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SABINE MANNITZ // FRIEDERIKE DREWS

CANADA'S VIOLENT LEGACY: HOW THE PROCESSING OF CULTURAL GENOCIDE IS HAMPERED BY POLITICAL DEFICITS AND GAPS IN INTERNATIONAL LAW

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This report looks at the systematic violence perpetrated in the context of colonial settlement policies in Canada, and at the consequences of this violence. In 2021, the remains of hundreds of bodies were discovered on the grounds of former so-called "residential schools" for Indigenous children, and the topic has been making international headlines ever since. The discovery was a shock for the Canadian public, despite the fact that between June 2008 and December 2015, a "Truth and Reconciliation Commission" (TRC) had been conducting investigations, in particular, into the practices and occurrences at these boarding schools. Starting in the mid-nineteenth century and in some cases continuing until the 1990s, the Canadian government had forced approximately 150,000 Indigenous children to attend these schools, most of which were run by churches and located far away from the reservations designated by the state as settlement areas for their families. Upon completion of its work in 2015, the TRC came to the conclusion that the intentional alienation of children from their origin groups amounted to "cultural genocide" committed against the First Nations, Inuit and Métis peoples. The declared political objective of the boarding school system was the Christianisation and cultural assimilation of the students into the *white* society. However, the TRC was not authorised to investigate whether this might also have constituted *physical* genocide – because that, in contrast to the case of *cultural* genocide, would have had legal implications.

This prominent case of colonial violence in Canada has prompted us to take a closer look at the concept of cultural genocide. How is it possible that an entire complex of crimes is held to constitute genocide, yet there are no consequences under criminal law? The key reason for this is the lacking codification of "cultural genocide". Our analysis will focus on the relevant nuances in pertinent legal definitions in order to understand the gaps they contain. These gaps result from a specific historical context; however, they also reveal fundamental political problems that go beyond that specific context and hinder a proper processing of history. The failure to acknowledge cultural genocide as a legally relevant concept limits the options to use the law in pertinent cases as an instrument to address collectively experienced violence, and creates manoeuvring space for political opportunism. The Canadian example thus reveals lacunae in international law, but it also highlights how much the law is dependent on political engagement: A processing of historical crimes such as cultural genocide committed against Indigenous peoples necessitates accepting political responsibility and developing and improving existing legal regulations.

In the debate about whether and to what extent the lack of norms anchoring cultural genocide in international criminal law constitutes a regulatory gap, it is not so much the definition as such that is contentious, but rather the question of its practical validity and applicability. In order to capture this debate about what constitutes cultural genocide, it is helpful to reconstruct the historical emergence of international law on this issue in the concrete context of the political interests at play. The negotiations on the codification of genocide resulted in the deletion of cultural genocide from the final version of the "Convention on the Prevention and Punishment of the Crime of Genocide" (CPPCG). Canada – like other states founded on settler colonialism – was a key player in this context. We therefore begin by retracing the political processes that precede the creation of any norm of international law; in a second step, we will illustrate the consequences this (incomplete) legislation had for the case in Canada.

Overall, political decision-makers increasingly face the question of how to handle the historical responsibility for colonial violence and its consequences in a way that can provide a new foundation for current political and societal relationships. It would be naïve to rely on supranational legislation, given the gaps in the existing laws and considering that these gaps are – or rather, were – partially intended, as we will show with the example of cultural genocide and how the process of codification as a rule of international law was influenced by Canada. In any case, it would not do the issue justice to simply trust in the regulatory power of legal procedures. Politics can and should champion the further development of supranational law in order to make it an effective instrument for the processing of crimes and injustice, including historical wrongdoings, but also in order to create a space where debates about the tensions between forensics and narratives can take place. Specifically, anchoring cultural genocide in international criminal law could give culturally marginalised groups legal recognition when they tell their stories in the context of collectively experienced crimes. However, defining the occurrences as crimes cannot substitute for a collective engagement with and re-telling of such a history of violence, nor for a societal and political discourse on its continued effects.

CONTENTS

1. INTRODUCTION[1]

In 2021, the remains of more than 1,500 bodies were found on the premises of so-called "residential schools" in Canada. As of the mid-nineteenth century, as part of a government policy of re-education, Indigenous children were forced to attend these boarding schools, most of them run by churches. After the first discoveries of human remains were made public in May 2021, radar technology was used to conduct a systematic search for unmarked graves on the grounds of these former schools. The discoveries of more human remains have shocked this North American country, which likes to present itself as an open society, proud of its cultural diversity – and many Canadians do see themselves that way. This ethos was developed in the course of a political reorientation in the 1970s and 1980s; in 1988, when it became apparent that immigration would make Canadian society more and more diverse, multiculturalism was declared by law as an official government policy. The political commitment to multiculturalism was intended, among other things, to help overcome the attitude of cultural superiority that was at the heart of European colonialization of North America and of assimilation strategies such as forcing Indigenous children to attend these schools – an attitude that had long been dominant but by now had been overtaken by lived reality.

Officially, cultural diversity is held in high esteem, but it has rarely been investigated whether this is actually reflected in the Canadian population's attitudes with regard to the Indigenous members of their society. A 2016 study on how much non-Indigenous Canadians know, and what opinions they hold, about their Aboriginal compatriots delivered a very patchy, ambivalent picture (Environics Institute 2016). However, it emerged that the general knowledge and awareness of the problematic practice of forcing Indigenous children to attend residential schools had increased as a result of the work carried out from 2008 to 2015 by the Truth and Reconciliation Commission (TRC), which had been mandated by the Canadian government to investigate the history of subjugation in these schools and its consequences for the Aboriginal population.[2] The work of the TRC consisted in securing documents – as far as those were available – interviewing witnesses and over 6,500 survivors of the boarding school system, documenting the findings, and issuing recommendations how reconciliation might be achieved between Aboriginal people and the *white*[3] majority in the country.[4]

One of the perturbing realisations made in 2021 is that, despite years of work by the TRC, large parts of the population are supposed to have been ignorant of the fact that the conditions in the residential schools caused hundreds of deaths and that bodies were discarded in anonymous graves. In

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1 The authors wish to thank Barry de Vries, Jens Stappenbeck, Felix Bethke, Franziska Schreiber, Julian Junk, Peter Kreuzer, Stefan Kroll and Una Jakob for their constructive comments on a previous, German version of this report; and Vera Mark for her careful translation.

2 Indian Residential Schools and the *Truth and Reconciliation Commission*, see Environics Institute 2016: 29.

3 In line with Critical Whiteness this report uses italics for the term "white" to emphasise that this is a construed concept. See for example Allen 1994; Dyer 1997; Eggers et al. 2009.

4 In 2015, the findings of the *Truth and Reconciliation Commission* (TRC), their sources and documents were permanently deposited with the *National Centre for Truth and Reconciliation* at the University of Manitoba in Winnipeg. This archive is open to access by the public and serves research purposes. In addition, the TRC has published extensive reports of their findings, which are accessible online, see www.trc.ca.

2015, the Commission had concluded that the intentional alienation of First Nations, Inuit and Métis[5] children constituted a case of "cultural genocide". However, the TRC lacked the authority to take a position on the question of a possible physical genocide, since that would have had legal implications (MacDonald 2015; Woolford/Benvenuto 2015). At the time, Prime Minister Justin Trudeau demanded a total renewal of the relationship between Canada and Indigenous peoples, but he failed to follow up on this with any political initiative. Likewise, during the recent election campaign Canada's dark colonial legacy did not warrant any attention from his Liberal Party. It is unclear whether this was because the topic simply does not move sufficient numbers of voters, or whether the potential for conflict was considered too much of a political risk for the party's profile.[6]

As early as 1990, the National Chief of the Assembly of First Nations Phil Fontaine demanded a public investigation into the situation at those residential schools, which were still operational at the time, and in 1991, the Canadian government complied with this request. As a result of the investigation, the last boarding schools for Indigenous children were closed over the course of the 1990s. However, it took twelve more years of public demands by victims for further investigations until Stephen Harper, the prime minister at the time, issued a formal apology to the survivors and, in that same year 2008, for the *Truth and Reconciliation Commission* to receive its mandate. This meant that for the first time, systematic, nationwide attention was given to the violence committed against Indigenous children within the boarding school system. Despite the fact that the TRC had already published its findings in an extensive report at the end of 2015, it was only with the discovery of human remains in 2021 that the wider Canadian public took proper notice.[7] Of course, since the mid-20th century the number of deaths occurring in the residential schools were no longer strikingly disproportionate compared to those in same age groups in the rest of the Canadian population, as had been the case between the 1860s and 1940s. In the first decades that this boarding school system for Aboriginals was operational, psychological and social neglect, lack of medical care and malnutrition led to the death of numerous children and youngsters.[8] But even though the TRC's final reports clearly document cases of death due to failure to render assistance, of violence and of sexual abuse well into the 1970s, for a long time these outrageous conditions did not have any noteworthy consequences. Granted, brutal (re-)education measures were applied not only in the Canadian residential schools, and not even only for the purposes of colonialist "civilization" efforts; they were common elsewhere until the mid-20th century. In the past few years, reports about severe violence and neglect in orphanages, juvenile homes and even convalescence homes for children in Germany, Ireland or Switzerland have attracted attention to situations which until a few decades ago simply were not considered an

5 These are the three major groups, currently comprising approximately 1.7 million people, recognised by the government as Indigenous Canadians. Cf. https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303; https://www.thecanadianencyclopedia.ca/en/article/first-nations (last accessed 4 March 2022).

