, Chief Judge of the ICJ Rosalyn Higgins stated:

On burden of proof it’s slightly different, because of course we are a civil court. And what may be absolutely correct for them as a criminal court is not necessarily what we would regard as the requisite burden of proof in a civil case. You’re in an overlap area where you’ve got something like genocide, where it is a crime under international law. And then you have difficult questions of whether the burden of proof vis-à-vis a state, which is what we’ll be dealing with, the same as for an individual.

part of a larger program to destroy the group's cultural institutions and heritage.

#### 4.7 Motivation is not intent as such

In interpreting the *Genocide Convention* it is necessary to distinguish motive from intent, a task made difficult by a tendency to conflate the two concepts. LaFave clarifies the difference between intent and motive stating, “[w]hen A murders B in order to obtain B’s money, A’s intent was to kill and his motive was to get the money.”<sup>269</sup> Hall explains the distinction stating:

The most common of all human traits is the direction of conduct toward the attainment of goals. Such conduct involves (a) the end sought; (b) deliberate functioning to reach the end, which manifests the *intentionality* of the conduct; and (c) the reasons or grounds for (the “causes” of) the end-seeking, *i.e.*, its *motivation*.<sup>270</sup>

Motive has little relevance in assessing a *prima facie* violation of the criminal law.

According to Hitchler:

As a general rule, no act otherwise lawful becomes criminal because done with a bad motive: and, conversely, no act otherwise criminal is excused or justified because of the motives of the actor, however good they may be.<sup>271</sup>

The reluctance to consider motive at the offense definition level does not result from the difficulty of establishing motives, but from the difficulty in evaluating them.<sup>272</sup>

According to Hall, in evaluating motives:

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<sup>269</sup> LaFave at, *supra* note 204 at 243. See also *Blacks Law Dictionary* 7<sup>th</sup> ed., s.v. “intent”:  
The state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it.  
When the intent to do an act that violates the law exists, motive becomes immaterial.  
See also s.v. “motive”: “Something, esp. willful desire, that leads one to act. – Also termed *ulterior* motive” (*ibid.*).

<sup>270</sup> Hall, *supra* note 207 at 141.

<sup>271</sup> Hitchler, *supra* note 206 at 109.

<sup>272</sup> *Ibid.* at 160.

the actor's own estimate of this motivation could hardly be accepted even if he had undoubtedly followed his conscience – unless we are prepared to say that every fanatic morally has carte blanche to wreak whatever harm he decides to inflict. Moreover there are no easily applied rules available to aid such judgment. ... Hence such a provision would imply a repudiation of legal adjudication as traditionally understood.<sup>273</sup>

As Hall illustrates, requiring a perpetrator to possess an untoward motive would establish a subjectivist standard of guilt, allowing “fanatics” to invoke their idiosyncratic worldview to escape culpability.<sup>274</sup> Therefore, it is not surprising that in Gardner's history of motive in the criminal law, he finds that the law, “with few exceptions,” continuously rejected the claims “of those contending their criminal acts were precipitated by benign motives of euthanasia or religious obligation.”<sup>275</sup>

#### 4.7.1 Motivation is irrelevant

Whether or not to include a motive element was among the most divisive issues the framers faced. The Ad Hoc Committee's Draft did include a motive element, requiring that acts must be based “on grounds of the national or racial origin, religious belief, or political opinion of its members.”<sup>276</sup> However, the Ad Hoc Committee Draft also stated that these motives were non-restrictive and were provided “only by way of illustration.”<sup>277</sup> While delegates in the subsequent Sixth Committee deliberations

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<sup>273</sup> *Ibid.* at 160-61.

<sup>274</sup> However, Hall surely overstates, as it is well accepted that motivation is often vital in assessing mitigation and determining punishment. See Martin R. Gardner, “The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present” [1993] Utah L. Rev. 635 at 640, highlighting the differential role of motive in both offense definition and defense.

<sup>275</sup> *Ibid.* at 666-67. Also consistently rejected were claims by the accused that they were unaware that their actions violated the law.

<sup>276</sup> Ad Hoc Committee Draft, *supra* note 82.

<sup>277</sup> *Ibid.* In agreeing on this provision, the delegates rejected a proposal that would have read “particularly on grounds of. ...”

exhibited unusual unity in their dissatisfaction with the Ad Hoc Committee's motive element, they exhibited little agreement on how to address these defects. These deliberations were characterized by disagreement over whether to include a motive element, by confusion over what practical effect a motive element would have, and by confusion over the role of motive in criminal law generally.<sup>278</sup>

A number of delegations supported the provision, arguing that motivation was central to the crime of genocide.<sup>279</sup> Mr. Morozov of the Soviet Union "stated that a crime against a human group only became a crime of genocide when that group was destroyed for national, racial, or religious motives."<sup>280</sup> Mr. Bartos of Yugoslavia agreed that, "[i]f motive were not defined, any crime committed by one group against another group might be regarded as genocide."<sup>281</sup> Mr. Reid of New Zealand insisted that, if "there might be bombing which might destroy whole groups," it was essential to enumerate motives, otherwise a modern war, even one undertaken at the U.N. Security Council's behest, could run afoul of the convention.<sup>282</sup>

Gerald Fitzmaurice, representing the United Kingdom, led a small but vocal faction within the Sixth Committee that fiercely opposed the provision. According to Mr. Fitzmaurice:

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<sup>278</sup> Greenwalt, *supra* note 239 at 2275, argues that beginning with the Ad Hoc Committee debates through ratification there was never "any sustained discussion about what exactly 'intent' or 'motive' meant." And, "[m]ost significantly, while some delegates did explicitly phrase the issue as one of motive, much of the discussion appears to collapse motive and specific intent, ..." (*ibid.*).

<sup>279</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc.A/C.6/SR.75 *supra* note 51, citing *Union of Soviet Socialist Republics: Amendments to Article II of the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess., U.N. Doc.A/C.6/223.

<sup>280</sup> *Ibid.* Mr. Raafat of Egypt similarly stated that "[i]t would not be genocide if a group were destroyed for motives other than those of national or racial origin, religious belief, or political opinion." (*ibid.*).

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.* Mr. Parades of the Philippines agreed that motives should be enumerated if the *Genocide Convention* were to retain its restrictive meaning (*ibid.*).

the concept of intent had already been expressed at the beginning of the article. Once the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege. The phrase was not merely useless; it was dangerous, for its limitative nature would enable those who committed a crime of genocide to claim that they had not committed that crime 'on grounds of' one of the motives listed in the article.<sup>283</sup>

Mr. Perozo similarly argued that it "would be a powerful weapon in the hands of guilty parties and would help them to avoid being charged with genocide."<sup>284</sup> This hard-line stance against any motive element was joined by Panama, which said that a motive element was unnecessary "since no provision was made for it in any penal code."<sup>285</sup>

Even among those arguing for including a motive element, there was wide disagreement over its proper contours and likely effect. The Soviet representative seemed to think that deleting a motive element would both mutilate the definition so that it would not catch cases it was intended to encompass and unduly broaden the definition so that, "perfectly legal situations might be covered by it."<sup>286</sup> Mr. Raafat of Egypt, Mr. Abdoh of Iran, Mr. Padres of The Philippines, Mr. Zourek of Czechoslovakia, and Mr. Kural of Turkey all agreed that motive was essential, otherwise mass killings and other group-destroying actions undertaken for political or other non-genocidal motives might be considered to be genocide.<sup>287</sup> Mr. Noriega of Mexico felt that a motive element would "clarify the concept of protected groups which article II sought to define and not merely

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<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.* UN Doc.A/C.6/SR.76.

