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Doomed to Repeat:

An Analysis of the Forcible Removal of Children in Australia From Colonisation to the Contemporary

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ABSTRACT

The development of the Convention on the Prevention and Punishment of Genocide aimed to ensure that the 'never again' rhetoric surrounding mass atrocities came to fruition. Yet, at the same time Australia ratified the Convention, First Nations children were being removed from their families under the guise of 'protection'. This practice has continued from colonisation to today, under different veils however perpetrating the same harm to First Nations communities. This study analyses the deficit in the protection of First Nations communities through the production and implementation of the Genocide Convention, the domestic human rights framework, and the failure to address Australia's colonial history. It shall explore the obligations owed to First Nations communities for historical injustices and argue that only through acknowledgement and reparation can the ongoing removals cease. Ultimately, it calls for the use of transitional justice to redefine the relationship between First Nations and non-indigenous communities to prevent the continuation of removals.

Keywords: Genocide, Transitional Justice, Settler Colonialism, Stolen Generations, Guarantees of Nonrecurrence, Reparations.

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INTRODUCTION

Another night with lights turned off.
Crying and suffering about why, why don't I have a mum and dad, like white children have.
Listen to them talking about their mum and dad, done that, done this. Soon I fall asleep,
another day has come.
Oh why didn't I have a mum and dad?
Another night, lights turn off.
Crying softly about why,
why don't I have a mum and dad?
Within my dream I can see that I do
have a mum and dad within my dreams.

*Valerie Linnow[1]

In 1948 the world powers at the time gathered to condemn what they defined as genocide with the production of the Convention on the Prevention and Punishment of Genocide (Henceforth "the Convention"). The Convention described a crime that 'shocked' humankind, specifically targeting the type of atrocities committed by the Nazis during The Holocaust.[2] However, the crime of genocide is broader than this common conception, it encompasses all acts undertaken with the intent to destroy protected groups of people, including the forcible transfer of children. Despite this, it was inconceivable to many that genocide was something that could occur on their land, by their governments, to their people. Rather, this crime has been prevalent throughout history, undertaken during conquest, empire-building and colonial endeavours.

In Australia the general understanding of genocide was that it 'has never been tolerated …. [and] it never will be tolerated here.'[3] As a sign of their international prowess against all forces of evil, Australia became one of the first signatories of the Convention, signing it on the first day it was open for ratification. Yet, despite the rhetoric of 'never again', genocide was ongoing, manifesting in the removal of thousands of First Nations children throughout Australia. As a colonial-settler state, the establishment of modern-day Australia has a history marked by violence. During colonisation, murder, rape and forced labour were commonplace

[1] Valerie Linnow, removed at age two to Bomaderry Children's Home and then Cootamundra Girls' Home. 'Stolen Generations' Testimonies', 2009, https://www.stolengenerationstestimonies.com/.
[2] UN General Assembly Resolution 96(I), adopted on 11 December 1946
[3] Mr Menzies, then Leader of the Opposition, Australia, Parliamentary Debates vol 203, 1949, 1865

as the British settlers declared the land "terra nullius" in 1788 and enforced their dominance of the 'uncivilised' inhabitants. It is estimated that over 20,000 First Nations people suffered violent deaths during the initial colonisation of Australia. Within the setter society, successive governments enacted policies aimed at tackling the 'Aboriginal Problem'. This would include forcibly removing mixed-race children from their families and communities. Between 1910 and 1970 it is estimated that at least 100,000 children were taken.[4] In real terms, Peter Read laments that

> '*there was not a single Aboriginal family which had not been touched by the policy of removal. Everybody had lost someone'.*[5]

Ordered by the State and implemented by both the state and missionaries, many of these children would be subjected to a childhood marked by suffering, exploitation and erasure of everything they once knew. They would face lifelong mental health difficulties and develop unhealthy dependencies with drugs and alcohol and the detrimental impact of the removal would span across generations. This group of children would become known as the 'Stolen Generation'.

In 1997 the Bringing Them Home Inquiry (Henceforth "BTH") concluded that the forced removal of First Nations children had been a genocidal practice. The report recommended reparation programmes to address the intergenerational trauma and rupture to First Nations people however, it would not go far as to suggest state accountability or punishment. It would be a further 9 years until in 2008 the Government would issue a formal apology for the removal of First Nations children from their communities. An apology that was welcomed but failed to identify such acts as a 'Genocide'. Rather than criminal liability or state accountability, the National Apology promoted reconciliation to move forward from a 'blemished chapter' in Australia's history.[6] However, 27 years after TBH, First Nations children are still removed from their families at alarming and disproportionate rates.

[4] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', Parliamentary Paper No 128, April 1997, 2.
[5] Peter Read, 'The Return of the Stolen Generation', *Journal of Australian Studies* 22, no. 59 (1998), https://doi.org/10.1080/14443059809387421, 4.
[6] The National Apology, Prime Minister Kevin Rudd and unanimously passed by the House of Representatives on 13 February 2008.

This thesis investigates the historical removals in Australia within the context of colonialism to understand how the removal of First Nations children continues to be prevalent and disproportionate. It will analyse the drafting of the Convention to assess how the duties to prevent and punish were limited to responding to a certain form of genocide. It will consider the ability of Australia to provide accountability to First Nations people and demonstrate how duties are still owed to survivors and descendants of the removal policies. By combining genocide studies and transitional justice (Henceforth, "TJ") through a postcolonial lens, this thesis shall assert the importance of meaningful TJ to tackle historical injustices that began with colonisation and continue to manifest in the disproportionate removal of children today. The thesis shall conclude that Australia has not come to terms with its colonial past, rendering the state unable to tackle the ongoing impacts of colonialism and genocide that still permeate.

The first chapter will address the development of the Convention from its first conception by Raphael Lemkin to the current definition enshrined in the Convention and Rome Statute. This Chapter will analyse how the removal of children remained an essential part of the Convention and the legacy of the cultural genocide. Whilst there is no 'hierarchy' of genocidal acts, this chapter will demonstrate how the Convention was shaped to exclude colonial acts of violence from its ambit. Imperatively, it will analyse how the exclusion of cultural and minority rights undermines the ability of the Convention to protect the most vulnerable and reduces the ability to hold colonial powers accountable for historical violence.

The second chapter shall draw the line between the colonisation of Australia and policies of removal that existed until the late 20th century to the contemporary removal of children. Tracing the legislation, policies and practices of state officials through the decades shall demonstrate how human rights abuses are ongoing. This chapter shall analyse the intergenerational impacts of removals demonstrating how the current removals exist in the legacy of the Stolen Generations and colonial narratives.

The third Chapter shall apply the legal definition of genocide under the Convention to assess the historical and contemporary removals. It shall analyse each separately concluding that the historical removals fall clearly within the definition of genocide, however, the ongoing removals may not necessarily be considered as such. It shall analyse how the contemporary removals still constitute a violation of human rights and establish how the descendants of the

Stolen Generations, and communities at large are justified in seeking ‘special obligations’ to remedy the historical treatment of the group.

Having established the Stolen Generations as experiencing genocidal practices, and ongoing removals representing human rights abuses as ongoing manifestations of colonialism and the removal policies, the fourth chapter analyses the implementation of the Genocide Convention in Australia. In deeming the implementation of the Convention insufficient, this chapter will assess how the human rights framework in Australia may assist individuals to seek reparations and claim their human rights.

Chapter Five shall analyse how contemporary removals may be prevented using the TJ framework. Traditionally a discipline aimed at bringing stability and peace to former autocracies through democracy, the TJ framework may be developed to apply to the settler-colonial context. It shall assess the limited use of TJ tools in Australia and consider how measures under guarantees of nonrecurrence may be more appropriate and effective at addressing the historical causes and their ongoing impacts. Finally, this chapter shall posit how radical and non-radical reform may be utilised to prevent ongoing removals.

This thesis shall conclude by finding that the discussion of removals in Australia can open the door to reassessing the relationship between First Nations and non-indigenous communities. In exploring the root causes of removals, the settler-colonial history of Australia is revealed and its legacy which manifests as human rights violations becomes evident. Finally, this thesis concludes by providing a list of recommendations for reform to assist in redefining the relationship between First Nations and non-indigenous communities.

TERMINOLOGY

Language has great power to educate, empower and inspire. However, it has also been used to violate, stigmatise and condemn. The language we select can create narratives, centre certain voices and exclude others. Further, the language we use to refer to groups of people can have devastating consequences as to what policies the majority population finds acceptable to enact on their behalf.[7] Legislation, reports and other sources used in this thesis often contain words, descriptions and terms which may be culturally sensitive reflecting the author's views but whose use is not appropriate and outdated. This author seeks to use the most respectful terminology regarding the subject of this thesis and the history, experience and culture of First Nations people. As such, this author shall use the following terms:

Throughout this thesis, this author shall use the term 'First Nations' referring to Aboriginal and Torres Strait Islander communities. This is in recognition and respect of the chosen term by First Nations people.[8]

This author shall use the term 'non-indigenous community' to distinguish First Nation people from the rest of the population. When discussing the early colonial period, this author shall refer to this community as 'settlers'. When the term 'white' is used this refers to the descendants of this community who established themselves as the majority population. Understood as a fluid category, the reference to whiteness is understood within the context as an aspiration for a homogenous society, a political policy and signified the imposed entitlement to the land over those who were deemed to be non-white.

