



April 2019

## Genocide Against Indigenous Peoples: The Experiences of the Truth Commissions of Canada and Guatemala

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### Recommended Citation

Guematcha, E. (2019). Genocide Against Indigenous Peoples: The Experiences of the Truth Commissions of Canada and Guatemala. *The International Indigenous Policy Journal*, 10(2) .

**DOI:** 10.18584/iipj.2019.10.2.6

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# Genocide Against Indigenous Peoples: The Experiences of the Truth Commissions of Canada and Guatemala

## **Abstract**

The truth commission of Guatemala stated that a genocide was committed against Indigenous Peoples in Guatemala. The truth commission of Canada concluded that a cultural genocide was committed against Aboriginal Peoples in Canada. The article questions the contribution of the truth commissions of Guatemala and Canada to the recognition of a genocide. Their contribution is analyzed in two areas. The article argues that the work of the two truth commissions shows that the context of a country and the perception of the crime influence the findings on genocide. It also states that the work of the two truth commissions on genocide is part of a movement towards an evolution of the 1948 United Nations Genocide Convention.

## **Keywords**

genocide, cultural genocide, Indigenous Peoples, Aboriginal Peoples, international law, truth commissions, Canada, Guatemala

## **Acknowledgments**

I would like to thank the Robson Hall Law School, the National Centre for Truth and Reconciliation, and the persons who help me to conduct my research during my visiting scholarship at the University of Manitoba: Professor Andrew Woolford, Raymond Frogner, Matthew Renaud, Donna Sikorsky, Helen Fallding, and Gail Mackisey.

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## Genocide Against Indigenous Peoples: International Law and the Experiences of the Canadian and Guatemalan Truth Commissions

Truth commissions are temporary, official, and non-judicial bodies set up by states to examine past violations or crimes, generally to foster lasting peace and/or reconciliation (Freeman, 2006; Hayner, 2011; United Nations Secretary General, 2004). They are considered a tool of transitional justice, defined by the United Nations Secretary General (2004) as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (para. 8). The mechanisms of transitional justice, which apart from truth commissions also comprise tools like prosecutions, reparations, reforms, or vetting (United Nations Secretary General, 2004), are generally created in order to deal with the past in states that are emerging from armed conflict and/or dictatorships. However, the success of truth commissions has led to their use in many states that are not *stricto sensu* [in a strict sense] in transition or emerging from armed conflict or dictatorships (Truth and Reconciliation Commission of Canada, 2015e; Greensboro Truth and Reconciliation Commission [North Carolina, USA], 2006). Truth commissions, created in a transitional or non-transitional period by states struggling to overcome a violent past, have sometimes dealt with Indigenous Peoples (Chilean National Commission on Truth and Reconciliation, 1993; Comisión para el Esclarecimiento Histórico [Commission for the Historical Clarification, Guatemala], 1999a; Comisión Verdad y Justicia [Truth and Justice Commission, Paraguay], 2008; Comisión Verdad y Reconciliación [Truth and Reconciliation Commission, Peru], 2003; the Timor-Leste Commission for Reception, Truth, and Reconciliation, 2013; Truth and Justice Commission [Mauritius], 2011; Truth, Justice and Reconciliation Commission of Kenya, 2013; Truth and Reconciliation Commission [Sierra Leone], 2004; Truth and Reconciliation Commission of Canada, 2015e; Truth and Reconciliation Commission of Liberia, 2009; Truth and Reconciliation Commission of South Africa, 1998; see also John, Cunningham, & Pop, 2013).<sup>1</sup> This article explores the role that truth commissions have played in cases of genocide against Indigenous Peoples.

Genocide, a concept introduced by Raphael Lemkin (1944), is a well-recognized crime, defined in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNGC, 1948) as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. (Article 2)

Despite this legal definition, there is a difference between genocide as a phenomenon analyzed and experienced in many societies or states and genocide as a crime defined by the UNGC. Indeed, understandings of genocide can sometimes differ from the international legal definition. Some states have their own definitions (Schabas, 2009) and many scholars have also constructed definitions of genocide that broaden the scope of the crime—for example, by including groups that are excluded from

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<sup>1</sup> In this article, I refer to Indigenous Peoples and Aboriginal Peoples synonymously.

the UNGC—or restrict it—by limiting the definition to mass murder, for instance (Totten & Bartrop, 2008). Despite these differences, the UNGC has remained the most important legal instrument pertaining to genocide and the centrepiece of its recognition. Consequently, any discussion of genocide should not ignore the UNGC.

Truth commissions are no stranger to the debate on genocide, either as a phenomenon or an international legal concept. One aspect of this has been their contribution to the recognition of genocide against Indigenous Peoples. Where truth commissions have addressed the perpetration of genocide against Indigenous Peoples, there are questions to ask regarding how they have dealt with the crime and to what extent they have either used the UNGC or gone beyond international legal concepts and norms.

The Paraguayan truth commission, the Truth and Justice Commission (Comisión Verdad y Justicia, 2008), paid attention to genocide in the context of repression in that country and implicitly followed the UNGC definition of genocide. It failed to find evidence to prove that acts committed against Indigenous Peoples amounted to genocide. After reporting acts committed against an Indigenous People (the Aché People), including extrajudicial executions and forced sterilization, it stated that even if some of the acts could fall into the category of genocidal acts, the Commission was not able to prove one of the core elements of genocide: The perpetrators' intention to destroy the group. However, the Commission asserted that the crimes committed constituted crimes against humanity because of their general and systematic character (Comisión Verdad y Justicia, 2008).

