

## Troubling History, Troubling Law: The Question of Indigenous Genocide in Canada

*Adam Muller*

I mean, there is no truth on this matter of what is a genocide.

—Samantha Power<sup>1</sup>

Why is there such a sharp contrast in attitudes to the past in different cultures? It is often said that history is written by the victors. It might also be said that history is forgotten by the victors. They can afford to forget, while the losers are unable to accept what happened and are condemned to brood over it, relive it, and reflect on how different it might have been. Another explanation might be given in terms of cultural roots. When you have them you can afford to take them for granted but when you lose them you search for them.

—Peter Burke<sup>2</sup>

In July 2014, members of the International Association of Genocide Scholars (IAGS), the world's largest organization devoted to the interdisciplinary study of historical and contemporary genocide, met in Winnipeg, Manitoba, for a conference organized under the broad theme of "Genocide Studies and Indigenous Peoples." Unusually for the IAGS, which typically

meets every second year, the Winnipeg conference was held in an off year, sandwiched between the organization's 2013 event in Siena, Italy, and a meeting scheduled for 2015 in Yerevan, Armenia, in order to coincide with ceremonies honouring the centenary of the Armenian genocide. The decision to break with tradition and have the IAGS meet in 2014 was not uncontroversial, but it ended up being justified by the IAGS executive for three primary and overlapping reasons:<sup>3</sup> the opening in Winnipeg of the Canadian Museum for Human Rights (CMHR), which was originally scheduled to take place in July; the expected conclusion in June of the work of the Truth and Reconciliation Commission of Canada (TRC), which had looked into the abuses occurring in Canada's Indian Residential School (IRS) system;<sup>4</sup> and the opening at the University of Manitoba later in 2014 of the National Research Centre on Indian Residential Schools, whose archive contains TRC testimony and other key documentation pertaining to the history and legacy of Canada's IRS system.

Converging in Winnipeg in the summer of 2014, then, were four distinct but importantly overlapping processes: one nurturing scholarly inquiry into genocide and its aftermaths; a second attempting to engage the general public in the story of human rights struggles and successes; a third collecting testimony pertaining to Canada's historically atrocious treatment of Indigenous peoples; and a fourth working to preserve this testimony and develop effective means for sharing it. Responding to this convergence, an article entitled "The Genocide Test," written by veteran public policy reporter Mary Agnes Welch, appeared in July in the *Winnipeg Free Press*. It was intended to elucidate some of the issues arising in virtue of the IAGS conference's theme, and in it Welch raised the question of whether or not Canadian settler colonialism was genocidal. In exploring the implications of this question, Welch solicited statements mainly from Indigenous and non-Indigenous scholars and activists who agree that it was so. She also noted the resistance of average Canadians to the idea that their country was founded on such a heinous crime,<sup>5</sup> even as she acknowledged recent advances in genocide scholarship that, over time, continue to shift the public's understanding of Indigenous history and the role played by genocide in shaping it. Summarizing the view of Charlene Bearhead, currently the education lead at the National Centre for Truth and Reconciliation, Welch concluded that "If nothing else, the next generation, armed with a fuller historic picture, will lead the change."<sup>6</sup> Significantly,

and not for the first time, Welch singled out the CMHR for failing to embrace this change and formally designate Canadian settler colonialism as genocidal—a failure that, since at least the summer of 2013, has caused the museum to come under sustained fire from scholars, Indigenous peoples, and their allies nationwide.

In what follows I propose using Welch’s article as the point of departure for a reflection on the underpinnings and scope of the change to which Welch and Bearhead refer, and on behalf of which they advocate. Along the way I will be considering specific aspects of the argument that there has been genocide committed against Aboriginal peoples in Canada. I will begin by considering what “genocide” means, exactly, by focusing on the text of the United Nations General Assembly Resolution 260, the Convention on the Prevention and Punishment of the Crime of Genocide (henceforth the “Genocide Convention”), which I will work to locate more precisely in its historical context. Any account of this context requires reference to the life and work of the convention’s primary framer, Raphael Lemkin, about whom more later. Rereading Lemkin allows us to comprehend the extent to which critical concern over the language of the Genocide Convention is justified. It also shows how the convention remains weakened by a set of political compromises that in crucial ways caused it to depart markedly from Lemkin’s original conception and hopes. By specifying difficulties with the convention’s dependence on an overly stringent notion of “special” genocidal intention, I provide substantial reasons for adopting a broader view of genocide. Such a view is, I conclude, much better suited to accounting for the destructive effects of European settler colonialism, in Canada and elsewhere in the world. It is also much more responsive to, and reflective of, the perspectives of Indigenous peoples themselves.

## What is Genocide?

Debate over whether or not genocide occurred in Canada hinges on at least two underlying issues: what we understand genocide to be, and whether or not the Canadian case—Canada’s historical treatment of Indigenous peoples—is special, and therefore unlike other instances of settler colonialism elsewhere in the world that seem more straightforwardly genocidal. For many Canadians it seems impossible to reconcile what is generally

known of Aboriginal Canadians' relatively more pacific experience of European settlement and governance with the experiences documented, say, by Bartolomé de las Casas in his shocking *A Short Account of the Destruction of the Indies* (1552), in which the Dominican monk and first-hand observer of Spain's brutally annihilatory conquest of South and Central America and the Caribbean is described in all its horror.

