



National Inquiry into
Missing and Murdered
Indigenous Women and Girls

A Legal Analysis of Genocide

SUPPLEMENTARY
REPORT

of the

NATIONAL INQUIRY INTO
MISSING AND MURDERED
INDIGENOUS WOMEN AND GIRLS



This supplementary legal analysis represents the views and opinions of the National Inquiry. In reaching our conclusion, we consulted with international legal scholars and lawyers with expertise on genocide and international crimes. The National Inquiry would like to thank, in particular, the contributions and insights of Professor Fannie Lafontaine, holder of the Canada Research Chair on International Criminal Justice and Human Rights at Université Laval; Amanda Ghahremani, international criminal lawyer and former Legal Director of the Canadian Centre for International Justice; and Catherine Savard, LL.M candidate at Université Laval. They are respectively Director, Investigator and Assistant-Coordinator of the Canadian Partnership for International Justice.

Cette publication est également disponible en français :

Une analyse juridique du génocide: un rapport supplémentaire de l'Enquête nationale sur les femmes et les filles autochtones disparues et assassinées

COVER IMAGE:

Special thanks to the artists whose work appears on the cover of this report:

Dee-Jay Monika Rumbolt (Snowbird), for *Motherly Love*
The Saa-Ust Centre, for the star blanket community art piece
Christi Belcourt, for *This Painting is a Mirror*



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1. INTRODUCTION

The mandate of the National Inquiry into Missing and Murdered Indigenous Women and Girls is, broadly speaking, to assess the root causes of the violence against Indigenous women and girls. The National Inquiry has determined that colonial structures and policies are persistent in Canada and constitute a root cause of the violence experienced by Indigenous women, girls, and 2SLGBTQQIA people. The report highlights that the thousands of truths shared before the National Inquiry reinforce the existence of acts of genocide against Indigenous women, girls, and 2SLGBTQQIA people:

The violence the National Inquiry heard about amounts to a race-based genocide of Indigenous Peoples, including First Nations, Inuit and Métis, which especially targets women, girls, and 2SLGBTQQIA people. This genocide has been empowered by colonial structures, evidenced notably by the Indian Act, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.¹

This supplementary report offers legal analysis and discussion supporting this conclusion.

The National Inquiry acknowledges that the determination of formal liability for the commission of genocide is to be made before judicial bodies. An assessment of both individual and state responsibility requires a considerable body of evidence and must be carried out by a competent tribunal charged with this task. The National Inquiry does not intend to fully demonstrate all the elements of a genocidal policy, since it does not have direct access to all of the evidence related to it. However, the information and testimonies collected by the National Inquiry provide serious reasons to believe that Canada's past and current policies, omissions, and actions towards First Nations Peoples, Inuit and Métis amount to genocide, in breach of Canada's international obligations, triggering its responsibility under international law. This report is limited to a legal analysis of genocide, but the National Inquiry's findings call for a broader examination of other international crimes, including in particular, crimes against humanity.

In Section 2, we discuss the definition of genocide. We outline the sources of the prohibition of genocide in international law, as well as the scope of the responsibility for breaching this rule, distinguishing state responsibility and individual responsibility. We provide a brief history of the drafting of this definition in treaty law and its failure to incorporate Indigenous and gender perspectives, and explain the unique nature of "colonial genocide", which is unlike the traditional understanding of genocide derived from the "Holocaust prototype".



In Section 3, we examine the material elements (*actus reus*) of genocide. We present the legal criteria to determine the existence of a protected group (national, ethnic, racial or religious) and of the five prohibited genocidal types of conduct. We then turn to assess whether Canada’s past and current policies, actions and omissions in relation to Indigenous Peoples qualify as genocidal actions.

In Section 4, we examine the definition and nature of “genocidal intent”, and how the “specific intent to destroy” element may apply to state conduct rather than individual behaviour. We assess the meaning of “destruction” within the legal definition of genocide and we scrutinize the existence of such a specific intent in Canada.

In Section 5, we explain the consequences of Canada’s breach of international law and elucidate Canada’s obligations to provide reparations and redress to Indigenous Peoples, particularly women, girls, and 2SLGTQQIA people.



2. DEFINING GENOCIDE

a) Genocide in International Law: Definition, Sources and Responsibility

The prohibition of genocide is contained both in international treaties and in customary international law and gives rise to both individual criminal responsibility and state responsibility.

Genocide is defined in the *Genocide Convention* as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²

Statutes of international criminal tribunals have replicated the same definition.³

The prohibition of genocide, “a modern word for an old crime,”⁴ does not merely constitute a conventional norm (provided by treaty). It has consistently been qualified as a universal and peremptory norm of customary international law: “The prohibition of genocide [...] has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.”⁵ International criminal tribunals have acknowledged the multiplicity of sources for the prohibition of genocide, both as a conventional norm and as customary international law:

[...] although the [Genocide] Convention was adopted during the same period that the term “genocide” itself was coined, the Convention has been viewed as *codifying a norm of international law long recognised* and which case-law would soon elevate to the level of a peremptory norm of general international law (*jus cogens*).⁶

The commentary to Article 26 on the *Responsibility of States for Internationally Wrongful Acts* expressly mentions that genocide is one of the peremptory norms that “are clearly accepted and recognized.”⁷



In the Canadian *Crimes Against Humanity and War Crimes Act*, genocide is defined as:

[...] an act *or omission* committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”⁸

The Canadian definition relies partly on the international definition found in the *Genocide Convention* and the *Rome Statute of the International Criminal Court*; two international treaties to which Canada is a party. However, the domestic statute explicitly adds one important element to the definition of genocide: omissions – that is, the *failure* to act – can constitute genocidal conduct. Importantly, the domestic definition relies on customary international law for what constitutes genocide and, by not listing the five punishable acts, the groups protected, or qualifying the intent to destroy, it allows for a living interpretation of the crime that remains consistent with the evolution of customary international law.⁹

The definition is divided into two important legal elements: the conduct (*actus reus*) and the intent (*mens rea*). The *actus reus* refers to the objective elements of the definition and comprises two elements: (1) the prohibited conduct enumerated in the definition (killing, causing serious bodily or mental harm, etc); and (2) the existence of a protected group against whom the conduct is directed. The *mens rea* refers to the subjective elements of the definition and comprises a general intent to commit the prohibited conduct and a specific intent to destroy the protected group, in whole or in part.

In the *Genocide Convention* and in customary international law, genocide is both a crime that entails individual criminal responsibility and a wrongful act that entails state responsibility. Most of the international legal developments of the past decades have dealt with individual and not state responsibility for international crimes. The principle of individual criminal responsibility for atrocity crimes was essentially born out of the Nuremberg and Tokyo trials after the Holocaust. The establishment of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the UN Security Council, the development of hybrid, internationalized criminal tribunals such as the one for Sierra Leone, and the creation of a permanent International Criminal Court, were all aimed at lifting the veil of statehood to bring individuals to account. The criminalization of genocide and other serious violations of human rights and the establishment of enforcement mechanisms at the international and national levels were indeed necessary to “give flesh and blood to the well-known dictum of the International



Military Tribunal, according to which ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.”¹⁰

However, individual criminal accountability for international crimes is not a substitute for state responsibility. On the contrary, the two forms of responsibility are of a different nature and complement each other, particularly in situations of organized, systemic and coordinated violence, which is often inherent to genocide. The National Inquiry, without excluding the possibility that individuals could be held liable for genocide in Canada, and duly noting the acts and omissions of provinces within Canada, draws a conclusion on the responsibility of Canada as a state for genocide under international law.

There is little precedent in international law for situations where the state is the perpetrator of genocide through structural violence, such as colonialism. State responsibility under the *Genocide Convention* has been historically seen as limited to preventing genocide and punishing it, but in 2007, the International Court of Justice (ICJ) read in an obligation on states *not to commit* genocide.¹¹ The ICJ explored the question of the attributability of genocidal acts to a state – Serbia – and eventually held that “the acts of genocide at Srebrenica [could not] be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus [did] not on this basis entail the Respondent’s international responsibility.”¹² While this test is an important legal development, the precedent itself is of limited relevance for the Canadian context since the genocidal acts were perpetrated by an armed group whose degree of dependence on the Serbian state was considered insufficient by the Court.