Finally, the 'Stolen Generations' refers to the First Nations children removed from their families. The policies predominantly targeted children of mixed descent due to their perceived ability to be saved from the 'doomed race.' Many outdated and derogatory language is retained in the literature surrounding 'half-caste' individuals, especially within legislation. Such language will be avoided as far as possible. Testimonials describe members of the Stolen Generations struggling with their identity and being in the middle of two

[7] Margaret D. Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*, 2009.
[8] Korff, J 2021, What is the correct term for Aboriginal people? <https://www.creativespirits.info/aboriginalculture/people/how-to-name-aboriginal-people>, retrieved 11 April 2024

worlds.[9] For clarity, this thesis shall refer to such children as First Nations children in reflection of the community and heritage the children were removed from.

METHODOLOGY

This thesis has undertaken a qualitative research analysis undertaking a comprehensive desk study. This thesis has relied heavily upon literature, reports and legislation to question the legacy of the Australian settler state upon First Nations people impacting the disproportionate removal of children from First Nations to non-indigenous settings.

The research topic was informed by insightful discussions with the Human Rights Commission of Aboriginal and Torres Strait Islander people which highlighted the ongoing removals as a product of postcolonial society. To understand this further, this thesis utilised a combination of genocide studies, postcolonial studies and TJ. Whilst there is an abundance of literature on the separate subjects discussed, this thesis seeks to combine these understandings. As such, this thesis has taken a multidisciplinary approach to understanding the legal, historical and social dimensions of the Stolen Generations. Essential to the thesis was the understanding of settler colonialism studied by Patrick Wolfe, the historical account of the Stolen Generations conducted by Margaret Jacobs, and the development of TJ studies to the Australian context examined by Damien Short. This thesis makes broader conclusions regarding the guarantees of nonrecurrence in the Australian context. As such, Chapter 2 follows Mayer Richecks' proposed analysis of establishing what and why violations occurred, how they were implemented and what effect violations had on the community. Chapter 5 considers her final stage of analysis, regarding how further human rights violations can be prevented. In adopting an intersectional approach this thesis seeks to adopt a gendered analysis throughout recognising the gendered target and impact of removal policies.

First Nations people are the central subjects of this study. As such, it is essential to embed ethical research practices into my study. This author has done this by questioning a) my role in undertaking this work, b) what biases I may bring, c) how First Nations peoples may be included in my work and d) how my research may impact communities. The Australian Institute of Aboriginal and Torres Strait Islander Studies ethics framework has provided a

[9] Rita Weberg, 'Stolen Generations' Testimonies'.

deeper understanding of how these responsibilities are carried out. This has required me to consider the key principles of self-determination, Indigenous leadership, impact and value, sustainability and accountability throughout my research. As my research has focused on working with documents, historical, archival and literature, it has been my responsibility to critically analyse the credibility, ethics and purpose of my sources. To centre First Nations peoples' voices and recognise different forms of communicating knowledge, each chapter shall be framed by a statement recorded in the 2009 Stolen Generation Testimonies project.

Chapter 1: The Genocide Convention

They took away my culture. Took away my identity.
I got none. No Yamatji, no Noongar. What am I?
I'm certainly not a wadjela (whitefella), hey?

*Michael Hannah[10]

The Convention was the first human rights treaty adopted by the General Assembly in 1949, predating the Universal Declaration of Human Rights by days. However, despite being a groundbreaking treaty in terms of ratification and the speed of drafting, the product is a far cry from what was originally envisioned by Raphael Lemkin. His conception of genocide was far-ranging and inextricably conceived genocide as a physical, biological and cultural crime. During the drafting period, the definition of genocide evolved failing to confer obligations to protect minority groups, defend culture or give rise to claims for reparations.

This chapter shall analyse the unique significance of the impact of child removal upon a group and the impetus for the forcible removal of children as an act of genocide. It shall consider the exclusion of culture, minority rights and reparation from the Convention as limiting its ability to prevent harm. Finally, it shall consider the legacy of cultural genocide and drafters' intentions in retaining the forcible transfer of children within the Convention despite the widespread practice of assimilation programmes.

Symbolic Importance of the Family Unit

Genocide defined as the destruction of 'groups' is inextricably tied to families and the symbolism of the child.[11] The family unit is the birthplace of traditions, history and heritage which join to form communities and ultimately, protected groups. Within the family, unit children represent the future vitality. Children symbolically embody the continuity of a group, physical proof of future generations and hope of a new life.[12] Forgey argues that as central to

[10] Michael Hannah, Yamatji from the Wadjari tribe removed to Carrolup Native Settlement, Western Australia then the Roelands Native Mission. 'Stolen Generations' Testimonies'.
[11] Elisa von Joeden-Forgey, 'The Devil in the Details: "Life Force Atrocities" and the Assault on the Family in Times of Conflict', *Genocide Studies and Prevention* 5, no. 1 (2010): 1–19. https://doi.org/10.3138/gsp.5.1.1.
[12] von Joeden-Forgey, 5.

a group, the family unit is 'the theatre of much genocidal violence.'[13] As the presence of a child can represent hope, the removal or killing of a child symbolises the extinction of a people.[14] As such rape, forced conversion and imposition of measures to prevent children from being born have been identified as aspects of genocide.[15]

Yet, the removal of children exists as its own act of genocide. For Lemkin, the importance of child removal lay in the basic understanding that children of a nation belong first to their families.[16] The act of separation made them 'dead to their familial nation' destroying the family unit, and in turn the community.[17] Separation destroys the opportunity for heritage, culture and identity to be shared through the generations. The focus is not merely on the child's body, but on their conscience as a member of a particular group and their ability to act as a harbinger of a nation's existence.[18] The desecration of family life by targeting a child, not only is an act of genocide but demonstrates a deep intent to commit a destruction so total that it exceeds physical killing. It destroys the hope of group survival and severs ties that reunification may not mend. This is what Lemkin meant he described genocide as an act beyond mass murder. Therefore, integral to genocidal processes is the destruction of the family unit.

The forcible transfer of children is the least studied act of the Convention, often seen as a 'legal anachronism'.[19] However, child removal is prevalent within genocidal practices. From the removal of 'racially valuable' children during the Nazi era to the removal of Siberian children to boarding schools or Indigenous children in North America, Canada and Australia; the practice is widespread, across decades and continents, as present in Western societies as Eastern, within authoritarian and democratic regimes. This chapter shall demonstrate how the

[13] von Joeden-Forgey, 6.
[14] von Joeden-Forgey, 7.
[15] UN Human Rights Council, '"They Came to Destroy": ISIS Crimes Against the Yazidis', *A/HRC/32/CRP.2* (Human Rights Council, 15 June 2016), https://www.refworld.org/reference/countryrep/unhrc/2016/en/110599.
[16] Raphael Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington : Carnegie endowment for international peace, Division of international law, 1944., 1944), https://search.library.wisc.edu/catalog/999476555402121.
[17] Dimitrios A. Kourtis, 'The Greek Civil War and Genocide by Forcible Transfer of Children', *Journal of Genocide Research*, 2023, 142–63, https://doi.org/10.1080/14623528.2023.2203924, 20.
[18] Kourtis.
[19] Kurt Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide' (Vancouver, University of British Columbia, 2007), 1.

forcible removal of children exists in the legacy of cultural genocide, and that the removal of minority protection undermines the ability of the Convention to protect children.

Genocide, an exceptional crime?