6 Cf. https://pm.gc.ca/en/news/statements/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation (last accessed 4 March 2022).

7 Cf. https://www.n-tv.de/politik/Knochenfunde-erschuettern-Kanada-article22715637.html (last accessed 4 March 2022) and this timeline https://www.tvo.org/article/felt-throughout-generations-a-timeline-of-residential-schools-in-canada (last accessed 4 March 2022).

8 The TRC documentations are categorised in phases of these historical periods. Likewise, the death rate statistics show a decline in excess mortality at residential schools after the 1950s.

issue.[9] It is difficult to say why these cases did not attract any significant public interest: perhaps it was because this kind of violence in an educational context was generally accepted, or perhaps it was because such acceptance, in turn, meant that the victims had nowhere to go or no one to tell about their experiences. The lines are blurred; both factors worked together. Moreover, in settler colonies such as Canada or Australia the forced schooling of Aboriginal children was connected to an ideology of cultural racism, which drastically and very efficiently cut off families from any information about or interaction with their abducted children. It was a long-term concept, an essential part of the mechanisms of power employed by the growing settler population to take possession of the land: remove Indigenous children from their families, communities and entire societies and put them in so-called boarding schools where they would be robbed of their cultural identity. This structure of violence founded in cultural racism goes beyond the kind of structural perils that total institutions often present for children and youngsters anyway.

In Canada, Aboriginal families were long kept in the dark about where their children had been taken and what had happened to them under the "care" of the state and Christian churches. Even the relatives of those victims who were identified by name rarely knew anything about the circumstances under which their children had died; this shows just how effective it was to separate children from their families and house them far away.[10] The outrage following the discoveries in 2021 was huge: grieving people placed children's shoes in front of the Canadian parliament, one pair for each of the more than 1,000 skeletons that had been unearthed,[11] and churches were set on fire.[12] These protests contributed to a (re)focusing of public attention on the violence committed as part of Canadian colonial politics, as well as its consequences. In this context – just as in the case of the TRC's reporting since 2015 – a troublesome discrepancy between the factual establishment of genocidal activities and the lack of any consequences becomes apparent. That is why we take this topical and prominent case of colonial violence in Canada as an opportunity to take a closer look at the concept of cultural genocide: How is it possible that an entire complex of crimes is held to constitute genocide, yet there are no consequences under criminal law? The key to this is the lack of a clear, unambiguous codification of cultural genocide. Our analysis will focus on the relevant nuances in legal definitions in an attempt to understand the gaps they contain. These gaps result from a specific historical context; however, they also reveal fundamental political problems that go beyond that specific context and hinder a proper processing of history. The failure to acknowledge cultural genocide as a legally relevant concept limits the options to use the law in pertinent cases as an instrument to address violence, and creates manoeuvring space for political opportunism. The Canadian example thus reveals lacunae in international law, but it also highlights that law is dependent on political engagement: A

9 For a current publication on this issue, see e.g. Röhl (2021): "Das Elend der Verschickungskinder" ["*The misery of children sent to care facilities*"].

10 Cf. https://www.riffreporter.de/de/gesellschaft/kanada-indigene-tote-kinder-katholische-schulen (last accessed 4 March 2022).

11 Cf. https://www.tagesschau.de/ausland/amerika/kanada-gebeine-ureinwohner-kinder-101.html (last accessed 4 March 2022).

12 Cf. https://www.faz.net/aktuell/gesellschaft/kriminalitaet/kanada-abermals-zwei-katholische-kirchen-niedergebrannt-17409744.html (last accessed 4 March 2022).

processing of historical crimes such as cultural genocide committed against Indigenous peoples necessitates accepting political responsibility and developing and improving existing legal regulations.

At this point, we want to emphasize that the issue under discussion here is relevant beyond the Canadian constellation. Post-colonial analyses have contributed to the increase in awareness of how problematic the long-term consequences of colonial interventions are, and questions about how to deal with historic acts of violence today have recently attracted more attention on a political level. Besides politicians acknowledging the injustice or even crimes and making gestures of apologies, there is also the question of possible compensation, restitution and reparation in the political arena. Germany, for example, admitted – 100 years after the events in question – that actions against the Herero and Nama in what was then German-Southwest Africa constituted genocide, and for six years negotiated with Namibia about a possible reconciliation treaty (Bahí Reitz/Mannitz 2021). Likewise, claims for the return of human remains and of cultural assets that had been stolen from colonial museums are gradually being responded to, and in some instances, bodies have been returned for burial, as well as stolen artefacts restored to the countries in question. Overall, however, the "colonial aphasia" (Stoler 2016) has not yet been overcome; rather, the former European colonial powers have so far addressed their colonial legacy only sporadically and mostly as a reaction to growing grassroots pressure (Habermas 2019). For states that were founded on settler colonialism, it is more of a challenge to avoid this confrontation. As early as the 1980s and 1990s, the United States, Canada, Australia and New Zealand developed collaborative formats for the restitution of museum artefacts to the Aboriginal peoples in their respective countries in their capacity as descendants of the victims or those who the items had been stolen from. A lot of work remains to be done in these countries, too, to achieve a proper and wide-ranging processing of the fact that settler colonialism was a fundamentally unjust regime. It is along those lines that the cases of the Indigenous children in Canada who died in specifically established boarding schools should be seen in the wider political context of facing, and coming to terms with, a past of colonial violence.

2. COLONIAL VIOLENCE IN NORTH AMERICA

Over the course of the colonialization of North America, *white* settlers committed numerous crimes against humanity.[13] However, the settlement process as such is not generally considered criminal. Starting in the 17th century, the territorial acquisition of land by European colonial powers followed the principle that certain areas were *terra nullius* – no man's land in terms of the law. The argument that there actually were people who already lived and made a living in those territories was rejected; these forms of settlement were considered "not civilized" and thus equivalent to a non-use of the land. While Great Britain, following this line of reasoning, explicitly declared Australia as *terra nullius* and claimed it for the British Crown, North America was settled by factual occupation. The competing colonial powers sorted out their claims for sovereignty amongst each other, for the most part simply ignoring and displacing the resident Indigenous peoples (Göcke 2016: 94), who were thus robbed of

13 Cf. https://www.zis-online.com/dat/ausgabe/2008_7_ger.pdf (last accessed 4 March 2022); on the so-called "Indian Wars", see e.g. Brown 1970 or Prins 1998.

all their rights and territory. Moreover, the Canadian Confederation – founded in 1867 – declared Indigenous peoples to be a problem that had to be dealt with. The young state implemented the *Indian Act* in order to assert its power. This law determined who was considered to be an "Indian", where they were allowed to settle, and other similarly fundamental interventions in their way of life.[14] "I want to get rid of the Indian problem," the head of the Canadian Ministry for Indian Affairs said as late as 1920, and: "Our object 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."[15]

So it emerges that the cultural assimilation of Indigenous peoples into the *white* society was an explicit political goal. In order to implement this policy, the Canadian élite established a school system operated by churches of various Christian denominations. Starting in 1876, the state forcefully separated approximately 150,000 children from their families and put them into boarding schools, often a long way from home. The aim was to Christianize them and bring them up to a way of life considered superior by the *white* colonialists (see TRC 2012). The assimilation programme of this boarding school system took the shape of daily physical and sexual abuse and an active form of neglect that condoned illness and death among the victims. Healthy students were housed side by side, in cramped accommodation, with children who had the measles, influenza or tuberculosis; malnutrition was a common occurrence. Many children never returned to their families. In some institutions and cohorts, the death rate is reported to have been close to 70%.[16] To this day, the boarding schools and also many survivors refuse to talk about the fate of those that disappeared. The recent skeletal finds offer their descendants clues as to what happened. Although the actual numbers may well be even higher,[17] it has become evident after only a few months of focused investigation in 2021 that thousands of children died on the schools' premises as a consequence of neglect and failure to render aid and that their corpses were buried in unmarked graves.

2.1 THE LIMITS OF A "GRASSROOTS MOBILISATION OF THE LAW"

Indigenous communities have been trying since the 1980s to instigate legal proceedings to prosecute cases of colonial violence and to hold those responsible to account for all the suffering. Civil rights activists have filed class actions with Canadian courts, citing individual acts such as physical or sexual abuse.[18] However, irrespective of the outcome of any such proceedings, the question is whether prosecuting individual crimes can really serve to achieve justice, given the systematic nature

14 Cf. https://archive.org/details/indianact00canauoft/page/n1/mode/2up (last accessed 4 March 2022). Parts of the Indian Act are still in force today.