Unlike the Paraguayan truth commission, truth commissions in Canada and Guatemala used the concept of genocide in different ways to characterize violations committed against Indigenous Peoples. The Truth and Reconciliation Commission of Canada (TRC) called what happened to Aboriginal Peoples (First Nations, Métis, and Inuit) in Canadian residential schools a *cultural genocide* (Truth and Reconciliation Commission of Canada, 2015e)—a crime not explicitly recognised in the UNGC, as will be discussed in the second section of this article. While in Guatemala, the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico [CEH]) reported that genocide was committed against many groups of Mayan Indigenous Peoples in Guatemala (Comisión para el Esclarecimiento Histórico, 1999b). These two truth commissions' conclusions can be studied comparatively for four main reasons:

- a. In the histories of both Guatemala and Canada, Indigenous Peoples have faced many problems, including poverty, marginalization, and discrimination (Carter, 1999; Salazar, 2012; Woolford, 2015).
- b. In both countries, the truth commissions tried to address the issue of Indigenous Peoples' rights.
- c. These two truth commissions, unlike others, used the terminology of genocide to name violations committed against Indigenous Peoples.
- d. In their reports on genocide against Indigenous Peoples, the Canadian and Guatemalan truth commissions insisted on elements that are not included in the UNGC's definition, as will be discussed in the third section of this article.

Truth commissions are not, of course, the only bodies that have dealt with Indigenous Peoples and genocide. In Australia, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander

Children from their Families, which was not *stricto sensu* a truth commission, published a report that used the terminology of genocide (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997). In Guatemala, a document compiled by the Catholic Church's Proyecto Interdiocesano de Recuperación de la Memoria Histórica [the Recovery of Historical Memory (REMHI)], which likewise was not *stricto sensu* a truth commission, analyzed violations committed by the country's military government, including those against Indigenous Peoples, and concluded that what happened had certain genocidal characteristics (Proyecto Interdiocesano de Recuperación de la Memoria Histórica, 1998). However, while the work of these two inquiries is important, they will not be analyzed in detail here because they fall outside the scope of this article, which is focused mainly on truth commissions.

Thus, this article focuses on the cases of Guatemala and Canada as the only truth commissions to date to have extensively considered and examined the perpetration of genocide against Indigenous or Aboriginal Peoples. These cases illustrate the contribution truth commissions can make to both the recognition of genocide against Indigenous or Aboriginal Peoples and the discussion of genocide as a phenomenon and a legal concept. Relying mainly on the Guatemalan and Canadian truth commissions and on the development of international law in the area of genocide, this article draws two lessons that pertain to the differences between genocide as defined by the UNGC and genocide as a phenomenon experienced by different societies. First, the work of the two truth commissions shows that the specificities of a country, including the context and the perception of genocide, influence findings on genocide. Consequently, the findings of truth commissions on genocide against Indigenous Peoples may vary. Second, despite their differences, both truth commissions tended to insist on elements not included in the UNGC and to understand genocide as a phenomenon that does not always fit international legal conceptions. The work of these two truth commissions involving Indigenous Peoples suggests that it may be appropriate to consider an evolution of international law regarding the crime of genocide to include new elements.

After presenting an overview of the Guatemalan and Canadian truth commissions, this article examines these two lessons. Then, the article analyzes developments in the understanding of genocide in each of the two truth commissions' final reports and underlines their specificities, including the influence of context and the perception of genocide against Indigenous Peoples on the commissions' findings. Finally, with regard to genocide against Indigenous Peoples, it examines the potential for an evolution of the UNGC based on the findings of the Canadian and Guatemalan truth commissions.

### **Overview of the Guatemalan and Canadian Truth Commissions**

#### **Guatemala: The Comisión para el Esclarecimiento Histórico**

The creation of the Guatemalan truth commission was the result of peace negotiations, under the auspices of the United Nations, between the Guatemalan government and the armed rebel group Guatemalan National Revolutionary Unity [Unidad Revolucionaria Nacional Guatemalteca, URNG], which had engaged in the civil war that ravaged Guatemala from 1962 until 1996 (Agreement on a Firm and Lasting Peace, 1996; Tomuschat, 2001). Before the conclusion of the final peace agreement, both parties signed agreements on several matters (Agreement on a Firm and Lasting Peace, 1996). In 1994 in one of those agreements, the parties agreed to establish a truth commission (Agreement on the

Establishment of the Commission, 1994). The truth commission received the name *Comisión para el Esclarecimiento Histórico* [the Commission for Historical Clarification]. It was created “to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer” (Agreement on the Establishment of the Commission, 1994, p. 13).

The Guatemalan truth commission had three members. A German professor of international law, Christian Tomuschat, was appointed by the United Nations Secretariat (*Comisión para el Esclarecimiento Histórico*, 1999a). Tomuschat subsequently appointed two other members, Alfredo Balsells Tojo, a Guatemalan lawyer, and Otilia Lux de Cotí, a Guatemalan human rights defender (*Comisión para el Esclarecimiento Histórico*, 1999a).

The Guatemalan truth commission started its activities in 1997. It examined documents, conducted field research and interviews, and collected testimonies from thousands of victims and witnesses (*Comisión para el Esclarecimiento Histórico*, 1999a). Relying on these elements, the Commission wrote a final report, which was published in February 1999. This report, *Memoria del Silencio* [Memory of Silence], emphasized the crimes and violations of both human rights and international humanitarian law that were committed during the armed confrontation and made recommendations to the Guatemalan government. Among the crimes reported by the Commission was the crime of genocide committed against Mayan groups, which it identified as Indigenous Peoples (*Comisión para el Esclarecimiento Histórico*, 1999b; Higonet, 2009).