The Canadian colonial context is different from the Srebrenica genocide, because in the former case, genocidal acts were not perpetrated by a group related to the state, but in direct application of governmental policies. As such acts of genocide perpetrated in application of the policies established and maintained by the Canadian state are attributable to Canada under the rules of customary international law. Article 4 of the International Law Commission's Draft articles on *Responsibility of States for Internationally Wrongful Acts*, which constitutes customary international law,¹³ provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government of a territorial unit of the State.”¹⁴ Pursuant to this article, “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”¹⁵



The obligation on states not to perpetrate genocide originates in customary international law. This customary rule has been codified to a large extent in the *Genocide Convention*, but remains independent of it. As we shall see, the same material elements (*actus reus*) and mental elements (*mens rea*) compose the crime committed by an individual and the international wrongful act committed by a state, but there are fundamental, inherent distinctions that serve to establish responsibility in both cases.

In this analysis, we will be separately examining both the actions and omissions that constitute genocide and the intent to commit genocide, to reveal that Canada's actions and omissions amount to genocide. These conclusions are based on existing interpretations of international law. However, the National Inquiry finds it important to first situate the current state of international law in what it has traditionally failed to consider: Indigenous and gender perspectives.

b) History of the *Genocide Convention* and Exclusion of Indigenous Perspectives

The term genocide was coined by the Polish jurist Raphael Lemkin from the Greek words *genos*, which means race or tribe, and *cide*, which derives from the Latin root *cidere*, to kill.¹⁶ For him, the concept of genocide was two-fold, entailing both a “negative” and a “positive” aspect.¹⁷ The “negative” aspect involved the “destruction of the national pattern of the oppressed group,” which was then followed by the “positive” “imposition of the national pattern of the oppressor.”¹⁸ He carried out an extensive historical review of atrocities perpetrated throughout history and identified three types of genocides: physical, biological and cultural. In his view, physical genocide consisted of the physical destruction of a group, biological genocide was the destruction of the group's reproductive capacity, and cultural genocide yielded the destruction of structures and practices that allowed the group to keep living as a group.¹⁹

The crime of genocide became an important issue at the very first session of the UN General Assembly (UNGA) in 1946. The Nuremberg Tribunal's final judgement, rendered on 30 September and 1 October 1946, was criticized as failing to punish what was referred to by many as a “peacetime genocide.”²⁰ Those criticisms gave rise to a strong political will to prevent further atrocities, which crystallized in the form of Resolution 96(I) on the crime of genocide.²¹ In accordance with Lemkin's conception of genocide, this Resolution defined genocide as “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”²² The UNGA affirmed that “genocide is a crime under international law which the civilized world condemns,”²³ and charged the Economic and Social Council (ECOSOC) to “undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide.”²⁴



The drafting process of what would become the *Convention on the Prevention and Punishment of the Crime of Genocide* can be divided into three parts. First, the UN Secretariat, upon ECOSOC's request, pursuant to Resolution 96(I), generated a first draft of the Convention. Second, this draft was edited by a Special Committee under the authority of ECOSOC. Third, in the second half of 1948, this draft became the point of departure for negotiations at the UNGA 6th Commission. Two of the most salient contentions throughout all stages of drafting pertained to the inclusion of cultural genocide and the forcible transfer of children, initially envisioned as "cultural genocide".²⁵ **In this context, it is remarkable how, throughout the entirety of the drafting process and negotiations on the matter of cultural genocide, Indigenous perspectives were completely ignored and excluded from the discussions.**

The omission of Indigenous voices was more than mere oversight. Colonial states, including Canada, actively pushed for "cultural genocide" to be excluded from the Convention, knowing that they were, at the very least, perpetrating this type of genocide contemporaneously with the drafting of the Convention. These countries argued that the protection of minorities should be addressed through international human rights instruments, because the inclusion of cultural genocide would impede the universal ratification of the Convention. Draft article III, which addressed cultural genocide, was eventually withdrawn during negotiations at the UNGA 6th Commission, with a vote of 25 to 16, and 4 abstentions.

Despite the defeat of cultural genocide as an enshrined type of genocide in the Convention, the act of forcible transfer of children was maintained under Article 2(e) in the final version of the treaty. Although Lemkin originally envisioned this conduct as a form of cultural genocide, it was considered by some negotiating countries to also represent physical or biological genocide.²⁶ The presence of paragraph (e) within the Convention remains the subject of extensive debate among legal scholars and jurists. If it is sometimes perceived as "anomalous" given the drafting history,²⁷ others instead consider it as an opening for the recognition of cultural genocide within the Convention.²⁸

The National Inquiry believes that the debate around "cultural genocide" versus "real" genocide is misleading, at least in the Canadian context. Of course, the "anomaly" resides in the fact that Indigenous peoples have to work with norms of international law decided by "sovereign states" who wilfully excluded their perspectives to serve their own interests. Be that as it may, the National Inquiry is of the opinion that the definition of genocide in international law, as it stands, encompasses the past and current actions and omissions of Canada towards Indigenous Peoples.



c) Genocide and the Traditional Exclusion of Gender Perspectives

Not only does the drafting history of genocide, as enshrined in the Convention, fail to incorporate Indigenous perspectives; the interpretations given to the definition also fail to address crucial, gendered facets of genocide.²⁹ Examining genocide through a gendered lens reveals that gender “is woven into the perpetrators’ planning and commission of coordinated acts that make up the continuum of genocidal violence.”³⁰ In particular, gender destructive acts allow perpetrators to “maximize the crime’s destructive impact on protected groups.”³¹ Despite gender’s prevalence and indispensability in the commission of genocide, gendered impacts of genocide are largely under-studied, and, as a result, “the expansive female experience of genocide is often reduced to rape and other acts of sexual violence, just as the male experience is frequently and erroneously limited to killings.”³² **In actuality, genocide encompasses a variety of both lethal and non-lethal acts, including acts of “slow death,”³³ and all of these acts have very specific impacts on women and girls. This reality must be acknowledged as a precursor to understanding genocide as a root cause of the violence against Indigenous women and girls in Canada.**

The Rwandan genocide and the seminal *Akayesu* judgement in 1998 had a major impact on the recognition of the gender-specificity of this crime. It affirmed that “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.”³⁴ Regarding the intention to destroy the group, the Chamber affirmed that “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.”³⁵ It further considered that “[s]exual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.”³⁶

This judgement also marked an important first step in the recognition of women and girls’ particular experience of genocide, paving the way to a more gendered analysis of this crime. **Targeting victims in a gender-oriented manner destroys the very foundations of the group as a social unit and leaves long-lasting scars within a group’s social fabric. It is inherent to its destruction.** Accordingly, for the purposes of its mandate, the National Inquiry emphasizes that gender-based violence is not simply “an aspect in the story of genocide itself, but also a key component in how we understand [...] societal vulnerabilities over the *longue durée*.”³⁷ **Genocide is a root cause of the violence perpetrated against Indigenous women and girls, not only because of the genocidal acts that were and still are perpetrated against them, but also because of all the societal vulnerabilities it fosters, which leads to deaths and disappearances and which permeates all aspects of Canadian society today.**



d) The Particular Nature of Colonial Genocide

Colonialism is a unique form of violence that does not fit easily in the international legal definition of the *crime* of genocide. The way in which the legal requirements have been developed and applied to establish individual responsibility, rather than state responsibility, partly explain why the traditional, legal understanding of genocide has often been considered incompatible with colonial genocide.

The Holocaust model, on which the definition is based, provides a limited prototype of genocide as time-intensive, mass murder, which is calculated, coordinated within a nation-state, and well-planned by authoritarian leaders espousing ideological worldviews. Although colonialism contains many of these elements, such a narrow conception of genocide fails to encompass the diverse lived experiences of Indigenous peoples across Canada, and elsewhere, and fails to give its true meaning to genocide. We will focus on three distinguishing aspects of colonial genocide: the nature; the temporal and geographic scope; and the ideological drive of the destruction.