A postcolonial analysis is required to understand the context in which the Convention was drafted. Removing the vacuum in which the Convention was drafted and contextualising it within the background of colonialism provides a greater understanding of the motivations of the drafters. In 1949 the international order was comprised of colonial powers with states such as Britain and France as key actors, on the other hand, their colonial territories were excluded from discussions and would not gain independence or a seat at the UN until the 1960s. Not merely excluded from discussions of the Convention, colonised nations were limited in utilising it. Article XII proposed by the UK gave the colonising powers the option of extending the application of the Convention to territories under their control. Thus, it was voluntary, not compulsory for colonial powers to allow their colonial territories to utilise the Convention. The UK argued that it would be unfair for territories to be bound by a Convention they had no part in drafting. However, this failed to acknowledge that as lacking statehood such territories were not allowed to participate in drafting or discussion on matters that would affect them and could offer them protection from the colonial powers that sought to exclude them.[20]

Whilst the Holocaust was the first major genocide on European soil in modern history, it was not a crime of exceptionality if taking a broader global analysis. Such crimes of genocide were not new to the international community but rather 'part of the everyday lexicon of colonial power'.[21] Moses holds that most nations that exist today were part of empires and experienced some form of colonisation process, of which genocide was rampant.[22] Despite this, the treatment of individuals in the colonies, particularly the issue of reparations, remains controversial. This is none too true in the context of Australia, in which the inquiry into the Stolen Generations which applied a lens of genocide resulted in a furious 'history war'.[23] Not

[20] Bachman, *Cultural Genocide: Law, Politics, and Global Manifestations*.
[21] Sarah Maddison and Laura J. Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice', *Peacebuilding* 2, no. 3 (2014), 253-69https://doi.org/10.1080/21647259.2014.899133, 262.
[22] A. Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History', in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. Dirk Moses A, First, vol. 12 (New York: Berghahn Books, 2008), 3–54.
[23] Paul Muldoon, 'Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonisation', *Journal of Intercultural Studies* 26, no. 3 (2005): 237–54, https://doi.org/10.1080/07256860500153518, 243.

only debating the actual intent behind the 'removal policies' Muldoon observes that what was actually at stake was whether or not Australia was founded and maintained on committing gross historical injustices against Indigenous people.[24]

As such, the nations that were instrumental in drafting the Convention, including France, the UK and Australia were nations that had perpetrated and rationalised genocidal practices for decades if not centuries. Orford holds it is important to acknowledge the 'everydayness and bureaucratisation of genocide' and argues that it is necessary to refute the assumption that mass human rights violations are exceptional to states in transition but a central practice to colonisation and conquest.[25] Arthur goes as far as to hold that a central international court was not created after World War 2 because states including France, feared it would expose their soldiers to be tried for human rights violations committed in the colonies.[26] The strength of the economic, political and military roles of such states which continued to permeate within the colonies, protected such nations from being exposed to accountability mechanisms potentially being sought.

Thus, the act of genocide was not a new concept, but the desire to prevent its occurrence in Western society was. Maddison argues that the imagined exceptionalism of the horrors of the Holocaust allowed the international community to 'reset the standard of justice' and enabled the creation of new mechanisms and new frameworks to deal with them.[27] This reset distanced the crimes of colonisers from the precise atrocity committed by the Nazis. By arguing that the new frameworks and procedures were produced carefully to exclude possible accountability for colonial crimes, this thesis shall expand on Maddison's argument. This will be demonstrated through an analysis of the drafting of the Convention and the eradication of the protection of minority rights and reparations.

[24] Muldoon.
[25] Ann Orford, 'Commissioning the Truth', *Columbia Journal of Gender and Law* 15, no. 3 (22 September 2006): 850–80, https://doi.org/10.7916/cjgl.v15i3.2534, 854.
[26] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31, no. 2 (May 2009): 321–67, https://doi.org/10.1353/hrq.0.0069.
[27] Sarah Maddison and Laura J. Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice', 262.

The Genocide Convention and Cultural Genocide

The Convention is unique as its establishment may be credited to one sole creator, Raphael Lemkin. The Polish lawyer coined the term 'genocide' in 1948 to describe the destruction of groups and advocated tirelessly for its establishment in international law.[28] Distinguished from mass murder, he sought to protect individuals from persecution based on their group membership. For him, the essence of genocide was cultural.[29] As such, his initial conception of genocide was comprised of two crimes, 'barbarity' and 'vandalism'.[30] The former addressed the physical elements of genocide as an action against life and the latter criminalised the destruction of artistic works as a crime on culture. The two elements combined described the specific wrong of destroying a 'people', beyond mass killing but including the destruction of a group's social and political institutions, personal security, liberty, health and dignity.[31] Powell's understanding of genocide as the destruction of a nation as a social and cultural fact, equally the killing of individuals and attacks on languages and religious practices as one multidimensional genocidal process.[32]

Upon defining the sole crime of 'genocide' Lemkin listed techniques of destruction which included political, social, cultural, economic, biological, physical, religious and moral genocide.[33] Whilst many conflate genocide with murder, upon this understanding, killing is not essential to the crime. Rather, scholars such as Powell, Bilsky and Klagsburn interpret the destruction of culture as the goal of genocide. These scholars entwine the destruction of a group's physical bodily integrity with the destruction of language, heritage, expression and lifestyles. It is these differences and desire to eliminate diversity and the characteristics which define the group as a group, that make them the target of genocidal practices.[34]

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[28] Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress*.
[29] Leora Bilsky, 'Cultural Genocide and Restitution: The Early Wave of Jewish Cultural Restitution in the Aftermath of World War II', *International Journal of Cultural Property* 27, no. 3 (2020), https://doi.org/10.1017/S0940739120000235.
[30] Raphael Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations, Additional Explications to the Special Report Presented to the 5th Conference for the Unification of Penal Law' (Madrid, October 1933).
[31] Raphael Lemkin.
[32] Christopher Powell, 'What Do Genocides Kill? A Relational Conception of Genocide', *Journal of Genocide Research* 9, no. 4 (2007): 527–47, https://doi.org/10.1080/14623520701643285.
[33] Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress*.
[34] Ana Filipa Vrdoljak, "Genocide and Restitution: Ensuring Each Group's Contribution to Humanity," *European Journal of International Law* 22, no. 1 (2011): 18, https://doi.org/10.1093/ejil/chr003.

However, the legal definition of genocide differs from Lemkins original formulation. In 1946 the General Assembly adopted Resolution 96(1) which affirmed genocide as a crime and requested that the Economic and Social Council draft a Convention to be submitted to the General Assembly for approval. The Economic and Social Committee appointed Lemkin and two other international experts to form the first Secretariat Draft. This altered Lemkin's techniques to describe genocide as having biological, physical and cultural elements. Despite opposition from his contemporaries, Lemkin advocated for the inclusion of cultural genocide described as the following acts:[35]

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 or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Following the completion of the Secretariat's Draft, the Economic and Social Council appointed an Ad Hoc Committee of Representatives to produce a draft Convention. Seven states were represented at the Committee: the United States of America, the Soviet Union, Lebanon, China, France, Poland and Venezuela. The ad hoc committees were split by those who believed that the protection of culture ought to lie in the Universal Declaration of Human Rights which was being drafted concurrently, or another human rights treaty. In particular, certain members of the ad hoc committee, including France and the United States believed an article on cultural genocide could be used as a backdoor for enabling an international review of how minorities were treated.[36] This resulted in the separation of cultural genocide into a separate article which prohibited the destruction of cultural products.

Having isolated cultural genocide into Article 3 of the draft Convention, the draft was submitted to the Sixth Committee to discuss the legal implications of the Convention. The Committee removed cultural genocide entirely from the Convention. Many delegates

[35] Jeffrey Bachman, ed., *Cultural Genocide: Law, Politics, and Global Manifestations*, First (London: Routledge, 2019), https://doi.org/10.4324/9781351214100.
[36] Bachman.

including Canada, France, the USA and the UK opposed its inclusion on the basis that it was not 'on par' with physical genocide.[37] Denmark argued that 'closing libraries' could not be equated to 'mass murder in the gas chambers' and that the Convention should be restricted to the most spectacular crimes.[38] As such, the committee agreed that the inclusion of cultural genocide would dilute its significance.

However, cultural genocide also posed a risk to many nations fearing external investigation of the treatment of minorities. Senator Thorpe found that the Australian Delegates in particular, along with the other colonial states argued against the inclusion of cultural genocide in the 1948 Convention.[39] The Egyptian and Brazilian delegates suggested that the concept of cultural genocide would hamper reasonable policies of assimilation in the name of national unity. Such policies were considered acceptable to promote the inclusion of minorities within the majority society. However, Mundorff argues that Lemkin distinguished between the policy of 'forced assimilation' and 'moderate coercion' or cultural change.[40] Cultural genocide was not intended to prohibit less serious measures such as prohibiting schools in minority languages but more serious forms of radical and 'inhumane' assimilation.[41] Such measures may be deemed inhumane where no measures are taken to facilitate the change and individuals are left without the conditions necessary for life.

According to Churchill and Jonassohn, forced assimilation, mass displacement and a reduction of a population by an invading group are products of settler colonialism which is inherently genocidal.[42] Lemkin wrote several unpublished papers regarding settler colonialism and genocidal practices. By definition and distinguished from other colonised states, a settler colonial state reduced the indigenous population to a minority supplanting the majority population with colonisers and migrants.[43] This definition reflects Lemkins

[37] UN General Assembly, 'Eighty Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948 : [6th Committee, General Assembly, 3rd Session]', *A/C.6/SR.83* (Paris, 5 October 1948).
[38] UN General Assembly.
[39] Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework' (Commonwealth of Australia, May 2024).
[40] Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide', 98.
[41] Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History'. *And* John Docker, 'Raphael Lemkin's History of Genocide and Colonialism', *Paper for United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies* (Washington DC, 26 February 2004),14.
[42] Kurt Jonassohn and Ward Churchill, 'A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present', *The American Historical Review* 104, no. 3 (1999): 867–68, https://doi.org/10.2307/2650994.
[43] Docker, 'Raphael Lemkin's History of Genocide and Colonialism'.

conceptions of genocide conducted in two stages. The first stage is the destruction of the national pattern of the oppressed group; the other is the imposition of the national pattern of the oppressor. This imposition may be made upon the remaining oppressed population or the territory alone after the removal of the population and the inhabitancy of the area by the oppressors.[44] Lemkin viewed the Nazi colonisation of Western Poland in 1945 as genocidal as the Poles 'could not achieve the dignity of embracing Germanism' as they were expelled, and territory taken by the Germans.[45]

As such, forced assimilation was central to Lemkins' concept of genocide.[46] However, Powell argues that the 'wording of the Convention was shaped by the desire of its framers not to criminalise their own behaviour' rather than rooted in the principles envisioned by Lemkin.[47] Thus, the eradication of cultural genocide from the draft not only stripped back the protection of culture but also the link between colonialism and genocide.