<sup>285</sup> *Ibid.* UN Doc.A/C.6/SR. 75-76 (Mr. Aleman, Panama). Speaking against Mr. Morozov of the USSR, Mr. Aleman pointed out "that there was a distinction between intention and motives, and ["elementary law"] did not use motives in the definition of crimes." Australia opposed any motive element (*ibid.* UN Doc.A/C.6/SR.75, Mr. Dignam). Brazil opposed any motive element, but favored the "as such" language as a compromise. (*ibid.* UN Doc.A/C.6/SR.76, Mr. Amado).

<sup>286</sup> *Ibid.* UN Doc.A/C.6/SR.76 (Mr. Morozov, USSR).

<sup>287</sup> *Ibid.* UN Doc.A/C.6/SR.75-76.

to enumerate.”<sup>288</sup> Mr. Demesian of Haiti declared motives to be “of considerable importance” because they would determine “the tribunal which would have to take cognizance of the crime.”<sup>289</sup> The French proposed their own non-limitative motive element, which would have inserted “by reason of its nature” so that Article 2 would read, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group by reason of its nature.”<sup>290</sup>

At this point, the debates became extremely confused, the delegates contradicting each other on the fundamental tenets of criminal law. Mr. Gross of the United States summarized the ongoing confusion:

At first he had thought that a statement for motives would result in ambiguity, in repetition or in a limitation. As a result of the discussion which had just taken place, he thought that a statement of motives would create ambiguity. The representative of the USSR had declared that the deletion of that statement would limit the scope of the convention, whereas other representatives had thought that such a deletion would extend its scope. As those assertions could not both be right, [he] feared that the inclusion of a statement of motives might give rise to ambiguity.<sup>291</sup>

As the debate continued, it became clear that a majority vote could not be mustered either in favor of enumerating motives, or for completely excluding motive from the convention. The Belgian delegation expressed concern that the lengthy and convoluted debates on motive would obscure the committee’s intent and would therefore make future

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<sup>288</sup> *Ibid.* UN Doc.A/C.6/SR.76.

<sup>289</sup> *Ibid.* According to Mr. Demesian:

If the motives were such that the criminal act could be described as genocide, the appropriate tribunal should be an international tribunal; if, on the other hand, the motives were such that the act could be described as a crime under common law it would have to be dealt with by national tribunals.

<sup>290</sup> *Ibid.* (Mr. Chaumont, France).

<sup>291</sup> *Ibid.*

interpretations of the convention unduly difficult.<sup>292</sup>

Looking for compromise, the delegates took up a Venezuelan proposal that inserted the words “as such” so the provision would read, “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.”<sup>293</sup> Venezuela claimed its amendment would retain motive by implication, without limiting possible motives, thereby “giv[ing] wider powers of discretion to the judges who would be called upon to deal with cases of genocide.”<sup>294</sup> The compromise garnered the necessary support, but left the delegates largely unsure of its meaning.<sup>295</sup> Mr. Morozov of the U.S.S.R. was of the view that, “the words ‘as such’ ... would mean that, in cases of genocide, the members of a group would be exterminated solely because they belonged to that group.”<sup>296</sup> The United States was actually against a motive element, but supported the “as such” by way of compromise, because it did not interpret this language as encompassing motive.<sup>297</sup> Mr. Spiropoulos of Greece thought these words did incorporate motives, though without enumerating them,<sup>298</sup> and Mr. Amado of Brazil believed that these words did not address motive at all, “but stressed the

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<sup>292</sup> *Ibid.* (Mr. Kaeckenbeeck, Belgium). See also Mr. Manini Y Rios, Uruguay (*ibid.*).

<sup>293</sup> *Ibid.* UN Doc.A/C.6/SR.75, citing *Venezuela: Amendment to Article II of the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess., U.N. Doc. A/C.6/231 (1948).

<sup>294</sup> Schabas, *Genocide*, *supra* note 19 at 250, citing *ibid.* UN Doc.A/C.6/SR.77 (Mr. Perozo, Venezuela).

<sup>295</sup> Drost, *supra* note 19 at 83. According to Drost, even as they voted in favor of the Venezuelan provision, the 6<sup>th</sup> Committee remained divided as to its meaning, several delegates voting “against the amendment precisely because the final words did not make any mention of motives for the commission of the crime.”

<sup>296</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc. A/C.6/SR.76 *supra* note 51.

<sup>297</sup> *Ibid.* (Mr. Gross). See also *ibid.* (Mr. Perozo, Venezuela). Mr. Perozo originally agreed with this assessment, insisting that he was in favor of deleting motives, but asserted that his delegation had submitted the “as such” amendment because “the statement that the essential factor in intent was the destruction of a group should be retained.” Later, he asserted, “motives were implicitly included in the words ‘as such’” (*ibid.*).

<sup>298</sup> *Ibid.*

element of intention.”<sup>299</sup> Mr. Kaeckenbeeck of Belgium was of the opinion that, “the Venezuelan amendment omitted motives but, in the interests of clarity, narrowed the concept of the group, which the committee had broadened by including intent to destroy part of a group.”<sup>300</sup> Mr. Amado of Brazil voted “for the Venezuelan amendment because it did not include the motives for the crime, but buttressed the element of intention.”<sup>301</sup>

Although the motive discussion had consumed an inordinate amount of time, this debate only seemed to obscure the role of motive in genocide. Finally, in apparent frustration, Mr. Manini Y Rios of Uruguay:

pointed out that the vote [for the “as such” language] had given rise to three different interpretations. Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group for any reason whatsoever, had wanted the emphasis to be transferred to the special intent to destroy a group, without enumerating the motives, as the concept of such motives was not sufficiently objective.<sup>302</sup>

Mr. Manini Y Rios then proposed a working group “to find out what the intention of its [the committee’s] members had been in voting for the Venezuelan amendment.”<sup>303</sup>

Because of these complex debates, it is impossible to discern any overriding legislative intent on the issue of motive. While it is clear that a majority of the delegates rejected an enumeration of culpable motives, fearing that this would unduly limit the

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<sup>299</sup> *Ibid.* UN Doc.A/C.6/SR.77. See also *ibid.* UN Doc.A/C.6/SR.76 (Mr. Raafat, Egypt) arguing, “‘as such’ added yet another description of the groups covered in the convention, while it did not define the motives for the crime”; (Mr. Chaumont, France) stated “it might well be asked whether the expression ‘as such’ applied to the description of the group rather than to the group itself” (*ibid.* UN Doc.A/C.6/SR.76).

<sup>300</sup> *Ibid.* UN Doc.A/C.6/SR.76.

<sup>301</sup> *Ibid.* See also Prince Wan Waithayakon, Siam, who: “explained why he had voted for the Venezuelan amendment. He thought there were two possible interpretations of the words ‘as such’; they might mean either ‘in that the group is a national, racial, religious or political group,’ or ‘because the group is a national, racial, religious or political group’” (*ibid.*).

<sup>302</sup> *Ibid.* UN Doc.A/C.6/SR.78.

<sup>303</sup> *Ibid.* The working group proposal was voted down “30 votes to 15 with 3 abstentions.”

convention's scope,<sup>304</sup> it is just as clear that a majority wanted to include some sort of non-restrictive motive element.<sup>305</sup> However, even if we take the vote in favor of the "as such" language to indicate that a majority of the delegations favored including a motive element, it remains impossible to determine how that motive element should be applied, even whether it would expand or limit the definition of genocide.

