

The MMIWG Final Report and Genocide

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On June 3, 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMWIG) issued its final report (see here). The report is a monumental and impressive tour de force setting out in detail how historically Canadian governments have treated indigenous people with contempt and have used racist and discriminatory policies to advance their own national policies. It also provides a great number of important recommendations related to culture, health and wellness, human security and especially the administration of justice (see here). In this context, the report makes a very valuable contribution to the understanding of the relationship between the Canadian government and indigenous people by explaining how indigenous women were subject to even greater suffering and more lamentable treatment than indigenous men, a phenomenon, which prevails to this day (see especially chapter 4 in volume 1a of the report).

Why is it then that all these positive aspects of the report have been overshadowed by a discussion of only one word: ‘genocide’? It is not that the word ‘genocide’ has not been used before in a report pertaining to indigenous people. This was the case in the 2015 *The Final Report of the Truth and Reconciliation Commission of Canada* (TRC report) where genocide is mentioned on the very first page of the Introduction to Volume 1 (see here) in the following words:

For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities

in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide.”

However, unlike the MMIWG report, the TRC report distinguishes cultural genocide from physical and biological genocide and does not attempt to frame the genocide debate within a legal framework. In contrast, the MMIWG refers twice to the fact that genocide is a complex notion, as a result of which it will rely on the legal analysis set out in the Supplementary Report – Genocide. (see here)

This reliance is expressed as follows:

Due to the gravity of this issue, the National Inquiry is preparing a supplementary report on the Canadian genocide of Indigenous Peoples according to the legal definition of “genocide,” which will be publicly available on our website.” (page 54, Volume 1a)

and

Throughout this report we have also pointed to other legal instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide (PPCG), that must be considered in terms of viewing Indigenous women, girls, and 2SLGBTQQIA people as rights holders. Please note that, due to the complexity of the issue of genocide, a supplementary report will be available on our website that explores this finding in greater detail within a legal framework of analysis.” (page 169, Volume 1b)

The reaction to the report so far in the news media has focused on the use of the word ‘genocide’, sometimes in a positive manner (see Maham Abedi in the Globe and Mail; Andrew Woolford in the Conversation and Sarain Fox in the Globe and Mail) but for the most part in a negative manner (see Editorial in the Globe and Mail; Erna Paris in the Globe and Mail; Brian Platt in the National Post; John Ivison in the National Post; Brian Platt interviewing Philippe Sands in the National Post and Father Raymond J. de Souza in the National Post). It has also already resulted in a call by the Organization of American States (OAS) for Canada to further investigate this allegation (see here).

Because of the influence of the Supplementary Report – Genocide on the MMIWG report, this article will focus on a legal analysis of this document.

Supplementary Report – Genocide (SRG): Introduction

The SRG reads for the most part as a legal opinion but is interspersed with more politically oriented views (which are for the most part set out in bold). These politically oriented references to the concept of genocide are not always consistent with the established legal application of that term to the facts before them. The legal portion of the 27-page report is generally based solidly on international jurisprudence and as a result there is no need for comment on it. However, the last five pages before the conclusion (pages 20 to 25) are problematic from a strictly legal point of view and will be analyzed in detail.

These last five pages make two assumptions to expand the concept of genocide as accepted at the moment in international law beyond what is reasonable and can only be termed as *lex ferenda* (or what the law should be) as opposed to *lex lata* (what the law is). The first legally problematic assumption is that the requirement to establish the ‘destruction of a group’ to prove genocide encompasses more than physical or biological killing and also includes cultural destruction or in the words of the SRG “non-lethal genocidal conduct” or “the destruction of a group as a social unit” (pages 20 and 23).

The second legally problematic assumption raises issues of the retroactive application of the law or legality. The last paragraph on page 23 says:

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.

However, the paragraph before this one refers to government actions, which preceded the main international law instrument dealing with genocide, the Genocide Convention of 1948 (see here, which was the main source for the legal analysis in the rest of the SRG) by at least a number of decades. This paragraph states after having examined ‘killing’ events in the 18th and 19th century in the preceding paragraph:

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.” 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. (pages 24-25)

Cultural genocide

The argument that the term ‘destruction’ also includes cultural genocide is based on two judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) issued by its Trial Chamber in 2005 and 2006 as well as a 2007 decision by the European Court of Human Rights (ECtHR). (pages 22-23)

While the statements attributed to these decisions are accurate, the SRG did not examine subsequent jurisprudence on this point from the last 12 years. The trend observed in the above three cases was short lived and reversed by international institutions in short order. In fact, the ICTY itself retreated from this position. The most recent example can be seen in the 2016 *Karadži?* Trial Chamber decision (see here, which was referred to in the SRG for another point, paragraph 553), which says:

The Genocide Convention and customary international law prohibit only the physical and biological destruction of a group, not attacks on cultural or religious property or symbols of the group. However, while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group. Forcible transfer alone would not suffice to demonstrate the intent to "destroy" a group but it is a relevant consideration as part of the Chamber's overall factual assessment.