The Protection of Minorities and Reparations

Initially, the protection of minorities fuelled the recognition of the crime of genocide, however, as with cultural genocide, these protections were eradicated from the Convention.[48] The Secretariat Draft envisioned genocide in Article 2 as acts committed:

> 'for the purpose of destroying them in whole or in part, *or of preventing their preservation or development*'[49]

The latter phrase of 'preservation or development' indicated the protection of cultural heritage, language and life. However, it was eliminated from the Convention by the ad hoc committee. The colonial powers and states such as America with Indigenous and Afro-descendent communities argued the protection of minorities ought to find its place in other human rights treaties, such as the non-legally binding Universal Declaration of Human Rights (Henceforth "UDHR") which was being drafted concurrently with the Convention. The colonial powers were concerned that a legally binding article on the protection of minorities

[44] Docker.
[45] Raphael Lemkin, 'Genocide - A Modern Crime', *Free World* (New York, April 1945).
[46] Bachman, *Cultural Genocide*.
[47] Powell, 'What Do Genocides Kill? A Relational Conception of Genocide'.
[48] Secretariat Draft, "First Draft of the Genocide Convention" (UN, May 6, 1947).
[49] Secretariat Draft. Emphasis added.

could be used as a backdoor for enabling an international review of how they were treating their minority populations.[50]

However, the impetus for a minority rights article in the UDHR also faltered. The prevailing attitude was that the principle of non-discrimination would be sufficient to protect minorities. Until this point, minorities were largely perceived as religious minorities. The Minority Treaties had been enforced against certain states such as Poland following World War 1 to protect specified groups. However, increasingly minority rights were being claimed to justify self-determination, a progressing concern for colonial powers. The term 'minority' was left undefined in the Declaration to enable states to reserve the right to select whose 'minority rights' they would respect. Ironically, this meant that the 'replacement' Minority Treaties, the UDHR, would not include any explicit mention of minority groups nor provide any positive obligations beyond non-discrimination.[51] The failure to provide meaningful minority rights in either document was summarised by the UN High-Level Panel as representing the State's concern for state security over human security.[52]

As with the protection of minorities, the issue of reparations was silenced by the colonial powers and those with strong minority populations. The Convention is silent on the rights of victims or the right of reparation yet, the Secretariat Draft Article 13 stipulated that:

> 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.[53]

Again, this article was rejected by the ad hoc committee. The American delegate argued it was 'not sufficiently precise to be of value'.[54] Further, Vrodoljak suggests that the lack of agreement regarding state responsibility for international crimes prevented the inclusion of a

[50] Bachman, *Cultural Genocide: Law, Politics, and Global Manifestations*.
[51] Johannes Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," *Human Rights Quarterly* 21, no. 4 (1999), https://doi.org/10.1353/hrq.1999.0052.
[52] Challenges and Change United Nations High-level Panel on Threats, *A More Secure World: Our Shared Responsibility*, A/59/565 (United Nations, 2004).
[53] Secretariat Draft, "First Draft of the Genocide Convention."
[54] UN General Assembly, 'Eighty Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948 : [6th Committee, General Assembly, 3rd Session]'.

reparations article.[55] Article 13 unlike the rest of the Convention places responsibility not on the individual but the entire population for acts of genocide committed by its government.[56]

Ultimately, the Convention focuses on the concept of individual accountability and punishment, emphasised by the impetus to create an international tribunal pushing the issue of genocide into the realm of criminal law. It would be this venue in which the issue of reparation ought to be assessed. By deeming reparations as the responsibility of an international criminal court to determine the reparations individual owed to their victims, reparations as a concept were distanced from the idea of state responsibility. Further, the International Criminal Court (Henceforth "the ICC") established by the Rome Statute has developed a restorative aim of reparations focussing on victims rather than perpetrators. When viewing genocide as a physical or biological harm this may be appropriate. However, when considering cultural harm which, deprives the contribution of a group to the world, the concept of restitution in a collective sense becomes much more complex. Reparation for damages to victims may be made for in one sense, but in another, it cannot restore values, human life, cultural artefacts or heritage. Vrdoljak's understanding of restitution is that it is not so much a remedy for a wrong, but it is the cessation of that wrong.[57] Thus, without restitution, the wrong may continue to permeate and victimise groups. This view is supported by the lack of application of time limits to restitution processes. The impact of eliminating cultural genocide from the Convention removes the opportunity to develop collective reparation rights and the concept of restitution as a cessation. It further shifted the emphasis of the Convention onto the 'punishment' element, with the duty to prevent less substantiated.

The Legacy of Cultural Genocide

The forcible transfer of children has been interpreted as both the 'shadow' of cultural genocide and concession.[58] However, its inclusion depended on reframing the forcible

[55] Vrdoljak, "Genocide and Restitution: Ensuring Each Group's Contribution to Humanity."
[56] Leora Bilsky and Rachel Klagsbrun, "The Return of Cultural Genocide?" *European Journal of International Law* 29, no. 2 (2018), https://doi.org/10.1093/ejil/chy025.
[57] Vrdoljak, "Genocide and Restitution: Ensuring Each Group's Contribution to Humanity."
[58] William A. Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide', *International Journal on Minority and Group Rights* 14, no. 2 (2007): 379–97, https://doi.org/10.1163/138548707X208881, 97.

transfer of children envisioned in the Secretariats draft as a cultural act to a biological and physical act.

Forcible child transfer understood as a form of cultural genocide relies on the conception that the transfers destroy the group by inhibiting children from continuing their cultural practices, learning their native language and practising traditions; as the children remain living, there is no biological or physical destruction. However, Mundorff argues that forcible child transferals destroy not only cultural existence but also a group as a physical-biological entity.[59] Analogous to rape, selective killing and forced deportations, forced transfers operate to prevent children from reproducing within the group and discouraging children's return. Kourtis reinforces this argument stating that the removals target the capacity of a group to reproduce and so perpetuate itself.[60] Thus, whilst destruction is culturally mediated, the ultimate goal remains the physical destruction of a group.[61]

The inclusion of the forcible transfer of children in the Convention was seen as a diplomatic victory of the Greek delegate, Jean Spriopoulos.[62] The prohibition on the forcible transfer of children had been removed by the ad hoc committee but was reintroduced as an amendment to the final draft by the Greek Delegate. The Greek amendment was forwarded to support the repatriation of Greek Children from the Balkans by Communist groups. The Greek Royalist Government hoped that the use of a genocide charge would 'depoliticise' their conflict and persuade the international community and the UN to intervene on their behalf to suppress the genocide of Greek children.[63] The delegate invoked the bio-physical argument, arguing that forced transfer was not 'primarily an act of cultural genocide' but a biological harm.[64] In removing children from their protected group, it is denying them the opportunity to be raised and embrace their culture, become future leaders of the group and further reproduce life and culture. Lemkin supported this argument stating that 'Greece a nation of 7 million would have a population of 16 million if not for the Greek children who were taken away for 400

[59] Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide'.
[60] Kourtis, 16.
[61] Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide'.
[62] Kourtis, 'The Greek Civil War and Genocide by Forcible Transfer of Children'.
[63] Kourtis.
[64] Kourtis, 16.

years'.[65] Thus, the crime of genocide, the destruction of a group not merely the killing of a group, is completed.

There were few objections to the amendment and little substantive debate about its inclusion.[66] The Polish Delegate was concerned that the 'transfers' of children may mean the evacuation during a time of war. The Belgian Delegate felt that population transfer did not necessarily mean the destruction of a population. However, the USA delegate argued that forcible child transfers were aligned more so with measures to prevent live births as there is 'little difference between the prevention of birth by abortion and the forcible abduction shortly after birth' to a mother.[67] The American support is curious as whilst they were in great opposition to the inclusion of cultural genocide, they were instrumental to the inclusion of forcible child removal.[68] It is understood that the inclusion of cultural genocide was seen to impose a risk on domestic assimilation policies impacting African Americans, however, the inclusion of child removal did not, despite removal policies operating in America for 80 years under the American Indian residential school program.[69]

The instrumental involvement of the American delegate may suggest the inclusion of forced transfer was not a 'concession' on cultural genocide, but the legacy of 'political groups' as a protected group within the Convention. The protected groups of 'national, ethnical, racial or religious groups' were decided on inherent to one's consciousness. However, the context of the Cold War meant politics and ideology were also wrapped in one's identity. Kourtis argues that the removal of children was viewed as genocidal because it ran afoul of an 'essentially biopolitical collective claim of the warring factions.'[70] Children were seen as both the harbingers of culture, life and group hood but also as future citizens and political beings.