Whereas the genocides that have been the object of judicial scrutiny thus far mainly focus on physical destruction implemented through lethal force (e.g. the Holocaust or Rwanda), colonial policies in Canada have often been rooted in lethal but also non-lethal measures, aimed at assimilating and obliterating Indigenous populations.³⁸ As a product of the nascent Canadian nation-state, Indigenous peoples and groups were expected to submit to colonial governments whose objectives were to “secure permanent access to Indigenous lands and resources for the settler population.”³⁹ Canadian colonial policies certainly included physical destruction, but they also endeavoured to elicit subjugation and obedience through violent and coercive “absorption” and assimilation.⁴⁰ These policies were implemented sporadically, against diverse Indigenous communities, with varying intensity, and over different temporal and geographical territories.⁴¹ As scholars Andrew Woolford and Jeff Benvenuto write, the predominantly “culturally oriented forms of Indigenous group destruction that characterize Canadian colonialism challenge entrenched colloquial and scholarly understandings of genocide as nothing more than mass murder.”⁴²

Colonial genocide is also a slow-moving process. Unlike the traditional paradigms of genocide, such as the Holocaust, the Armenian Genocide, and the Rwandan Genocide which took place over the course of 12 years,⁴³ 8 years, and 3 months respectively, colonial destruction of Indigenous peoples has taken place insidiously and over centuries. The intent to destroy Indigenous peoples in Canada was implemented gradually and intermittently, using varied tactics against distinct Indigenous communities. These acts and omissions affected their rights to life and security, but also numerous economic, cultural and social rights. In addition to the lethal conduct, the non-lethal tactics used were no less destructive and fall within the



scope of the crime of genocide. These policies fluctuated in time and space, and in different incarnations, are still ongoing. Without a clear start or end date to encompass these genocidal policies, colonial genocide does not conform with popular notions of genocide as a determinate, quantifiable event.⁴⁴

The National Inquiry is of the opinion that genocide in Canada can be understood as a “composite act,” which is “a breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful.” In such a case, the “breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”⁴⁵ The commentary to the Draft Articles on State Responsibility further explains:

Composite acts ... are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is “a series of acts or omissions defined in aggregate as wrongful.” Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination ... Some of the most serious wrongful acts in international law are defined in terms of their composite character.⁴⁶

Framing genocide in Canada as an unlawful act of the state spanning decades and composed of numerous distinct acts and omissions which, in aggregate, violate the international prohibition against genocide allows us to understand its true nature without the entanglement caused by an inappropriate “copy and paste” of the logic pertaining to individual criminal liability and to Holocaust-types of genocides.

Finally, many interpreters of the international legal definition of genocide cling to an uncritical view that genocide can only be committed in totalitarian and authoritarian regimes. Inherent in that perception of the definition is the notion that genocide is the product of the individual mastermind (individual criminal responsibility) with a deranged reactionary ideology (special intent), unfettered by the safeguards of democracy and rule of law.⁴⁷ This reigning view of genocide, which is also present in comparative genocide studies, ironically places countries like the United States and Canada “as the redeeming power in world affairs, whether as the agent of liberalization or as the cavalry that rescues victims from genocidal elites and their militias in the “Third World.”⁴⁸ As genocide scholar Dirk A. Moses critiques, this view “ignore[s] the genocidal foundation of settler colonies” including Canada and “ignores the fate of the Native Americans [and First Nations].”⁴⁹



Racist ideology certainly plays a role in colonialism, and there are key historical figures who promoted this racist ideology and advocated for the violent physical and cultural destruction of Indigenous peoples in Canada. However, reducing colonialism to individual culpability negates the collective nature of “colonial design”⁵⁰ and the reality that “bureaucratic mechanisms are employed in the destruction of cultures”⁵¹ both in democratic contexts and in totalitarian ones. Rather than a uniform national policy of genocide, Canadian history, with its federalist aspirations, is permeated by assorted policies of physical, structural, and legal erasure,⁵² perpetrated not only by individual masterminds, but by a collective, burgeoning nation-state.

The insidious and gradual nature of the obliteration of Indigenous peoples, and the lack of a uniform national policy spearheaded by a totalitarian mastermind, differentiate colonial genocide from our traditional understanding of what constitutes a genocide.⁵³ These distinguishing factors have, unfortunately, allowed the Canadian consciousness to dismiss Canada's colonial policies as racist and misconceived, rather than acknowledge them as explicitly genocidal and, even, ongoing.



3. CANADA'S ACTIONS AND OMISSIONS AS GENOCIDAL CONDUCT (ACTUS REUS)

As noted above, the *actus reus* refers to the objective elements of the definition and comprises two elements: (a) the existence of a protected group, against whom (b) prohibited conduct, as enumerated in the definition (e.g. killing, causing serious bodily or mental harm) is directed.

a) Protected Groups

A crucial element of genocide is that victims are targeted not because of their individual identity, but because of their membership in a protected group.⁵⁴ The *Genocide Convention* identifies four protected groups: national, ethnical, racial, and religious groups. The ICTR Trial Chamber has clarified the objective meanings of this nomenclature: “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”⁵⁵ An ethnic group constitutes “a group whose members share a common language or culture.”⁵⁶ A racial group, a concept now criticized as “outmoded or fallacious,”⁵⁷ can be defined “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”⁵⁸ Finally, a “religious group is one whose members share the same religion, denomination or mode of worship.”⁵⁹

A negative definition of the group (as not being the same as the perpetrator) is not sufficient; the group must be identified through positive characteristic. However, a “strictly positivistic approach might lead to the conclusion that only persons falling precisely within any of the categories mentioned by name in the Genocide Convention could be victims of the crime of genocide as perceived in international law.”⁶⁰ To prevent an effective negation of the applicability of genocide to many contexts, the concept of protected group has been interpreted broadly by international jurisprudence. In the *Akayesu* Trial Judgement in 1998, the ICTR case law demonstrated that, even if the Tutsi did not *prima facie* match the definition of an ethnic group, they nevertheless constituted a protected group since the Belgian colonizers had differentiated them from the Hutu, notably through the establishment of a system of identity cards based on that distinction.⁶¹ This distinction was further confirmed by the self-perception of both groups’ members, and the self-perpetuation of this distinct identity.⁶² As such, they fit the definition of a protected group with stable and permanent characteristics, as opposed to temporary ones.⁶³

Following the *Akayesu* judgement, international jurisprudence has developed a subjective conception of protected groups, taking into account both the perception of perpetrators and victims. In the *Nchamihigo* case, the ICTR Trial Chamber went as far as to affirm that “it is enough for the



perpetrator to perceive the victim as belonging to the national, ethnic, racial, or religious group which the perpetrator intended to destroy in whole or in part. It is not necessary for the victim actually to belong to the group.”⁶⁴ The fact that the victim perceived himself or herself as part of the group may also be relevant in some instances.⁶⁵

The National Inquiry emphasizes that a broad interpretation of the notion of protected group is consistent with the object and purpose of the *Genocide Convention*, does not depart from its text, and has not been contested by states.⁶⁶ Therefore, it endorses the view expressed by the Darfur Commission of Inquiry, which affirmed that it may “be safely held that that interpretation and expansion [of a protected group] has become part and parcel of international customary law.”⁶⁷

When it comes to the Canadian context, Indigenous peoples are obviously not one homogeneous group. The Canadian constitution legally recognises three categories of Indigenous peoples – Inuit, Métis, and First Nations – but within these three groups, there is incredible diversity. Without entering into detailed statistical information, let us only mention as an example that in 2016, more than 70 Aboriginal languages were spoken across Canada, falling into 12 separate language families encompassing significantly more cultures.⁶⁸

If we were to examine Canada’s relationship with all of these groups individually, or for the purpose of individual criminal prosecution, we could possibly conclude that there have been hundreds of genocides. However, for the purposes of this analysis on Canada’s responsibility as a state for colonial genocide, the National Inquiry uses the term Indigenous peoples collectively.

Beyond the question of whether Indigenous peoples can be construed as a national, ethnic and/or racial group as per the definition discussed above, what matters is that the conduct and policies of the Canadian government generally targeted Indigenous peoples as a whole and considered them as such. The Canadian genocide made a “mosaic of victims,”⁶⁹ as did other recognized genocides,⁷⁰ and the diversity within Indigenous peoples in Canada must not be construed as undermining the existence of the genocide that was perpetrated against them.

Indigenous peoples could possibly fall into all three of the above categories of protected groups. They were targeted because of their distinct cultures, languages, spirituality, and occupation of traditional land, and therefore we may consider them as a protected group for the purposes of this analysis.

b) Genocidal Conduct – the Five Prohibited Acts/Omissions

The conception of genocide as a crime committed predominantly through organized mass killings belittles the complexity of genocidal violence and undermines its very definition, which includes



both lethal and non-lethal methods of destruction. We will (i) briefly outline the main legal principles established in relation to the prohibited conduct envisaged by the genocide definition, before (ii) turning to some of the testimony heard at the hearings of the National Inquiry, which, in conjunction with the findings of previous inquiries and research, provides ample evidence that all enumerated acts were committed, even if technically only one needs to be proven.

It should be noted that in the context of colonial genocide, where state policies spanning decades are at the core of the determination of state responsibility for genocide, the evidence pertaining to the *actus reus* and the inference of the *mens rea* tend to blur. Consequently, the next section on the specific intent to commit genocide contains material also relevant to the *actus reus* component.