### **Canada: The Truth and Reconciliation Commission**

Sixteen years later, a Canadian truth commission also dealt with genocide against Indigenous Peoples. The Truth and Reconciliation Commission of Canada (TRC) is unique because its creation was the result of a lawsuit (Niezen, 2013), not government-driven action. The decision to create the TRC came after a legal battle engaged by former students in the Canadian residential school system against the Canadian federal government and the churches involved in administering the schools (Nagy, 2014). Many former students and organizations had been criticizing the residential schooling policy whereby Aboriginal children were removed from their families by Canadian authorities and placed in the schools. These civil legal claims and later class action lawsuits sought to obtain reparation for the harm caused by residential schooling (Buti, 2001; Cassidy, 2003; Olthuis Kleer Townshend LLP, 2012; Truth and Reconciliation Commission of Canada, 2015b). In 2006, the Government of Canada, the involved churches, the plaintiffs, and representatives of Aboriginal Peoples signed an agreement (Indian Residential Schools Settlement Agreement, 2006a). Intended to be implemented under court supervision, the Agreement set rules regarding the compensation of Aboriginal individuals affected by the federally run residential schools.<sup>2</sup> The creation of a truth and reconciliation commission was one of the provisions and commitments listed in the 2006 agreement (Indian Residential Schools Settlement Agreement, 2006b). An Order-in-Council of the Governor General, on the recommendation of the Canadian prime minister, established the Indian Residential Schools Truth and Reconciliation Commission in 2008 (Order-in-Council, 2008a), subsequently known as the Truth and Reconciliation Commission of Canada.

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<sup>2</sup> It is worth noting that the limited scope of the compensation set up by the Agreement, which did not cover all Aboriginal groups, communities, and family members, has been criticized (see Henderson & Wakeham, 2009).

Three Canadian commissioners were appointed by orders-in-council as members of the TRC for a five-year term. Justice Harry LaForme, a judge of the Ontario Court of Appeal, was designated chair of the commission (Order-in-Council, 2008b); Claudette Dumont-Smith, a health expert; and Jane Brewin Morley, a lawyer, were the other commissioners (Order-in-Council, 2008c, 2008d). Shortly after the three commissioners began their work in June 2008, LaForme resigned in October 2008, and the two other members resigned in January 2009 (Truth and Reconciliation Commission of Canada, 2012). A selection panel chose three new commissioners, who were appointed for a five-year term. Justice Murray Sinclair, a judge of the Court of Queen's Bench of Manitoba, was appointed chair of the TRC (Order-in-Council, 2009a). Dr. Marie Wilson, a journalist, and Chief Wilton Littlechild, a lawyer, were appointed as commissioners of the TRC (Order-in-Council 2009b, 2009c). They took office on July 1, 2009. In 2014, at the end of their five-year term, the commissioners were reappointed for an additional year to complete their work (Order-in-Council, 20014a, 2014b, 2014c).

The task assigned to the Canadian truth commission was mainly to document and establish an historical record on what happened in the residential schools, including consequences and impacts, in order to foster reconciliation (Indian Residential School Settlement Agreement, 2006b). The TRC conducted research on Canadian residential schools, organized national and community truth and reconciliation events, and collected thousands of documents and testimonies from Aboriginal victims, survivors, and witnesses (Truth and Reconciliation Commission of Canada, 2015e). It rendered its final report in 2015. In its report, the TRC stated that Canada committed cultural genocide against Aboriginal Peoples in the context of residential schools (Truth and Reconciliation Commission of Canada, 2015e).

Because of their different contexts, the creation of the Canadian and Guatemalan truth commissions took different paths. The two truth commissions shared a common commitment to shedding light on violations of Indigenous Peoples' rights that have progressively drawn the attention of international law (Anaya, 2009; Saul, 2016; Thornberry, 2005). In doing so, they mobilized the terminology of genocide to draw different conclusions because of the different contexts of the two countries and their understandings of genocide.

### **The Influence of Context and Understanding of Genocide on the Characterization of Abuses: Cultural Genocide and Genocide**

The Guatemalan and Canadian truth commissions used the word genocide to characterize what happened to Indigenous Peoples in the two countries, and both referred to the UNGC. However, in Canada, the TRC referred to cultural genocide, while in Guatemala the CEH referred simply to genocide. In the same vein, the two truth commissions did not use the same reasoning, nor did they give the same importance to the UNGC. These differences are rooted in the context of the two states and the understanding of genocide in the two cases.

#### **Canada: Cultural Genocide Against Indigenous Peoples in the Context of Residential Schools**

The Canadian Truth and Reconciliation Commission's relation to genocide can be understood through two main conclusions: First, the TRC did not rely explicitly on the UNGC to draw its main conclusions about the violations committed against Indigenous Peoples in the context of residential schools in Canada. In the summary of its final report, the TRC wrote that Canadian federal government's policies

regarding Aboriginal Peoples, including residential schools, amounted to cultural genocide. According to the Commission:

For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide." (Truth and Reconciliation Commission of Canada, 2015b, p. 1)

Going further, the TRC defined cultural genocide. It stated, "*Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group" (Truth and Reconciliation Commission of Canada, 2015b, p. 1).

In these strong statements, which are at the heart of its final report's main conclusions, the TRC's lack of reference to the UNGC is consistent with international law. Indeed, the UNGC does not recognize cultural genocide. Cultural genocide, whose definition stresses the intent to destroy the culture and language of a protected group, was discussed during the drafting process and negotiations which led to the adoption of the UNGC.<sup>3</sup> But states rejected the idea of incorporating cultural genocide in the Convention (Schabas, 2009). By not relying on the UNGC, the TRC implicitly confirmed what had already been established in international law. However, some parts of the TRC's report question whether the non-recognition of cultural genocide is in conformity to international law.