This curiosity may alternatively be explained by the distorted understanding of civilisation. The Venezuelan delegate stated that:

[65] Raphael Lemkin, *Totally Unofficial*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013).
[66] Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide'.
[67] UN General Assembly, 'Eighty Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948 : [6th Committee, General Assembly, 3rd Session]'.
[68] Kourtis, 'The Greek Civil War and Genocide by Forcible Transfer of Children'.
[69] Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide'.
[70] Kourtis, 'The Greek Civil War and Genocide by Forcible Transfer of Children', 20.

> Sub-paragraph 5 of Article II had been adopted because the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization and living in conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such a case there would be no question of mass murder, mutilation, torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.[71]

Thus, a line was drawn between removals in a child's best interest and removal to destroy a group. Although the Venezuelan delegate did not refer to any specific removal programmes, the statement may be seen as an idealistic or naïve viewpoint in light of contemporary understanding of the intergenerational, physical and mental effects of forcible removal programmes which were in existence at the time of the 6th Committee meeting. The acts of the Nazi abductions under Himmler's 'child stealing campaigns' and the Greek struggle distanced the crime of child removal from the removal policies prevalent at the time. The USA, Canada, UK and Australian delegates failed to see their own actions in a crime described during Nazi trials as 'a crime which in many respects transcends them all… the crime of kidnapping children'.[72] As a result, the Greek amendment was adopted by twenty votes to thirteen, with thirteen abstentions rendering 'forcibly transferring children out of the group' the 5th act of genocide.

Summary

This chapter has explained the context in which the Convention was formed resulting in a text a far cry from the comprehensive protection of minority groups which Lemkin originally sought. Without undermining the significance of the Convention and the achievement of drafting a universally accepted document, it may also be acknowledged that the Convention's purpose was never to criminalise or investigate colonial actions. The elimination of culture,

[71] UN General Assembly, 'Eighty Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948 : [6th Committee, General Assembly, 3rd Session]'.
[72] United States of America vs. Ulrich Greifelt, et al (7 July 1947).

minority rights, and restitution demonstrate the attitude of the drafters that ‘never again’ was to be applied in certain contexts, for certain people. This failure undermines the ability of the Convention to ‘prevent’. It further demonstrates the lack of impetus to substantiate the obligations contained in the Convention to protect individuals in colonised states, or to enable individuals to bring claims against colonial powers. Understanding the context of the Convention is important in ascertaining its legal and political power today and how it may be utilised in combating both current and historical injustices. Having established that assimilation programmes were overlooked as vehicles of genocide, the next chapter shall draw a line from Australia’s history as a settler colonial state to the modern removal of First Nations children through the assimilation and absorption policies.

Chapter 2: Stealing Generations

When nighttime came, I used to cry.
I used to cry because I had no mother to put me to bed and hug me up in it.

*Marita AhChee[73]

The same year that Australia ratified the Convention, the practice of removing children from First Nations peoples' communities was widespread and systematic. These practices have continued to occur at increasing and disproportionate rates. Whilst not all removals are human rights violations, this chapter will argue that many are. Maddison argues whilst Australia may not have returned to the official policies of race-based child removal, the acknowledgement of the truth of the Stolen Generations has not resulted in addressing the wider marginalisation or economic oppression that has its roots in settler colonialism.[74] As such, this chapter will demonstrate how today's removals are a direct product of colonialism and a continuation of the Stolen Generations. By applying a colonial lens to the Stolen Generations, the contemporary removals may be explained, understood and prevented.

This chapter will consider what historical violations took place during colonisation, why the Stolen Generations occurred, how it was implemented and what effects they have on today's society. It shall then analyse the current removals of First Nations children by welfare and the criminal justice system. It shall conclude that these removals are justified by ongoing colonial logic and implemented in ways that reproduce the trauma experienced by the Stolen Generations.

The Significance of 1788

The removal of children from First Nations peoples was a part and parcel of a process of colonisation that began in 1788 with the arrival of English settlers to Botany Bay. However, the existence of First Nations people in Australia predates 1788 by millennia. Having arrived in Northern Australia between 24,000 and 60,000 years ago First Nations peoples formed around 500 tribes with various languages and customs. Over these millennia, First Nations

[73] Marita AhChee, removed from her Anmetjere mother to Garden Point Mission in Melville Island, Northern Territory 'Stolen Generations' Testimonies'.
[74] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice'.

people hunted, gathered and cultivated traditional lands. They organised themselves in typically nomadic tribes but with sophisticated systems of kinship, law and religion, believing in the intergenerational continuation of land rights.[75] However, this sophistication was not recognised by the settlers.

Settler colonialism is 'inherently eliminatory' as described by Wolfe.[76] He asserts that is a process, not a single event of invasion in 1788. Rather, this year marks the advent of a pervading structure defined by violence, which continues to dominate the lived experience of First Nations Communities.[77] Short argues that the term 'settlement' is merely a 'colonial euphemism for invasion' which denies the violent nature of settlement.[78] Colonialism as a process replaces the original inhabitants of the land, with newcomers who view themselves as superior owners of the land. This entitlement is justified by a deep-seated understanding that the newcomers would make much better use of the land.[79] This 'use' was defined by profit. Disregarding any other concepts of land use, the incorporation of Australian land into the colonial empire, developed the international markets; Australian wool became connected to the Yorkshire Mills and the cotton produced in India, Egypt and under the Slave Trade.[80] Rather than respect the differences in lifestyle and use of land, these differences were perceived as posing a threat to the nation-building efforts of the settlers.[81] The foundation of the modern state was therefore built on the eradication and displacement of such practices.

What distinguishes Australia as a settler-colonial state from other colonial conquests, is the lack of treaty relations between the indigenous and non-indigenous communities. There was no attempt to establish labour rights as with the Spanish Laws of Burgos in South America or the Native American Land treaties. The 1837 Select Committee on the Treatment of Indigenous Communities (Henceforth the "Select Committee") distinguished the First Nations peoples from other Indigenous communities as 'the most degraded of the human

[75] Michael Legg, 'Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations.', *Berkeley Journal of International Law* 20, no. 2 (2002): 387–435, https://doi.org/10.15779/Z38KM0Q.
[76] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native', *Journal of Genocide Research* 8, no. 4 (2006): 387–409, https://doi.org/10.1080/14623520601056240, 387.
[77] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice'.
[78] Damien Short, 'Reconciliation and the Problem of Internal Colonialism', *Journal of Intercultural Studies* 26, no. 3 (August 2005): 267–82, https://doi.org/10.1080/07256860500153534.
[79] Wolfe, 'Settler Colonialism and the Elimination of the Native'.
[80] Wolfe.
[81] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.

race'.[82] As such, the settlers deemed the land 'terra nullius', an empty land. This legal fiction dehumanised First Nations peoples and disregarded their potential to be seen as subjects of international law, citizens of their own country or as a nation in their own rights. Instead, it enabled the settlers to rapidly utilise the land and extract its resources to establish a modern state. Therefore, Short argues that the state's existence is illegitimate as it was built upon the act of settlement and colonial dispossession. [83]

'A doomed race' and a lingering issue

Between 1788 and 1901, the population of First Nations people decreased from 750,000 to 31,000.[84] The Select Committee identified the impact of colonisation on the reduction in population stating that those 'most in contact with Europeans will become utterly extinct'.[85] However, they distanced themselves from responsibility by viewing their 'extinction' as not due to the colonial violence, massacres and the introduction of foreign diseases, but to the inferiority of First Nations people's genetics. Based loosely on Darwin's theory of survival of the fittest, it became understood that the First Nations peoples were 'doomed' to extinction, left behind in favour of civilisation, progress and modernity.[86]

However, Dr Lang at the Select Committee highlights the role of the missionaries in checking the 'progress of extinction' and requiring Christian education, conversion and civilisation.[87] This paternalistic attitude is characteristic of British colonialism as Stoler notes that the 'politics of compassion' was not in opposition to the Empire, but a fundamental element of it.[88] Further, Moses argues that given the British condemnation of the treatment of Indigenous Persons by Spain in Latin America, it may be presumed that they believed their presence to be a true benefit to the First Nations people in Australia by encouraging civilisation and Christianity.[89] Missionary groups and designated protectors were designated to encourage

[82] House of Commons, 'Report of the Parliamentary Select Committee on Aboriginal Tribes' (London, 1837),10.
[83] Damien Short, 'Reconciliation and the Problem of Internal Colonization', *Journal of Intercultural Studies* 26, no. 3 (August 2005): 269–82.
[84] Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History'.
[85] House of Commons, 'Report of the Parliamentary Select Committee on Aboriginal Tribes', 11.
[86] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940, 26*.
[87] House of Commons, 'Report of the Parliamentary Select Committee on Aboriginal Tribes', 11.
[88] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[89] Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History'.

such ‘civilisation’ which resulted in paternalistic ‘protection measures being imposed upon First Nations people.