Furthermore, the National Inquiry insists that its analysis should not be seen as an exhaustive documentation of all conduct that comprises the genocide against Indigenous Peoples in Canada. **It highlights some of the most prevalent conduct revealed in its hearings and interviews, and examines this conduct through a gender-focused conception of genocide with specific impacts on women and girls. A gendered lens recognises that genocide can be perpetrated through the commission of lethal and non-lethal acts.** The National Inquiry regrets that in international law, “[p]rogress [...] has been halting as the view of “genocide as massacre” continues to assert itself, both in courtrooms and in the corridors of power.”⁷¹ However, the evidence amassed through the powerful testimonies of survivors who spoke before the National Inquiry forms part of a global awakening to the urgent necessity of fully taking into consideration gender implications of the five acts of genocide.

i. Applicable Law for Genocide by Killing

The underlying conduct “killing of members of the group”⁷² has been interpreted broadly by international criminal tribunals: the term “killing” includes all forms of homicide and thus must be construed more widely than “murder.”⁷³ In other words, “killed” is interchangeable with the phrase ‘caused death’.⁷⁴ Premeditation is not necessary for the *actus reus* of genocide to take place.⁷⁵ As noted in the Global Justice Center’s report on gender and genocide:

Killing, often primarily of men and adolescent boys, is the privileged genocidal act, and consequently examinations of the commission and risk of genocide largely and unhelpfully revolve around the numbers killed. Genocidal killing is in fact a highly gendered activity, with men and boys targeted for different reasons and killed in different ways than women and girls.⁷⁶



ii. Applicable Law for Genocide by Serious Bodily or Mental Harm

Serious bodily or mental harm encompasses a broad range of non-fatal genocidal acts. It has been jurisprudentially defined as “an intentional act or omission causing serious bodily or mental suffering.”⁷⁷ This concept encompasses, *inter alia*, “acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”⁷⁸ It should be noted that “serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁷⁹

We previously noted the ground-breaking inclusion by the ICTR of sexual violence as constitutive of genocide. This interpretation was later adopted and enshrined, along with torture, in the Elements of Crimes that complement the Rome Statute as serious bodily or mental harm.⁸⁰ This list is not exhaustive and includes a variety of other conduct that falls within the scope of this definition, for instance, deportation and forcible transfer.⁸¹ Ultimately, the gravity of the suffering must be assessed with due regard for the particular circumstances of each case.⁸²

iii. Applicable Law for Genocide by Inflicting Conditions of Life Meant to Bring about Physical Destruction

The infliction of conditions of life meant to bring about physical destruction has been interpreted on many occasions by the ICTY and ICTR Trial Chambers. The ICTY Trial and Appeals Chamber in *Tolimir* summarised the relevant jurisprudence by affirming that these underlying acts:

[...] are methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts [...] include, *inter alia*, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.⁸³

The ICC Elements of Crimes provide a similar definition: “[t]he term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”⁸⁴ A prominent factual application of this definition can be found in the *Al-Bashir* case at the ICC. In this decision, the Pre-Trial Chamber held:



[...]the acts of contamination of the wells and water pumps and the forcible transfer of hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups coupled with the resettlement in those villages and lands they had left by members of other tribes allied with the Government of Sudan [...] were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.”⁸⁵

iv. Applicable Law for Genocide by Imposing Measures Intended to Prevent Births within the Group

One of the earliest clarifications of the meaning of “imposing measures” was in the *Eichmann* case, in which the Court stated that it can be construed as “actually putting the measures into effect, at least to the point of giving orders to carry them out.”⁸⁶ However, the phrase “intended to” “suggests that the mere subjective tendency to prevent births suffices.”⁸⁷

Prohibited measures under this article were interpreted by *ad hoc* tribunals as being both physical and mental. While physical measures include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages,”⁸⁸ mental measures may include, for instance, traumatic acts following which victims refuse to procreate. The *Akayesu* Trial Chamber explains, “[f]or instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”⁸⁹

v. Applicable Law for Genocide by Forced Transfer of Children from One Group to Another

There is little jurisprudence related to the underlying act of forcible transfer of children. According to the ICC Elements of Crimes, this prohibited conduct requires that “[t]he perpetrator forcibly transferred one or more persons” belonging to a particular national, ethnical, racial or religious group to another group.⁹⁰ The ICC Elements of Crimes further require that the transferred person be under 18 years of age, and that this age was known (or should have been known) by the perpetrator.⁹¹

The ICTR Trial Chamber in *Akayesu* adopted a rather wide interpretation of the *actus reus* of forcible transfer of children, affirming that its “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.”⁹² This approach was codified in the ICC



Elements of Crimes, which specifies that the term “forcibly” includes “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.”⁹³

c) Canada’s Policies as Elements of the *Actus Reus*

The unique nature of colonial genocide, perpetrated by a state through the establishment and maintenance of policies over lengthy periods of times, implies a pattern of “domination and dehumanization”⁹⁴ which enable a myriad of genocidal acts to take place. The National Inquiry does not intend to elaborate on all of the elements of the genocidal *actus reus* that took place in Canada over the years in application of state policies. The National Inquiry is not a tribunal nor a court of justice and could not directly hear the considerable body of evidence this assessment would require. However, genocidal acts permeate the thousands of testimonies heard by the National Inquiry in the course of its mandate.

Stories of violence against women, girls, and 2SLGBTQQIA people are rooted in past events and refer to the lasting, generational consequences of these events. Testimonies of survivors suggest that colonial structures and policies, “evidenced notably by the Indian Act, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, [directly led] to the current increased rates of violence, death, and suicide in Indigenous populations.”⁹⁵

In particular, truths heard by the National Inquiry shed light on “deaths of women in police custody; [Canada’s] failure to protect Indigenous women, girls, and 2SLGBTQQIA people from exploitation and trafficking, as well as from known killers; the crisis of child welfare; physical, sexual, and mental abuse inflicted on Indigenous women and girls in state institutions; the denial of Status and membership for First Nations; the removal of children; forced relocation and its impacts; purposeful, chronic underfunding of essential human services; coerced sterilizations; and more.”⁹⁶ The National Inquiry considers that those acts, in addition to numerous others and those mentioned below in the *mens rea* section, qualify as elements of the *actus reus* of genocide as defined above.

It further notes that its findings are consistent with those of previous commissions established by the Canadian state, such as the 1991 Aboriginal Justice Inquiry, the 1996 Royal Commission on Aboriginal Peoples, the 2001 Aboriginal Justice Implementation Commission and the 2015 Truth and Reconciliation Commission. Within their respective mandates, these commissions highlighted past and current forms of violence perpetrated by the Canadian state against Indigenous peoples, as well as the lasting effects of the colonial policies and structures maintained until now. The lack



of implementation of many, if not most, of their recommendations is further evidence of Canada's continuing violation of its international obligation not to commit genocide. **These prohibited conducts, which match one or more of the prohibited acts within the definition of genocide, coupled with the specific intent to destroy discussed in the next section, leads the National Inquiry to conclude that there are serious reasons to believe that Canada is responsible for committing genocide against Indigenous peoples.**



4. CANADA’S SPECIFIC INTENT TO DESTROY INDIGENOUS PEOPLES (MENS REA)

a) What is “Specific Intent” for a State?

Genocidal intent has historically been interpreted from the perspective of individual criminal responsibility. The requirement to establish states’ *mens rea* has been the object of little jurisprudence. The intent (or *mens rea*) inherent to the crime of genocide, as it pertains to individual criminal responsibility, consists of two distinct mental elements: a general intent to commit the underlying acts and a specific intent to destroy the group in whole or in part.⁹⁷

When it comes to state responsibility for the international wrongful act of genocide, the National Inquiry considers the attribution of intent to a state, in the same manner as evaluating a physical person’s state of mind, is somewhat fictional.⁹⁸ As William Schabas points out, states “do not have specific intent. Individuals have specific intent. States have policy. The term specific intent is used to describe the inquiry, but its real subject is State policy.”⁹⁹ That is, state policies embody the state’s *mens rea*. This explains why, according to Schabas, “when asked whether ‘acts of genocide have been committed,’ bodies like the Darfur Commission and the ICJ do not pursue their search for these marginal individuals. Rather, they look to the policy.”¹⁰⁰

This interpretation of state intent as being policy-based is supported in supplemental academic literature. As Paola Gaeta further elucidates:

For the international responsibility of the state to arise, however, there would be no need to demonstrate that the state as such – or one or more of its officials – harboured a genocidal intent in the criminal sense. This is a requirement that only pertains to the criminal liability of individuals. Absent direct evidence of the existence of a genocidal policy, it would be necessary only to prove that, because of the overall pattern of violence, the ultimate goal of the policy of the state cannot but be that of destroying the targeted group as such.¹⁰¹

By contrast, the necessity to prove a genocidal policy to establish individual criminal responsibility has been the object of debate. Without entering into the details of this complex question, the ICTY Appeals Chamber in *Jelisić* stated that “the existence of a plan or policy is not a legal ingredient of the crime,” but it recognized that “in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases.”¹⁰² It has indeed been argued that a policy always underlies the commission of genocide and that it is either a formal requirement or at least an implicit, but necessary, element of the crime.¹⁰³



The ICC Elements of Crimes have also added a contextual element to the definition of genocide, requiring that “[t]he conduct [take] place in the context of a manifest pattern of similar conduct directed against that group or [is] conduct that could itself effect such destruction.” The Pre-Trial Chamber in the *Al-Bashir* case at the ICC appeared to interpret the first leg of this requirement so as to require a genocidal policy as a prerequisite to both individual genocidal acts and genocidal intent.¹⁰⁴

Regardless of the debate as regards individual criminal liability, **the National Inquiry is of the view that a state’s specific intent to destroy a protected group can only be proved by the existence of a genocidal policy or manifest pattern of conduct. This is particularly inescapable in the context of colonial genocide where, as already noted, the internationally wrongful act is slower, more insidious, structural, systemic, and often spans multiple administrations and political leadership.**

The proof needed to establish the *mens rea* for genocide is necessarily complex. In the 2007 *Serbia* case, discussing evidence of state intent, the ICJ affirmed that:

[t]he *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.¹⁰⁵

Furthermore, the jurisprudence of ad hoc tribunals has clarified that specific intent may:

[...] in the absence of direct explicit evidence, 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 atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.¹⁰⁶

b) What does intent to destroy a protected group mean?

The National Inquiry acknowledges that the exact scope of the intent to destroy a protected group, in whole or in part, is controversial.¹⁰⁷ The traditional conception of genocidal intent, restricted to the physical or biological destruction of a group, is rooted in the Convention’s *travaux préparatoires*. As mentioned previously,¹⁰⁸ states voted in favour of the exclusion of Article 3 of the draft convention, which would have provided for cultural genocide. Accordingly, international



criminal tribunals have often invoked the Convention's *travaux préparatoires* to support the view that the definition should be restrictively construed.

However, this approach is increasingly criticized. First, it is not consistent with the general principles of interpretation laid down in the *Vienna Convention on the Law of Treaties* (VCLT). If the *travaux préparatoires* and negotiations surrounding the elaboration of the 1948 Convention are relevant to grasp the nature of the concept of genocide, they only have a limited legal value; *travaux préparatoires* are not a source of international law.¹⁰⁹ As such, these texts can only be used as a supplementary means of interpretation, either to confirm interpretations done in accordance with the ordinary meaning of the terms of the treaty, in their context and in the light of the treaty's object and purpose, or if such an interpretation leaves the meaning ambiguous, or leads to a result which is manifestly absurd or unreasonable.¹¹⁰ **As we will demonstrate in the analysis below, interpreting genocidal intent as encompassing only physical and biological destruction does not accord with the ordinary meaning of the word "destruction" in its context (i.e. the prohibited acts) and in light of the object and purpose of the Convention. Moreover, a restrictive interpretation of the term "destroy" leads to absurd results, particularly the forcible transfer of children, but also many non-lethal genocidal conduct encompassed in the definition, which can hardly be reconciled with any of those aims.**¹¹¹

The inclusive approach to interpreting the meaning of "destruction" is best exemplified by a trend of cases before German domestic courts and the European Court of Human Rights (ECHR), which have concluded that genocidal intent may be construed as including the destruction of a group *as a social unit*. After the Bosnian genocide, the German Federal Attorney-General investigated approximately 131 cases of suspected genocide, many of which culminated in prosecutions.¹¹² In the 1997 *Jorgic* case, the Higher Regional Court in Düsseldorf held that "[t]he intent to destroy a group, taken literally as part of the elements of the genocide crime, includes more than sheer physical-biological destruction"¹¹³ and also encompasses the "destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together."¹¹⁴ This interpretation was based on the literal meaning of genocide as enshrined in German domestic law, the *Genocide Convention*, and the statutes of both *ad hoc* international criminal tribunals. The Regional Court further concluded that, in the light of differing ICTY and ICTR jurisprudence, "an understanding of genocide that went beyond biological-physical destruction of the protected group was possible."¹¹⁵ These findings were subsequently confirmed in appeal both by the Federal Court of Justice and the Federal Constitutional Court of Germany.¹¹⁶

Despite this emerging trend, the ICTY Trial Chamber in the 2001 *Krstić* judgement expressly rejected the view adopted by German domestic courts in the *Jorgic* case. The Trial Chamber affirmed that "despite recent developments, customary international law limits the definition of



genocide to those acts seeking the physical and biological destruction of all or part of the group.”¹¹⁷ This ruling was upheld in appeal, but one of the Appeals judges, Judge Shahabuddeen filed a partially dissenting opinion where he concluded that “the intent to destroy the group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part, except in particular cases in which physical destruction is required by the Statute.”¹¹⁸

One year later, in the 2005 *Blagojević* judgement, the ICTY Trial Chamber gave preference to this dissenting opinion, with an eye to the *Jorgic* precedent and the *Akayesu* case at the ICTR, and held:

A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself.¹¹⁹

In other words, the Trial Chamber in *Blagojević* “found an intent to physically destroy the group through acts intended to harm its socio-cultural structure,”¹²⁰ and convicted Blagojević for the crime of genocide.¹²¹

In the 2006 *Krajišnik* case, the ICTY Trial Chamber followed Judge Shahabuddeen’s reasoning and determined that the word destroy “is not limited to physical or biological destruction of the group’s members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members.”¹²² In a notable footnote to this quote, the ICTY Trial Chamber remarked:

[i]t is not accurate to speak of “the group” as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members’ culture and beliefs, are neither physical nor biological. Hence the Genocide Convention’s “intent to destroy” the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said.

The ECHR eventually heard the German *Jorgić* case in 2007 and upheld the German rulings.¹²³ The ECHR confirmed that interpreting genocidal intent as including the destruction of a group as a social unit was “consistent with the essence” of the offence of genocide.¹²⁴ The Court proceeded to explain:



[t]here are no reported cases in which [national courts of State Parties to the Genocide Convention] have defined the type of group destruction the perpetrator must have intended in order to be found guilty of genocide, that is, whether the notion of ‘intent to destroy’ covers only physical or biological destruction or whether it also comprises destruction of a group as a social unit.¹²⁵

The ECHR corroborated the German courts’ expansive interpretation of the ‘intent to destroy the group as such’ as being “covered by the wording, read in its context, of the crime of genocide in the Criminal Code and [did] not appear unreasonable.”¹²⁶

After careful examination of divergent views and a rigorous analysis of the definition of genocide as it currently stands, the National Inquiry is of the view that the “specific intent to destroy” covers not only physical or biological destruction, but also, at a minimum, the destruction of a group as a social unit. In addition to the arguments emanating from the case law cited above, the National Inquiry notes, in particular, that the phrase “as such” may be construed as meaning the group as a social unit.¹²⁷ As William Schabas points out, “[t]he words of the Convention can certainly bear such an interpretation [...]. It would also encompass without doubt the destruction of aboriginal communities by a combination of violence, eradication of economic life, and incitement to assimilation.”¹²⁸ Moreover, the act of forced transfer of children does not fit within a narrow conception that is limited to physical-biological destruction, nor do the other non-lethal prohibited acts that fall within the scope of the definition.

Following the *Krstić* case at the ICTY, some scholars have suggested that biological destruction “must then be construed so as to include the forcible transfer of children.”¹²⁹ However, the National Inquiry finds that biological genocide – that is the destruction of the group’s reproductive capacity – is incongruous with the inherent nature of the forced transfer of children.¹³⁰ The prohibition of the forcible transfer of children can only logically be construed in relation to the specific aim of destroying a group as a social unit.¹³¹ With the recent legal developments pertaining to this element of genocide, some scholars believe that “it is likely that future tribunals or courts will accept this view of intention to destroy if they feel it is required to achieve justice.”¹³²

The National Inquiry fully embraces and adheres to the legal reasoning behind the view that genocidal intent encompasses the destruction of a group as a social unit, in addition to physical and biological destruction.



c) Canada's intent to destroy Indigenous Peoples

Canada's colonial history provides ample evidence of the existence of a genocidal policy, a "manifest pattern of similar conduct", which reflects an intention to destroy Indigenous peoples. The Canadian state was founded on colonial genocidal policies that are inextricably linked to Canada's contemporary relationship with Indigenous peoples. Modern Canadian policies perpetuate these colonial legacies, and have resulted in clear patterns of violence and marginalisation of Indigenous peoples, particularly women, girls and 2SLGBTQQIA people. These policies are documented in detail in *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a, and include practices such as child over-apprehension, lack of police protection, forced sterilization, and the ongoing impacts of Indian Act legislation, as well as the maintenance of the status quo.