Both of these issues may be seen at work in the responses to Welch's article published subsequently by the *Winnipeg Free Press*. For example, in his opinion piece entitled "Canadian Policies Don't Meet Genocide Test," Michael Melanson, who has commented frequently on this issue, always in the same vein, proffers the view that the conceptual limits of genocide have been indisputably established by the United Nations through its adoption of the Genocide Convention on 9 December 1948. Melanson views attempts to conceive of genocide outside of the frame of the convention's language and relevant case law as distorting and counterproductive, not least since the United Nations is unlikely to revise the text of the agreement any time soon. For Melanson and many others, the Genocide Convention is the decisive authority in matters genocidal; although individual countries, including Canada, have laws prohibiting genocidal acts, these commentators consider the convention more authoritative since it speaks for an international consensus.<sup>7</sup> More than this, Melanson contends that whatever violence has been directed against Aboriginal Canadians, as with the case of missing and murdered Aboriginal women, was undertaken not by the state acting with genocidal intent, but by those personally acquainted with the victims, and that even the seizing of Aboriginal children and their relocation to residential schools and subsequent mistreatment was accomplished not by the Canadian state in a coordinated effort at group destruction, but by more and less beneficent groups often affiliated with Aboriginal communities, and for the most part functioning independently. Speaking for many Canadians, Melanson writes that in the Canadian case there is no clear evidence of genocidal intent: "The RCMP showed most of the murdered aboriginal women were killed by people they knew. Southern Chiefs Organization Grand Chief Terry Nelson said recently the high number of aboriginal children in CFS care was 'the definition of genocide.' Since devolution, those seizures have been undertaken by aboriginal agencies. Groups do not target themselves for genocide and

suicides, by definition, are not genocide, but wholesale judgment seems to be the point.”<sup>8</sup>

In his published reply to Melanson, IAGS vice president Andrew Woolford points out that overreliance on the international legal architecture that gives the genocide concept its coherence and institutional force, and which remains crucial to our capacity to recognize genocide on the ground, has the undesirable effects of actually weakening the concept’s integrity and limiting its relevance to contexts wherein groups violently clash. In advancing this claim Woolford, a sociologist, acknowledges that he is “a genocide scholar working in the tradition of Raphael Lemkin,”<sup>9</sup> and indeed his perspective has in important ways been shaped by (even as Woolford has contributed importantly to) a reassessment of Lemkin’s work and legacy. This reassessment is currently underway in the field of genocide studies and cognate disciplines such as law, history, and political science, and I will be referring to it as the “Lemkinian Turn.” Raphael Lemkin (1900–1959) was the Polish-Jewish jurist who coined the term “genocide” and brought the idea of this singular crime to the broader public’s attention, not least through the publication of his influential study of Nazi wartime conduct, *Axis Rule in Occupied Europe* (1944). Following the Second World War, Lemkin almost singlehandedly drafted the text of the Genocide Convention, and shepherded its passage through the byzantine committee structures of the United Nations, driven then as now by parochial national interests. Speaking of Lemkin’s struggle to see the genocide concept incorporated into international law, Woolford writes that “Although Lemkin drafted the United Nations’ Genocide Convention, his definition was diluted by the nations of the world, sometimes for what were practical reasons, but other times for clearly political reasons.”<sup>10</sup>

This is not a trivial point. Over the course of its transnational institutionalization, Lemkin’s foundational idea of genocide was shorn of much of its breadth and complexity, generally in response to the desire of the victorious postwar powers (most notably the Soviet Union and Great Britain) not to leave themselves open to legal challenges to their own occasionally genocidal, colonial, and imperial conduct.<sup>11</sup> It is therefore striking in this regard that chief among the alterations to Lemkin’s original text was the removal of any reference to cultural genocide, a key component of Lemkin’s original conception of the crime and the idea most directly indebted to the jurist’s reading of the history of European colonialism. According

to the standard view of the evolution of his ideas, such as that provided by Michael Ignatieff in a recent essay in the *New Republic*,<sup>12</sup> Lemkin's formulation of the genocide concept is held to have been primarily influenced by the Holocaust, an extermination event that was particularly conspicuous to him given his Polish and Jewish origins, and which still looms large over accounts of the evolution of postwar justice and human rights talk of the period—notwithstanding the recent appearance of persuasive revisionist historiography by Samuel Moyn, Marco Duranti, and others.<sup>13</sup>

The centrality of the destruction of culture to Lemkin's original formulation of the genocide concept cannot be denied. For Lemkin, genocide was a crime centring on a group's destruction, an idea retained in article 2 of the Genocide Convention, which defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." According to Peter Balakian, who has recently published work arising from research into hitherto unknown documents contained in Lemkin's archive, Lemkin understood groups to be sustained by three main attributes or capacities: the physical existence of their members; their ability to remain biologically reproductive (i.e., their wherewithal to produce new members of the group, and thus to renew themselves); and their capacity for "spiritual" or cultural expression. According to Lemkin, genocide occurs when one or all three of these capacities is destroyed, rendering a group unable to persist and its members unable to recognize one another as the same kinds of beings-in-the-world. Balakian argues that "Lemkin focuses on how the destruction of religious institutions and objects, for example, eliminates the 'spiritual life' through which a human group finds defining expression; when a group's culture (schools, treasures of art and culture, houses of worship, and the like) is destroyed, he argues, 'the forces of spiritual cohesion' are torn apart and the group 'starts to disintegrate.'"<sup>14</sup>

As an indication of how far it departs from Lemkin's original intentions, nowhere in the Genocide Convention is this cohesion that Balakian refers to identified as something worth protecting. Instead, the United Nations agreement targets threats to a group's biological and reproductive integrity, as may be witnessed by article 2's itemization of genocidal conduct, which entirely concerns physical harms or constraints:

- 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.<sup>15</sup>

This list makes no mention of the fact that a group may cease to exist for reasons other than the application of massive physical violence; and nowhere in the convention is culture identified as worthy of preservation in virtue of its role in sustaining group life. It should be remembered that culture serves as the expression (i.e., the outer form) of a group's inner life, and it is thus a mechanism through which group integrity may be maintained and renewed, and the identities informed by it sustained. With this in mind, Lemkin clearly states that there are two distinct but often overlapping modes of genocidal destruction. One of these he labels "barbarism," the other "vandalism."<sup>16</sup> While barbaric acts are those directed against human bodies in various ways, vandalism targets culture by seeking to destroy monuments, sites of conscience, works of art, and the like. Such destruction is the essence of what Lemkin understands "cultural genocide" to be, since in his view culture is the essence of a people. In an unpublished 1948 essay on genocide in international law, he writes:

Cultural genocide can be accomplished predominately in the religious and cultural fields by destroying institutions and objects through which the spiritual life of a human group finds its expression, such as houses of worship, objects of religious cult, schools, treasures of art and culture. By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate.<sup>17</sup>

To be clear, what Lemkin terms cultural genocide is criminal as well as immoral for precisely the same reason as what he calls “physical” or “biological” genocide. For all of these forms of destruction have the same object in common: the annihilation of a group.<sup>18</sup>

This particular object is the defining feature of genocide, and the source of its primary harms. What makes genocide different from, say, varieties of mass murder, is not its conspicuous production of bodies, but rather the attempted destruction of what might be called “human kinds.” The signal casualty of genocide is not people, but *a people*, and thus a highly morally and politically charged form of (and capacity for) belonging. I agree with Christopher Powell and Amarnath Amarasingam in their contribution to this volume insofar as, like them, I see genocide as targeting “the social institutions and relationships necessary for the perpetuation of group life,”<sup>19</sup> what I want to call the “groupness” of groups—the corporeal, social, ideological, and institutional preconditions of social life, the people and structures through and against which our identities are shaped and our world comes to make sense. For Lemkin, the loss of cultures should be a matter of universal concern, since it results in the reduction of human diversity and with it our permanent alienation from distinctive repertoires of human achievement from which we might learn a great deal. He writes that “When a nation is destroyed, it is not the cargo of the vessel that is lost, but a substantial part of humanity with a spiritual heritage in which the whole world partakes.”<sup>20</sup>

## Lemkin and Colonialism

In their landmark account of Lemkin’s understanding of colonial history, historians Michael A. McDonnell and Dirk Moses show that, contrary to the standard view, Lemkin’s conception of genocide was profoundly marked by his encounter with colonialism’s destructive excesses, which he experienced primarily through his reading of works of history and autobiography, though also first-hand while living in pre-World War Two Poland. More than this, they argue that “the very notion [of genocide] is colonial in nature because it entails occupation and settlement,”<sup>21</sup> two hallmarks of colonialism. In their analysis, McDonnell and Moses scrupulously review Lemkin’s research notes and show how his thinking drew heavily from reference works on the European conquest of North



and South America, including several by las Casas, whose descriptions of the mass murder of Indigenous populations he found harrowing. In addition to work documenting Spanish crimes, Lemkin also delved deeply into texts on the withering effects of European oppression in North America, Australasia, East Asia, and Africa.

For Lemkin, European colonialism's brutality was in some cases clearly genocidal, and his conception of genocide was deeply indebted to his attempt to understand the nature of colonialism's harms. Prominent amongst these harms was the destruction of Indigenous cultures. Lemkin worked tirelessly to ensure the inclusion of cultural genocide in the Genocide Convention, but failed to do so principally owing to resistance from world powers fearful that their own colonial pasts might leave them vulnerable to indictment, a fear heightened by the postwar intensification of liberation struggles in Europe's remaining colonies. McDonnell and Moses are correct to see the displacement of Indigenous peoples and the eradication of important (by their lights) features of their traditional lives as intrinsic to colonialism.<sup>22</sup> Lemkin's failure to get language on culture included in the Genocide Convention severely compromises the international community's ability to confront colonial abuses, and to determine which of them might or might not be genocidal. It therefore makes some sense to view the convention, notwithstanding all the good it has done, as in some sense continuing to labour in colonialism's shadow.

Michael Melanson and others aside, appealing to international law in response to the question of whether or not genocide occurred in colonial contexts is hardly straightforward. On the contrary, while cases such as that of the Herero in Namibia, who had their villages and food supplies destroyed by troops acting in support of German settlers, before being driven off into the desert to die, may seem more obviously criminal by the light of the Genocide Convention (i.e., because they concern state-sanctioned mass murder in the context of an attempted ethnocide), other examples, such as that of settler colonialism in Canada, which lacks both the high levels of violence and degrees of coordination and state involvement found in the German case, are harder to categorize. Not, however, that the experience of the Herero proved all that easy to formally designate a genocide. It was not until the appearance of the UN's *Whitaker Report* in 1985, more than eighty years after the fact, that German actions in Southwest Africa received their proper label, and not until 2004 that the German

government issued a formal apology for earlier crimes, even as it refused to provide financial compensation for the descendants of the genocide's original victims.

So then, acknowledgement of the partial and political character of the Genocide Convention attunes us to the contingency of international law in determinations of whether or not genocide has occurred. Notwithstanding how well it works in some cases where physical violence figures prominently, the convention works less well in others where groups have been targeted for destruction through the undermining of their cultural distinctiveness. While commentators like Stephen Katz limit genocide only to intentional acts of physical destruction aimed at a group (Katz believes that the Holocaust is the only world-historical event to actually satisfy this definition),<sup>23</sup> scholars such as Martin Shaw and Paul Boghossian argue that "a strong case can be made for saying that that concept [in international law] is deeply flawed, flaws that make its application to particular cases deeply problematic and that are hard to remedy."<sup>24</sup> These flaws bear on the suitability of international legal frameworks to settle the question of whether or not genocide has occurred in colonial contexts.