The ‘doomed’ race theory was undermined by the prevalence of mixed-race children within the colonial settler state. Discussions on colonial violence often overlook the gender dimension that often marks colonial settler societies. Partly due to the lack of women within colonial enterprises, partly as inherent to the ‘colonial adventures’, men developing relations with the local women was commonplace in settler colonial societies.[90] Whilst some academics including McGrath argue that that at times indigenous women themselves would initiate contact out of curiosity and desire or in the hope of receiving goods in exchange, this overlooks the inherent power dynamic between the coloniser and colonised.[91] First Nations people were no longer able to support themselves from the land and so were reliant on the Reserves upon the settler’s resources. This resulted in women resorting to prostitution with the settlers to support themselves and their families. Jacobs offers a more critical perspective stating that the ‘colonisers used rape, sexual assault and forced concubinage as a weapon of conquest’.[92] This persuasive analysis perceives the sexual relationships between First Nations people, mostly women and the colonisers as a human rights abuse, another form of control and inherent to colonial violence.

The result of such relationships was mixed-race children. Hence, a lingering issue emerged. The existence of children not only represented the continuance of First Nations people but symbolised a threat to land ownership. The removal of children was necessary to undermine First Nations peoples’ claims to the land by breaking their affiliations with their ‘kin and country’.[93] The successes of the colonial settler state depended on the complete eradication, absorption, or assimilation of children into white society. Thus, a two-pronged approach emerged, segregating ‘full-bloods’ on reserves, and controlling mixed-race individuals.

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[90] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[91] Ann McGrath, ‘The White Man’s Looking Glass: Aborignal-Colonial Gender Relations at Port Jackson’, in *Pastiche I : Reflections on Nineteenth-Century Australia*, ed. Penny Russel and Richard White (Allen & Unwin, 1994), 27–44.
[92] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[93] Jacobs.

Segregation and Protection Legislation

Queensland implemented the first instrument of separate legal control over First Nations people through The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld). This followed the 1895 Government Investigation led by Archibald Meston, Southern Protector of Aboriginals for Queensland who condemned the cruel and desperate conditions imposed on First Nations communities by 'unscrupulous and degraded white' men.[94] He presented the segregated reserves overseen by white authorities as a more benevolent approach to aboriginal affairs. As in the Select Committee Report, the guise of protection and civilisation was used to justify the eradication of indigenous people and culture. Whilst the methods were different, Meston held no more respect for the 'degraded and ignorant' First Nations Peoples than those before him. The 'protection of Indigenous people' rather than punishing wrongdoing towards First Nations peoples, resulted in deeper segregation and control. On the reserves, First Nations peoples were dependent on the government for rations, lived severely restricted lives and were ineligible for citizenship in the new nation.[95]

New South Wales and Victoria adopted a 'Board of Protection' to regulate the affairs of First Nations peoples whilst the remaining states appointed a Chief Protector. The Chief Protector in most states became the legal guardian of First Nations peoples and was empowered to remove children in their best interests. For example, the Aborigines Act 1905 required Protectors to approve any interracial marriages and transferred guardianship of mixed-descent children to the Protectors who had the power to remove children and send them to government institutions.[96] Initially, legislation held that only children who were neglected, unprotected or orphaned could be removed. However, this legislation was used broadly. Children were deemed orphans when their indigenous parents were not married or if they were mixed race; despite the intricate indigenous kinships which ensured that no child was an orphan within the indigenous community. By 1911 administrators had successfully lobbied for legislation that removed the restrictions on removal. For example, South Australia in 1911 removed the requirements that a court order needed to be obtained to prove 'neglect' and empowered the Chief Protector to be the legal guardian of every 'aboriginal and half-caste' child. In 1915, the Victoria Act removed all references to neglected or orphaned children. At

[94] Jacobs, 40.
[95] Jacobs.
[96] Katherine Ellinghaus, 'Absorbing the Aboriginal Problem: Controlling Interracial Marriage in Australia in the Late 19th and Early 20th Century', *Aboriginal History Journal* 27 (2011), https://doi.org/10.22459/ah.27.2011.13.

this time, the children removed were expected to 'merge' into society. By expelling mixed-race individuals into white society it was hoped they would merge into the population. However, such individuals faced discrimination and unemployment, resulting in the establishment of shanty towns on the outskirts of cities.[97]

The language used to justify the removal of children was directly imported from Britain's domestic policies migrating British children to the colonies. The parallels between the Stolen Generations and those affected by the 'Lost Innocents' policies are manifold. As the Stolen Generations sought to eradicate a population, the lost innocents were required to build a more desirable 'White' one. The British Poor Law Act 1850 allowed the 'Boards of Guardians' to facilitate the emigration of children with the consent of the Poor Law Board and the child. However, the idea of consent was largely a fallacy. Bean and Melville refute the concept that the children were 'orphans'.[98] They determined that the child was more likely to have been 'abandoned, illegitimate or from a broken home. They came from all sorts of backgrounds and classes and were by no means all poor.'[99] In 1930 it was amended to allow all 'orphans or deserted' children to be migrated. This narrative of removing orphaned, destitute, or delinquent children in their best interests would be adopted, with an added racialised component to impact First Nations children for generations.[100] As with the removal of children in Australia, the Catholic Church and charitable organisations played significant roles in the emigration of children. The Lost Innocents Inquiry suggest that during the most intense period of emigration between 1870 and 1914, between 100,000 and 180,000 children were sent from the United Kingdom to the Colonies including Australia.[101]

Absorption Theory

In 1937 the theory of 'biological absorption' described by Chief Protector O.A Neville was cemented as justifying the removal of children to tackle the ongoing 'Aboriginal Problem'. Whilst those deemed to be 'fullblood Aborigines' were considered a 'doomed race' to become 'extinct', those with mixed heritage would be 'biologically absorbed' into the white

[97] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'.
[98] Philip Bean and Joy Melville, *Lost Children of the Empire* (Harper Collins Publishers, 2018).
[99] Bean and Melville.
[100] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[101] Commonwealth of Australia, 'Lost Innocents: Righting the Record - Report on Child Migration', Inquiry (Senate Community Affairs References Committee Secretariat, 2001), 13.

population. Neville articulated a three-point plan to this end: first the "full-bloods" would die out, secondly "half-castes" should be removed from their mothers and thirdly marriages between "half-castes" and the white community would be controlled.[102] Within three generations this process would be completed as demonstrated by this image produced in Neville's book 'Australia's Coloured Minority: Its Place in the Community.'

THREE GENERATIONS
(Reading from Right to Left)

1. Half-blood—(Irish-Australian father; full-blood Aboriginal mother).
2. Quadroon Daughter—(Father Australian born of Scottish parents; Mother No. 1).
3. Octaroon Grandson—(Father Australian of Irish descent; Mother No. 2).

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Through 'biological absorption' the First Nations people's population would be eradicated, or extinct, and any potential claims to land would be broken. Jacobs holds that it was not a coincidence that both Australia and America whilst seeking to become modern, industrialised nations enacted removal policies. The removal of First Nations children was critical as the continued 'survival, persistence and resistance' of First Nations people undermined the settler's claims to land and the homogenous white state the settlers were attempting to build.[104] This took on a gendered dimension as the control of girls, controlled the population. Thus, girls were particularly targeted by removal policies. In 1921 80% of those removed in New South Wales were girls.[105] The logic was that removing girls approaching puberty would lower the birth rate of First Nations people.[106] Thus the 'protection' of women and girls was effectively a pseudonym for controlling their sexuality and reproduction. This resulted in Neville at the 1937 Canberra conference, confidently assuring the audience that in 50 years everyone would be able to "forget that there were ever aborigines in Australia".[107]

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[102] Colin Tatz, 'Genocide in Australia', *Journal of Genocide Research* 1, no. 3 (1 November 1999): 315–52, https://doi.org/10.1080/14623529908413964.
[103] A.O. Neville, *Australia's Coloured Minority: Its Place in the Community* (Currawong Publishing Company, 1947), https://books.google.es/books?id=qZMrAAAAIAAJ.
[104] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[105] Jacobs.
[106] Jacobs.
[107] Commonwealth of Australia, 'Conference of Commonwealth and the Aboriginal Authorities' (Canberra: Commonwealth of Australia, 1937), 11.

By disconnecting children from their group identity and traditional land association, the aims of the colonial settler state were fulfilled.