This is the second conclusion: In some segments of its report, the TRC appeared to conclude that what happened in the context of residential schools in Canada *could* fall under the UNGC's understanding of genocide. In the fifth volume of its report, while criticizing the refusal of the Canadian courts to acknowledge wrongdoings committed against Aboriginal Peoples in Canada, the TRC wrote:

It is difficult to reconcile the refusal of courts to acknowledge the loss of language and culture as being compensable with the very important principle that such acts could constitute acts of genocide, an acknowledged crime against a racial group in breach of the UN Convention on Genocide. (Truth and Reconciliation Commission of Canada, 2015c, p. 125)

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<sup>3</sup> See, for example, the proposition of the Ad hoc Committee:

Article III ('Cultural' Genocide) In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of national or racial origin or religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. (United Nations Secretary General, 1947, p. 17)

The TRC recognized explicitly that cultural genocide was rejected during the drafting process of the UN Genocide Convention (Truth and Reconciliation Commission of Canada, 2015c). However, it noted, “Nonetheless, while the term genocide generally refers to the physical destruction of members of a racialized group, the Convention [the UNGC] contains provisions that appear to contemplate criteria other than immediate physical destruction” (p. 125). After quoting Article 2 of the UNGC, which defines genocide, the TRC report asserted that “articles 2(d) and 2(e) do not require that the victims themselves be ‘destroyed’ but that the measures taken against them be intended to result in the destruction of the ‘national, ethnical, racial or religious group, as such’” (p. 125). Referring to one of the genocidal acts outlined in Article 2(e) of the UNGC, the TRC added:

The forcible removal of children from their racial community in order to be indoctrinated into another racial community and thereby “destroy” their original group would likewise be an act of genocide, even though the children themselves continued to live as members of the new group. (Truth and Reconciliation Commission of Canada, 2015c, pp. 125-126)

Moreover, it argued that it is its view “that if Canada were to attempt to do today what it did in the nineteenth century through residential schools, it could face severe international consequences” (Truth and Reconciliation Commission of Canada, 2015c, p. 126). Elsewhere in the same volume of its report, the TRC continued in the same vein by indicating:

Considering that one element of the *UN Convention on Genocide* involves recognizing that the forcible removal of children from one group to another group for the purpose of wiping out the racial identity of the children is a crime, it is difficult to understand why courts have not been more willing to recognize at least intentional acts of cultural and racial destruction or deprivation as a compensable tort. (Truth and Reconciliation Commission of Canada, 2015c, p. 206)

More explicitly, in the sixth volume of its report, the TRC made a connection between Article 2(e) of the UNGC and the Canadian State’s policy of removing children from their family. It indicated:

It is difficult to understand why the forced assimilation of children through removal from their families and communities—to be placed with people of another race for the purpose of destroying the race and culture from which the children come—is not a civil wrong even though it can be deemed an act of genocide under Article 2(e) of the *United Nations Convention on Genocide*. (Truth and Reconciliation Commission of Canada, 2015d, p. 48)

This statement by the TRC resembles the conclusion of the Australian commission of inquiry set up to investigate the transfer of Aboriginal children from one group to another—even if, unlike the Canadian truth commission, the Australian commission was addressing the permanent transfer of children. In its 1997 report *Bringing them Home*, the Australian commission stated that the removal of Aboriginal children from their families constituted genocide, basing its statement on the UNGC (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997). The opinion of the Truth and Reconciliation Commission of Canada is also akin to the views of some scholars who suggest that Article 2(e) can be interpreted as a recognition of cultural genocide (Saul, 2016; Thornberry, 2005).

It seems clear that in the fifth and sixth volume of its report, the TRC's statements converge around the point that the forcible transfer of children, which took place in the context of residential schools in Canada, amounts to genocide according to the UNGC's definition—even if the members of the group were not physically destroyed.

Thus, the Canadian TRC made two arguments that can give the impression of a contradiction, raising a legitimate question: Why does one part of the report state strongly that what occurred was a cultural genocide, a crime not recognized in the UNGC, while another part of the report states that some actions directed against Aboriginal Peoples could fall under the UNGC?

One could assume that the use of the term “cultural genocide” was meant less as legal term than as a phrase directed towards victims and their process of mourning. To this end, Akhavan (2016) sought to understand why Aboriginal victims and survivors applauded during the final ceremony of the TRC when what happened to them was characterized as a cultural genocide, and to answer the question of whether cultural genocide is a “legal label” or a “mourning metaphor” (p. 245). After examining the complexity and fate of cultural genocide in international law, he concluded that “for the survivors that applauded in Ottawa, cultural genocide is above all a song of bereavement, a metaphor for mourning, rebuilding a shattered self-conception through the power of words” (p. 270). Indeed, beyond the legal matters that may interest scholars and experts, the stigmatization of past wrongdoings is very important for victims of atrocities. The worse and more profoundly negative the words used to describe the past, the better it may be for the victims. The use of the word “genocide,” sometimes commonly referred to as “the crime of crimes,” alongside the word “cultural” follows this rationale.