15 Cf. https://canlitguides.ca/canlit-guides-editorial-team/poetry-and-racialization/duncan-campbell-scott/ (last accessed 4 March 2022).

16 Cf. https://www.n-tv.de/politik/Knochenfunde-erschuettern-Kanada-article22715637.html (last accessed 4 March 2022).

17 Cf. https://www.tagesschau.de/ausland/amerika/massengrab-kanada-indigene-101.html (last accessed 4 March 2022).

18 Cf. https://www.nsb.com/speakers/phil-fontaine/ (last accessed 4 March 2022).

of this threat to the very existence of Indigenous peoples and the depth of injustice they have suffered as a collective. Answers to this can be found in various fields of international law.

In the course of processing Nazi Germany's crimes against the Jewish people and other racialized population groups, a crime under international law was discussed for the first time, which today's victim associations also cite in the context of Canada's politics of assimilation: genocide. Shortly after the Nuremberg Trials ended, the UN adopted the Genocide Convention. The prohibition to commit genocide contained therein is limited to the physical and biological destruction of a specific group of humans. However, the convention also considers the forcible transfer of children of the group to another group to be a form of genocide, if such happens with the intent to destroy the first group.[19] This subsection of the UN Convention is cited by many First Nations groups in North America as well as by Australian Aborigines in order to hold the former colonial powers to account.

In the context of cultural genocide, it is revealing that the initial draft of the UN Convention contained a significantly broader and more differentiated definition of genocide, envisaging protection for a larger group of people. In particular, the draft also described – and penalized – cultural genocide as the destruction of specific characteristics of a group by means of violence (Abtahi/Webb 2008). However, in 1948 opinions on this more broadly designed notion of genocide were split among the negotiating delegations at the UN. It is hardly surprising that in particular countries with a colonial past refused to agree with this concept, and eventually it was deleted altogether from the text of the convention. Likewise, more recent treaties do not contain the term; rather, reference is made to related, but vague and inconsistently phrased terminology such as "cultural damage" or "cultural assimilation". It is a reflection of this gap that any legal debate about possible reparations for the victims of the boarding school system in Canada always featured a major elephant in the room: is there a legal definition for what was done to the Indigenous peoples in Canada, and are there consequences to be drawn from this? After all, the payment of reparations would be a logical response to the violation of a law. However, such a violation would have to be proved first. In this regard, the finds of skeletal remains on the premises of former residential schools provide significant evidence of the deadly practices that were concomitant with this strategy of cultural destruction by means of re-education.

The pressure on the Canadian government and the involved churches was increased not only by the class actions filed by some of the victims, but also and above all by the public campaigning of Indigenous civil rights activists. In the 1980s and 1990s, survivors of the Canadian boarding school system claimed damages to the amount of several billion dollars (Novic 2016: 41). Eventually, in 2006 the Canadian government adopted the *Indian Residential School Settlement Agreement*, an agreement designed to "settle" the conflict between victim groups, the state and the churches. This agreement stipulated, on the one hand, the payment of reparations and on the other, the establishment of the above-mentioned Truth and Reconciliation Commission (TRC), which conducted its investigations for seven years, starting in 2008.[20] As a result of these years of work, the commission

19 Cf. https://www.voelkermordkonvention.de/voelkermord-eine-begriffsbestimmung-9308/ (last accessed 4 March 2022).

20 Cf. https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 (last accessed 4 March 2022).

stated unequivocally that the actions against the Indigenous peoples of Canada constituted cultural genocide. The commission also published 94 "calls to action", asking the government to launch a systematic processing of the country's colonial legacy in order to advance the inner-Canadian process of reconciliation.[21]

2.2 HOW DO POLITICAL STAKEHOLDERS ENGAGE WITH THIS PROCESS?

Political reactions to the TRC's report included statements of apology by the Canadian government and an official acknowledgment that the crimes against the First Nations, Inuit and Métis constituted cultural genocide. But what is the consequence of confessing atrocities which, in legal terms, are not classified as a crime? Given that law is not a static thing but can and must be adapted when situations emerge that require regulation, there should be proactive engagement by political stakeholders in order to further develop legal instruments. Granted, the Canadian government has undertaken some attempts at reconciliation; however, those had no palpable effect on the lives of the white Canadian society. Moreover, paying individual reparation which are primarily aimed at achieving reconciliation between a few surviving victims and perpetrators does not really advance the necessary process of confronting the issue and dealing with it as a society as a whole.[22]

Furthermore, in the context of long-term consequences of colonial politics several researchers have posed the question whether it is possible at all to "compensate" for the destruction of an entire culture, or whether it would be better to provide financial support to the descendants explicitly to help them re-acquire cultural features – inasmuch as that is still possible (see Novic 2016: 192–236). For example, the separation of children from their families and their internment in boarding schools resulted in the irreversible loss of numerous Indigenous languages and orally traded cultural knowledge. Considerations like these also prompted the TRC to request, in their final report, specific investments aimed at counteracting the ongoing systemic discrimination of the Indigenous peoples still living in the country. Cultural education, health and youth work were named as some of the areas where projects should receive government funding.

When the TRC's report was published in several volumes in 2015, Justin Trudeau – who at the time was running for the Liberal Party in the federal election campaign – promised full implementation of the commission's calls to action.[23] To date, according to a study conducted by a Canadian research institute, only nine of the overall 94 calls to action have been effectively implemented[24] – de-

21 Cf. https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf (last accessed 4 March 2022).

22 Paulette Regan, a member of the TRC, sees the *longue durée* of the white Canadian society's self-perception of its history of colonial violence at the core of the challenge to fundamentally deconstruct Canadians' own mentality and from there create new foundations for the relationships between the various population; foundations that differ from the colonial patterns and attitudes and the experiences resulting therefrom (Regan 2010).

23 Cf. https://www.nationalobserver.com/2015/12/15/news/trudeau-promises-immediate-action-final-trc-report (last accessed 16 December 2021).

24 Cf. https://www.aptnnews.ca/national-news/trc/ (last accessed 4 March 2022).

spite the fact that the resistance encountered by the TRC in the course of their investigations shows how necessary it would be for political stakeholders to genuinely take up the commission's catalogue of requests if they want to achieve any improvement in the attitudes of the various Canadian population groups to each other.

> "Although the prime minister [Harper] assured First Nations, Métis, and Inuit peoples that "there is no place in Canada for the attitudes that inspired the Indian residential school system to ever prevail again," my premise is that, unfortunately, such attitudes are still alive and well today, rooted in settler historical myths and colonial mindsets. To understand why this is so, it is instructive to explore how colonial violence is woven into the fabric of Canadian history in an unbroken thread from past to present, which we must now unravel, upsetting our comfortable assumptions about the past." (Regan 2010: 6)

It appears that engaging with its own colonial past is a disagreeable task for the Canadian state; this became apparent in the way governmental agencies and authorities very noticeably dragged their feet when it came to cooperating with the TRC. Bureaucratic hurdles were created where in theory brief, informal cooperation would have been possible, and the commission was thus denied access to numerous witness statements. This experience, in turn, reinforced feelings of mistrust among the members of Indigenous groups. Reservations towards governmental institutions generally run deep in this population group, so deep indeed that even the TRC was seen by many as belonging to the perpetrator group and thus, ultimately, the colonial regime (Arsenault 2015). In this view, the Truth Commission represents a part of the system that had been imposed on Indigenous peoples ever since the colonialization of North America and its procedures.

Attempts to reflect the violence of the colonial past on both the political and the moral level typically face a structural dilemma: colonialism creates a hierarchical constellation of invasive power élites and those they subject, with effects that continue to be felt in the present. Canada was a case of "internal genocide" (Hofmann 2018: 57–83). Victims and perpetrators live in one and the same country; this exacerbates the fact that these instances of colonial violence represent a complex of crimes with explosive political, moral, legal and societal implications for the concrete coexistence of both groups. In theory, the concept of cultural genocide has the potential to support the process of working through these cases of colonial violence in a way that also addresses these different levels in legal terms.

3. THE CONCEPT OF CULTURAL GENOCIDE

> "These oppressed peoples live physically; however, the experience of colonialism renders the spirit destroyed. In other words, the body is alive but the essence of the human spirit or culture has been extinguished." (Starblanket 2018: 174)

The crime of genocide, and the role allotted to cultural genocide in this context, carry great relevance for any processing of the past and achieving reconciliation, not only in Canada. Canadian victims associations urge the government to do more than just verbally acknowledge the occurrence of cultural genocide and to draw legal and political consequences. The debate about whether the lack of a codification of cultural genocide in international criminal law constitutes a regulatory gap is of crucial importance for the members of culturally marginalised population groups who have suffered collective persecution. In this context, the discussion is not so much about the definition as such but above all about questions of practical validity and applicability. In order to understand the legal debate about the elements, the criminalization and the consequences of cultural genocide, it is useful to look at the history of this concept, how it came into existence and what the political situation and interests were at the time.