Commentators have been similarly perplexed, generally disregarding the preparatory debates as too indeterminate to be useful, deferring instead to the *Genocide Convention's* "ordinary meaning." In 1985 Special Rapporteur Benjamin Whitaker concluded:

An essential condition is provided by the words "as such" in Article II, which stipulates that, in order to be characterized as genocide, crimes against a number of individuals must be directed at their collectivity or at them in their collective character or capacity. Motive, on the other hand, is not mentioned as being relevant.<sup>306</sup>

The International Law Commission, in its commentary to the *Draft Code of Crimes Against the Peace and Security of Mankind*, stated:

the intention must be to destroy the group "as such" meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings. ..."<sup>307</sup>

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<sup>304</sup> *Ibid.* UN Doc. A/C.6/SR.77. A USSR amendment (*Union of Soviet Socialist Republics: Amendments and Additions to the Preamble and Article I of the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess., UN Doc. A/C.6/212 (1948)) to link genocide to Nazism and racism "was rejected by 34 votes to 11, with 6 abstentions."

<sup>305</sup> *Ibid.* A United Kingdom amendment (*United Kingdom: Amendments to Articles I and II of the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess. UN Doc. A/C.6/222 (1948)) to delete all reference to motive was "rejected by 28 votes to 9, with 6 abstentions."

<sup>306</sup> Whitaker, *supra* note 175 at 19.

<sup>307</sup> ILC, "Draft Commentary," *supra* note 50 at 46.

According to Pieter Drost: “[t]he Convention did not take a definite stand on the matter [of motivation]. In the absence of any words to the contrary the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime.”<sup>308</sup> And, according to Nersessian: “[t]he underlying motivations for the crime of genocide are irrelevant. If the requisite intent exists, it matters not whether that intent was fueled by animus toward the protected group, by hopes of financial gain, ... or indeed by any reason at all.”<sup>309</sup>

International tribunals considering the matter have reached similar conclusions resulting in a broad consensus that the *Genocide Convention* does not address motive. In *Jelusic*, the Appeals Chamber recalled:

the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.<sup>310</sup>

In *Kayishema & Ruzindana*, the tribunal similarly noted that, “[t]he existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”<sup>311</sup> It went on to state:

that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing the acts proscribed in Article 2(a) through to (e) were committed “with intent to destroy, in whole or in part a national,

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<sup>308</sup> Drost, *supra* note 19 at 84. See also Storey, *supra* note 166 at 228: “The fact that this [genocidal] act is committed with a beneficial motive is apparently irrelevant. Genocide does not require malice; it can be (misguidedly) committed ‘in the interests of’ a protected population.”

<sup>309</sup> Nersessian, *supra* note 31 at 268.

<sup>310</sup> *Jelusic*, *supra* note 257 (Appeals Chamber, Judgment) at para. 71 citing *Prosecutor v. Tadic* (1999) Case No. IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Judgment) at para 269, declaring “the irrelevance and ‘inscrutability of motives in criminal law’ insofar as liability is concerned, where an intent – including a specific intent – is clear.”

<sup>311</sup> *Kayishema* (Appeals Chamber), *supra* note 252 at para. 161.

ethnic, racial, or religious group.<sup>312</sup>

Thus, the courts that have addressed the relevance of motive in assessing genocidal intent have found the former largely irrelevant.

#### 4.7.2 Confusing motivations

Confusing matters, some refer to the secondary intention in a specific intent offense as “motive.”<sup>313</sup> For instance in *Akayesu*, the tribunal stated that, “[t]he perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior *motive*, which is to destroy, in whole or part, the group of which the individual is just one element.”<sup>314</sup> Notice that “ulterior motive” can also be referred to as a “secondary” or “further” intent, or in Triffterer’s terms, “*ertwieterer vorsatz*.” It is unclear why the tribunal referred to this additional mental element as an “ulterior motive,” especially when the *Genocide Convention* itself specifically refers to it as “intent.” However, in the end it is a distinction without a meaning as these vocabulary disputes do not affect the analysis; the motivating urge behind the “ulterior motive” remains irrelevant in establishing guilt. The recent ICJ decision in *Bosnia v. Serbia* should clarify any lexical

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<sup>312</sup> *Ibid.* See also *Brdjanin*, (Trial Chamber) *supra* note 141 at para. 696, citing the same language.

<sup>313</sup> Hitchler, *supra* note 206 at 113: burglary:

consists in breaking and entering a dwelling house at night with *intent* to commit a felony therein. The intent to commit a felony, which is an essential element of the crime, is the motive for the breaking and entering, and burglary is therefore “an exception to the ordinary rule of criminal liability, whereby motive is regarded as immaterial.”

See also Dressler, *supra* note 244 at 121. But see LaFave, *supra* note 204 at 242, explaining that although some authors refer to this secondary intent in specific intent crimes as “motive,” the better approach is: “to view such crimes as *not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, the medial end may also be considered in terms of intent.”

<sup>314</sup> *Akayesu*, *supra* note 138 at para 522 [emphasis added].

confusion.<sup>315</sup> According to the ICJ: “[i]n addition to those mental elements, Article II requires a further mental element. It requires the establishment of the ‘intent to destroy, in whole or in part, ...[the protected] group, as such.’”<sup>316</sup> It went on to confirm that, “[t]he specific intent is also to be distinguished from other reasons or motives the perpetrator may have.”<sup>317</sup> From this language, we see both that the court is unambiguously referring to the “further mental element” as intent, rather than motive, and that, “any other reasons or motives” remain irrelevant.

#### 4.7.3 Schabas’ “hatred” proposal

Schabas argues that although there is near consensus among scholars and courts in favor of omitting motive: “the reasoning is rarely very compelling. Little in the way of justification is offered to support this view, the main rationale being essentially pragmatic, namely that it can only further complicate prosecutions of genocide.”<sup>318</sup> However, Schabas’ proposal seems far broader than any of the proposed motive elements, requiring that, for genocide to be found, the act must have been committed out of “hatred” for the group.<sup>319</sup> Schabas paraphrases Article II of the Ad Hoc Committee

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<sup>315</sup> *Bosnia v. Serbia*, *supra* note 32.

<sup>316</sup> *Ibid.* at para. 187.

<sup>317</sup> *Ibid.* at para. 189.

<sup>318</sup> Schabas, *Genocide*, *supra* note 19 at 251-252.

<sup>319</sup> Delegations proposed several alternative “motive” elements. France (*Amendments to the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess. U.N. Doc.A/C.6/224 (1948)) proposed amending Article 2 to read: “Genocide is an attack on life directed against a human group, or against an individual member of a human group, on account of the nationality, race, religion or opinions of such a group or individual.” The U.S.S.R. (U.N. Doc.A/C.6/223, *supra* note 279) proposed amending Article 2 to read: “For purposes of the present Convention, genocide shall be understood to mean any of the following criminal acts aimed at the physical destruction of racial, national (or religious) groups committed on racial, national (or religious) grounds. ...” Belgium (*Amendments to the Draft Convention*, UNGAOR C6, 3<sup>rd</sup> Sess., U.N. Doc.A/C.6/217 (1948)) proposed amending Article 2 to read: “Where such acts are committed with intent to cooperate in destroying a national, racial, or religious group on grounds of national or racial origin or

Draft,<sup>320</sup> which was cut before the final draft, in proposing that to prove motive, “[t]he organizers and planners [of genocide] must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole.” He would require: “the prosecution to establish that genocide, taken in its collective dimension, was committed ‘on grounds of nationality, race, ethnicity or religion.’ The crime must, in other words, be motivated by hatred of the group.”<sup>321</sup> Schabas is on extremely shaky ground as he equates “on the grounds of ...” with “hatred of the group.” “On the grounds of” is subject to many interpretations. It could be taken to mean because the group’s nationality, race, ethnicity, or religion is different, irritating, inconvenient, or stands in the way of profit taking. It might also mean because the group’s nationality, race, ethnicity, or religion is “hated” – but this is only one of many interpretations that could attach to this phrase. Most historical forcible child transfer programs have targeted groups “on the grounds of” their national or racial origin. That is, group members were selected for this discriminatory treatment because of their particular “racial” or “national” characteristics including perceived laziness, shiftlessness, godlessness, etc. Often those implementing these programs viewed these characteristics as backward, so much so that the group’s destruction might be a small price to pay to rid individuals of these characteristics, but this did not necessarily lead them to “hate” the group. Schabas’ hatred proposal might represent an obstacle in proving genocide in some instances of forcible child transfer because it would require the prosecutor to prove actual hatred of

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religious belief.” It is significant that none of these unsuccessful provisions would require a court to find the perpetrator was motivated by hatred of the group.