Not all the states adopted the same theories and rationale as asserted by Neville. Within the Federation, it was the prerogative of each state to legislate to deal with the 'Aboriginal Problem.' For example, Queensland policies followed a 'purist theory' and policy of segregation inspired by the American treatment of African Americans. Ellinghaus suggests that this may be attributed to the large population of First Nations people within the state.[108] This meant that unlike in other states where 'biological absorption' required First Nations women to only marry White men, First Nations women and mixed-race women were only allowed to marry aboriginal or mixed-race men. However, despite differences in theory and regarding marriage control, policies to remove children were commonplace throughout the century.[109]

A gender analysis provides a deeper understanding of how these views were perpetuated within society. Jacobs argues that particularly Christian women were motivated by their desire to integrate into the 'emerging nations' so that they 'hitched their maternalistic wagons to the train of the settler colonial state'.[110] Just as the settlers had originally perceived the differences between themselves and First Nations peoples as evidence of their savagery, this logic continued. The criticisms were far ranging from how women carried and fed their children to more serious allegations of infanticide. Others disparaged the ability of First Nations peoples to care for their children due to the great poverty they witnessed, without acknowledging that this poverty was induced by European colonisation. In 1907 a 'Travelling Protector' was reported stating that he considered 'a great scandal to allow any of these half-caste girls to remain with the natives'.[111] This narrative reinforced the understanding that removal policies were based on the protection of children, serving the cause of morality and civilisation within the colonial project.

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[108] Ellinghaus, 'Absorbing the Aboriginal Problem: Controlling Interracial Marriage in Australia in the Late 19th and Early 20th Century'.
[109] Ellinghaus.
[110] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940, 148*.
[111] Tony Barta, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide', *Journal of Genocide Research* 10, no. 2 (1 June 2008): 201–14, https://doi.org/10.1080/14623520802065438 202.

Welfare and Assimilation

From the late 1940s, a slow transition began in which states replaced explicit legislation with general child welfare legislation.[112] Whilst this applied equally to First Nations and non-indigenous children it was still modelled upon assimilation theory which became the official policy in 1951. Whilst assimilation theory rejected the quasi-scientific theory of biological absorption, it still aimed to ensure that the First Nations people were eradicated by becoming indistinguishably integrated into the settler society.[113] Government financial incentives to institutions and missions that removed children led to disproportionate rates of removal. General welfare legislation saw the return of 'neglect', 'destitute' or 'uncontrollable' requirements. However, these terms were often conflated to apply to First Nations methods of child-rearing, viewing poverty as neglect or simply lying about the conditions children were living. Despite the change in legislation, the practical effect remained the same, even the same officers and institutions were used to remove children.[114] The legal guardianship of First Nations peoples' children only ceased in the 1960s.[115] In 1965 the official policy of assimilation recognised that assimilation did not mean the surrender of 'identity, customs and culture' and the 1967 referendum marked a shift towards integration of First Nations people within society.[116] Despite, these changes the next sections show how removals continue to disproportionately impact First Nations peoples.

Intergenerational and Genocidal Impact

The impact of removals is ongoing and continues to impact the descendants of the Stolen Generations. Beresford and Omaji stated that it 'is impossible to overstate the destructiveness of forcible removal' holding that removal includes the loss of opportunities to acquire cultural knowledge, form good models of relationships, and parenting, and embeds psychological trauma.[117] The impact of removal ruptured individuals' sense of identity. Despite assimilation

[112] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'.
[113] Short, 'Reconciliation and the Problem of Internal Colonialism'.
[114] David Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty', *Murdoch University Journal of Law* 10, no. 3 (2003): 1–66.
[115] van Krieken, Robert, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation', *Oceania* 75, no. 2 (December 2004): 121–51, https://doi.org/10.1002/j.1834-4461.2004.tb02873.x.
[116] Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty'.
[117] Quentin Beresford and Paul Omaji, 'Rites of Passage : Aboriginal Youth, Crime and Justice', *South Fremantle, WA : Fremantle Arts Centre Press*, 1996, 33.

policies, many of those who were removed were not recognised as 'White Australians' but no longer saw themselves as a part of the First Nations peoples communities. Many children did not return to their families; some feared returning to their communities believing themselves to be unwanted, and others did not remember what community they belonged to.

The nature of removals led to a deep mistrust of public authorities. The 'forcible element' of removal not only refers to physical force, but coercion and duress. Whilst some parents did consent to the removal of their children, many believed that doing so would enable them to be taken to a better institution which enabled visitation rights; however, this was often not the case.[118] Conversely, others attempt to evade separation. Many remember running into the bush, hiding behind logs and painting their faces darker with charcoal to disguise themselves from the authorities.[119] Those undertaking the removals were state actors usually the police, taking children from their homes, schools or hospitals. The latter venues were used to remove the children without their parent's knowledge thus instilling fear in the community of public services and authorities. As a result, those who have experienced a form of removal have ongoing issues with authority and controls on indigenous culture which remain. BTH concluded that there is a direct association between removal and the likelihood of criminalisation and further instances of removal.[120] Simply stated, 'removals beget removals.'[121]

The trauma of removal led to individuals being vulnerable to life-long and chronic illnesses. This includes being twice as likely to suffer from psychological distress in their adulthood including depression which can manifest in poor physical health and reliance upon dependencies such as drugs and alcohol. In West Australia, it was found that of those who had been forcibly removed 36.6% suffered physical health issues, 48.4% suffered from mental problems, 44.7% from substance abuse and 40% were later imprisoned.[122] This makes families more vulnerable to state intervention. Rather than effective and culturally

[118] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[119] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'.
[120] Australian Human Rights Commission.
[121] Commissioner for Aboriginal Children and Young People, 'Preliminary Report: The Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia' (Adelaide: ATSICPP, October 2023), 12.
[122] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'.

appropriate early intervention, the current system does not support the parenting capacity to be developed. 1 in 4 unborn children are subject to a child protection report are Aboriginal suggesting that removal and punishment is preferred. This issue is compounded by the mistrust First Nations peoples have with public authorities, including hospitals and educators as these were the actors that removed children from their families.

Finally, even those who have evaded or overcome severe physical and mental health challenges, the Stolen Generations members who become parents report an inability to nurture their children. BTH found this to be one of the most significant consequences of the removal policies.[123]

> "It's not as though I don't love my kids… it's just that I expected them to be as strong and independent and to fight for their own self like I had to."[124]

As the removed children had not experienced parenting or care in the institutions, many parents were unable to develop parenting skills and build nurturing relationships with their children. As a result, many of the parents of the Stolen Generations report having 'problem children' of their own. This is defined as children exhibiting substantial behavioural problems of inconsistency, unpredictability, and a conflict of values with mainstream society.[125] Being unable to form parental relationships with their children continues the intergenerational trauma of removal and disadvantaged communities.[126] It inhibits parents' ability to pass down their cultural traditions, language and rituals, and increases the vulnerability of children to removal. This not only continues the cycle of removal but fulfils the eliminatory colonial aims by severing First Nations people's connections with their land and pushing them to assimilation into mainstream society.

The genocidal impact of removals is not merely a 'body count'. Wolfe argues that the success of the Australian practice lies in the social classification of offspring.[127] Not only the physical

[123] Australian Human Rights Commission.
[124] Australian Human Rights Commission, 189.
[125] Australian Human Rights Commission.
[126] United Nations General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia', *Human Rights Council* (United Nations, 8 August 2017), http://aiatsis.gov.au/explore/articles/first-encounters-and-frontier-conflict.
[127] Wolfe, 'Settler Colonialism and the Elimination of the Native'.

removal of children but also the control of marriages demonstrates that it was the intention that the 2nd generation of children would be born into a different group from the one that the abducted child was removed from. As Lemkin envisioned in the Greek context, if not for the removal of children, the population of First Nations people would be significantly greater than it is currently estimated. There remain individuals who may not know that they or their parents were part of the Stolen Generations. In this way, the colonial goal of disconnecting First Nations peoples from their land and heritage to the result of reducing the population has been fulfilled. As with genocidal practices, simply because the complete eradication of the First Nations people was not completed, does not mean it did not occur.

Modern practices of removal

1997 BTH Inquiry recognised the 'entrenched pattern of disadvantage and dispossession' which continued to manifest in the removal of First Nations children.[128] Despite this, in 2024 the rate of First Nations child removals is increasing. The Family Matters 2023 Report stated that as of June 2022, there were 22,328 First Nations children in out-of-home care and a further 478 First Nations young people in a detention centre on an average night in June 2023.[129] Whilst not all removals represent human rights violations in themselves, they exist in the ongoing manifestation of conditions caused by colonialism and policies subjected to the stolen generation.

First Nations people remain targeted by current laws, policies and practices that facilitate the removal of First Nations people's children through welfare and the criminal justice systems. Whilst the legislation may not be explicit, it was submitted to the Inquiry into Human Rights in Australia (2024) by the Senior Policy Executive that current laws continue to exact colonial legacies of human rights abuses and criminalise First Nations people's way of life. Further, Matthews describes the practices as continuing to 'punish parents for poverty and punish children with alienation' for a problem created by the eliminatory behaviour of the

[128] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' 492.
[129] Australian Institute of Health and Welfare, 'Youth Detention Population in Australia 2023' (Australian Institute of Health and Welfare, December 2023).

colonial setters.[130] The next section shall demonstrate how current policies continue the effect of the removal legislation.