Having established the composite character of the wrongful acts committed for decades by Canada, in violation of the international prohibition of genocide, the National Inquiry also concludes that Canada, as a state, has exhibited the requisite *mens rea*. Canada has displayed a continuous policy, with shifting expressed motives but an ultimately steady intention, to destroy Indigenous peoples physically, biologically, and as social units, thereby fulfilling the required specific intent element.

Colonial policies in Canada aimed to obliterate the various Indigenous nations who occupied the land at the time and posed a real threat to the existence of Indigenous communities. As examples of documented factual occurrences, throughout the 1700s, colonial troops participated in "biological warfare"¹³³ by distributing blankets infested with the smallpox virus throughout Indigenous communities, "with the effect of reducing the populations of specific Indigenous Nations by upwards of 50 percent."¹³⁴ In the 1750s, scalping bounties were offered in Nova Scotia, by legal proclamation, to entice and reward the murder of its Indigenous peoples, the Mi'kmaq.¹³⁵ Many other Indigenous nations were persecuted and murdered, including the Beothuk who are believed to have been completely eliminated by the late 1820s.¹³⁶

In addition to the premeditated killing of Indigenous peoples, there existed egregious colonial policies that caused serious bodily and mental harm to Indigenous peoples and deliberately inflicted conditions of life on Indigenous communities calculated to bring about their physical destruction. In the 1870s, colonial troops "denied food as a means to ethnically cleanse a vast region from Regina to the Alberta border as the Canadian Pacific Railway took shape."¹³⁷ In the 1880s, government-sanctioned residential schools were created and Indigenous children were forcibly removed from their families to face starvation, deliberate infection of diseases, beating,



torture, rape, solitary confinement, assaults and ill-treatment within the Indian residential school system. In the early 1900s, government doctors subjected Indigenous children to inhumane medical experiments at the residential schools, including purposefully exposing healthy children to children infected with tuberculosis, which “led to mortality rates of 30 to 60 percent amongst the children who were forced to attend those schools.”¹³⁸

These historical policies are appalling in their systematic destruction of Indigenous communities, but what is more appalling is that many of these policies continue today under a different guise. The National Inquiry’s findings expose contemporary policies that are clearly linked to the colonial era and ongoing colonial violence, demonstrating a “manifest pattern” attributable to present-day Canadian state conduct with Indigenous communities. This conduct includes both proactive measures to destroy, assimilate, and eliminate Indigenous peoples,¹³⁹ as well as omissions by the Canadian government to ensure safety, equality, and access to essential services which have had direct, life-threatening consequences on Indigenous communities, in particular on women, girls, and 2SLGBTQIA people.



5. CONCLUSION: CANADA'S RESPONSIBILITY FOR GENOCIDE AND OBLIGATIONS OF REPARATIONS

The thousands of stories of violence heard by the National Inquiry over the three intense years of its mandate lifted the veil over the existence of a genocide perpetrated by the Canadian state against Indigenous peoples. This genocide was enabled by colonial structures and policies maintained over centuries until the present day and constitutes a root cause of the violence currently being perpetrated against Indigenous women, girls and 2SLGBTQQIA people.

Legally speaking, this genocide consists of a composite wrongful act that triggers the responsibility of the Canadian state under international law. Canada has breached its international obligations through a series of actions and omissions taken as a whole, and this breach will persist as long as genocidal acts continue to occur and destructive policies are maintained. Under international law, Canada has a duty to redress the harm it caused and to provide restitution, compensation and satisfaction to Indigenous peoples. But first and foremost, **Canada's violation of one of the most fundamental rules of international law necessitates an obligation of cessation: Canada must put an end to its perennial pattern of violence against and oppression of Indigenous peoples.**

So far, Canada's failure to listen to Indigenous perspectives and to address flagrant violations of their most basic human rights, and in particular those related to violence against Indigenous women, girls, and 2SLGBTQQIA people, has been remarkable. The so-called champion of multiculturalism and fundamental human rights has lamentably and willingly failed to act upon numerous recommendations that have been made over time, through myriad different actors, including the commissions it itself established. However, listening to Indigenous voices is more than a demonstration of good faith: it is a legal requirement. Ending this genocide and providing due reparations require that the government of Canada fully and promptly implement the Calls for Justice made by this National Inquiry. Canada must adopt a decolonizing approach to "resist and undo the forces of colonialism"¹⁴⁰ while acknowledging and dismantling the colonial structures fostering racism, oppression, and other forms of violence perpetrated against Indigenous women, girls, and 2SLGBTQQIA people.

Canada must ensure that "all Indigenous women, girls, and 2SLGBTQQIA people are provided with safe, no-barrier, permanent, and meaningful access to their cultures and languages in order to restore, reclaim, and revitalize their cultures and identities."¹⁴¹ It must ensure that the rights to health and wellness, human security, justice, culture and equality of Indigenous Peoples are recognized, upheld, and protected on an equitable basis.



Ending the Canadian genocide of Indigenous Peoples requires an honest and active process of decolonization and indigenization of structures, institutions, legislation and policies. The swift implementation of the National Inquiry's Calls for Justice is essential to address the violence against Indigenous women, girls, and 2SLGBTQQIA people. It is also mandated by international law as measures of reparation, a direct consequence of Canada's responsibility for the commission of genocide.

It is time to call it as it is: Canada's past and current colonial policies, actions and inactions towards Indigenous Peoples is genocide. And genocide, as per law binding on Canada, demands accountability. The National Inquiry hopes that its legal analysis and findings will contribute to the necessary discussion on genocide in Canada and trigger further research on this characterization of colonial violence, which is a fundamental root cause of the violence experienced by Indigenous women, girls, and 2SLGBTQQIA people.



¹ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place, Volume 1a*, p. 50.

² *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), art 2 [*Genocide Convention*].

³ See e.g. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UNSC Res CS 827 (1993), UNSCOR, 3217th Sess, UN Doc S/RES/827 (1993), art 4 [*ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda*, UNSC Res 955 (1994), UNSCOR, 3453th Sess, UN Doc S/RES/955 (1994), art 2 [*ICTR Statute*]; *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002), art 6 [*Rome Statute*].

⁴ Louis Rene Beres, “Justice and realpolitik: International law and the prevention of genocide” (1988) 33 Am J Intl Law 123 at 123–124.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Separate Opinion of Judge Lauterpacht, [1993] ICJ Rep 407 at para 100. See also *Armed Activities on the Territory of the Congo (New Application: 2002)*, Jurisdiction of the Court and Admissibility of the Application, [2006] ICJ Rep 6 at para 64.

⁶ *Prosecutor v Radislav Krstić*, IT-98-33-T, Judgment (2 August 2001) at para 541 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Krstić Trial Judgement*] (emphasis added). See also e.g. *Prosecutor v Clément Kayishema and Obed Ruzindana*, 95-1-T, Judgment and Sentence (21 May 1999) at para 88 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kayishema Trial Judgement*].

⁷ “Report of the Commission to the General Assembly on the work of its fifty-third session” (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2001) at 85 [ILC Articles & Commentary].

⁸ *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, arts 4(3) and 6(3) [*CAHWC Act*]. Emphasis added.

⁹ See Fannie Lafontaine, *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) at 160ff.

¹⁰ Paola Gaeta, “On What Conditions Can a State Be Held Responsible for Genocide?” (2007) 18:4 Eur J Intl Law 631 at 633.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at para 166 [*Serbia 2007*]. See also Gaeta, *supra* note 10 at 632–633.

¹² *Ibid* at para 395. The Court held that Bosnia Serbs were 1) not 'state organs' of the Serbian government, 2) not under the 'direction and control' of the Serb state, and 3) had not received 'aid or assistance' from Serbia.

¹³ See e.g. *Bosnia and Herzegovina v Serbia 2007*, *supra* note 11 at para 398.

¹⁴ ILC Articles & Commentary, *supra* note 7 at 26, art 4.