<sup>320</sup> *Supra* note 2, Article 2: “In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members. ...”

<sup>321</sup> *Ibid.*

the group. However, because these programs have each been directed at the group, in its capacity as a group, all would appear to qualify as genocide under any of the less restrictive proposed motive elements.

#### **4.7.4 Policy reasons against a motive element**

In large part, the debate on whether to include motive in the *Genocide Convention* breaks down upon the lines of well-worn retributivist and utilitarian policy arguments. If the sole purpose of the *Genocide Convention* is (was) to exact retribution on those who have committed genocide, then there is solid reason to consider motive at the offense-definition level. Under this doctrine it would be wrong to punish those who believed they were destroying protected groups for benevolent reasons. However, throughout the *Genocide Convention* and the preparatory materials we see an overriding determination to prevent genocide, by deterrence and by stopping it even at its earliest stages. In this sense, the *Genocide Convention* appears strongly utilitarian, and far less emphasis is placed on the perpetrator's actual "moral" culpability. Instead, the emphasis is on setting an example so that other states, individuals, and organizations are deterred from committing similar genocidal actions. As Professor Sayre says, "[s]ocial and public interests require protection from those with dangerous and peculiar idiosyncrasies as well as from those with evil designs."<sup>322</sup>

#### **4.7.5 Motive: Summary**

If a motivation requirement is read into the *Genocide Convention*, it should not be

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<sup>322</sup> Sayre, *supra* note 203 at 1018. See also, Gardner, *supra* note 274 at 715.

restricted to “hatred” of the group’s character. Neither the *Genocide Convention*, nor the preparatory materials, nor the logic of the *Genocide Convention* support such a reading. Instead, we should remember that the *Genocide Convention* is intended to guard humanity’s interest in maintaining diverse human groups. It matters little whether that destruction was motivated by the difference, inconvenience, or un-profitability presented by the group, or by hatred of the group itself; in any case the group has been destroyed and humanity has suffered an irreparable loss. Further, the specific intent requirement will adequately protect those who have “inadvertently” committed acts that would otherwise be considered genocide. To avoid these confusions, the better reading would omit any motivation requirement, focusing instead on the perpetrator’s intent.

#### **4.8 Chapter summary**

As we have seen, the “with intent to” language does establish a formidable evidentiary threshold, requiring the prosecutor to prove that one of the prohibited actions listed in Article 2 was committed with the requisite level of intent specific to that act and that this act was animated by a very specific further intent to destroy the group. This specific intent can be inferred from circumstantial evidence, including “the general political doctrine,”<sup>323</sup> whether the individual victims were selected for mistreatment based on their group affiliation, and whether the prohibited actions took place amidst other actions aimed at destroying the group’s culture.

We now understand that most of those who have planned and implemented forcible child transfer programs believed, earnestly and erroneously, that this was in the

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<sup>323</sup> *Karadzic, supra* note 254 at para. 94.

“best interests” of the children involved. However, this belief cannot excuse an act of genocide. A benevolent attitude toward individuals should not excuse a crime against the group. The *Genocide Convention* draws a bright line, prohibiting five group-destroying actions, and contains no exception for acts deemed beneficial to the individuals of the group. More significantly, it would allow a perpetrator’s subjective belief to trump criminality. This would set a dangerous precedent, especially in the historical context of genocide, where perpetrators have often committed heinous acts in pursuit of what they believe to be the greater good.

## CHAPTER 5: A GENOCIDE BY ANY OTHER NAME ...

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Despite Article 2(e)'s broad and obvious prohibition of forcible child transfers, some claim that it does not encompass many of the transfer programs mentioned in this thesis. These assertions break down into two primary arguments. First, some claim that the forcible transfer of children as practiced in most of these programs was really a form of cultural genocide or ethnocide, and is therefore excluded from a convention addressing only physical and biological genocide.<sup>324</sup> A more nuanced version of this argument holds that where perpetrators intended forcible child transfers to destroy the group physically or biologically, they should be regarded as a form of genocide. However, where intended to destroy the group as a cultural unit, forcible child transfers, though reprehensible, are beyond the *Genocide Convention's* reach.<sup>325</sup> Second, some claim that the *Genocide Convention* exempts these programs because they were conducted as part of greater assimilation schemes, which they claim the framers did not intend to prohibit.<sup>326</sup> This chapter addresses both arguments in turn. First, it argues that under current genocide case law the forcible transfer of children, as conducted in the disputed programs, was a

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<sup>324</sup> See Samuel Totten, "A Matter of Conscience" in Samuel Totten, Steven L. Jacobs eds., *Pioneers of Genocide Studies* (New Brunswick, NJ: Transaction Publishers, 2002) 545 at 566. Totten does "not think part "e" ... belongs in the U.N. Convention. As horrible as that crime is, I do not see how it constitutes genocide. Ethnocide yes: genocide, no." See also Andrew Markus, "Genocide in Australia (2001) 25 Aboriginal History 57 at 65.

<sup>325</sup> See Nicodeme Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide* UN ESC 31<sup>st</sup> Sess. U.N. Doc. E/CN.4/Sub.2/416 (1978), citing Jean Graven, "Les Crimes Contre L'humanite," *Academie de Droit International de la Haye, Recueil des Cours*, 1950 at 501-02; See also Robert van Krieken, "Barbarism of Civilization: Cultural Genocide and the 'Stolen Generations'" (2000) 50 *British Journal of Sociology* 297 at 298 [van Krieken, "Barbarism"]. van Krieken seems to endorse this proposition, recognizing that forcible child transfers can be both "cultural" and "biological." Regarding Australia's forcible child transfers, van Krieken says these acts were: "actually alien to [the *Genocide Convention's*] overall intent, particularly its concern to exclude the question of 'cultural' genocide. In this sense, then, it is clear that 'genocide' has only restricted range of application of law."

<sup>326</sup> Reynolds, *supra* note 118 174-76; McGregor, *supra* note 161. According to McGregor, because Australia's post-war child removal programs were overtly assimilationist, they would not qualify as genocide, cultural genocide, or even ethnocide.

physical act intended to destroy the group as a physio-biological entity. Therefore, this practice amounts to genocide even though the means of destruction were often culturally mediated. Next, it argues that attempts to excuse forcible child transfers by redefining them as “assimilation” lack a foundation in law. Although forcible child transfers have at times been conducted as part of larger assimilation schemes, this context does not excuse these practices and may even prove genocidal intent.