## Genocidal Intent

For his part, French historian and editor Jean-Louis Panneé argues that reference to Lemkin's own hopes for the Genocide Convention reveals the breadth and fullness of his original conception. Panneé is especially keen to note Lemkin's concern with the systematic character of genocidal annihilation, his recognition of genocide as both a process and a political practice, and therefore as something fundamentally ideological. Writing of Lemkin's anticipation of ideas found in the work of Holocaust historian Raul Hilberg, Panneé argues that "By placing emphasis on genocide as a process, Raul Hilberg, just as Lemkin, gave it an eminently political dimension, because some individuals 'authorize themselves to kill' ... in keeping with their respective Weltanschauung."<sup>25</sup> What marks genocide for Panneé and others is not the power it has to wreak physical destruction, but rather the qualities of mind and conduct, and along with them the structures of power, that contribute to the annihilation of a group's integrity, its capacity to renew itself, and its members' ability to flourish. This view overlaps with that of McDonnell and Moses, who put the matter

thus: “Mass killing . . . is not intrinsic to genocide; it can occur without executions or gassings. The proposition that scholars who think that genocide is a synonym for the Holocaust need to entertain is that Lemkin regarded the latter as a consequence of Nazi imperialism and colonialism in Europe. The Holocaust and German imperium between 1939 and 1945 was for him a continuation of the genocidal occupations that have characterized colonialism through the ages.”<sup>26</sup> If these scholars are right, then a Lemkinian view attuned to the dynamics of history and culture might indeed be better suited to ascertaining whether or not genocide has occurred in Canada as part of Indigenous experiences of settler colonialism.

However, both in the Genocide Convention and throughout Lemkin’s scholarly corpus, the “intent to destroy” is claimed to be an essential feature of genocidal processes.<sup>27</sup> According to Panneé, “Lemkin insisted on this dimension of genocide that, in truth, encompasses the two essential elements of this tragic story, namely the will to chase off or cause the disappearance of a specific population and recourse to extermination.” He cites a passage from Lemkin’s essay “What is a Genocide?” in this regard: “Would the expression ‘mass murder’ reflect the precise concept of this phenomenon? I think it would not, as it does not include the motive of the crime, the more so when the final aim of the crime rests on racial, national, and religious considerations.”<sup>28</sup> For Lemkin, motive matters, and there can be no motive without intent.<sup>29</sup> But the issue of intent is highly problematic in the case of Canadian settler colonialism, since Canadian history offers up no evidence comparable to Adolf Hitler’s autobiographical *Mein Kampf* (1924), the transcripts of the Wannsee Conference, or Heinrich Himmler’s 1943 Posen speech to the SS, all of which testify to the Nazis’ programmatic intention to destroy European Jews.<sup>30</sup> Before any argument can be marshalled that settler colonialism in Canada was genocidal, then, it is first necessary to take a closer look at what genocidal intent is. For the purposes of the analysis here, it is the international legal conception of this intent that matters most since Lemkin played a crucial role in shaping it. It speaks for his understanding of what it means to intend to destroy. It is only in the wake of such an analysis that it becomes possible to reflect more generally on the status of intent in accounts of the history of Canadian settler colonialism.

The conception of intent embodied in the Genocide Convention is relatively straightforward. It revolves around the idea of there being a “special

intent” (*dolus specialis*) at work in genocides, which may be contrasted with the general intent (*dolus*) to do harm. According to criminal law professor and German judge Kai Ambos, the special and general intents comprise the two legally relevant mental elements operative during a genocide. That is, for the *genocidaire* to be legally guilty of the crime, it must be shown that he intended to do harm and understood his actions as likely to bring this harm about (the general intention); and he must be shown to intend to do harm to a particular group or groups (the special intention). Without the addition of this *dolus specialis*, even the most hideous atrocities committed as the result of only a general intention to harm would not qualify legally as genocide. For Ambos this demonstrates that genocide viewed legally is marked by a kind of surplus of intent, what he calls a “transcending internal tendency” (überschießende *Innentendenz*).<sup>31</sup> This surplus reflects the fact that genocides are about more than mere violence; they are acts of violence with a special purpose, namely the destruction of groups. This surplus helps to distinguish acts of genocide from those of persecution, which by definition requires the persistence of groups, albeit in states of ongoing misery.

It should be noted that the intention being privileged in this conception of the *dolus specialis* is reserved for those directing and sponsoring genocides, and not to the foot soldiers carrying genocide out on the ground. What international law cares about, and criminalizes, are the actions of those in charge of these atrocities, the “architects of doom.” Abuses arranged or committed by those further down the ladder, such as mid- and lower-level bureaucrats, soldiers in the field, vigilante mobs, and so on, are considered evidence of a higher-level intent to destroy, an intention that subordinates are held to lack. Accordingly, garden-variety functionaries, militants, and bigots, those whom Daniel Goldhagen famously termed Hitler’s “willing executioners,” though potentially guilty of other crimes, cannot themselves be held legally responsible for genocide. This fact has the rather odd consequence of at least conceptually severing actors from their actions, since while contributing materially to the commission of a genocide (i.e., performing acts of genocide), a person would not be considered responsible for furthering genocide, either morally or in the eyes of the law. Looking at matters this way fails to take into account how the desire to eliminate a group may be present more and less explicitly in the minds and dispositions of genocidal functionaries, shaping their conduct

and the institutions through which their animus is felt and operationalized. It doesn't look closely enough at who knew what and how.