¹⁵ *Ibid.*, art 4(2).

¹⁶ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Columbia University Press, 1944) at 79 [Lemkin, *Axis Rule*].

¹⁷ Leora Bilsky & Rachel Klagsbrun, “The Return of Cultural Genocide?” (2018) 29:2 Eur J Intl Law 373 at 378. See also *ibid.*

¹⁸ Lemkin, *Axis Rule*, *supra* note 16.

¹⁹ Raphael Lemkin, “Genocide as a Crime under International Law” (undated) Am Jew Hist S, Manuscript Collection P-154, Raphael Lemkin Collection, box 6, folder 2 at 2.

²⁰ See e.g. Henry T King Jr, “Origins of the Genocide Convention” (2008) 40 Case W Res J Intl L 13 at 13.

²¹ The Resolution was presented as “necessary to address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished”: see William A Schabas, “Origins of the Genocide Convention:



From Nuremberg to Paris” (2008) 40 Case W Res J Intl L 35. See also *The Crime of Genocide*, GA Res 96 (I), UNGAOR, 1st Sess, 55th Plenary Mtg, UN Doc A/RES/260 (1946) at 188–189 [Resolution 96 (I)].

²² Resolution 96 (I), *supra* note 21. Interestingly, the Resolution also affirmed that “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.” (Emphasis added.)

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Robert van Krieken, “Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation” (2004) 75:2 *Oceania* 125 at 135.

²⁶ UNGA Sixth Committee, 3rd Session, 82nd Meeting, UN Doc A/C.6SR.82 (1948).

²⁷ William A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 294 [Schabas, *Genocide*].

²⁸ See e.g. *ibid* at 294 (paragraph (e) “contemplates what is in reality a form of cultural genocide”); Claus Kreß, “The Crime of Genocide under International Law” (2006) 6:4 *Int Crim L Rev* 461 at 484 (“This prohibited act is situated at the border line with so-called cultural genocide”).

²⁹ The preamble of the Convention expresses the aim to “liberate *mankind* from [the] odious scourge of genocide” (emphasis added).

³⁰ Global Justice Center, “Beyond Killing: Gender, Genocide, & Obligations Under International Law” (2018) at 2, online (pdf): *Global Justice Center* <<http://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf>>.

³¹ *Ibid.*

³² *Ibid* at 9.

³³ *I.e.*, acts that does not “lead immediately to the death of members of the group”: see e.g. *Kayishema* Trial Judgement, *supra* note 6 at para 116.

³⁴ *Prosecutor v Jean-Paul Akayesu*, 96-4-T, Judgement (22 September 1998) at para 731 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Akayesu* Trial Judgement]. Reference omitted.

³⁵ *Ibid.*

³⁶ *Ibid* at 732.

³⁷ Elisa von Joeden-Forger, “Gender and the Future of Genocide Studies and Prevention” (2012) 7:1 *GSP* 89 at 92–93.

³⁸ Pam Palmater, “Genocide, Indian Policy, and Legislated Elimination of Indians in Canada” (2014) 3:3 *Aboriginal Policy Studies* 27 at 28, citing Dean Neu & Richard Therrien, *Accounting for Genocide: Canada’s Bureaucratic Assault on Aboriginal People* (Blackpoint, NS: Fernwood Publishing, 2003) at 8.

³⁹ Palmater, *supra* note 38 at 30. See also Dirk A Moses, “Toward a Theory of Critical Genocide Studies” (18 April 2008), online: *Online Encyclopedia of Mass Violence* <<https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/toward-theory-critical-genocide-studies>> [Moses, “Critical Studies”].

⁴⁰ Palmater, *supra* note 38 at 31, citing Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) at 34.

⁴¹ Andrew Woolford & Jeff Benvenuto, “Canada and colonial genocide” (2015) 17:4 *J Genocide Res* 373 at 374.

⁴² *Ibid* at 375.

⁴³ Adara Goldberg, “Canada and the Holocaust” (6 May 2016), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/holocaust>.

⁴⁴ Woolford & Benvenuto, *supra* note 41 at 375.

⁴⁵ ILC Articles & Commentary, *supra* note 12 at 27, art 15.

⁴⁶ *Ibid* at 62.

⁴⁷ Moses, “Critical Studies”, *supra* note 39.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*



- ⁵⁰ Palmater, *supra* note 38 at 32.
- ⁵¹ *Ibid*, citing Neu & Therrien, *supra* note 38.
- ⁵² Palmater, *supra* note 38 at 34.
- ⁵³ Woolford & Benvenuto, *supra* note 41 at 375.
- ⁵⁴ See Resolution 96 (I), *supra* note 21: “The victim of the crime of genocide is the group itself.” See also *Prosecutor v Goran Jelisić*, IT-95–10-T, Judgment (14 December 1999) at para 79 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Jelisić* Trial judgment]; Agnieszka Szpak, “National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals” (2012) 23:1 *Eur J Intl Law* 155 at 158–159.
- ⁵⁵ *Akayesu* Trial Judgement *supra* note 33 at para 512.
- ⁵⁶ *Ibid* at para 513.
- ⁵⁷ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General” (Geneva: UN, 2005), at para 494 [*Darfur Report*].
- ⁵⁸ *Akayesu* Trial Judgement *supra* note 34 at para 514.
- ⁵⁹ *Ibid* at para 515.
- ⁶⁰ Szpak, *supra* note 54 at 159.
- ⁶¹ *Akayesu* Trial Judgement, *supra* note 34 at para 702.
- ⁶² *Ibid*.
- ⁶³ See e.g. *Akayesu* Trial Judgement, *supra* note 34 at para 516; *Darfur Report*, *supra* note 57 at para 501.
- ⁶⁴ Szpak, *supra* note 54 at 162. See *Prosecutor v Siméon Nchamihigo*, 01-63-T, Judgement and Sentence (12 November 2008) at paras 329–338 (International Criminal Tribunal for Rwanda, Trial Chamber).
- ⁶⁵ *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, 96-3-T, Judgement and Sentence (6 December 1999) at para 56 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Rutaganda* Trial Judgement]; *Prosecutor v Ignace Bagilishema*, 95-1A-T, Judgement (7 June 2001) at para 65 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Bagilishema* Trial Judgement].
- ⁶⁶ *Darfur Report supra* note 57 at para 501.
- ⁶⁷ *Ibid*. See also Szpak, *supra* note 54 at 161, 168; Johan D van der Vyver, “Prosecution and Punishment of the Crime of Genocide” (1999) 23:2 *Fordham Intl L J* 286 at 306.
- ⁶⁸ Statistics Canada, “The Aboriginal languages of First Nations people, Métis and Inuit: Census of Population, 2016” (2017) at 1, online (pdf): www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016022/98-200-x2016022-eng.pdf. See also e.g. The Royal Canadian Geographical Society in partnership with Canada’s National Indigenous Organizations, *Indigenous Peoples Atlas of Canada*, 4 vols (Ottawa: Canadian Geographic, 2018)., *Indigenous Peoples Atlas of Canada* (Ottawa: Canadian Geographic, 2018).
- ⁶⁹ See Michael Berenbaum, ed, *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (New York: New York University Press, 1990). See also Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Gardena, CA: SCB Distributors, 2018) at 35.
- ⁷⁰ For instance, the Holocaust did not aim only at the destruction of the Jews: the Nazis also targeted the Poles and other Slavic peoples, homosexuals, etc. See Starblanket, *supra* note 69 at 35.
- ⁷¹ Global Justice Center, *supra* note 30 at 11.
- ⁷² *Genocide Convention*, *supra* note 2, art 2 (a).
- ⁷³ *Akayesu* Trial Judgment *supra* note 34 at para 500.
- ⁷⁴ International Criminal Court, *Elements of Crimes*, ICC-ASP/1/3 at 108, UN Doc PCNICC/2000/1/Add.2 (2000), n 2 [Elements of Crimes].
- ⁷⁵ *Prosecutor v Laurent Semanza*, 95-20-T, Judgment and sentence (15 May 2003) at para 319 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Semanza* Trial Judgement].
- ⁷⁶ Global Justice Center, *supra* note 30 at 12.
- ⁷⁷ *Krstić* Trial Judgement, *supra* note 6 at para 513.
- ⁷⁸ *Akayesu* Trial Judgement *supra* note 34 at para 504.