Therefore, this chapter retraces the political processes that precede the creation of international law; the subsequent chapter will illustrate the consequences of this (incomplete) law for the Canadian case. The central focus is on the concept of cultural genocide, which was never properly anchored in international law; doing so now could provide the legal basis for Indigenous peoples in Canada to systematically address the violence inflicted upon them by the Canadian state as a *collectively experienced crime*. The discussions reconstructed in the following serve to illuminate the influence of discrepancies in political power structures on the creation of international law – more specifically, how the negotiations on the codification of genocide resulted in the deletion of cultural genocide from the final text of the "UN Convention on the Prevention and Punishment of the Crime of Genocide" (hereafter UN Genocide Convention or CPPCG).

3.1 THE ORIGIN OF THE TERM "GENOCIDE"

The term "genocide" has its origin in Raphael Lemkin's book "Axis Rule in Occupied Europe" (1944). The drafting of the UN Genocide Convention was imprinted by Lemkin's concept of how to establish the illegality of the crime of genocide. Lemkin combines the Greek lexeme *genos* – which he translated as race or tribe – with a participle of the Latin word for 'killing', *caedere*. In doing so, he created the linguistic base for the concept of genocide and is therefore referred to as the "father" of the term genocide.[25] Lemkin, a legal scholar, published his book – which was to become foundational for any research into genocide – under the impression of the persecution of Jews by the National Socialists. In the words of legal scholar Ana Vrdoljak: "The content and organization of *Axis Rule* were designed to convey how the discrimination, segregation, and eventual elimination of groups were systematically implemented through laws and decrees" (Vrdoljak 2009: 1184). However, the term was not meant to be limited to describing the attempt by the National Socialists to exterminate the European Jewry. Lemkin put it more generally than that: "[b]y genocide we mean the destruction of a nation

25 See Schabas 2000; cf. also "Prof Lemkin 'father' of Genocide Pact. Nominated for 1951 Nobel Peace Prize", Jewish Telegraphic Agency, 18 (33), 26 February 1951, http://pdfs.jta.org/1951/1951-02-26_039.pdf?_ga=2.258457871.424429522.1633444409-748495078.1633444409 (last accessed 4 March 2022).

or of an ethnic group". When he formulated his concept, he was heavily influenced by historical accounts (Lemkin 1944: 79).[26]

William A. Schabas, an expert on international law, has pointed out that Lemkin's definition was narrow in that it addressed crimes directed against "national groups" rather than against "groups" in general (Schabas 2005: 25). On the other hand, Schabas considers the definition to be rather wide, as it also included the cultural extermination and the destruction of a group's habitat (ibid.). Above all, Lemkin emphasized the collective element of this crime, and he proposed a typology with eight distinct techniques: political, social, cultural, economic, biologic, physical[27], religious and moral genocide. According to Lemkin, even those techniques of genocide that were not directly lethal were aimed at destroying the "common patterns" (Novic 2016: 19) and thus the continued existence of a specific and targeted group. In this context, he said that

> '[G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.' (Lemkin 1944: 79)

Thus, the distinct, collective identity of a national group[28] becomes suppressed and "swallowed up" by the invading oppressor (Starblanket 2018: 41).

Tamara Starblanket is an expert on international law and a member of the *Nehiyaw*, one of the First Nations groups in Canada that also goes by the name of *Cree* in other English-language regions. Her Master's thesis "Suffer the Little Children" (2018) investigates the genocide that was concomitant with *white* settler colonialism in North American. She analysed the genocidal attack that resulted from the interplay between national law and political guidelines – which Lemkin called a "coordinated plan" – and applied it to the concrete case, concluding that the goal had been to completely destroy the group by applying one or several of the eight genocide methods identified by Lemkin (Starblanket 2018: 41). This happened in the two phases Lemkin described like this:

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26 Lemkin himself pointed out that the ideas which were eventually conceptualized as 'cultural genocide' had come to him as early as 1933, i.e. before the persecution and mass murder of European Jews, and that in formulating this concept, he had been motivated less by contemporary developments but rather by historical observations (Rabinbach 2009: 65).

27 The distinction between physical and biological methods of genocide refer to the physical killing versus the application of means to render a group incapable of procreation, e.g. forced sterilisation.

28 Lemkin applied an essentialist concept of what constituted a group, as was customary at the time.

> "[O]ne, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals." (Lemkin 1944: 79)

It is important to note that Lemkin's focus was on ensuring that genocide should not be reduced to those actions that directly caused the victims' death. In his view, once a group had been effectively exterminated physically or culturally, the loss was permanent, i.e. even if there were individual survivors, those would be robbed of a crucial part of their identity (Power 2003: 51).

3.2 THE CODIFICATION OF GENOCIDE

Once Lemkin had introduced a definition of the term "genocide", he pushed for the concept to be anchored in international law. During the Nuremberg trial against the major war criminals, he used diplomatic influence to get the US-American chief prosecutor to include the term "genocide" in the indictment, and although in the end the defendants in the initial trial were not sentenced for genocide, this trial was the first time this particular crime was officially mentioned in an internationally significant legal context (Power 2003: 50).

The United Nations, founded in 1945, triggered the development of further legal instruments to prevent crimes of similar scope and brutality as the persecution and murder of the European Jewry by the Nazis. The UN's work in the area of prevention of "genocide" and other large-scale crimes was decisively influenced by Lemkin's lobbying efforts on behalf of the term. In particular, his concept of cultural genocide provoked major controversies among the countries negotiating the exact wording of the UN Genocide Convention. The analysis of the published *travaux préparatoires* offers a view of the links between minority rights and cultural genocide; at the same time, a re-shaping of Lemkin's original genocide concept and politically motivated efforts to limit it becomes apparent.

In 1946, the UN General Assembly initiated the process of codifying an internationally applicable prohibition of genocide. GA Resolution 96(1) describes genocide as "contrary to moral law and to the spirit and aims of the United Nations".[29] The core of the resolution already comprised the precepts and bans that were later included in the Genocide Convention: genocidal actions were criminalized, and the obligation to prevent and punish genocide as well as the collective element of this crime were established. Initially the United Nations Economic and Social Council (ECOSOC) was tasked with drafting an appropriate international instrument to enforce these aims; this council passed the task on to the UN General Secretary. The convention subsequently went through three phases: (i) proposal and debate amongst the UN member states; (ii) re-drafting of the convention by an ad-hoc

29 UNGA Res. 96(1) (11 December 1948) "The Crime of Genocide"; https://undocs.org/en/A/RES/96%28I%29 (last accessed 4 March 2022).

committee; (iii) debate of the final draft in the United Nation's Sixth Committee (legal) (Novic 2015: 24). During each of these three phases, the concept of cultural genocide underwent fundamental changes.

Three experts – Henri Donnedieu de Vabres (France), Vespasian V. Pella (Romania) and Raphael Lemkin (Poland) – authored the first draft of the Genocide Convention. Lemkin, based on the work already described above, argued for an inclusion of cultural genocide in the scope of criminalized activities. The first draft of the Genocide Convention was presented to the ECOSOC in 1947; it contained a wide-ranging definition of the term, in particular with regard to which action should be considered a crime and therefore punishable (Abtahi/Webb 2008: 215f). The draft proposed to protect "racial"[30], national, linguistic, religious or political groups from genocidal destruction. However, for the purposes of the convention, the eight techniques of genocide Lemkin had put forward in *Axis Rule* were reduced to three main categories – biological, physical and cultural genocide:

> "In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.
> Such acts consist of:
>
> 1. [Physical Genocide] Causing the death of members of a group or injuring their health or physical integrity […]
>
> 2. [Biological Genocide] Restricting births […]
>
> 3. [Cultural Genocide] Destroying the specific characteristics of the group by:
>
> (a) forcible transfer of children to another human group; or
> (b) forced and systematic exile of individuals representing the culture of a group; or
> (c) prohibition of the use of the national language even in private intercourse; or
> (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
> (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction of documents and objects of historical, artistic, or religious value and of objects used in religious worship." (ECOSOC 1947: 228).

The commentaries to this section reveal that there were "divergent views among the experts" (ibid. 234). Vespasian V. Pella and Henri Donnedieu de Vabres held that cultural genocide "represented an undue extension of the notion of genocide" (ibid. p. 234). Lemkin, on the other hand, was of the

30 The use of the term 'race' in a legal context is highly disputed and here must be seen in the context of the time; see Barskanmaz 2011: 385.

opinion that "racial", national or religious groups could not exist unless they preserved their spiritual and moral unit. Therefore, he argued, cultural genocide was far more than any act of forced assimilation or coercion, but rather a method to achieve the destruction of the cultural, moral and religious life of a group of humans.