Following a comprehensive survey of the relevant legal cases, Ambos argues that “the case-law approach is predicated on the understanding ... that ‘intent to destroy’ means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based.”<sup>32</sup> Dissenting from this tradition, Ambos follows Alicia Gil Gil and Otto Triffterer in exploring the possibility of reconceptualizing genocidal intention to include the *dolus eventualis*, or conditional intent. Conditional intent is what Ambos describes as “a transcending subjective element (*elemento subjetivo transcendente*) with regard to the constituent acts of the offence and the criminal result.”<sup>33</sup> It is what philosophers of action sometimes call a “global” intention out of and against which specific “local” intentions form and become salient. It does not attach itself to specific acts, but rather coordinates them by, amongst other things, providing a conduit for rationalizations and easy access to justificatory schemes. Ambos writes that “As to these constituent acts, e.g. the killing of a member of the group in the case of genocide, *dolus eventualis* would be sufficient, combined however with intention in the sense of the unconditional will with regard to the remaining acts—i.e., the killing of other members of the group—necessary to bring about the final result of the crime, or at least knowledge of the co-perpetrators’ intention to that effect, and at the same time the presumption that the realization of these acts is possible.”<sup>34</sup> In his view it is enough to show evidence of genocidal intent when an accused is clearly responsible for acts the outcome of which might have reasonably been expected to contribute to the destruction of a group. In Alexander Greenwalt’s words, “principal culpability should extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions.”<sup>35</sup> Since this understanding comprises the conceptual background against which the perpetrator forms intentions and acts, Ambos calls Greenwalt’s a “knowledge-based approach” to the problem of genocidal intention.

Again, context matters since it is always within contexts that actions take place and intentions form; one never acts in a vacuum, or without some kind of bigger-picture understanding of one’s place in the world, however broadly or narrowly conceived. Even as we want to acknowledge that genocide’s foot soldiers frequently fail to act in the moment specifically

with the intent to destroy, we need at the same time to recognize the ways that they understand the meaning of their actions. Accordingly it is perhaps easier to understand why sociologists, historians, and genocide scholars have expressed so much dissatisfaction with the appeal to the Genocide Convention and related international law when making determinations concerning whether or not a genocide has occurred, and also why the legal and related political establishments have been reluctant to do so. For the former, trained to prefer thick to thin descriptions and with an eye (post-Foucault) to the vagaries of Power, international law is simply far too conservative as well as reluctant to examine closely the events on which it seeks to pass judgment. For the latter, constrained by case law, a narrower conception of intent, and an inability to look beyond physical harms, genocide is only ever committed by the few who plan and clearly organize it, not by the many who carry it out.

## Intent in the Canadian Case

As noted above, evidence of the intent to destroy is not totally clear-cut when it comes to making the case for Canadian settler-colonial genocide. This is not to say it is wholly absent. In one of the mostly widely quoted expressions of the Canadian government's official hostility toward Canadian Indigenous peoples, Deputy Superintendent General of Indian Affairs Duncan Campbell Scott (1862–1947), speaking for his office as well as for attitudes prevailing in Canada more generally, wrote in 1920 that “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone. ... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.”<sup>36</sup> It is difficult to think of a more direct statement of genocidal intent, at least if one accepts the view that genocide is criminal to the extent that it results in the destruction of groups, not simply the deaths of human beings.

Andrew Woolford and other scholars of settler-colonial genocide remind us that we should not be too quick to think that Canadian Aboriginals weren't physically harmed owing to colonial policies and practices. In an important essay on genocide as “ontological destruction,” Woolford

observes that “while all Aboriginal groups experienced at least some degree of attempted assimilation, some also experienced high levels of physical destruction through settler violence, disease, and deadly residential-school conditions, as well as biological interference with reproductive processes.”<sup>37</sup> His view is seconded by political scientists David MacDonald and Graham Hudson, who point out that “Many acts that constitute serious bodily and mental harm are known to have been performed by school officials and private parties during the operation of these schools. These include sexual assault, threats of death, severe beatings and assault, inhuman and degrading treatment—including systematic assaults on Aboriginal self-identity, and disfigurement and serious injuries to health as a result of the forced cohabitation of healthy children with children infected with communicable diseases.”<sup>38</sup> Nevertheless, Woolford cautions against too easily assuming Canadian settler colonialism was genocidal. In his view there are two main difficulties confronting anyone levelling such a charge: the lack of any coordinated plan for the destruction of Canada’s Indigenous peoples, and the awkward truth that many of the policies and institutions responsible for the destruction of Aboriginal life were created not to destroy Indigenous peoples but, explicitly at least, for reasons of benevolence.<sup>39</sup> Discussion of both of these difficulties dovetails with the preceding account of legal intent. This is because for genocide to be distinguishable from other forms of atrocious action, some kind of a distinctive intention to destroy a group must be present, whatever we understand by “intention.” Benevolent intentions do not seem to qualify as genocidal in this regard, although they are certainly paternalistic, and additionally there must be evidence of coordinated action. One cannot, after all, cause a genocide either inadvertently or by oneself. Instead, one must will genocide into being and carry it out with the aid of others.

Woolford responds to these concerns by suggesting that Canadian settler colonialism gave rise to what he terms a “colonial network of destruction.”<sup>40</sup> In explaining what this means he relies on nodal governance theory, which is concerned with charting the workings of the “outcome governing system” (OGS), or complex network of systems and structures through which a society organizes and governs itself. The OGS not only rationalizes social action, it justifies it by assigning meaning to the structures and patterns of action comprising everyday life. Woolford explains that the OGS is “a term which refers to how collective actors through

both conscious and habituated actions generate collective outcomes that are perceived as ‘goods’ (e.g. peace, happiness, and economic well-being) or else defined as problems when things go wrong (e.g. violence, famine, and suffering).<sup>241</sup>