However, one could legitimately wonder whether most of the survivors at the TRC's final ceremony were applauding the word “genocide” or the word “cultural,” and whether many of them thought that cultural genocide was in fact equivalent to genocide. This question is not irrelevant, since certain facts show that the word “genocide” has been at the heart of discussions regarding Aboriginal Peoples in Canada and beyond: First, some confusion appeared in public discourses in Canada about the distinction between genocide as defined by the UNGC and cultural genocide. For example, in a 2011 speech Canada's then-Minister of Aboriginal Affairs and Northern Development Canada John Duncan declared that “the history of residential schools tells of an education policy gone wrong” (Duncan, 2011, para. 7). He also reportedly said: “I don't view it that way [as an act of cultural genocide], but it was certainly very negative to the retention of culture and if it had extended for another generation or two it might have been lethal, yes” (“Saganash Calls on Duncan,” 2011, para. 6).

Taken as a whole, this statement by the former Canadian minister leads to some inconsistency. Cultural genocide does not necessarily imply deaths. Genocide, in the UNGC definition, implies physical and/or biological destruction, and it has been interpreted in that manner (International Law Commission, 1996). Consequently, without contravening this rationale, one cannot reasonably assert or suggest that a policy could have become a cultural genocide only if deaths occurred. If one looks carefully at the statement of the former minister, one may assume that he meant to say that what happened to Aboriginal Peoples in Canada in the context of residential schools was not a genocide, but that it might have become one had the policy continued for one or two generations with widespread fatalities. In actuality, the former minister's statement implicitly equates genocide and cultural genocide. It could also be taken to mean that cultural genocide does not always fall under the legal definition of genocide, but

that sometimes it does. The statement drew criticism; many individuals denounced it for diminishing the violations committed and refusing to name what happened as cultural genocide (“Saganash Calls on Duncan,” 2011). The debate that followed, however, was oriented around understanding genocide, with some condemning the statement by relying on the UNGC and linking what happened to Aboriginal Peoples in Canada to its definition of genocide (Palmater, 2011). This orientation is questionable, since the UNGC does not deal with cultural genocide, the expression used in the statement that caused the controversy. One could consequently conclude that the discussion was not actually about cultural genocide, but about genocide as defined and recognized by the UNGC.

For the people who condemned the minister’s statement, his refusal to accept the terminology of cultural genocide was seen as minimization. For them, keeping a connection to the legal definition of genocide was important in order to uphold the accuracy of characterizations of the violations committed against Aboriginal Peoples. Rhetorical reference to genocide in discussions about Indigenous Peoples’ rights is also recurrent at the international level. The United Nations Declaration on the Rights of Indigenous Peoples (2007) states that Indigenous Peoples “shall not be subjected to any act of genocide” (Article 7). An observation of the discussions held across many sessions of the United Nations Permanent Forum on Indigenous Issues shows that the issue of genocide against Indigenous Peoples was very often emphasized (United Nations Permanent Forum on Indigenous Issues, 2008, 2011).

Second, in Canada the word “genocide,” without the adjective cultural, had been circulating in debates among Aboriginal Peoples for several years. Before the TRC’s work and report, many scholars, Indigenous Peoples, residential school survivors, and others had been using the word to characterize Canadian policy regarding Aboriginal Peoples, including residential schools, as one of its core elements (Akhtar, 2010; “Manitoba First Nation Organization,” 2013; MacDonald, 2014; Robinson & Qinnay, 1985; Truth Commission into Genocide in Canada, 2001). Even the chair of the TRC, Justice Murray Sinclair, used the word “genocide” several times in public to characterize the Canadian policy regarding residential schools (MacDonald, 2015; Puxley, 2012). So why did the TRC refer to cultural genocide instead of genocide, given that (a) its chair used the term several times in public, and (b) it seemed to fit the perception of Aboriginal Peoples in Canada?

Pragmatic reasons guided by the Canadian context certainly influenced the TRC’s decision. As MacDonald (2015) has explained, the TRC did not conclude that a genocide had not happened, while “invoking genocide would have opened the commission to attack from right-wing activists, armchair lawyers, and others” (para. 9). The TRC chose the expression “cultural genocide” so as to avoid harsh criticism and controversies that would have hampered reconciliation. Indeed, while the TRC was conducting its activities, Canada faced multiple challenges around reconciliation. Reconciliation between Aboriginal Peoples and non-Aboriginal people in Canada was at the heart of the commission’s activities and goals. For many years, Canadian federal authorities have been reluctant to use the terminology of genocide to describe the residential school policy. On the one hand, then, the Canadian authorities would have been opposed to the qualification of what happened in the context of residential school as genocide. On the other hand, however, Aboriginal Peoples in Canada have been stressing the use of the word “genocide.”

As such, the expression “cultural genocide” appeared to be the best compromise. Aboriginal Peoples in Canada would find in the expression a recognition of the violations they endured, even if it was reduced and restricted by the designation “cultural.” It would be very difficult for the Canadian government to oppose the expression, which has no legal consequences either in Canadian law or in international law, without seeming either legalistic or minimizing. Here it is worth recalling that Canada contributed to the exclusion of cultural genocide from the UNGC. According to Schabas (2009), during the negotiations for the adoption of the genocide convention, “Canada declared that, if the Committee were to retain the cultural genocide provision, the Canadian government would have to make certain reservations ‘as the Canadian Constitution limited the legislative powers of the Federal Government to the benefit of the provincial legislatures’” (p. 212). Canada’s delegation to the negotiations was instructed to work towards the suppression of Article 3 of the draft genocide convention, which recognized cultural genocide, and eventually to vote against the whole convention if the issue was not resolved (Schabas, 2009). With this in mind, one could legitimately wonder if, in 1948, Canada was afraid of the legal consequences that the recognition of cultural genocide by an international instrument could have had regarding its own policies against Aboriginal Peoples. As discussion of whether or not a genocide has been committed against Aboriginal Peoples is an established national debate in Canada, this core fact could not have been ignored by the TRC when it wrote its report.