Not only has the ICTY reversed its position, but other international institutions, such as the International Court of Justice (ICJ) in another decision referred to by the SRG, namely the 2015 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see here, paragraphs 134-136), where the argument used by the SRG on page 20 that "a restrictive interpretation of the term "destroy" leads to absurd results, particularly the forcible transfer of children" was raised by Croatia but rejected by the Court:

134. Croatia argues that the required intent is not limited to the intent to physically destroy the group, but includes also the intent to stop it from functioning as a unit. Thus, according to Croatia, genocide as defined in Article II of the Convention need not take the form of physical destruction of the group. As evidence of this, it points out that some of the acts of genocide listed in Article II of the Convention do not imply the physical destruction of the group. By way of example, it cites "causing serious . . . mental harm to members of the group" (subparagraph (b) of Article II), and "forcibly transferring children of the group to another group" (subparagraph (e) of that Article).

135. Serbia, on the contrary, rejects this functional approach to the destruction of the group, taking the view that what counts is the intent to destroy the group in a physical sense, even if the acts listed in Article II may sometimes appear to fall short of causing such physical destruction.

136. The Court notes that the travaux préparatoires of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context (see Report of the Ad Hoc Committee on Genocide, 5 April to 10 May 1948, United Nations, Proceedings of the Economic and Social Council, Seventh Session, Supplement No. 6, UN doc. E/794; and United Nations, Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Eighty?Third Meeting, UN doc. A/C.6/SR.83, pp. 193-207).

It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group (Report of the ILC on the Work of Its Forty-Eighth Session, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, pp. 45-46, para. 12, quoted by the Court in its 2007

Judgment, I.C.J. Reports 2007 (I), p. 186, para. 344).

It follows that “causing serious . . . mental harm to members of the group” within the meaning of Article II (b), even if it does not directly concern the physical or biological destruction of members of the group, must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part. As regards the forcible transfer of children of the group to another group within the meaning of Article II (e), this can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group’s capacity to renew itself, and hence to ensure its long-term survival.

Incidentally, in the context of the seriousness of destruction, the Court also rejected, in general, the serious phenomenon of ethnic cleansing as genocide in paragraphs 162, 477 and 510.

Last, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2018 in the *Case 002/02* in the context of the trial of two leaders in the Khmer Rouge regime for their part in the deaths of millions (here) also rejected the broader interpretation of genocide employed by the SRG on page 20 in the following words:

799. The Co-Prosecutors submit that, contrary to some international jurisprudence, the intended destruction of a group need not be “physical or biological”. They contend that a “group can be deprived of its existence through the destruction of its specific traits, or dispersal of its members, leading to the dissolution of its unity and/or collective identity in a fundamental and irremediable manner”. By way of example, the Co-Prosecutors submit that forcibly transferring children to another group is an act of genocide that does not involve physical or biological destruction. …

In contrast, the KHIEU Samphan Defence submits that the Genocide Convention only envisages the physical and biological destruction of a group. No other parties made any relevant submissions in this regard.

800. The Chamber concurs with the finding of the ICJ, based in part on the travaux préparatoires of the Genocide Convention, that the scope of that Convention waslimited to the physical or biological destruction of the group to the exclusion of cultural genocide. Even when underlying acts of genocide do not “directly concern the physical or biological destruction of members of the group [such as causing serious mental harm or forcible transfer of children]”, those acts must be carried out “with the intent of achieving the physical or biological destruction of the group, in whole or in part”.

801. While in the current case the actus reus of genocide is limited to killing members of the group, the possible combination of forced transfer and killings targeting members of the same group may be a relevant factor to take into account to assess the specific intent to destroy. In this regard the Chamber concurs with the approach taken by the ICTY “that the physical or biological destruction of a group is not necessarily the death of the group members” and “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 – particularly when it involves the

separation of its members", because "[i]n such cases […] the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was".

Retroactivity

As the SRG states in its historical overview on page 6, the term "genocide" and its defining elements were first conceived by Raphael Lemkin in 1944, quickly followed by resolution 96(i) in 1946 by the United Nations General Assembly adopting the notion of genocide (see here) and in 1948 by the Genocide Convention.

The Genocide Convention, a treaty with 151 States Party and 41 additional signatories, cannot be applied retroactively as a result of article 28 of the 1969 *Vienna Convention on the Law of Treaties* (see here), which was applied in the *Croatia v. Serbia* case, mentioned above, at paragraph 95.

This raises the question whether genocide can be applied before 1944 pursuant to customary international law. State practice in that regard is not helpful. With respect to the Armenian massacres, an event comparable to genocide, the international outrage was reflected by a statement by the governments of France, Britain and Russia on 24 May 1915 denouncing these acts as "crimes against humanity and civilization" (see Joseph Rikhof, "The Istanbul and Leipzig Trials: Myth or Reality?" In *Historical Origins of International Criminal Law: Volume 1*, edited by Morten Bergsmo, CHEAH Wui Ling and YI Ping, here, page 261, footnote 5). As well, later on, in 1919 and 1920, when a large number of perpetrators for those massacres were put on trial and convicted during the so-called Istanbul trials, the terminology used was "mass murder against the Armenians" while mention was also made of "calamities", "deportation with the goal of annihilation", "slaughter", and "massacres" (idem, page 276), "extermination of the deportee population", "annihilation of the population" (idem, page 278) and allowing "premeditated tragic events to take place, causing all manner of slaughter, looting, and pillage, such are entirely unacceptable to human and civilized sensibilities and which, in Islam's views of the severity of the crimes are considered among the greatest of offences" (idem, page 279). It is clear from this iteration of the terminology used that that these practices were not yet collectively recognized as a single crime of genocide.