The OGS is comprised of many “nodes,” different sites “within an OGS where knowledge, capacity and resources are mobilized to manage a course of events or, in other words, to put governance into action.”<sup>242</sup> In Canada, one such node would be the country’s IRS system. Regardless of the more or less benign local intentions informing the processes and mechanisms of Aboriginal education within a specific IRS, Woolford contends that all IRSs must be seen as contributing to Canada’s network of destruction. This is because all of these schools understood Aboriginal life and identity to be something in need of correction, traces of an obsolete and redundant existence out of which the country’s Indigenous peoples needed to be educated. From the perspective of the IRS system and its benefactors in church and government, Indigeneity was a problem that needed to be solved. And yet, “one must acknowledge that it is only possible to claim to be providing civilizing uplift to Indigenous peoples if one misrecognizes them and treats them first as barbarous peoples. Such misrecognition allows one to bury or bracket one’s intent—to act without actively admitting to the ends one seeks to achieve.”<sup>243</sup>

Obscured in the history of Canadian settler colonialism, then, are both a prevailing conception of Indigenous life as somehow not worth living, and a corresponding global intention to eradicate it. Conception and intention echo loudly in discussions of historical genocide since they bear a striking resemblance to the Nazis’ notion of “life unworthy of life,” the view originally advanced by German jurist Karl Binding and psychologist Alfred Hoche in 1920, and later taken up by Hitler in *Mein Kampf*, that certain groups of people (i.e., those with mental or physical disabilities) were little more than “human ballast” in need of sterilization or euthanasia.<sup>44</sup> We find the idea of Indigenous non-viability and expendability historically present throughout Canada’s OGS, where it can be seen underlying all of the decisions made by individuals and (governmental and non-governmental) organizations responsible for managing the country’s Aboriginal affairs. That is, at its core Canadian settler colonialism developed and evolved in ways continually informed by the idea of Indigenous life as something to be overcome. Hence Woolford’s observation



that “Within the settler-Canadian worldview, there was little room for the continuance of Indigenous societies.”<sup>45</sup> We can find further evidence of the eliminationist character of this worldview once again in the words of Duncan Campbell Scott, who expresses his hope for the beneficent elimination of Indigenous life thus: “The happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.”<sup>46</sup>

What work by Woolford and others on Canadian settler-colonial genocide reveals is how the intent to destroy is present but unevenly distributed throughout Canada’s OGS. This uneven distribution, along with the profoundly and often subtly networked character of the mechanisms and sites of colonial destruction, obliges us to rethink certain features of a genocide’s causal history. Most obviously, rather than viewing genocides as coherent events organized around an overarching set of intentions to destroy a particular group—intentions held by a privileged few in power who then direct the actions of subordinates accordingly—we should instead think of them as occurring through the simultaneous operations of multiple nodes conjoined in a (dominant) cultural network seeking a group’s annihilation. This network may be more or less formally justified, and insofar as its structure is concerned, it may be more or less tightly woven given the specifics of its material and historical circumstances. Any such network is genocidal to the extent that it is animated by a *dolus specialis*. This special intention has as its object the elimination of a group, but it is revealed only occasionally in the formal justifications offered to authorize specific acts. Most of the time it may be found implicit in the ideologies underpinning the logic responsible for narrowing the available choices for those making decisions about the welfare of people belonging to other groups, individuals with all levels of authority embedded in and shaped by institutions, and social structures richly permeated by eliminationism.

At least for the scholars whose work I have discussed here, this special intention more closely resembles what I have explained earlier as a *dolus eventualis*, the recognition of which requires a judgment about what a reasonable person should have known about the annihilatory consequences of his or her actions. But at times even this seems too narrow a constraint. As Woolford notes, “What this attack on ontology amounted to was an attack on habitus—a full assault upon the learned dispositions of Indigenous

life that were the storehouse of the embodied practices of Indigeneity.<sup>247</sup> That is, the primary casualty of settler colonialism in Canada were the individuals, conditions, and structures required for a people to make sense of themselves as such. Their destruction is attributable to a diverse range of actors working in concert, not always knowingly, to achieve the end of traditional ways of being and thinking, the practice of living and not just mere physical persistence. No doubt prominent amongst these actors is Canada's IRS system, about which we are really just beginning to learn in the wake of the activities of Canada's TRC. Woolford cites Hayter Reed, a senior bureaucrat in the government department responsible for overseeing Indian affairs, who in the 1890s "instructed teachers and staff of the residential schools to employ 'every effort ... against anything calculated to keep fresh in the memories of the children habits and associations which it is one of the main objects of industrial education to obliterate.'"<sup>248</sup>

Such clear statements of intent must, however, be read alongside less explicit expressions of moral disregard such as the dietary experiments uncovered by Ian Mosby that were conducted by the Canadian government on Aboriginal communities and residential schools between 1942 and 1952.<sup>49</sup> Along with Christianization, the theft of Indigenous land, the introduction of diseases, and the forcible removal and adoption of Aboriginal children (the so-called "Sixties Scoop"), these experiments may be located within a complex and evolving nodal network of destruction rationalized by the intention to destroy a form of life deemed not worth living. On this broader conception of genocidal intentionality (broader since it is a corporate intention not reducible to individual mental states), even acts of apparent benevolence may be seen as complicit in genocide to the extent that they were understood by their actors as likely to result in a group's inability to persist on its own terms. Indeed disregard of a group's *eidōs*, or sense of itself—of what it regards as its history, values, and prospects—constitutes one of genocide's enduring moral harms.

## Settler-Colonial Genocide in Canada: Final Thoughts

It is notable how few published works are available that specifically deny there having been a genocide committed in Canada. Denial does not seem

to be an intellectually respectable position, suggesting that it is perhaps instead just a manifestation of vulgar prejudice. Certainly insofar as the community of genocide scholars is concerned, there is no real question anymore that Canadian settler colonialism was genocidal. What remains unknown is exactly how such settler colonialism functioned as a nodal network to yield ontological destruction. Unlike the Holocaust, whose history and posterity have been extensively documented and commented upon, giving it (an increasingly contested) paragonicity, the story of colonialism in Canada has not yet been comprehensively told. More importantly, perhaps, it is only just starting to be told from the perspective of Indigenous peoples themselves. To pick only two such examples, the recent production of memoirs by IRS survivors,<sup>50</sup> along with the testimony given before the TRC, are both in the process of revising our picture of residential schools and their workings as sites of genocide. Likewise, recent additions to the repertoire of international legal instruments such as the Declaration of the Rights of Indigenous People, which codifies “Indigenous historical grievances, contemporary challenges and socio-economic, political and cultural aspirations,”<sup>51</sup> have done much to introduce Indigenous perspectives on matters of history and justice, especially concerning the colonial past.