### **Guatemala: A Genocide against Indigenous Peoples in the Context of a Civil Armed Conflict**

Unlike the TRC, the Guatemalan Commission for Historical Clarification (CEH) did not encounter large-scale national debates and controversies over naming genocide against Indigenous Peoples. Unlike the TRC, the scope of the CEH’s mandate was not limited. It was set up after a bloody civil war in order to examine violations of human rights and acts of violence. The United Nations played a role in its establishment, and it had a somewhat international dimension. This context can be considered an element that freed the Commission from the kind of concerns that could have led its members to refrain from qualifying the crimes committed as genocide.

The perpetration of a genocide against Indigenous Peoples in Guatemala was related to the Guatemalan civil war, which broke out in the context of the Cold War between the government of Guatemala, an ally of the United States of America, and the URNG, a leftist armed opposition group. During the armed conflict, Mayan groups—Indigenous Peoples in Guatemala who were already both historically discriminated against and victims of racism—were viewed by the government as sympathizers of the URNG and thus enemies (Comisión para el Esclarecimiento Histórico, 1999b). Government armed forces targeted Mayan groups, escalating between 1981 and 1983 (especially in rural areas). Many Mayan groups were subjected to killings, massacres, torture, mistreatment, forced displacement, and other abuses (Comisión para el Esclarecimiento Histórico, 1999b). In its examination of what happened to Indigenous Peoples of Guatemala during the civil war, the CEH explicitly stated that a genocide was committed against four Mayan groups between 1981 and 1983 (Comisión para el Esclarecimiento Histórico, 1999c).

The CEH dealt with genocide in two main ways. First, it deliberately based its findings on the UNGC and placed the abuses committed against Guatemalan Indigenous Peoples in the context of international norms. The wording of the UNGC and international norms were important in the CEH’s report. Relying on the definition provided by the 1948 Genocide Convention, and in an effort to bring its

conclusions close to its provisions, the CEH both explained why it characterized Indigenous groups as victim groups under the protection of the Convention and gave explanations of how the Guatemalan authorities intended to destroy that group in part or in whole.

In identifying the victim group, the CEH faced the challenge of establishing that Indigenous Peoples fall under the groups named in the UNGC. Indigenous Peoples are not explicitly listed among the protected groups identified by the UNGC, which are restricted to national, racial, religious, and ethnic groups. As such, the CEH decided to characterize Mayan groups as ethnic groups (Comisión para el Esclarecimiento Histórico, 1999b), strategically using the identification criteria that had been instrumental in determining the existence of a protected group in international criminal law. It affirmed that this determination depended on objective and subjective elements, with the objective elements being stable ones such as language and culture and the subjective elements being the group members' self-perception of belonging. The CEH accordingly underlined that the Constitution of Guatemala and one of the agreements signed in the course of the peace negotiations, the Accord on the Identity and Rights of Indigenous Peoples, recognized Mayan Indigenous groups as ethnic groups. It also addressed the self-identification criterion, stating that the members of the Indigenous Mayan groups identified themselves as ethnic groups. The CEH concluded that, in its understanding, Mayan ethnic groups were among the Indigenous Peoples in Guatemala, that they identified themselves as such, and were identified as such by others (Comisión para el Esclarecimiento Histórico, 1999b). Beyond these legal grounds, the CEH's decision to assert that Indigenous Peoples were an ethnic group protected under the UNGC can also be viewed as a way of rejecting the narrative from former government officials that identified the groups as political threats to justify targeting them.

Regarding the determination of the authorities' intent to destroy, the CEH analyzed and reported the abuses committed between 1981 and 1983 against four Mayan Peoples in four regions. It selected these regions on the basis of elements such as the availability of information, the identified victim groups, and the intensity and patterns of violence. Its analysis found that the Guatemalan government had acted with genocidal intent. According to the commission, the discriminatory nature and repetition of the attacks against members of the Mayan groups were evidence of intent to destroy the groups (Comisión para el Esclarecimiento Histórico, 1999b; Perlin, 2000). The Guatemalan commission strongly stated:

Considering the series of criminal acts and human rights violations which occurred in the regions and periods indicated and which were analyzed for the purpose of determining whether they constituted the crime of genocide, the CEH concludes that the reiteration of destructive acts, directed systematically against groups of Mayan population, within which can be mentioned the elimination of leaders and criminal acts against minors who could not possibly have been military targets, demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed "with intent to destroy, in whole or in part" these groups (Article II, first paragraph of the Convention). (Commission for Historical Clarification, 1999, p. 39, para. 111; for the original version in Spanish, see Comisión para el Esclarecimiento Histórico, 1999c, p. 49, para. 111)

The CEH then categorized the genocidal acts under consideration. It wrote that the acts reported amounted to violations of Sections (a), (b), (c), (d), and (e) of Article 2 of the UNGC. For example, the

CEH linked massacres committed against Mayan group to “killings” as mentioned in Article 2(a); torture, cruel, and inhumane actions to “serious bodily and mental harm to members of the group” as described in Article 2(b); and raids on Mayan villages and the bombing of displaced persons to “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” in Article 2(c) (Comisión para el Esclarecimiento Histórico, 1999c, pp. 49-51, paras. 112-122). Although the CEH did not refer to acts that violate Article 2(d and e) in the conclusion of its report—for reasons that are unclear—other segments dealt with acts that can be linked to Article 2(e). For example, it reported the forced transfer of children in its analysis of violations committed in the area it identified as Region II (Maya Achi; Comisión para el Esclarecimiento Histórico, 1999b).