⁷⁹ *Krstić* Trial Judgement, *supra* note 6 at para 513. See also *Akayesu* Trial Judgement *supra* note 34 at para 502: the harm do not need to be “permanent and irremediable.” But see *Semanza* Trial Judgement, *supra* note 75 at para 321: “[s]erious mental harm” means “more than minor or temporary impairment of mental faculties.” See also *Kayishema* Trial Judgement, *supra* note 6 at para 108; *Rutaganta* Trial Judgement, *supra* note 65 at para 51; *Prosecutor v Alfred Musema*, 96-13-T, Judgement and Sentence (27 January 2000) at para 156 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Musema* Trial Judgement]; *Bagilishema* Trial Judgement, *supra* note 65 at 59.

⁸⁰ *Elements of Crimes*, *supra* note 74, n 3.

⁸¹ *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Judgment (24 March 2016) at para 545 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v Zdravko Tolimir*, IT-05-88/2-A, Judgment (8 April 2015) at para 202 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Tolimir* Appeals Judgment]; *Krstić* Trial Judgement, *supra* note 6 at para 513; *Kayishema* Trial Judgement, *supra* note 6 at 113.

⁸² *Krstić* Trial Judgement, *supra* note 6 at para 513.

⁸³ *Tolimir* Appeals Judgment *supra* note 81 at para 225. See also e.g. *Akayesu* Trial Judgement, *supra* note 34 at paras 505–506; *Kayishema* Trial Judgement, *supra* note 6 at paras 115–116; *Rutaganta* Trial Judgement, *supra* note 65 at para 52; *Musema* Trial Judgement, *supra* note 79 at para 157; *Krstić* Appeals Judgment, para. 25.

⁸⁴ *Elements of Crimes*, *supra* note 74, n 4.

⁸⁵ *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest (12 July 2010) at paras 32–40, (International Criminal Court, Pre-Trial Chamber).

⁸⁶ *Attorney General of Israel v Adolf Eichmann*, (1961) Dist Court Jerusalem 40/61, 36 ILR 277 (Israel) at para 199.

⁸⁷ Claus Kreß, “The Crime of Genocide under International Law” (2006) 6:4 Int Crim L Rev 461 at 483.

⁸⁸ *Akayesu* Trial Judgement *supra* note 34 at paras 507– 508. See also *Kayishema* Trial Judgement, *supra* note 6 at para 117; *Rutaganda* Trial Judgement, *supra* note 65 at para 53; *Musema* Trial Judgement, *supra* note 79 at para 158.

⁸⁹ *Akayesu* Trial Judgement, *supra* note 34 at para 508.

⁹⁰ *Elements of Crimes*, *supra* note 74, art 6 (e).

⁹¹ *Ibid.*

⁹² *Akayesu* Trial Judgement, *supra* note 34 at para 509. This approach was endorsed by subsequent jurisprudence. See *Kayishema* Trial Judgement, *supra* note 6 at para 118; *Rutaganda* Trial Judgement, *supra* note 65 at para 54; *Musema* Trial Judgement, *supra* note 79 at para 159.

⁹³ *Elements of Crimes*, *supra* note 74, n 5.

⁹⁴ Starblanket, *supra* note 69 at 66.

⁹⁵ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place, Volume 1a*, p. 50.

⁹⁶ *Ibid.*, p. 53.

⁹⁷ Kai Ambos, “What does ‘intent to destroy’ in genocide mean?” (2009) 91:876 Int Rev Red Cross 833 at 834.

⁹⁸ William A Schabas, “State Policy as an Element of International Crimes” (2008) 98:3 J Crim Law Criminol 953 at 971 [Schabas, “State Policy”].

⁹⁹ *Ibid.* at 970.

¹⁰⁰ *Ibid.*

¹⁰¹ Gaeta, *supra* note 10 at 643.

¹⁰² *Prosecutor v Goran Jelisić*, IT-95-10-A, Judgment (5 July 2001) at para 48 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Jelisić* Appeals judgment].

¹⁰³ See review and proposals in Antonio Cassese, “Is Genocidal Policy a Requirement for the Crime of Genocide?” in Paola Gaeta, ed, *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) at 128.

¹⁰⁴ *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) at para 149-152 (International Criminal Court, Pre-Trial Chamber).

¹⁰⁵ *Serbia 2007*, *supra* note 11 at para 373. The ICJ adopted the same view and explicitly cited this excerpt in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015, [2015] ICJ Rep 3 at para 417.



- ¹⁰⁶ *Jelisić Appeals Judgement*, *supra* note 102 at para. 47, cit. in *Darfur report*, *supra* note 57 at para. 502
- ¹⁰⁷ Kreß, *supra* note 28 at 481; William A Schabas, *Genocide in international law* (2009) at 271.
- ¹⁰⁸ See Part 2-b), *above*.
- ¹⁰⁹ *Statute of the International Court of Justice*, 18 April 1946, 33 UNTS 993, art 38.
- ¹¹⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 31–32.
- ¹¹¹ Schabas, *Genocide*, *supra* note 37 at 294; Elisa Novic, “Physical-biological or socio-cultural ‘destruction’ in genocide? Unravelling the legal underpinnings of conflicting interpretations” (2015) 17:1 J Genocide Res 63 at 70.
- ¹¹² Ruth Rissing-van Saan, “The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia” (2005) 3 J Int Crim Just 381 at 382.
- ¹¹³ *Ibid* at 398.
- ¹¹⁴ Karolina Wierczynska, “Evolution of the Notion of Genocide in the Context of the Jurisdiction of the National Courts” (2006) 28 Polish YB Intl L 83 at 90.
- ¹¹⁵ Rissing-van Saan, *supra* note 112 at 398.
- ¹¹⁶ The Federal Constitutional Court held that “the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group [...]. [T]he intent to destroy the group [...] extends beyond physical and biological extermination [...]. The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.” 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa); cited in *Krstić Trial Judgement*, *supra* note 6 at 579. See also Schabas, *Genocide*, *supra* note 37 at 272.
- ¹¹⁷ *Krstić Trial judgment*, *supra* note 6 at 580.
- ¹¹⁸ *Prosecutor v Radislav Krstić*, IT-98-33-A, Judgment (19 April 2004) paras 48 and 55 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) . See also Kreß, *supra* note 28 at 488.
- ¹¹⁹ *Prosecutor v Vidoje Blagojević & Dragan Jokić*, IT-02-60-A, Judgment (17 January 2005) at para 666 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [*Blagojević Appeals Judgement*].
- ¹²⁰ Novic, *supra* note 112 at 68.
- ¹²¹ *Blagojević Appeals Judgement*, *supra* note 119 at para 122. His conviction was overturned in appeal on a different point of law, as the Appeals Chamber considered that his knowledge of mass killings, an essential element in this case, had not been proved.
- ¹²² *Prosecutor v Momčilo Krajišnik*, IT-00-39-T, Judgment (27 September 2006) at para 854 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).
- ¹²³ *Jorgić v Germany*, No 74613/01, [2007] III ECHR 263, 47 EHRR 6.
- ¹²⁴ *Ibid* at para 103.
- ¹²⁵ *Ibid* at para 46.
- ¹²⁶ *Ibid* at para 105.
- ¹²⁷ Kreß, *supra* note 27 at 487.
- ¹²⁸ Schabas, *Genocide*, *supra* note 36 at 271: “The words of the Convention can certainly bear such an interpretation [...]”
- ¹²⁹ Kreß, *supra* note 27 at 487.
- ¹³⁰ Novic, *supra* note 111 at 70.
- ¹³¹ *Ibid* at 77: “a ‘broader’ understanding of the mens rea would [...] certainly attribute to [...] some coherence [to the legal definition of genocide], if only to clarify the status of subparagraph (e).”
- ¹³² Alberto Costi, “The 60th Anniversary of the Genocide Convention” (2008) 39 VUWLR 831 at 845.
- ¹³³ Jordan Gill, “Extirpate this execrable race’: The dark history of Jeffery Amherst” (29 April 2017), online: *CBC News* <www.cbc.ca/news/canada/prince-edward-island/jeffery-amherst-history-complex-1.4089019>.
- ¹³⁴ Palmater, *supra* note 39 at 32, citing American Medical Association, “Smallpox as a Biological Weapon: Medical and Public Health Management” (1999) 281 JAMQ 2127 at 2128.



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¹³⁶ Palmater, *supra* note 38 at 32.

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¹³⁸ Palmater, *supra* note 38 at 32–33.

¹³⁹ *Ibid* at 32.

¹⁴⁰ National Inquiry into Missing and Murdered Indigenous Women and Girls, “Interim report: Our Women and Girls are Sacred” (2017) at 22, online (pdf): MMIWG <<http://www.mmiwg-ffada.ca/files/ni-mmiwg-interim-report-en.pdf>>.

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