### **5.1 Cultural genocide is no excuse: An exploration of the critical matter of destruction**

While it is clear that the “to destroy” language in Article 2 is not restricted to acts of killing, the exact meaning of this phrase remains contested. As mentioned above, the Secretariat’s Draft originally contained three categories of genocidal destruction, physical, biological, and cultural.<sup>327</sup> Article I(II)(1) addressed acts “[c]ausing the death of members of a group or injuring their health or physical integrity, ...” while Article I(II)(2) prohibited “[r]estricting births, ...” and Article I(II)(3) prohibited “[d]estroying the specific characteristics of the group, ...”<sup>328</sup> The Ad Hoc Committee Draft, which followed, combined acts of physical and biological destruction in Article 2, while acts of cultural destruction were contained in a separate article of the same draft.<sup>329</sup> According to the UN *Yearbook, 1947-1948*, the Ad Hoc Draft defined physical/biological genocide as:

deliberate acts committed with the intent of destroying a national, racial, religious or political group by killing its members, impairing their physical integrity, inflicting on them conditions aimed at causing their deaths or imposing measures intended to prevent births within the group.

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<sup>327</sup> Secretariat’s Draft, *supra* note 18.

<sup>328</sup> *Ibid.*

<sup>329</sup> Ad Hoc Committee Draft, *supra* note 82.

Cultural genocide the draft Convention defined as any deliberate act committed with the intention of destroying the language, religion or culture of a ... group, such as, for example, prohibiting the use of the group's language or its schools or places of worship.<sup>330</sup>

The delegates finally eliminated all reference to cultural genocide from the *Genocide Convention* during the eighty-third session of the Sixth Committee debates.<sup>331</sup> The deleted provision read:

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial, or religious group on grounds of national or racial origin or religious belief such as

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or in the language of the group;
2. Destroying or preventing the use of, libraries, museums, places of worship or other cultural institutions and objects of the group.<sup>332</sup>

This provision would have created a very broad definition of genocide, prohibiting measures designed to prevent groups from using their languages and prohibiting destruction of the group's cultural institutions. None of these acts would directly threaten the group's existence, though they might gradually erode the group by eliminating its distinctive features. The Sixth Committee Draft, which the UN General Assembly unanimously ratified, did not draw any distinctions between categories of destruction, but simply listed five prohibited genocidal acts.<sup>333</sup> The issue of cultural genocide came up again during the final ratification debates in two General Assembly plenary sessions.<sup>334</sup>

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<sup>330</sup> *Supra* note 73 at 597.

<sup>331</sup> 6<sup>th</sup> Comm. Summary Records, UN Doc.A/C.6/SR.83, *supra* note 51. During this debate, the Chairman "put to the vote the exclusion of cultural genocide from the convention." The committee voted to exclude "[b]y 25 votes to 16, with 4 abstentions ..." (*ibid.*).

<sup>332</sup> Ad Hoc Committee Draft, *supra* note 82.

<sup>333</sup> *Report of the Sixth Committee to the General Assembly* UN GAOR, 3d Sess. UN Doc. A/760 (1948).

<sup>334</sup> UN GAOR, 3d Sess., 178<sup>th</sup> – 179<sup>th</sup> Plen. Mtgs.

Both the U.S.S.R. and Venezuela proposed cultural genocide provisions to replace the ill-fated cultural genocide provision of the Secretariat's Draft. Like Article 3 of the Ad Hoc Committee's Draft, the proposed Soviet amendment was broad<sup>335</sup> and the delegates rejected it by a wide margin.<sup>336</sup> The Venezuelan amendment was comparatively narrow,<sup>337</sup> but the Venezuelan delegate withdrew it due to a perceived lack of support.<sup>338</sup>

### 5.1.1 The ILC destruction approach

Although the *Genocide Convention* as finally ratified makes no mention of types or categories of culpable destruction, the ILC takes the failure of the cultural genocide provisions as indicating that the delegates had excluded all forms of cultural destruction from the convention. According to the ILC:

As clearly shown by the preparatory work for the Convention, the destruction in question is the *material destruction of a group either by physical or biological means*, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. ... [T]he text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural

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<sup>335</sup> *Union of Soviet Socialist Republics: Amendment to the Convention of the Prevention and Punishment of Genocide*, UNGAOR, 3<sup>rd</sup> Sess. U.N. Doc. A/766 (1948). The Soviet proposal read:

In this convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin, or religious beliefs such as:

- (a) Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group.
- (b) Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

<sup>336</sup> UN GAOR, 3d Sess., 179<sup>th</sup> Plen. Mtg. at p. 847 (Rejected 31 votes to 14, with 10 abstentions).

<sup>337</sup> See *Ibid.* at p. 816. The Venezuelan amendment "retained three of the factors in the original article III and deleted all those which might lead to confusion. Those three factors were: religious edifices, schools and libraries of the group."

<sup>338</sup> *Ibid.* at p. 847.

genocide' contained in the earlier two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide.<sup>339</sup>

The ILC approach has been persuasive and the ICJ, ICTY and ICTR have cited it approvingly.<sup>340</sup> Commentators, especially those addressing the Australian programs, have also implicitly adopted the ILC approach to claim that forcible child transfers, as conducted in Australia and elsewhere, cannot amount to genocide<sup>341</sup> According to this logic, because these forcible child transfers were intended to immerse the children in a new culture they were cultural and cannot amount to physical or biological genocide. In this chapter, I will argue that, under the existing genocide case law, forcible child transfer as practiced in Australia and elsewhere was a form of physical or biological genocide. While forcible child transfers may often destroy the group through cultural means, the perpetrators intended to destroy these groups as physical biological entities, not merely their continued cultural existence.

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<sup>339</sup> ILC, "Draft Commentary," *supra* note 50 at 90-91.

<sup>340</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 344. *Semanza*, at para. 315:

Article 2 of the Statute indicates that the perpetrator must be shown to have committed the enumerated prohibited acts with the intent to "destroy" a group. The drafters of the Genocide Convention, from which the Tribunal's Statute borrows the definition of genocide verbatim, unequivocally chose to restrict the meaning of 'destroy' to encompass only acts that amount to physical or biological genocide.

See also *Kristic* (Appeals Chamber) *supra* note 157 at para 25. "The Genocide Convention and customary law in general, prohibit only physical or biological destruction of a human group"; *Brdanin*, *supra* note 141 at para. 694. But see *Kristic*, (Appeals Chamber) *supra* note 157 (Judge Shahabuddeen, Partial Dissenting Opinion) at paras. 48 – 54. Judge Shahabuddeen criticizes the ILC approach as contravening the rules of treaty interpretation by disregarding the *Genocide Convention's* ordinary meaning. According to Judge Shahabuddeen "the [*Genocide Convention*] itself does not require an intent to cause physical or biological destruction of the group in whole or in part" (*ibid.* at para. 48). He goes on to say, "[i]t is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the convention, ... provided that the intent attached to a listed act, ..." (*ibid.*). See also *Blagojevic*, *supra* note 153 at paras 665-66, endorsing Judge Shahabuddeen's approach.

<sup>341</sup> van Krieken, "Cultural Genocide" *supra* note 117; Reynolds, *supra* note 118 at 175.

### 5.1.2 The developing case law on culturally mediated destruction

The ICTR and ICTY continue to reiterate that the *Genocide Convention* does not address cultural genocide. However, on at least three issues, rape, selective killing, and forced deportations, they have recognized that the line between cultural and physiological genocide is blurry as acts aimed at destroying the group physically or biologically remain deadly to the group even though these acts may work their destruction through cultural processes.<sup>342</sup> Under this emerging standard, forcible child transfers, as conducted in Australia and elsewhere, would also amount to physical or biological genocide. Like rape, selective killing, and forced deportations, forcible child transfer is a physical and biological act that destroys the group through processes that are often primarily cultural.