When this text was presented to the UN member states in the first phase of drafting, Lemkin's position received much criticism; Canada and the US in particular voiced strong opposition to the concept (Davis/Zannis 1973: 15–27). Joining the US was France, stating that the concept of cultural genocide held the risk of an infringement of national sovereignty – especially with regard to governmental regulation mechanisms to enforce minority rights (ECOSOC 1946–1948: 527). Similarly, to these two countries, Canada defended its interest in not adopting a norm of criminal law that would entail being held responsible for its own past of colonial violence. The representative of the Canadian delegation claimed that the Canadian government and population abhorred any intentional act that aimed to eradicate the language, religion and culture of any of the mentioned groups. However, he continued, the Canadian government was reluctant to include minority rights in a crime of cultural genocide. Rather, those rights should be codified in a pact on human rights. The delegate concluded that to put cultural genocide on the same level as physical genocide would weaken the convention overall (ECOSOC 1948c: 1224). In the subsequent negotiations, the Canadians maintained their resistance against the concept of cultural genocide (Starblanket 2018: 48). Some other countries, however, approved of the concept (Novic 2016: 25).

Nonetheless, in the course of the revision of the convention's first draft by an ad-hoc committee, only the delegations from the USSR, Lebanon, Pakistan and Venezuela supported Lemkin's concept of cultural genocide – and considering the subject matter, this may appear somewhat curious:

> "The cultural bond was one of the most important factors among those which united a national group, and that was so true that it was possible to wipe out a human group, as such, by destroying its cultural heritage, while allowing, the individual members of the group to survive. The physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime." (ECOSOC 1948a: 727)

This view met with the opposition of a coalition of countries that rejected the idea that physical death and cultural genocide should have the same legal significance and, instead, pleaded to move the topic to the field of human rights. Eventually the delegations of the UN member states agreed to a "compromise" that proposed to address cultural genocide in a separate article (ECOSOC 1948b: 842). Elisa Novic, author of "The Concept of Cultural Genocide" (2016), offers a detailed analysis of the negotiations on this point and concludes that the sole aim of this strategy was to not jeopardize the success of the convention (Novic 2016: 26). Tamara Starblanket notes on the result for the concrete case of Indigenous peoples that "the effect of this maneuver is to *restrict the scope* of the convention so that its coverage related to the genocide of Indigenous Nations is qualified under this approach" (2018: 50).

Therefore, the revised draft of the convention did not contain the term "cultural genocide". Only the act of forcibly transferring children belonging to a protected group to another group was considered a criminal offence covered by the convention. The final definition only refers to physical and biological genocide. The first section of Article II refers to the element of context on the subjective level. Accordingly, a genocide must have been committed or attempted with the intent to destroy a group protected by the convention. The remainder of Article II CPPCG describes potentially genocidal acts on the objective level of the norm:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (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." (United Nations General Assembly: 1948)

Therefore, it emerges that not only was the concept of cultural genocide struck from the final text of the CPPCG, which eventually came into force in 1951. The scope of what was considered a protected group was also narrowed and no longer comprised political, economic and cultural groups. By deciding to exclude those, the signatory states further reduced the protective scope of the genocide prohibition. The provision regarding the forcible transfer of children of a protected group to another group was all that remained from the initial definition of the cultural element of genocide. The contracting parties held that this act had a physical and biological effect on the survival of the children and therefore (!) constituted physical genocide.[31] Thus, of the eight techniques listed in Lemkin's Axis Rule the political, social, cultural, economics and moral genocide were not included in the convention in the end.

The strongest argument against including cultural genocide in the CPPCG was that in the eyes of many of the signatory states it violated a "minority right" and should therefore be discussed in the context of the Universal Declaration of Human Rights (UHDR) (Novic 2016: 29). Indeed, the negotiations about the codification of universal human rights in international law took place simultaneously to those about the CPPCG. But the delegations, which had voted against including a provision on cultural genocide in the CPPCG, also cast their vote against the concept in the text of the UDHR. As was the case in the discussion about the codification of human rights, the strongest opposition against anchoring the concept of cultural genocide in international law came from the United States, Canada[32] and France (Novic 2016: 29–32). The failure to include the concept in the UHDR as well meant

31 The Greek delegate used this argument when proposing to re-introduce of the clause, see Novic 2016: 27. Likewise, the French delegation based their argument in favour of an inclusion of the clause on this, see Starblanket 2018: 55.

32 Canada is among the few states that later also voted against the UN Declaration on the Rights of Indigenous Peoples.

that a window of opportunity to establish mechanisms of international criminal law and human rights law was now closed, as the escalation of the Cold War meant parties were much less willing to negotiate anything. Only decades later, in the course of the establishment of the International Criminal Court in The Hague, new avenues opened up.

3.3 CULTURAL GENOCIDE AS A CRIMINAL OFFENCE UNDER INTERNATIONAL LAW

Since the adoption of its ultimately narrow codification, the legal definition of genocide has received much criticism. In order to be successful, measures of "restorative justice"[33] require uniform legal foundations to initiate any process of working through conflicts. Therefore, there are frequent calls for a broader definition of genocide. Likewise, terms for alternative or additional concepts that are formed by adding the '-cide' suffix – for example, "indigenocide", "linguicide" or "femicide" – present themselves as attempts to articulate structural crimes against collectives within legally relevant categories.

Besides being subsumed under the provisions on genocide, the crimes committed against the Indigenous peoples of what is now Canada could also fall into the ambit of crimes against humanity. According to article 7 section 1 (h) of the Statute of Rome – the treaty establishing the International Criminal Court (ICC) – persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural (!) or religious grounds constitutes a punishable crime. Thus, in the context of crimes against humanity an act of persecution does not necessarily have to be connected to an act of physical-biological destruction in order to be considered a crime under international law. This served as a central argument against codifying the concept of cultural genocide. Further contradictions emerge: although cultural genocide has not been codified as a crime, elements thereof can be found in the prohibition of genocide anchored in international law after the Second World War. And the prohibition of genocide is a peremptory norm of international law, i.e. the international community agreed that the prohibition to engage in genocidal acts is unconditional and can never be rendered unenforceable.[34] In order to determine these contradictory interspaces in the law, we must have a closer look at the levels of acts that may constitute the crime.

When the ICC was established in The Hague, the concept of genocide as contained in the UN Genocide Convention (CPPCG) was transferred to the Rome Statutes of 1998. With the entry into force of these statutes in 2002, the court was given global jurisdiction over crimes that affect the international community as a whole. In particular, the court is charged with enforcing the prohibition of genocide. [35] According to the CPPCG and Art. 6 of the Roman Statutes, a genocide has three constitutive elements:

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33 Instruments and measures of restorative justice serve to bring about conflict transformation by way of societal and, in particular, legal and juridical reparation procedures.

34 In international law, these norms with absolute and unconditional validity are called *ius cogens*.

35 The wording of art. 6 of the ICC's Roman Statute is identical with the already cited provisions of the CPPCG.

(1) The objective aspect of *actus reus*, i.e. those elements of the crime that do not reference the perpetrator's internal attitude to the act.
(2) *Mens rea*, the subjective element which relates to aspects that occur within the perpetrator, internally.
(3) The contextual element: the act was committed as part of an apparent pattern of similar actions against the group, or the act was committed in a way that in and of itself it can trigger such destruction (Ambos 2014: 5).

So in order to declare that a certain act constitutes genocide, specific conditions must be fulfilled. In the following, we will demonstrate how the prohibition to commit genocide may have bearing on the case of the violence committed against Indigenous peoples in Canada's residential school system. First, we will use the Canadian example to trace out a "logic of elimination"[36]. Then we will put forth arguments why the codification of genocide should be broadened to include cultural genocide. It does not do justice to the depth of wrongfulness of a targeted cultural eradication of a group to categorize the relevant acts as crimes against humanity and, within this framework, as mere "persecution". Giving these crimes appropriate consideration under international law would not create a cure-all; however, it would provide a confirmation of the fundamental wrongfulness of these acts for the descendants of victims of a (cultural) genocide, as well as arguments in their battle for recognition.

4. THE CRIMES COMMITTED IN CANADIAN RESIDENTIAL SCHOOLS – *ACTUS REUS* AND *MENS REA*

The treatment of Indigenous peoples by the settler colony Canada throws into sharp relief the legal and political relevance of the concept of cultural genocide. This section turns the focus on the question, which elements of genocide play a role in the strategy of cultural elimination that emerges as part of Canadian colonial politics. We turn to the legal categories of international criminal law – which is based on continental European law and Anglo-American common law – both for terminology and for arguments. Thus, our analysis follows two requirements these legal systems share: *actus reus* and *mens rea,* and offers a contextual analysis of the respective instruments of international law.

4.1 THE CRIMINAL ACTS – *ACTUS REUS*

In Anglo-American common law, the *actus reus* element of a criminal act covers everything that is not considered a 'mental, internal' contribution to the act on the part of the perpetrator. In concrete terms, this means that for a crime to qualify as genocide, an act must be designated as genocidal by the existence of a relevant act and the occurrence of certain 'results'. In his book *Genocide in International Law* William Schabas posits that three of the five proscribed genocidal acts imply results that can be proved in the concrete case: killing members of a group, inflicting serious physical or psycho-

36 The term "logic of elimination" in the context of cultural genocide committed against Indigenous peoples was influenced, in particular, by the historian Patrick Wolfe. He defined this term as the structural tendency of settler colonialism to achieve a position of cultural dominance in the acquired land. See Wolfe 2006: 387.

logical harm, and forcibly transferring children of one group to another group. Likewise, any attempt to destroy – actively or passively – a legally protected group by committing one of these three acts is a punishable crime (Schabas 2000: 156–157). In this sense, genocide can be committed either by individuals or by state actors on behalf of governments,[37] by political, religious or even non-profit institutions (Schabas 2000: 446; Quigley 2016: 235).