However, in a second argument, the Guatemalan truth commission went beyond the UNGC. The CEH wrote that acts not listed in the UNGC, but which were part of the same plan, are relevant because they reinforce evidence of the intent to destroy (Comisión para el Esclarecimiento Histórico, 1999b). The CEH included the destruction of goods and crops, forced displacement, and the destruction of cultural elements. It reported attacks against the identity of the Maya and the destruction of sacred Mayan sites that obliged them to stop their traditional rituals. It pointed out the persecution of Mayan priests as part of the destruction of culture and identity. It also considered the killing of a priest as an attempt to destroy the material and physical aspect of the Mayan culture (Comisión para el Esclarecimiento Histórico, 1999c).

In stressing the destruction of cultural elements of Indigenous Peoples in its 1999 report, even if it did not say that that destruction amounted to cultural genocide, the CEH was not far from the conclusions drawn many years later by the TRC.

Thus, the work of both commissions shows that the context of the state where the commission occurs influences its findings on genocide. This difference of approach is also based on a dual understanding of genocide, a crime that is both a phenomenon perceived differently by different societies and a notion strictly defined by the UNGC. These differences aid in unpacking the dynamic behind identifying genocide or cultural genocide. Moreover, the fact that both commissions insisted on elements not included in the UNGC shows their participation in a movement towards an evolution of international law in the area of genocide.

## **A New Consideration of Genocide on the Basis of the Reports of the Two Truth Commissions**

### **The Inclusion of Culture**

In international law, the destruction of cultural elements in cases of genocide are only admitted as evidence of the intent to destroy a protected group when such acts have been committed alongside the physical or biological destruction of the protected group (Schabas, 2009). The case of Guatemala fulfilled that requirement, since the destruction of cultural elements of the Mayan Indigenous Peoples went alongside the physical destruction of the members of the groups. The Guatemalan truth commission provided substantial detail about the destruction of Mayan culture and the killing of Mayan individuals (Comisión para el Esclarecimiento Histórico, 1999b). The Canadian case was different, because the mandate of the TRC was restricted. The TRC analyzed the destruction of the culture of Aboriginal Peoples of Canada in the context of residential schools. It did not examine the question of an intent to physically or biologically destroy Aboriginal Peoples of Canada.

However, both commissions shared a common interest in revealing the truth about the destruction of culture in situations of genocide. They also shared the will to place culture, an element not recognized in the UNGC, at the heart of the crime of genocide, following a trend that seeks to include culture in international case law and doctrine around genocide. By doing so, they gave weight to culture, an element that was already relevant in Raphael Lemkin's (1944) work on genocide (see also Woolford, 2015). In this regard, the late international criminal law scholar and judge Antonio Cassese proposed the deletion of "racial groups" from the definition of genocide in the UNGC and the inclusion of "cultural groups." According to Cassese (2009):

It would be necessary to delete the old-fashioned and scientifically wrong reference to "race" as the connotation of one of the targeted groups and add instead a reference to "cultural groups." It should be specified that those attacks on such groups should be banned which are carried out with the intent of destroying the cultural traditions of a group. This ban would aim at protecting the fundamental hallmarks that characterize the habits, rituals, traditions, artistic manifestations etc. of a group, in particular of aboriginal groups of Latin America, Africa, Canada, and Australia. (p. 541)

Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) relied on the destruction of elements of culture in order to prove the intent to destroy a national group before reaching the conclusion that a genocide was committed. It wrote:

The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege* [no crime without a law]. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group. (*Prosecutor v. Radislav Krstić*, 2001, para. 580)

Many scholars have called for the recognition or acknowledgement of cultural genocide in international law (see for example Novic, 2016). The two truth commissions' insistence on including culture in their accounts of genocide supports the argument for such an evolution.

### **The Relevance of Reparations**

The Canadian and Guatemalan truth commissions also dedicated segments of their reports to the reparation of the harm caused by cultural genocide and genocide against Indigenous Peoples (Comisión para el Esclarecimiento Histórico, 1999c; Truth and Reconciliation Commission of Canada, 2015a). In doing so, they considered an important element not included in the UNGC. Indeed, the UNGC does not contain any provisions on reparations. Just as in the case of culture or cultural genocide, the states

involved rejected the idea of integrating a provision on reparations for victims. The draft Convention initially contained an Article 8, which stated:

When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations. (United Nations Secretary General, 1947, p. 47)

The provision was rejected because, among other reasons, some states held that reparations must be set through judicial proceedings (Schabas, 2009). The absence of a reparation provision in the Convention has led some scholars to call for the revision of the UNGC to include reparations (Cassese, 2009). In their reports, both the Canadian and Guatemalan truth commissions stressed the need for symbolic, individual, and collective reparations.

In Canada, the TRC's *Calls to Action*, which sought "to redress the legacy of residential schools and advance the process of Canadian reconciliation" (Truth and Reconciliation Commission of Canada, 2015a, p. 1), pointed out measures that the Canadian authorities need to implement in the area of reparation. Most of the recommended measures amounted to collective and/or symbolic reparations. Financial and individual reparations were already a part of the agreement that created the Commission, which stipulated that financial compensation would be allowed to victims (Indian Residential Schools Settlement Agreement, (2006b)). Several of the TRC's recommendations can be categorized as satisfaction, a form of reparation recognized in international law that includes, among other things, apologies, commemoration, and the search of truth (Basic Principles and Guidelines on the Right to a Remedy and Reparations, 2005). Among the reparations proposed were, for example, various educational measures to be taken in favor of Aboriginal Peoples; measures pertaining to memorialization, notably in archives and museums; and an apology from the Pope, to follow the apology made by the Prime Minister of Canada on June 11, 2008 (Truth and Reconciliation Commission of Canada, 2015a). Rehabilitation, which includes "medical and psychological care as well as legal and social services" (Basic Principles and Guidelines on the Right to a Remedy and Reparations, 2005, para. 21), was also an important element in the TRC's *Calls to Action*. The document called for health and legal measures to be implemented in order to improve the living conditions of Aboriginal Peoples in Canada.