#### a) Selective killing

Killing is the first and least controversial means of group destruction listed in Article 2.<sup>343</sup> As discussed above, for killings to amount to genocide they must be carried out with intent to destroy a substantial part of a protected group. In *Prosecutor v. Jelusic*, the Trial Chamber determined that “substantial” could have both a qualitative and a quantitative meaning.<sup>344</sup> That is, a group might be destroyed either by killing a

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<sup>342</sup> But see Nersessian, “Contours” *supra* note 31 at 323-24, surveying the emerging case law and criticizing the “qualitative” approach to genocide as unduly expanding the genocide convention to encompass measures of “cultural” genocide. Nersessian cautions that: “If the qualitative approach is used at all, it must be applied in accord with the object and purpose of the Genocide Convention and limited to the physical and biological existence of the group.”

<sup>343</sup> *Genocide Convention*, Article 2(a) *supra* note 2.

<sup>344</sup> *Jelusic*, *supra* note 153 at para. 82. See also Jorgensen, *supra* note 243 at 302; Verdirame, *supra* note 254 at 587.

significant proportion of the group's members or by selectively killing an important segment of the population, especially its leaders.<sup>345</sup> According to the Trial Chamber:

Genocidal intent may manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. This would then constitute an intention to destroy the group "selectively."<sup>346</sup>

In *Prosecutor v. Kristic* the Trial Chamber similarly found that, "the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of the two or three generations of men would have on the survival of a traditionally patriarchal society. ..."<sup>347</sup> By emphasizing the highly patriarchal characteristics of Bosnian Muslim society the tribunal explicitly recognized the importance of culturally mediated processes of group destruction. It also recognized that perpetrators might target genocidal actions to take advantage of a group's particular cultural characteristics. Although killing is unquestionably a physical act, in this instance the group destruction it caused depended heavily on cultural factors. Similarly, in selectively killing a group's leadership the perpetrator does not intend to cause the group's immediate physical destruction, but to weaken the group culturally, facilitating its ultimate physical destruction.

#### **b) Forced Deportations**

The Trial Chamber in *Blagojevic* surveyed the issues surrounding forced

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<sup>345</sup> *Jelusic, ibid.* at para. 82; *Prosecutor v. Sikirca* (2001) Case No. IT-95-8 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 77. "The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization ... would impact the survival of the group as such." See also *Brdjanin, supra* note 141 at para. 703.

<sup>346</sup> *Jelusic, ibid.* at para. 82.

<sup>347</sup> *Kristic* (Trial Chamber) *supra* note 154 at para. 595.

deportations, finding that although they are not listed among the acts Article 2 specifically proscribes, and although they do not directly cause the death of group members or deliberately prevent members from reproducing within the group, forced deportations still constitute genocide when conducted with intent “to destroy the group as a separate and distinct entity.”<sup>348</sup> According to the Trial Chamber: “the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, the other acts or series of acts, can also lead to the destruction of the group.”<sup>349</sup> The Trial Chamber might have found that forced deportations amount to genocide only insofar as they disperse the group, making it difficult for group members to reproduce within the group.<sup>350</sup> In this sense, forced deportations clearly constitute a violation of Article 2(d) of the *Genocide Convention*, which prohibits “[i]mposing measures intended to prevent births within the group.”<sup>351</sup> However, the Trial Chamber ratified a much broader proposition, highlighting the manner in which forcible deportation destroys the group by attacking its “history, traditions, the relationship between its members, the

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<sup>348</sup> *Blagojevic*, *supra* note 153 at para. 665. See also ILC, “Draft Commentary,” *supra* note 50 at 92, determining that “when carried out with intent to destroy the group in whole or in part,” forced deportations violate Article 2(c) of the Genocide Convention. *Contra Bosnia v. Serbia*, *supra* note 32 at para. 190. According to the ICJ, “ethnic cleansing” can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention.”

<sup>349</sup> *Blagojevic*, *ibid.* at para. 666.

<sup>350</sup> See *Bosnia v. Serbia*, *supra* note 32 at para. 190, endorsing this much more limited proposition. See also *Kristic* (Appeals Chamber) *supra* note 157 at para. 31. “The Trial Chamber ... impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.” But see *Kristic* (Appeals Chamber) partial dissenting opinion of Judge Shahabuddeen at para. 35: “[S]tanding alone, forcible transfer is not genocide. But in this case the transfer did not stand alone ...” (*ibid.*).

<sup>351</sup> *Genocide Convention*, Article 2(d) *supra* note 2.

relationship with other groups, the relationship with the land.”<sup>352</sup> The Trial Chamber emphasized that it was not reading the *Genocide Convention* as encompassing cultural genocide, but was instead attempting “to clarify the meaning of physical or biological genocide.”<sup>353</sup> According to this interpretation forced deportation, like selective killing, is a physical act that operates culturally to destroy the group physically or biologically.

**c) Rape**

Rape is a horrifying physical act that, when conducted systematically against a human group, has obvious bio-genocidal consequences.<sup>354</sup> However, like selective killing and forced deportation, courts have determined that, in conjunction with its immediate physical and biological effects, rape also achieves genocidal results through cultural processes. The Trial Chamber in *Akayesu* specifically cited cultural factors in determining that rape can amount to genocide. According to the Trial Chamber:

In Patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.<sup>355</sup>

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<sup>352</sup> *Blagojevic*, *supra* note 153 at para. 666

<sup>353</sup> *Ibid.*

<sup>354</sup> See Kelly Dawn Askin, “Gender Crimes Jurisprudence in the ICTR: Positive Developments” (2005) 3 J. of Int’l Crim. Justice 1007, surveying the development of the jurisprudence on rape and other gender crimes at the ICTR; Siobhan K. Fisher, “Occupation of the Womb: Forced Impregnation as Genocide” (1996) 46 Duke L. J. 91 at 120-32, pointing out the many types of harm resulting from rape with impregnation. Aside from the tremendous psychic consequences, which certainly affect group viability, rape is used “to proliferate members of one group [while] simultaneously prevent[ing] the reproduction of members of another” (*ibid.* at 121). Specifically, when women are pregnant with progeny of another group, “they cannot be pregnant with the children of their own people” (*ibid.* at 124); Carpenter, *supra* note 146; Magkalini Karagiannakis, “The Definition of Rape and its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals of Rwanda and the Former Yugoslavia” (1999) 12 Leiden J. of Int’l. L. 479; Verdirame, *supra* note 254 at 595-97.

<sup>355</sup> *Akayesu*, *supra* note 138 at para 507.

According to the Trial Chamber, systematic forced impregnation of the women of a protected group amounts to genocide because the culture of highly patriarchal societies prevents children of such rapes from being accepted into the group. Later, the Trial Chamber linked rape with the destruction of families and the group as a whole, stating that:

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>356</sup>

As with forced deportations, the tribunal might have reached a much more limited holding, finding that rape amounts to genocide only insofar as it causes the victimized woman to suffer physical or psychic harm that would prevent her from reproducing within the group. Such a holding would have endorsed a narrow definition of genocidal destruction, one exclusively limited to physical or biological genocide. The tribunal however endorsed a much broader conception of genocidal destruction, recognizing the crucial role of cultural factors in maintaining the group's physical and biological existence. According to the tribunal, rape not only inflicts tremendous suffering on the victimized woman, but affects the viability of the family structures of which she is a part.<sup>357</sup> The decision is vague about the mechanisms through which rape destroys the victimized woman's family, community, and group as a whole, but it seems apparent that cultural factors are at play. The tribunal's emphasis on the crucial role of families in assuring group viability is also important to this thesis. According to the tribunal, measures that weaken family structures weaken the group and make it more susceptible

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<sup>356</sup> *Ibid.* at para 731.