Complicating matters even more is the instability of the term “genocide” itself. As I have tried to show here, the concept has been criticized by a wide variety of scholars and activists dissatisfied with its narrow construal in international law. The “Lemkinian Turn” in genocide studies seeks to redress these perceived legal shortcomings. By reminding us of the ideological and institutional contexts within which the Genocide Convention emerged, as well as Lemkin’s privileging of group destruction in his account of genocide’s harms, by offering a less restrictive account of genocidal intention, and by highlighting the fact that groups may be destroyed using means other than mass murder, means often directed towards the annihilation or radical and unwanted transformation of a people’s identity and culture, Lemkinian scholars are providing ample reasons to reassess judgments concerning European colonialism’s legacies and history. Early results of this reassessment have thus far contributed to further cementing the conclusion that settler colonialism was generally, and in the Canadian context specifically, genocidal.

In sum, evidence continues to mount that the Genocide Convention is inadequate to the task of reliably determining when a genocide has been

committed, and therefore of deciding whom to punish in its wake. Restoring the destruction of culture to the centre of our understanding of genocidal criminality is both overdue and likely to have a significant effect on how Indigenous experiences and history are generally understood. In light of this reappraisal, which requires us above all to take Indigenous perspectives seriously, it may become possible to explore new pathways towards genuine reconciliation. In MacDonald's and Hudson's words, "Changes in the UNGC to 'restore' cultural genocide, while reducing the impact of *dolens specialis* [sic], would have a marked impact on how Aboriginal history in Canada would be reinterpreted, both legally and morally. These changes would provide wider legal scope for reassessing the IRS system and the nature of truth and reconciliation."<sup>52</sup>

## NOTES

- 1 Pete McCormack, "Genocide and the Role of the Individual: An Interview with Samantha Power," PeteMcCormack.com, [http://www.petemccormack.com/interview\\_power\\_001.htm](http://www.petemccormack.com/interview_power_001.htm) (accessed 15 February 2016).
- 2 Peter Burke, *Varieties of Cultural History* (Cambridge: Polity Press, 1997), 54.
- 3 Additional reasons included budgetary worries and a longstanding commitment by IAGS to organize an Indigenous-themed conference.
- 4 The TRC was originally scheduled to wind down its operations in 2014, but due to a number of factors—including the consequences of its mismanaged first year of operations under the leadership of then chairperson Justice Harry Laforme, and the late release of a trove of important government documents following a 2013 ruling by the Ontario Superior Court—the TRC's mandate was extended for an additional year. The TRC staged its closing ceremonies from 1 May to 3 June 2015, and ceased operations entirely on 18 December of that year.
- 5 Significantly, a 2015 survey undertaken by the Angus Reid Institute in the wake of the release of the TRC's summary report showed a large majority of Canadians agreeing with the commission that the country's residential schools perpetrated "cultural genocide" on Indigenous peoples.
- 6 Mary Agnes Welch, "The Genocide Test," *Winnipeg Free Press*, 12 July 2014, <http://www.winnipegfreepress.com/breakingnews/the-genocide-test-266849891.html> (accessed 2 September 2016).
- 7 Note that in its definition of genocide, Canada's Crimes Against Humanity and War Crimes Act (2000) defers "to customary international law or conventional international law" and "principles of law recognized by the community of nations." Available at <http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf>.
- 8 Michael Melanson, "Canadian policies don't meet 'genocide test,'" *Winnipeg Free Press*, 17 July 2014, <http://www.winnipegfreepress.com/opinion/analysis/canadian--policies--dont-meet-genocide-test-267286851.html> (accessed 1 September 2016).