As of 1849, the Canadian Department of Indian Affairs arranged for the transfer of Aboriginal children to residential schools. Continuous attendance of these boarding schools – which often were located in remote areas – was compulsory for Aboriginal children between the age of five and sixteen. Each of the newly founded Canadian provinces established these residential schools, many of which were church-run and remained operational until the mid-1970s. During a first wave of closures in the 1970s, those boarding school operated by the state remained open, and the last state-run residential school was shut down in 1996 (Morse 2009: 281). According to an investigation by the *Royal Commission on Aboriginal Peoples* conducted in the 1990s, the children were prohibited to speak their mother tongue, and punishment was threatened if they did. Instead, they were obliged to speak English or, in the province of Québec, French. In addition, these residential school were chronically underfunded so that there was a constant scarcity of everything. This meant that on top of the serious psychological and social stress, which these children suffered, they were regularly and continuously being denied fundamental necessities. According to the aforementioned commission's report, the children did not receive sufficient food or clothing and no medical care (State of Canada 1996: 172). Moreover, survivors of the residential school system talk about cases of death by neglect, or torture, induced starvation to death, forced labour and sexual violence (Starblanket 2018: 112; TRC 2021). In short, violence, general neglect and a lack of hygiene to the point that it presented a health risk led to the death of a large number of children.

Simon Baker, a former student at the Lytton School in British Columbia, recounts how his brother died of meningitis and how the way his corpse was handled not only lacked any trace of piety but also of hygiene:

> "A coffin was ordered from Kamloops, and the next day the principal told me I had to go with him to put my brother in a coffin. […] [We] washed him and put some clothing on him, but the coffin was too short, and that's the thing I couldn't believe, they wouldn't order another coffin. He had been dead for twenty-four hours, so we had to break his knees to put him in the coffin. It was so hot out, so the body started to smell. When I got back to the school, I could smell that odour. It stayed with me for a while." (Grant 1996: 137, quoted from Starblanket 2018: 113)

This case occurred during the time Simon Baker attended the boarding school, between 1915 and 1930.

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37 Bosnia and Herzegovina vs. Serbia and Montenegro, 26th February 2007, ICJ-167; https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf (last accessed 4 March 2022).

In 1907, a doctor from the Department of Indian Affairs had conducted and documented studies in fifteen boarding schools. These studies show that over a period of ten years, 42% of the more than 1,500 children that were the object of the studies died of unmet medical needs, malnutrition and tuberculosis. Even after the publication of the doctor's own – and further – studies on the abysmal conditions at these schools there was no significant change, the numbers of death among the children and youngsters continued to be high.[38] There were even reports of torture, such as beating the children until they lost consciousness and suffered permanent and semi-permanent damage (for example broken limbs, fractured skulls, burst eardrums, intentional burns by fire or boiling liquid, or piercing the body with needles in select places) (Starblanket 2018: 117; see also Churchill 2013: 101–103). Likewise, it is reported that the intentional withholding of food was normal practice. In 1944, a study conducted by the Department of Indian Affairs attested below-normal weight in 28% of the girls and 69% of the boys attending the Elkhorn Residential School in the province of Manitoba (Churchill 2013: 93). Furthermore, the daily routines of the children and youngsters usually comprised only a minimal education component. For the main part, they were coerced, under threat of punishment for non-compliance, to do agricultural labour. In addition, boys were often forced to help with building works on the dilapidated school premises, while girls had to work in the kitchens. This forced labour was intended to cover the running costs of the chronically underfunded residential schools and ended only when the last boarding schools were shut down (Yeboah 2018). Likewise, according to survivors sexual violence was the rule rather than the exception.

In 1995, Arthur Plint, the former headmaster of a residential school on Vancouver Island, was sentenced to eleven years in prison for the sexual abuse of children in his care; his victims were aged six to thirteen (Lazaruk 1995: 3). The sentence makes clear that this case of paedophile violence was no exception. Judge Douglas Hogarth called Plint, as an individual, a "sexual terrorist", but he also commented on the boarding school system as a part of a strategy of cultural estrangement, which allowed (sexual) exploitation:

> "[The children] were prisoners in the residential school and he knew it. […] The Indian residential school system was nothing more than institutionalized pedophilia, […] Generations of children were wrenched from their families and were brought to be ashamed to be Indians." (Lazaruk 1995: 3)

Of course, in specific contexts all the above-mentioned acts are punishable crimes – for example, physical harm, sexual abuse, or death resulting from failure to care for wards are crimes under Canadian national law. However, the intentional, systematic manner in which Indigenous children were taken from their families and became victims of the residential school system can not be addressed by sentencing individual perpetrators. Why is there no law that offers protection beyond the individual case?

38 See Churchill 2013: 97–99; according to the investigation of time periods by the TRC and publicly accessible death registries, death rates only became "normal" as of the 1940s.

In order to be protected against genocidal acts under the CPPCG, a collectivity of humans must comply with a specific definition of "group".[39] This definition refers to so-called "stable groups", to be distinguished from so-called "mobile groups", such as economic or cultural (!) groups (Ambos 2014: 7). The First Nations, Inuit and Métis living in contemporary Canada fall under the UN definition of "Indigenous peoples". According to this interpretation, historically they present as a "mobile" collectivity of individuals who are not dominant in society; as such they may be cultivating and protecting their ancestral territory for themselves and future generations, but they do not constitute a protected "stable" group (Lenzerini 2009: 75). As a "mobile" group, the victims of Canadian colonialism therefore are not protected by the UN's prohibition to commit genocide; rather, international law recreates the fiction of *terra nullius*!

4.2 CULTURAL ELIMINATION AS POLITICAL PRACTICE – *MENS REA*

The element of *mens rea* – that is, the attitude of the (group of) perpetrator(s) – requires that the genocidal act was committed with both intent and the knowledge of the consequences. According to the legal scholar Kai Ambos, the prohibition of genocide protects a collective legal interest – specifically, the right of certain groups to exist and to be part of a pluralistic global community. Ambos defines such groups as "unique social entities" (Ambos 2014: 3) which are more than the aggregate of the individuals that compose them:

> "As a consequence, it suffices that the special intent of the *genocidaire*[40] is directed at the social existence of the group, to destroy it as a social entity, independent of the direction of the objective acts against the physical or biological existence of the individual members of the group." (Ambos 2014: 4)

Similarly, the International Criminal Tribunal for Rwanda (ICTR) stated in its judgment in the *Akayesu* case:

> "[T]he victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual."[41]

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39 As has already been stated, the protective scope of the CPPCG is identical to that of art. 6 of the Roman Statutes. Since the Roman Statutes entered into force for Canada only with its ratification in 2002, but the last residential school were closed already in 1996, the following arguments are based on the CPCCG as their legal source.

40 Ambos uses the term *genocidaire* to denominate the perpetrators of a genocidal act. Accordingly, a *genocidaire* is anyone who had a specific genocidal intention (special intent) when executing the act.

41 Akayesu, 2nd September 1998, ICTR-96-4-T, Para. 521; https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf (last accessed 4 March 2022).

Nonetheless, it is evident that genocidal crimes also violate individual rights. The violation of the rights of an individual is a fundamental element, but at the same time also just an "intermediate step" towards the genocidal act of destruction, i.e. the destruction of the group as a whole (Ambos 2014: 3). The group of perpetrators actively participates in carrying out the collective crime by committing individual crimes.

In Canada, the basis for the transfer of Indigenous children into the residential school system was the *Indian Act*, which came into force in 1876. Based on this law, Canada's ruling élite determined specific territories for Indigenous groups, where they were allowed to settle but which were under government control. The *Indian Act* served as a tool to control agriculture, trade and consumption in the so-called reservations – and the *Department for Indian Affairs*, created specifically to control and "civilize" the Indigenous population, used this set-up to ensure that the people living on the reservations were economically dependent on the British Crown, and, after the foundation of the autonomous Canadian Confederation, on the Canadian state (Bartlett 1977: 582–584). In a governmental address in 1920, the deputy superintendent of the ministry declared this intention to exercise control as follows:

> "I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department and that is the whole object of this Bill [Indian Act]."[42]

The Canadian government aimed for a cultural assimilation of Indigenous peoples into the norms, procedures and ways of life that had been transferred from Europe. The theory of legal positivism, dominant at the time the Canadian Confederation was established (see Boyle 1999: 15), justified this state-operated assimilation strategy by distinguishing between the "civilized West" and the "uncivilized Non-West".[43] This narrative considered Indigenous communities to be "barbaric" and "primitive" and therefore not entitled to manage their land or matters regarding their own communities. This was the spirit behind the settling of North America by the Europeans; they considered this ungoverned territory (Williams 1992: 221–235). In this regard, cultural genocide is shown to be a fundamental element of (not only North American) settler colonialism (Wolfe 2006: 403).