In Guatemala, the CEH's recommendations included many reparatory measures. But unlike in Canada, the Guatemalan truth commission dealt with victims of an armed conflict. For that reason, the CEH's recommendations are not specifically dedicated to Indigenous Peoples. The Guatemalan truth commission prescribed the creation of a national reparations program that included restitution, financial compensation, rehabilitation, and satisfaction for all victims (Comisión para el Esclarecimiento Histórico, 1999c). Mayan victims were entitled to the proposed global reparations program. However, the CEH also took into account the particularity of the victimization of Indigenous Peoples as a collective group. It recommended the active participation of Indigenous Peoples of Guatemala in the "definition, execution and evaluation" of the reparations program (Comisión para el Esclarecimiento Histórico, 1999c, p. 63). In the same vein, as in Canada, some reparatory measures amounting to satisfaction were set for Indigenous Peoples as a collective group. The CEH insisted on memorialization, recommending:

That the commemorations and ceremonies for the victims of the armed confrontation take into consideration the multicultural nature of the Guatemalan nation, to which end the Government and local authorities should promote and authorize the raising of monuments and the creation of communal cemeteries in accordance with the forms of Mayan collective memory.

(Commission for Historical Clarification, 1999, p. 49, para. 5; for the original version in Spanish, see Comisión para el Esclarecimiento Histórico, 1999c, p. 62, para. 5)

The commission also recommended “[t]hat the sacred Mayan sites violated during the armed confrontation [be] reclaimed and their importance highlighted in accordance with the wishes of the communities affected” (Commission for Historical Clarification, 1999, p. 49, para. 6; for the original version in Spanish, see Comisión para el Esclarecimiento Histórico, 1999c, p. 62, para. 6).

The work of the Canadian and Guatemalan truth commissions on genocide against Indigenous Peoples demonstrate that reparation is an important element to consider in a state after findings of genocide.

### **The Need for Reconciliation**

Reconciliation is at the heart of the activities of many truth commissions, including those conducted in Canada and Guatemala. After compiling information about the genocidal abuses committed against Indigenous Peoples, the Canadian and Guatemalan truth commissions insisted on the need for reconciliation. Yet while the crime of genocide is always a dramatic sign of a deep social split and the disruption of a state’s social fabric, states did not consider reconciliation in the UNGC. One could respond that reconciliation is hard to define, that it has a certain degree of abstraction that law cannot easily capture, and that it is characterized by continuous individual and social effort. But still, without reconciliation, a society that has faced large-scale crimes and abuses cannot effectively recover from the past.

Contrary to the lack of recognition in international law of the importance of reconciliation after a genocide or cultural genocide, reconciliation between Indigenous Peoples and non-Indigenous Peoples was at the heart of the work of the Canadian and Guatemalan truth commissions. In Canada, where the commission had the word “reconciliation” in its name, this was a core issue. The TRC pointed out in many parts of its report the need for reconciliation in Canada between Aboriginal and non-Aboriginal peoples (Truth and Reconciliation Commission of Canada, 2015d). The Guatemalan Parliament adopted a National Reconciliation Law in 1996, before the truth commission released its report (Decreto del Congreso n°145-96, 1996). Even if the matter of reconciliation between Indigenous and non-Indigenous peoples was not part of its mandate, the truth commission insisted on it in its recommendations. The CEH’s report rooted the Guatemalan armed confrontation in, among other things, the “racism, inequality and exclusion” that it said characterized the relationship between the Guatemalan State and Indigenous Mayan Peoples (Commission for Historical Clarification, 1999, p. 55; for the original in Spanish, see Comisión para el Esclarecimiento Histórico, 1999c, p. 68). It called for the achievement of “national harmony and reconciliation” by the means of “cultural change... through an active policy of education and peace” (Commission for Historical Clarification, 1999, p. 55; for the original in Spanish, see Comisión para el Esclarecimiento Histórico, 1999c, p. 68).

Fundamentally, examining these commissions and how they examined genocide points to gaps in the UNGC. The reports of the Canadian and Guatemalan truth commissions insist on elements such as

culture, reparations, and reconciliation, which are important and could be included in the UNGC in the future. However, it is not certain that such a reform, in the light of the two truth commissions' examinations of genocide against Indigenous Peoples, could realistically take place today. States, especially those with Indigenous Peoples in their populations, would surely be reluctant to embrace a such a reform of the UNGC that uses the terminology of genocide to describe abuses committed against Indigenous Peoples. Even beyond these states, it is not certain that there would be consensus within the States Parties of the UNGC for a reform. In light of this, a potential strategy could be the adoption of specific legislation on genocide at the national level, which, among other things, could involve the inclusion of Indigenous Peoples as a victim group and policies around culture, reparation, and reconciliation.

In conclusion, the Canadian and Guatemalan truth commissions contributed to the recognition of genocide against Indigenous Peoples in several ways. They reached different conclusions because of their different understandings of genocide and the contexts in which they operated. However, both commissions provide a perspective on elements of genocide that remain to be considered in international law. In the area of genocide, international law is still mainly based on the UNGC. Today, it is difficult to imagine that states will revise the UNGC to include new elements. However, the work of the TRC in Canada and the CEH in Guatemala shows that the scope of the UNGC is too restrictive, and there is room for changes.

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