<sup>357</sup> *Ibid.*

to outside aggression. The *Akayesu* Trial Chamber's characterization of rape as genocide has been widely ratified by subsequent tribunals and appears relatively non-controversial.<sup>358</sup>

### **5.1.3 Summary: Forcible child transfer amounts to physical and biological genocide**

Although generally reaffirming the ILC approach, the case law of the ICTR and ICTY does not indicate that acts intended to physically or biologically destroy the group through culturally mediated processes are somehow excluded from the *Genocide Convention*. Rather, it indicates that proscribed acts conducted with intent to destroy the group as a separate and distinct physical or biological entity amount to genocide, even where that destruction was mediated through cultural processes. Under this standard, destroying libraries, preventing the use of museums and places of religious worship, or prohibiting daily intercourse in the group's language do not amount to genocide. These acts of cultural destruction attempt to strip the group of its unique heritage while leaving the group largely intact. On the other hand, proscribed acts carried out with intent to destroy the group would amount to genocide.

Under this standard, forcible child transfers, as carried out in Australia and

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<sup>358</sup> See Women's Initiatives of Gender Justice, "Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes" (2005) online: <[www.iccwomen.org/publications/resources/docs/Overview\\_Sexual\\_Violence\\_and\\_International\\_Criminal\\_Law.doc](http://www.iccwomen.org/publications/resources/docs/Overview_Sexual_Violence_and_International_Criminal_Law.doc)> citing *Kayishema*, *supra* note 260 (Trial Chamber) at para 108; *Prosecutor v. Musema* (2000) Case No. ICTR-96-13-T (International Criminal Tribunal for Rwanda, Trial Chamber) at para. 156; *Kristic* (Trial Chamber) *supra* note 154 at paras. 509,513; *Prosecutor v. Kamuhanda* (1998) Case No. ICTR-97-23-S (International Criminal Tribunal for Rwanda, Trial Chamber) at para. 634; *Stakic*, *supra* note 157 at para. 516; *Prosecutor v. Kagelijeli* (2003) Case No. ICTR-98-44A-T International Criminal Tribunal for Rwanda, Trial Chamber) at para. 815; *Prosecutor v. Gacumbitisi* (2004) Case No. ICTR 2001-64-T (International Criminal Tribunal for Rwanda) at para. 291.

elsewhere, were acts of physical and biological genocide. Like forced deportation, selective killing, and systematic rape, forcible child transfer is a physical act that operates culturally to destroy the group biologically, by preventing children from reproducing within the group, and physically, by discouraging children from returning to their group. Often, the intended destruction was culturally mediated – the children held away from the group and forced to internalize the dominant culture – but in each case the ultimate goal was the group’s physio-biological destruction. Therefore, even under the ILC standard for destruction, the forcible child transfer programs mentioned in this thesis would amount to genocide. In each instance, perpetrators intended to destroy the targeted group as a “separate and distinct” physical or biological entity, not merely to destroy its status as a unique cultural unit.

## 5.2 Assimilation is no excuse

Some have also argued that the Australian forcible child transfers cannot amount to genocide because they were actually part of a larger assimilation scheme.<sup>359</sup> According to this logic, because the delegates did not intend to prohibit assimilation, had they considered the later stages of the Australian forcible child transfer programs, they would have found it acceptable.<sup>360</sup> However, because the *Genocide Convention* contains no assimilation exception, and because the ratification debates do not clearly indicate that a majority of delegates intended to excuse all assimilative actions, there seems to be little

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<sup>359</sup> Reynolds, *supra* note 118 at 174-77. See generally, McGregor, *supra* note 161.

<sup>360</sup> Many delegates were clearly concerned that the proposed prohibitions on “cultural” genocide would interfere with their right to assimilate disparate populations. For instance, “[t]he Egyptian delegation had also expressed the fear that the concept of cultural genocide might hamper a reasonable policy of assimilation which no state aiming at national unity could be expected to renounce.” (6<sup>th</sup> Comm. Summary Records, UN Doc.A/C.6/SR.63 *supra* note 51 (Mr. Rafat, Egypt)). Mr. Amado, Brazil feared that the “cultural” genocide provision would interfere with “legitimate efforts made to assimilate ... minorities by the countries in which they were living” (*ibid.*).

to ground this argument.

Henry Reynolds attempts to carve out an assimilation exemption by referring to Lemkin's commentary to the Secretariat's Draft. According to Reynolds, "Lemkin, who was so committed to seeing cultural genocide included in the Convention, did not regard assimilation as a major problem."<sup>361</sup> However, the passage that Reynolds cites actually reads:

Professor Lemkin pointed out that cultural genocide was much more than just a policy of forced assimilation by moderate coercion – involving for example, prohibition of the opening of schools for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on. 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.<sup>362</sup>

From this passage we see that to Lemkin, "forced assimilation by moderate coercion" involved prohibiting groups from; 1) opening schools to educate their young in the group language; 2) publishing newspapers in the group language, or; 3) using the group's language in official documents, etc. To Lemkin, these measures were less serious than cultural genocide, to which he was fervently opposed.<sup>363</sup>

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<sup>361</sup> Reynolds, *supra* note 118 at 175 citing Secretariat's Draft *supra* note 18. See also Robert van Krieken, "Cultural Genocide," *supra* note 117 at 134-35.

<sup>362</sup> Secretariat's Draft, *supra* note 18 at p.27. The Commentary addresses assimilation at two other points as well stating:

By this definition, certain acts which may result in the total or partial destruction of a group of human beings are in principle excluded from the notion of genocide, namely, international or civil war, isolated acts of violence not aimed at the destruction of a group of human beings, the policy of compulsory assimilation of a national element, mass displacements of population" (*ibid.* at 23).

And: "Policy of forced assimilation of a section of the population: Such a policy, even if the notion of "cultural" genocide ... is admitted, it does not as a rule constitute genocide" (*ibid.* at 24).

<sup>363</sup> See A. Dirk Moses, "Genocide and Settler Society in Australian History" in A. Dirk Moses ed., *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (New York: Berghen Books, 2004) at 22. According to Moses, in taking Lemkin's work as a whole, "it would be safe to infer that he did not equate assimilation with cultural genocide." For more information on

Lemkin, like many framers, would have seen gradations within the concept of assimilation. Assimilation encompasses a broad spectrum of actions, from mildly coercive requirements that minority communities send their children to state day schools for instruction in the state language, to forced religious conversions, with death and dispossession serving as the penalties for non-compliance. Assimilation programs relying only on moderate coercion were apparently acceptable and would not implicate the proposed provision on cultural genocide. However, in its more severe forms assimilation might constitute a form of outright physical or biological genocide. Therefore, it seems unlikely that Lemkin, had he known of it, would have “accepted as appropriate” Australia’s assimilative policies, especially when those policies involved forcibly and permanently stripping Aboriginal groups of sizable proportions of their children.<sup>364</sup> It seems doubtful that the delegates intended to excuse any act so long as its perpetrators claimed it had been committed as part of a greater assimilation scheme. Such an interpretation would create a large loophole, allowing perpetrators to excuse genocidal acts on grounds that they were actually intended to “assimilate” the victim group.

Although Reynolds finds significance in that, “no one condemned assimilationist

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Lemkin’s views on these issues, see also Dominick Schaller, “Raphael Lemkin’s View of European Rule in Africa: Between Condemnation and Admiration” (2005) 7 J. Genocide Research 531 at 536, stating: “Lemkin has been an enthusiastic advocate of colonialism and he considered the ‘civilization’ of the Congo and other parts of Africa by Europeans to be a necessary task.” Schaller goes on to state: “The way Lemkin has perceived Africans can only be described as racist” (*ibid.*). See also, Michael A. McDonnell & A. Dirk Moses, “Raphael Lemkin as a Historian of Genocide in the Americas” (2005) 7 J. of Genocide Research 501, discussing Lemkin’s views on the colonization of the Americas. According to these authors, “Lemkin doubted the credibility” of Spanish rationalizations that “pointed to the barbarism and savagery of the Indians to justify their rule.” From these efforts to research Lemkin’s unpublished writings it seems that Lemkin, like many of the educated of his time, had complex and often contradictory views on colonialism and assimilation. Still, he had always been against forcible child transfers, regarding them as a primary form of “biological” genocide (*ibid.* at 507).