The intentions behind the *Indian Act* as quoted above are evidence of a systematic logic of elimination, employed by the Canadian government in an attempt to eradicate the cultural features of In-

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42 Titley 1992: 50. Cited after Public Archives of Canada, RG10 (Records of the Department of Indian Affairs), Issue 6810, File 470-2-3, No. 7.

43 In his book *Orientalism* (1978), Edward Said explored the dichotomy between "Occident" and "Orient" in the context of political power distribution. However, the concept does not quite cover the currently prevalent distribution of power between the Global North and the Global South, which is seen by researchers into Anglo-American post-colonialism as a tense relationship between *"West and Non-West"*, see: Hutchings 2011: 639–641. This binary set-up is also reflected within former settler colonies such as Canada, where values and ways of life associated with the West were imposed upon Indigenous peoples as purportedly superior, which in turn had long-term impacts on hierarchical relations.

digenous communities,[44] and "civilizing" the children was explicitly seen as a means to achieve this. "In order to educate the children properly we must separate them from their families. Some people may say that this is hard but if we want to civilize them we must do that", as the minister of Public Works Hector Langevin said in 1883 (TRC 2021: i). The cultural elimination of the cultures collectively called "Indigenous" was the official policy of the Canadian government; this was confirmed by then Prime Minister Stephen Harper in 2008 in an official statement of apology. Harper said that Canada's aggressive assimilation strategy had aimed to extract Aboriginal children from their homes, families, traditions and culture and to assimilate them into the dominant culture (Government of Canada 2010). Today, the debate about whether the destruction of the cultural group of Canada's Indigenous peoples must be linked to physical-biological destruction has become moot to a certain point: The finds of skeletal remains in 2021 has made it public worldwide that there were more than just a few individual deaths. Still the question remains whether these deaths had occurred in the context of a specific and systematic intent to destroy. The forcible transfer of Aboriginal children to the residential schools had followed the objective "kill the Indian in the child" (Government of Canada 2010). This phrase emphasizes the motive of cultural eradication, but – so it was claimed – it could not be said for sure that the perpetrators were motivated by, and had intended, the actual killing in the sense of a physical genocide. It can therefore be considered as established that there had been the intent to destroy in the sense of a cultural eradication; the intention to kill Aboriginal children could not be proved, especially since the aim had been to "civilize" these children. What can be taken as fact, though, is that at the latest with the beginning of the 20th century the Department of Indian Affairs had become aware of the glaring neglect that prevailed in the residential schools, and that numerous children and youngsters still fell victim to this neglect and the failure to remedy it.

4.3 LEGAL ASSESSMENT AND LACUNA

Much of what was going on in the Canadian residential school system displays genocidal elements. The systematic separation of Aboriginal children from their families is a textbook example of the forcible transfer of children as defined in the ICC statutes. And yet, this practice does not fall under the genocide clause: firstly, because the Canadian Inuit, Métis and First Nations are not considered a protected cultural group, which means the *actus reus* element is not applicable. And secondly, because on the level of *mens rea* it has not been possible to prove that the Canadian politicians in charge of devising and implementing the Indian Act acted with the specific intent to physically destroy. Thus, the extent of genocidal violence and the acts committed against the former students of the residen-

44 The question whether the *dolus specialis* to commit genocide – i.e. the *genocidaires'* specific and dedicated intent to destroy – necessitates the physical-biological destruction plays a central role in the debate about cultural genocide. Or, put differently, the debate is whether there can be a genocide in the absence of murder and killings. In society's view, when a group is destroyed but there are no murders, this is subordinate to genocidal crimes that involve killing. If one assumes that forcible assimilation is part of a genocidal "logic of elimination", it is possible to call acts of cultural destruction genocide even when there are no deaths. An opposing view insists that the cultural destruction must go hand in hand with measures of physical and/or biological extermination in order to be considered genocide. Against the background of this as yet unresolved debate among legal scholars, our historical positioning of the term "genocide" assumes that both the CPCCG and the ICJ require that the *dolus specialis* to commit genocide must, in practice, occur in combination with an act of physical-biological destruction. In addition, this act of destruction must be accompanied by a specific intent to destroy; see Benvenuto 2015: 27.

tial schools cannot be subsumed under the UN Genocide Convention and the Roman Statutes of the ICC. And yet, the sum of all these acts presents a crime that is far more serious than Harper's description of "profoundly negative [and] wrong" (Government of Canada 2010) suggests. In the context of this statement, the international law scholar Alfred de Zayas asks whether "'wrong' isn't a far cry from criminal" (de Zayas 2021: 3). And Tamara Starblanket concludes that the Canadian government committed genocide, regardless of the legal lacuna (Starblanket 2018: 269).

There are indicators that Canada intentionally obstructed the assumption of responsibility for the violence committed in the past. The resistance against including the concept of cultural genocide in the CPPCG has already been described. Canada ratified the CPPCG in 1952; however, it took a further twenty years for the definition of genocide to be transposed into national law. Under the Canadian Criminal Code, genocide is any act that results in the killing of members of a protected group, or any intentional measure that brings about the physical destruction of the group. However, the Canadian legislator did not include the forcible transfer of children from one group to another group. Furthermore, the relevant definition is not given in the section dealing with genocide, but rather in the section on so-called "hate propaganda" (Government of Canada 2021a: Section 318). This incomplete transfer of the Convention – which, after all, is peremptory international law – is very obviously an opportunistic blockade of the fundamental objective of the treaty.

These reservations should have been raised by Canada during the negotiations to codify genocide in the CPPCG. William Schabas emphasizes the *ius cogens* character of the prohibition of genocide and points out that this is incompatible with individual interests:

> "For the Secretariat, reservations of a general scope had no place in a convention that did not deal with the private interests of a State, but rather the preservation of an element of international order. The Secretariat considered it "unthinkable" that, for example, States could pick and choose among the groups to be protected under the Convention." (Schabas 2000: 521)

Exceptions should have been either included in the Convention itself or officially declared by any signatory state (Schabas 200: 521). Similarly, Starblanket calls this incomplete transfer of the genocide definition on the part of Canada a charade and an "implicit reservation" against the text of the Convention (Starblanket 2018: 223). In 1951, the International Court of Justice (ICJ) was called upon for an *advisory opinion* on the principal question of whether reservations such as these were compatible with the CPPCG as a matter of principle. In a narrow vote of seven to five, the judges decided that the argument of state sovereignty had to bow before the moral and humanitarian principles upon which the Convention was based and that thus such reservations would have to subject to very strict parameters (International Court of Justice 1951: 1). Given this premise, Canada's definition of genocide as embodied in its national criminal code violates the Vienna Convention on the Law of Treaties (VCLT). The VCLT is considered a fundamental multilateral agreement under international law; it sanctions violations of international treaties. Article 18 contains a prohibition to defeat the object and purpose of a treaty as follows:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."[45]

Accordingly, the Canadian government should have communicated its reservations against the final wording of the CPPCG and the definition of genocide contained therein. This argument may appear naïve, given that law is always the product of decisions of (power) politics. However, the incomplete transfer of the prohibition of genocide into national law means that until the 1990s, Canada was in violation of an international treaty!

In assessing the process of codification of the CPPCG and Canada's role as a signatory state, Tamara Starblanket concludes that the northern American state had, at that time, been involved in genocidal violence against Indigenous peoples for a whole century. Even during the codification of the CPPCG, it was generally understood and agreed that the prohibition of genocide was *de rigueur*.[46] In her view, it is not possible for a state to negate its responsibility for genocidal crimes by contributing to the creation of regulatory gaps in international law and its own national law in relation to precisely those crimes that it is culpable of (Starblanket 2018: 235). But given that until this day, the treatment of First Nations, Inuit and Métis in Canada is not considered to have been genocide, in practice, such negation of responsibility is very much the case. Political engagement with these blind spots is essential.

5. A TASK FOR LAW, POLITICS AND SOCIETY AS A WHOLE

Our study has looked at the concept of cultural genocide and it is potential to serve as an instrument for processing colonial violence, based on Canada's politics of assimilating Indigenous peoples. The analyses of this case distinguished between the historical, legal and cultural levels. The term "genocide" as originally coined by Ralph Lemkin included the crime of cultural genocide and defined this as the effective physical or cultural destruction of a group of humans. In Lemkin's view, survivors of this type of genocide, too, were being robbed of an indispensable part of their identity.