After the Second World War, but before the adoption of the Genocide Convention, a number of trials, including the indictments in the Nuremberg trials, used the term 'genocide' and based their reasoning on either the work of Lemkin or the 1946 United Nations General Assembly Resolution. This development has been described in the European Court of Human Rights (ECtHR) case of *Vasiliauskas v. Lithuania* (see here in paragraphs 171-172), where the Court stated:

171. The Court turns to the question of whether the definition of genocide in the Convention existed alongside broader customary norms of international law, which could provide a valid basis for the applicant's conviction for genocide.

172. It is clear from the Court's earlier finding in relation to the accessibility of the offence that in 1953 genocide was already a crime under international customary law. The indictment of October 1945 before the Nuremberg International Military Tribunal, as well as certain prosecutors' oral submissions, charged the defendants with genocide, the significance of which is not necessarily undermined by the fact that the final judgment made no mention of the crime of genocide. UN General Assembly Resolution 96 (I) of 11 December 1946, adopted unanimously and without debate, affirmed the existence of the international crime of genocide. There followed several references in indictments to the crime of genocide, and convictions for crimes with genocidal purposes in the post-Nuremberg trials under Control Council Law no. 10as well as in the trials by the Supreme National Tribunal of Poland (1946-48) of *Hoess*and *Greiser.* Article 1 of the Genocide Convention "confirmed" that genocide was a crime under international law. The ICJ later referred to Resolution 96 (I) and confirmed that the principles underlying the Genocide Convention were recognised by civilised nations as binding on States even without any conventional obligation.

The cases mentioned in this quote and relevant comments with respect to genocide can also be found in the Law Reports of Trials of War Criminals (see here), volume VI (see here, pages 32, 48, 75 and 99; volume VII (see here), pages 7-9 and 24-26; volume XIII (see here), pages 36-42; and volume XV (see here), pages 122-123. From the above it become apparent that the reference to customary international law in relation to the concept of genocide is limited to the time period between 1944 and 1949.

The fact that genocide did not exist before the Second World War was also discussed in the *Croatia v. Serbia* case, mentioned above, where the Court stated in paragraphs 95 and 97:

95.The Court considers that a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the travaux préparatoires suggests a different conclusion. Nor does the fact that the Convention was intended to confirm obligations that already existed in customary international law. A State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring but the fact that it subsequently becomes party to the Convention does not place it under an additional treaty obligation to have prevented those acts from taking place.

97. The negotiating history of the Convention also suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past. …

By contrast, in spite of the events immediately preceding the adoption of the Convention — to which many references were made — there was no suggestion that the Convention under consideration was intended to impose an obligation on States to punish acts of genocide committed in the past.

The only exception to this approach is mentioned in the SRG, page 3, where it quotes the *Krsti?* Trial Chamber decision of the ICTY (see here) by saying:

[…] 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*).

The italicized wording in this quotation is correct but it also important to check the footnote on which this quote is based, namely footnote 1195 to paragraph 541 in *Krsti?*. This footnote in turn relied on the ICJ *Advisory Opinion re Reservations to the Convention on the Prevention and Punishment of Genocide* of 1951 (see here), page 23; however, page 23 of that advisory opinion does not reflect what the Trial Chamber ascribes to it but instead says the following:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universa1 character both of the condemnation of genocide and of the CO-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

Conclusion

A discussion of genocide as a sociological phenomenon would be useful in the context of justifiable criticisms of Canadian policies dealing with indigenous women as is done in the MMIWG Final Report. However, by introducing a legal approach to this debate, the authors have raised an expectation of legal consequences and responses. With this expectation comes the responsibility of the authors to be absolutely correct in their analysis. At a minimum, the authors should have pointed out differences of opinion and explained convincingly why they chose the particular direction of labeling practices from the past, as lamentable as they were, as genocide without clarifying whether their arguments pertain to the realm of *lex ferenda*or *lex lata*. This was not done in the SRG and a result the two essential assumptions, which broaden the legal parameters of genocide beyond its internationally recognized limits, do not stand up to scrutiny and would never hold up as a legal argument in any international

institution.

The authors of the document would have been wise to have followed the advice of the United Nations Office on Genocide Prevention and the Responsibility to Protect, which states in the very first paragraph of its Guidance Note 1 (see here):

The question is sometimes asked whether specific events, past of present, can referred to as “genocide”. It is important to adhere to the correct usage of the terms for several reasons; (i) the term is frequently misused in reference to large scale, grave crimes committed against particular populations; (ii) the emotive nature of the term and political sensitivity surrounding its use; and (iii) the potential legal implications associated with a determination of genocide.

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