<sup>364</sup> Reynolds, *supra* note 118 at 176 claiming, “[w]e can assume that, had he known of it, Lemkin would have accepted as appropriate Paul Hasluck’s [mid-twentieth century] drive for assimilation.”

policies or argued that they had genocidal implications,” the delegates were probably far from united on this matter.<sup>365</sup> For instance, Sandr Bahadur Kahn of Pakistan said his delegation:

understood perfectly that new countries desired to assimilate immigrants in order to create a powerful national unit; nevertheless if assimilation was nothing but a euphemism concealing measures of coercion designed to eliminate certain forms of culture, Pakistan formally opposed fascist methods of that kind, which emanated from philosophies that should be repudiated as contrary to the spirit and the aims of the Charter of the United Nations.

While Reynolds reads the general lack of attention paid to assimilation as an endorsement of this practice, it seems just as likely that the delegates simply avoided the issue as too contentious. Had there been true unity on assimilation, the *Genocide Convention* might have excused forcible child transfers and other otherwise genocidal measures when conducted as part of a larger assimilation scheme – but it did not. Here, it is important to remember that unless there is a very clear intent on the part of the framers to the contrary, the *Genocide Convention* must be read according to its “ordinary meaning.”<sup>366</sup> Since the framers exhibited no clear intent to excuse proscribed acts when those acts were committed as part of a larger assimilation scheme, interpretation of the *Genocide Convention* reverts to its “ordinary meaning,” which contains no assimilation exception.

Far from excusing acts that otherwise amount to genocide, evidence that forbidden acts were carried out during a program of forced assimilation may actually prove culpable intent. Forced assimilation centers on a hostility toward the targeted

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<sup>365</sup> Reynolds, *supra* note 118 at 176.

<sup>366</sup> *Vienna Convention*, *supra* note 32, Article 31.

group's continued existence as a "separate and distinct entity." It aims to see the group's distinctive characteristics eliminated as the group is absorbed into another group. In this sense, forced assimilation is akin to "attacks on the cultural and religious property and symbols of the targeted groups."<sup>367</sup> The ICTY and ICTR have stated,<sup>368</sup> and the ICJ recently affirmed, that, when carried out in tandem with an act prohibited under the *Genocide Convention*, evidence of such attacks could prove the existence of the specific intent to destroy the group.<sup>369</sup> Therefore, although acts of "forced assimilation by moderate coercion," may not amount to genocide, acts specifically proscribed in Article 2 of the *Genocide Convention* certainly do; and this remains true whether or not the perpetrators justified these acts with assimilationist rhetoric. In fact, the rhetoric of assimilation may actually prove genocidal intent.

### 5.3 Chapter summary

Thus, we see that attempts to escape liability for genocide by re-defining forcible child transfer as ethnocide, cultural genocide, or assimilation probably fail. Although the ILC destruction approach remains persuasive, the emerging genocide case law indicates that courts will be likely to determine that prohibited actions do constitute genocide even where intended to destroy the group through cultural processes. Similarly, the *Genocide Convention* contains no exception for acts carried out as part of a larger assimilation plan and, in the absence of a clear intention on the part of a majority of delegates, there seem to be no grounds for construing one. In fact, the international genocide case law indicates that attacks on a group's cultural and religious symbols may help prove the

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<sup>367</sup> *Bosnia v. Serbia*, *supra* note 32 at para. 343 citing *Kristic* (Trial Chamber) *supra* note 154 at para. 580.

<sup>368</sup> See above §4.6.

<sup>369</sup> *Ibid*; *Supra* note 263.

specific intent to destroy the group. To the extent assimilative policies mimic such attacks, those policies might actually help establish the existence of genocidal intent.

## CHAPTER 6: CONCLUSION

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As this thesis has demonstrated, Article 2(e) “makes sense” in the context of an international treaty that is intended to protect the viability of human groups. The *Genocide Convention* does not protect human groups as loose amalgamations of individuals who happen to bear similar traits; it protects the group itself. Group protection, in turn, requires robust prohibitions on acts that undermine group viability by disrupting the internal processes that are vital to the group’s continued existence as a “separate and distinct entity.” Child rearing is the quintessential process that racial, ethnic, religious, or national groups perform, as it is only through childrearing that these groups perpetuate themselves. Thus, any instrument purporting to protect these human groups should recognize the central role of child custody in assuring those protections.

Determining a *prima facie* violation of Article 2(e) requires a simple three-step inquiry. First, the fact finder inquires whether children of a protected group were indeed transferred to another group. Next, they determine whether the transfers were carried out forcibly. Finally, they determine whether the transfers were conducted with intent to destroy the group as such, at least in part. As we have seen, claims that the forcible transfers were intended to benefit the affected children are largely irrelevant to assessing culpability. A clear majority of courts and commentators have determined that mixed intentions and motivations are irrelevant in assessing acts of genocide and it is doubtful that the law has ever allowed benevolent motivations to trump criminal liability where an act was otherwise committed with culpable intent. It also does not matter that transferred children were often subjected to processes intended to strip them of their group’s culture.

Forcible child transfer is a form of physical and biological genocide that, while it may operate through cultural processes, is specifically forbidden under the *Genocide Convention*.

Article 2(e) of the *Genocide Convention* is actually quite narrow, prohibiting only the removal of minority group children for reasons specific to the children's affiliation with a particular group, and then only when that removal is animated by intent to destroy the group. States continue removing minority group children for reasons specific to that child's situation, including allegations that the child has suffered mistreatment, with no apparent danger of violating the *Genocide Convention*. Even where these interventions disproportionately affect minority groups, and might endanger the group's existence as an entity, there remains no danger of violating the *Genocide Convention* because there is no apparent intent to destroy the group. In fact, even the strongest reading of the *Genocide Convention* permits states tremendous latitude in their dealings with minority group children. States can compel education in the dominant culture and language, so long as this education is delivered in day schools and does not transfer custody of the children outside of the group. States can also compel boarding school attendance, so long as the education provided is sensitive to the children's culture and is not intended to threaten the group's existence. In short, all that the *Genocide Convention* seems to say is that if a state is interested in removing minority group children, it must do so in a manner that is not intended to destroy the children's group – hardly an unworkable constraint for states and others hoping to help minority group children.

One goal of this thesis has been to establish grounds on which groups victimized by forcible child transfers could seek redress through economic and moral claims.

Litigation generates a wealth of documentation that both establishes culpability and documents the untoward consequences of these programs.<sup>370</sup> Moreover, as Minow points out, “[t]he truth-telling surrounding the struggles for reparations can alter attitudes more than the reparations themselves, yet the palpable symbolism of actual reparations will redeem those struggles in ways that all the narration and fact gathering never could.”<sup>371</sup> However, many victimized groups will find courts unavailable to hear their claims, or that the expense of litigation is prohibitive. In those instances, it is hoped that victimized groups can use the legal framework established in this thesis to pursue a moral claim in the media and perhaps the legislature. In any case, calling these acts for what they were – genocide – provides victimized groups valuable symbolic capital that can be converted into tangible change.

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<sup>370</sup> Minow, *supra* note 22 at 123-24.

<sup>371</sup> *Ibid.* at 132.

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