The crimes in the context of the Canadian residential school system that have recently come to light in such a shocking way are evidence that cultural genocide was a part of the colonial regime. A "logic of civilization", which negated and discredited existing mobile ways of life, was at the heart of any iteration of settler colonialism that invoked the concept of *terra nullius* to claim territorial prerog-

45 Vienna Convention on the Law of Treaties (1969): Article 18.

46 Legal scholars debate what ranking the prohibition of genocide held within the system of international law before its codification in the CPPCG, see Schabas 2000: 3.

atives. In that sense, there is a close connection between the seizure of land and cultural destruction. The fact that due to the influence exerted by former colonial powers such as France, the US and Canada this dimension of violence has, to this day, not been included in the UN Genocide Convention illustrates the political character of legally agreed norms. Law and politics influence each other reciprocally. Even though law aims to achieve dogmatic universality, the reconstruction of the history of the ban on genocide shows that the creation of international law is impacted by political interests and that its original foundations include categories which continue to deny pre-colonial realities. Thus, the norms codified into law, the treaties and also court cases in the area under discussion cannot do justice to the claim of universality: the definition of the groups protected by the Genocide Convention ignores "mobile" ways of life like such as practised by many Indigenous peoples in North America.

Since cultural genocide has not been codified as a norm of international criminal law due to political interests, the concept cannot be used today as a legally relevant instrument to process the conflict. Still, the Truth and Reconciliation Commission initiated by the Canadian government, having interviewed thousands of witnesses and survivors in the course of their seven-year work, explicitly named cultural genocide as the relevant concept for interpreting the documented complex of crimes (Government of Canada 2021b). In doing so, the Commission took their lead from Lemkin's definition, adding that states that commit cultural genocide engage in destroying the political and social institutions of a targeted group. These acts of destruction included disappropriation, forcibly transferring population groups into designated areas, prohibiting the use of their native language and the observation of spiritual traditions, persecuting spiritual leaders and destroying family bonds in order to prevent the passing on of cultural values and customs. As of the mid-19th century, Canada committed of all of these acts (TRC 2021: 1).

Establishing an independent Truth Commission to support the processing of the violence that had been committed in the residential schools was part of the *Indian Residential Schools Settlement Agreement* concluded in 2007. The objective was to bring about reconciliation between the former students, the Assembly of First Nations, numerous organisations representing the interests of Aboriginal peoples, and the Canadian government (Government of Canada 2021b: 23). However, it seems that reconciliation between victims and perpetrators of the residential school system can only be possible if this also addresses the systematic framing of the colonial crimes by the Canadian Confederation. The TRC was tasked to investigate the connections between the eradication practices of the historically formed *white* settler communities, the residential schools and the structural discrimination on Indigenous peoples in Canada. It was and still is doubtful whether a commission instigated by the Canadian government can distance itself sufficiently in order to carry out the necessary work – investigating and processing violent crimes that were after all initiated by the state and have become anchored in history – from a neutral position. Given the proximity of the Commission to the government – at least it was perceived by many as such – some government authorities as well as Indigenous groups offered only limited cooperation with the TRC (Arsenault 2015: 31–33). It is illuminating that the TRC recapitulated the systematic nature of the crimes that occurred in residential schools but failed to break up the dichotomy between the colonialists and those being colonized. This psychological and social fault-line still separates the largely better-off *white* Canadian population from the marginalized Indigenous population. The Commission's report does not touch at all upon the

factual disappropriation and the restrictions on the freedom of movement and of settlement placed on the Indigenous peoples by the *Indian Act* and still effective today. At least the TRC unequivocally called the practice of the residential schools a tactic of cultural genocide. And yet, as the latter is not a legally relevant category, questions remain unanswered and one is left feeling perplexed: among the actions suggested by the TRC, the idea of reparations for the violation of *collective* rights is hardly explored. Rather, the focus is on reparations for the violation of *individuals'* human rights. The report contains no plea for the prosecution of the collectively experienced violence.[47]

Cultural genocide has long-term, intergenerational effects. Individual court cases and symbolic political apologies like the one offered by Canadian prime minister Stephen Harper in 2008 may serve as important gestures, but they do not constitute a long-term strategy for processing the events or for making reparation. In the specific case discussed here, the current Canadian government should start by questioning the role played by their predecessors during the negotiations to codify genocide in the CPPCG. Canada joined the efforts to codify this crime as early as 1946, but the last residential schools were only closed half a century later: this clearly shows the lack of political will to face, and take responsibility for, the country's violent colonial past. As a minimal political gesture, the aforenamed convention should be transposed in to inner-Canadian law. But a far more effective step towards achieving a long-term transformation of the country's history of violence would be for Canada – as a significant financial contributor to the International Criminal Court – to speak up in favour of including cultural genocide in international law. Furthermore, Canada should put much more effort into implementing the measures contained in the *Declaration on the Rights of Indigenous Peoples*, which was adopted by the UN in 2007 – and ratified by Canada only in 2016! This is the only way for this North-American state to believably distance itself from the historical perpetrators and become a neutral instance for working through the conflict and commencing a long-term process of peace and reconciliation.

The skeletal finds on the premises of residential schools in 2021 were a shock to Canadian society. They also made clear that the fact that there is a legal *gap* does not make the injustices committed against the First Nations, Inuit and Métis any less significant; on the contrary, the existing trenches are only deepened by the lack of categorization of allocation of responsibilities. And yet, the question whether the law could help bring about reconciliation only addresses a part of the complex history of violence that goes hand in hand with the settler colonialism upon which modern Canadian society is built. Achieving intra-societal peace and mutual respect necessitates a much more in-depth questioning of the dominant narrative and self-conception of this colonialism. Paulette Regan, a leading member of the TRC, defined this necessity as follows:

> "[…] as Canadian citizens, we are ultimately responsible for the past and present actions of our government. To those who say that we cannot change the past, I say that we can

47 In fact, the Commission obviously placed great value on financial support by the state of measures of cultural revitalization of victimised languages and cultures. But although the TRC calls the investigated acts "cultural genocide", no thought is given to the question whether surviving perpetrators, those responsible for carrying out these crimes, should be legally held to account (see also Starblanket 2018: 28). Thus, the measures proposed by the TRC cannot serve as measures of Restorative Justice.

> learn from it. We can better understand how a problematic mentality of benevolent paternalism became a rationale and justification for acquiring Indigenous lands and resources, and drove the creation of prescriptive education policies that ran counter to the treaty relationship. Equally importantly, we can explore how this mentality continues to influence Indigenous-settler relations today. Failing to do so will ensure that, despite our vow of never again, Canada will create equally destructive policies and practices into the future. […] For all these reasons, I think of the apology not as the closing of what is commonly referred to as a dark, sad chapter in Canada's history but rather as an opening for all Canadians to fundamentally rethink our past and its implications for our present and future relations." (Regan 2010: 4)

In the interest of achieving honest internal reconciliation, Prime Minister Justin Trudeau should campaign to recognize the crime of cultural genocide. This step would not only give a signal for the legal processing but also open up the space for a historical narrative from a different perspective. So far, there is no political strategy for how facing the country's violent history could trigger changes in the national concept of self and in the relationships between different population groups. For example, in order to create a space for all elements of the country's society to process the events, the familiar paradigm of individual crimes committed by individual perpetrators would have to be broken, since interpretations like these render opaque the complex system of power distribution and domination in settler colonialism. Canada's *white* population has been supporting this system and has consistently profited from it. That is why politics must include the *white* population majority in the process of confronting the events and in debates about possible forms of compensation. While the shock about finding the remains of mistreated children is still fresh within Canadian society, the country has an opportunity to start a process of facing up to its history in a manner that interlinks law and politics and can perhaps serve as a model for other former colonial powers.

In general, political decision-makers in former colonial powers are increasingly facing questions about how to handle historical responsibility for colonial violence and its effects and consequences in a way that also offers new foundations for current political and societal relations. It would be naïve to think one could rely on supranational law for this; this is made clear by the gaps in the law, which – as we have shown with the example of cultural genocide and Canada's exertion of influence on the codification process in international law – are or were partially intentional. In any case, too much optimism in the regulatory powers of legal processes would not do justice to the matter at hand. Politics can and should actively promote the further development of supranational law so that it may serve to process wrongful acts, including historic injustice; but also in order to create the necessary space for debate in the area of tensions between forensics and narratives (Campbell 2008: 4). Establishing that a legally sanctioned crime has been collectively committed can replace neither the collective engagement with, and re-telling of, such a story nor the societal and political engagement with its continued consequences: "Ultimately, the attitudes and actions of the majority population must shift. It is not just the minds and pocketbook of settler society that must be reached, but its heart, soul, and conscience as well" (Regan 2010: 109). As an analytical category, the term "cultural genocide" can offer important impulses.

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CANADA'S VIOLENT LEGACY: HOW THE PROCESSING OF CULTURAL GENOCIDE IS HAMPERED BY POLITICAL DEFICITS AND GAPS IN INTERNATIONAL LAW

To this day, cultural genocide is not covered by the UN Genocide Convention, nor is it codified as a crime in international law. The authors offer a look at the genesis of the convention and show that the political interests of former colonial powers are largely to blame for this regulatory gap. Taking as an example the cultural genocide committed against Indigenous peoples in Canada, Mannitz and Drews demonstrate how such interests obstruct not only claims for reparations but also the development of societal discourse and debates that could serve to process historical injustice and present-day conflicts.

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