- 9 Andrew Woolford, "Genocides distinct, complex," *Winnipeg Free Press*, 18 July 2014, [http://www.winnipegfreepress.com/opinion/letters\\_to\\_the\\_editor/have-your-say-267613581.html](http://www.winnipegfreepress.com/opinion/letters_to_the_editor/have-your-say-267613581.html) (accessed 1 September 2016).
- 10 Ibid.
- 11 See William Korey, "Lemkin's Passion: Origin and Fulfilment," *PISM Series 1* (2010): 75–98. Korey contends that with respect to the drafting process of the Genocide Convention, "Technical and drafting considerations had to give way, almost at the outset, to political calculation" (89).
- 12 Michael Ignatieff, "The Unsung Hero Who Coined the Term 'Genocide,'" *New Republic*, 21 September 2013, <http://www.newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide> (accessed 3 September 2016).
- 13 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2012); Marco Duranti, "The Holocaust, The Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth," *Journal of Genocide Research*, 14, no. 2 (2012): 159–186.
- 14 Peter Balakian, "Raphael Lemkin, Cultural Destruction, and the Armenian Genocide," *Holocaust and Genocide Studies* 27, no. 1 (2013): 60.
- 15 Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, [http://www.oas.org/dil/1948\\_Convention\\_on\\_the\\_Prevention\\_and\\_Punishment\\_of\\_the\\_Crime\\_of\\_Genocide.pdf](http://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf) (accessed 1 September 2016).
- 16 Balakian, "Raphael Lemkin, Cultural Destruction, and the Armenian Genocide," 59.
- 17 As cited in Balakian, "Raphael Lemkin," 60.
- 18 Sociologist Damien Short shows how Lemkin understood physical and cultural genocide "not as two distinct phenomena, but rather [as] one process that could be accomplished through a variety of means." See Short, "Cultural Genocide and Indigenous Peoples: A Sociological Approach," *The International Journal of Human Rights* 14, no. 6 (2010): 838.
- 19 See Powell and Amarasingam, "Atrocity and Proto-Genocide in Sri Lanka," in this volume.
- 20 Ibid.
- 21 Michael McDonnell and A. Dirk Moses, "Raphael Lemkin as Historian of Genocide in the Americas," *Journal of Genocide Research* 7, no. 4 (2005): 501.
- 22 See Ronald J. Horvath, "A Definition of Colonialism," *Current Anthropology* 13, no. 1 (1972): 45–57.
- 23 See Stephen Katz, *The Holocaust in Historical Context* (Oxford: Oxford University Press, 1994).
- 24 Paul Boghossian, "The Concept of Genocide," *Journal of Genocide Research* 12, nos. 1–2 (2010): 73. See also Martin Shaw, *What is Genocide?* (Cambridge: Polity Press, 2007).
- 25 Jean-Louis Panneé, "Raphael Lemkin and Raul Hilberg: About a Concept" *PISM Series 1* (2010): 114.
- 26 McDonnell and Moses, "Raphael Lemkin as Historian of Genocide in the Americas," 502.
- 27 See David MacDonald and Graham Hudson, "The Genocide Question and Indian Residential Schools in Canada," *Canadian Journal of Political Science/Revue canadienne de science politique* 45, no. 2 (2012): 427–449; *Ibid.*, 439.

- 28 In Panneé, “Raphael Lemkin and Raul Hilberg,” 111.
- 29 Lemkin’s conception of agency and causal responsibility runs contrary to that of Christopher Powell and Amarnath Amarasingam in their contribution to this volume. Powell, Amarasingam, and other structuralist/functionalist thinkers view our immediate moral and practical agency as crucially overdetermined by the various structures and ideologies in which we “disciplined” subjects are always already enmeshed. For such thinkers genocide is first and foremost “a global and systemic problem,” and so Powell and Amarasingam feel justified in asserting that “what defines genocide is not so much the intentions of those engaged in its perpetration or even the moral qualities of the acts involved, but its distinctive qualities as a process” (See Powell and Amarasingam, “Atrocity and Proto-Genocide in Sri Lanka”). The alternative view that I am working to sketch here is that, per Lemkin, intentions matter to our understanding of what genocide is and who (or what) to hold responsible for its perpetration. However, I am critical of the legal conception of intention (i.e., *mens rea*), since it is far too crude and conspicuously disconnected from contemporary scholarly accounts of how people and collectivities plan and act. A more nuanced and less exclusive conception of intention is required to make sense of Canadian settler colonialism and other complex atrocities, and I’ve tried to provide some idea here of what one might look like although a thorough account exceeds (and runs in some ways parallel to) the explanatory aims of this chapter.
- 30 This is not to say that there are no relevant statements of destructive intent in the Canadian case, as I explain. Rather, it is difficult to connect such statements causally to the actual systems and structures responsible for the destruction of Canadian Aboriginal life. Of course this remains an issue in Holocaust scholarship too, but in that context intentionalism is longstanding and it has been plausibly elaborated by such distinguished historians as Saul Friedlander and Eberhard Jäckel, notwithstanding powerful functionalist critiques of the view.
- 31 Kai Ambos, “What Does ‘Intent to Destroy’ in Genocide Mean?” *International Review of the Red Cross* 91, no. 876 (2009): 835.
- 32 Ibid., 838.
- 33 Ibid., 840.
- 34 Ibid.
- 35 As cited in Ambos, “What Does ‘Intent to Destroy’ in Genocide Mean?” 840–841.
- 36 As cited in Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1992): 50.
- 37 Andrew Woolford, “Ontological Destruction: Genocide and Canadian Aboriginal Peoples,” *Genocide Studies and Prevention* 4, no. 1 (2009): 81.
- 38 MacDonald and Hudson, “The Genocide Question and Indian Residential Schools in Canada,” 440.
- 39 In more recent work Woolford downplays the significance of benevolence claims, arguing that by morally justifying displacement and destruction they strategically served to mask an underlying and rapacious desire for land. See Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Lincoln, NE: University of Nebraska Press, 2015).

- 40 Andrew Woolford, "Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada," *Settler Colonial Studies* 3, no. 1 (2013): 70.
- 41 Ibid.
- 42 Ibid.
- 43 Ibid., 72–73.
- 44 Karl Binding and Alfred Hoche, *Allowing the Destruction of Life Unworthy of Life: Its Measure and Form*, Trans. Cristina Modak (Greenwood, WI: Suzeteo Enterprises, 2012).
- 45 Woolford, "Nodal Repair and Networks of Destruction," 73.
- 46 As cited in Blanca Tovias de Paisted, "Navigating the Cultural Encounter: Blackfoot Religious Resistance in Canada (c. 1870–1930)," in *Empire, Colony, and Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. Dirk Moses (Oxford: Berghahn Books, 2008), 281.
- 47 Woolford, "Nodal Repair and Networks of Destruction," 75.
- 48 Ibid.
- 49 See Ian Mosby, "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952," *Histoire Sociale/Social History* 46, no. 91 (2013): 145–172.
- 50 See for example Ted Fontaine's *Broken Circle: The Dark Legacy of Indian Residential Schools* (Victoria, BC: Heritage House Publishing, 2010).
- 51 "Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples," *United Nations Permanent Forum on Indigenous Issues*, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> (accessed 3 September 2016).
- 52 MacDonald and Hudson, "The Genocide Question and Indian Residential Schools in Canada," 443.