Child Welfare

The original removal policies were enacted under welfare legislation, with varying degrees of explicit racialisation. Such legislation was based on faulty assumptions about what was in a child's best interests, conflating poverty with neglect and disregarding cultural childrearing practices as abuse.[131] However, modern-day legislation has retained the same effect of disproportionate removals despite The Racial Discrimination Act 1975 preventing such explicit legislation. The ability of this Act to protect minorities is undermined by the ease with which it has been suspended. For instance, in 2007 it was suspended to enable 'Emergency Intervention in the Northern Territories' which has been described as 'overtly' discriminating against First Nations peoples infringing the right to self-determination and stigmatising already stigmatised communities.[132] The Act was reinstated in 2010 and the legislation was rebranded under the 'Stronger Futures' title. However, the Special Rapporteur in 2027 noted that the programme retained punitive features, stigmatised the community and drained financial resources.[133] This reinforces that despite the evolution of legislation, the harmful effects are maintained under new guises.

The Aboriginal and Torres Strait Islander Child Placement Principle was developed in the 1970s to prevent the ongoing harm and suffering of removing First Nations children from their families.[134] The framework prioritises children staying with their parents, however, where this is not possible it provides that children be placed with their family, then their community, and then appropriate First Nations individuals. However, whilst the policy has been introduced into legislation and policy across all Australian states and territories, there appears to be a significant lack of practical implementation. The Queensland Indigenous

[130] Ingrid Matthews, 'The Colonial Logic of Child Removal', *Australian Journal of Human Rights* 29, no. 3 (2023): 551–57, https://doi.org/10.1080/1323238X.2023.2261172.
[131] Trivedi, Shanta, 'The Harm of Child Removal', *New York University Review of Law & Social Change* 58, no. 43 (5 February 2019): 523–66, https://doi.org/10.2139/ssrn.3341033.
[132] James Anaya, 'Preliminary Note on the Situation of Indigenous Peoples in Australia', *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (United Nations, 2009), 2.
[133] United Nations General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia'.
[134] Fiona Arney et al., 'Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle', Child Family Community Australia (Sydney: Australian Institution of Family Studies, August 2015).

Child Placement Principle audit found that between 2012-2013 only 12.5% of cases considered the 5 required steps.[135] Even where the framework is considered, issues arise with a lack of appropriate First Nations people being available to house removed children, and the few who are available are overstretched. The Human Rights Inquiry found that 'less than half' of children removed are placed within First Nations communities.[136] The remaining half are still separated from their culture and communities.

Legislation such as the Children and Young Persons (Care and Protection) Act 1998(NSW) has re-introduced the conditions of removal where a child is suffering from 'neglect and emotional abuse' from the protectionist era. Less evidentially stringent than physical abuse, Mathews asserts that such criteria are 'readily substantiated' by allegations that are indistinguishable from acute poverty.[137] Further, where care authorities are alerted of a concern of domestic violence, this fulfils the eligibility criteria for removal. Whilst intervention is required to protect children from domestic violence, removal does not resolve the problem effectively or address the root cause of the prevalence of violence in First Nations communities. Matthews further highlights how domestic violence is often perpetrated by a white male, demonstrating another form of ongoing colonial violence. In the same way that the removal policies misunderstood First Nations child-rearing culture, these policies weaponise the impacts of intergenerational trauma to accuse parents of neglect and an inability to raise their children.[138] Whether it be through the care system, or ongoing boarding schools targeting First Nations Children, the government still adopts a paternalistic approach of intrusive intervention and removal from First Nations communities as in the 'best interest' of children.[139] As with the original protection measures which failed to address colonial violence against First Nations peoples, contemporary protection measures fail to address the root causes of poverty and historical abuses against First Nations people. Thus, it is argued that the 'best interest' argument continues to result in 'data [that] carries the hallmarks' of racism which were prevalent throughout the Stolen Generations.[140]

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[135] Arney et al.
[136] Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework'.
[137] Matthews, 'The Colonial Logic of Child Removal', 555.
[138] Matthews.
[139] Economic and Social Council Secretariat, 'Indigenous Peoples and Boarding Schools: A Comparative Study' (New York: United Nations, 1 February 2010).
[140] Commissioner for Aboriginal Children and Young People, 'Background Paper: The Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia' (Adelaide: ATSICPP, 2023).

The result of colonisation upon First Nations communities of socio-economic disadvantage, adverse physical and mental health outcomes, poorer education outcomes and higher incarceration rates renders them susceptible to further intervention.[141] Without acknowledging, the establishment of the colonial settler state as an instrument of abuse and poverty, state legislation fails to address the key issues of poverty, mental health issues, substance misuse and domestic violence. Rather than being a measure of last resort, the overuse of removals continues to perpetrate the harms suffered by the Stolen Generations and disenfranchise the next generations.

Policing and the Criminal Justice System

The child protection scheme works in tandem with policing, facilitating the removal of children from their homes. The 2017 Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples determined that there is a strong link between 'child removal into out-of-home care and juvenile detention' to adulthood incarceration.[142] A major risk factor of removal is becoming known to the police through other means.[143] This first contact is commonly made when police officers accompany child removal officers. Further, low-income areas, public transport routes and shopping precincts often have higher levels of police presence, mandated to form suspicion and substantiate reports about First Nations people. These expose First Nations people to a greater likelihood of encountering the police. Once this contact is made legislation such as the Law Enforcement (Powers and Responsibilities) Act 2003 (NSW) (LEPRA) authorises children to be criminalised from 'reasonable' suspicion in the mind of police officers. This suspicion may be based as much as on any observed behaviour as both unconscious and conscious bias. The impact of children being in contact with the care services leads to a higher chance of contact and detention within the youth criminal justice system and consequently the adult criminal justice system:

[141] Commissioner for Aboriginal Children and Young People, 'Preliminary Report: The Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia'.
[142] Australian Law Reform Commission., 'Pathways to Justice - an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples : Final Report', 2017.
[143] Matthews, 'The Colonial Logic of Child Removal'.

> "Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people, yet our children are alienated from their families at unprecedented rates … our youth languish in detention in obscene numbers."[144]

The overcriminalisation of First Nations peoples demonstrates how detention is used as a tool for child removal and the separation of children from their culture. As compared to non-indigenous children, Indigenous children are 24 times more likely to be detained.[145] The Australian Institute of Criminology recognised that 'For many Aboriginal people, police officers taking children into custody and locking them in the cells, particularly in circumstances where this would not happen to a non-Aboriginal child, is a continuation of the practices of the past that have led to the Inquiry being established.[146] Thus, the conclusion in BTH that 'the juvenile justice system provides the linchpin for the criminalisation and removal of a new generation of Indigenous children and young people' remains as true today as it did in 1997.[147]

The over-policing of First Nations children is partly enabled by the low age of criminal responsibility maintained in Australia. The age of criminal responsibility in Australia remains at 10 years old. Whilst Article 40(3) of the Convention of Children's Rights (CRC) holds that member states must promote the establishment of a law that sets out the minimum age at which children shall not be presumed to have the capacity to infringe the penal law, it does not set a minimum age. Whilst other common law jurisdictions such as the United Kingdom and New Zealand also state the age at 10 years old, repeated UPR recommendations have been made to raise the age condemning this approach.[148][149] Whilst in theory, a rebuttable presumption of 'doli incapax' applies which finds that children between 10-14 years cannot commit a crime due to their insufficient understanding of 'right' and 'wrong'. However, the disproportionate conviction rate of First Nations children compared to non-indigenous youth,

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[144] First Nations National Constitutional Convention, Uluru Statement from the Heart (Uluru May 2017)
[145] Cultural Survival, 'Observations on the State of Indigenous Human Rights in Australia' (Cultural Survival and The American Indian Law Clinic of the University of Colorado, July 2020), https://www.colorado.edu/law/academics/clinics/american-indian-law-clinic.
[146] Australian Law Reform Commission., 'Pathways to Justice - an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples : Final Report', 4.
[147] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', 474.
[148] Manfred Nowak, *Global Study on Children Deprived of Liberty* (New York: United Nations, 2019).
[149] Cultural Survival, 'Observations on the State of Indigenous Human Rights in Australia'.

suggests that this presumption is disproportionately discharged.[150] Once charged, the Special Rapporteur records that measures for minor and non-violent crimes were more likely to be punitive than rehabilitative.[151] Thus, First Nations children are more likely to enter the criminal justice system and face more punitive punishments in detention where they are alienated from their families. Mathews argues removing children to detention 'condemns generations… to lives of poverty and trauma.'[152] This perpetuates the cycle of marginalisation that began with colonisation and the Stolen Generations and continues to eradicate First Nations culture and heritage through the dissociation of youth. As the care system appears to punish parents for their poverty, the criminal justice system punishes children 'for being poor' rather than providing meaningful assistance.[153]

The treatment of children in detention is not dissimilar from the reports of those institutionalised in the 'Stolen Generations' subjected to mistreatment and containment within institutions. During detention, serious allegations of abuse have emerged of 'strip-searches, prolonged isolation and hooding'.[154] There have been further allegations of the use of tear gas, solitary confinement and use of spit hood in the Dale's Youth Detention Centre of the Northern Territory. These devices have been linked to custodial deaths in the United Kingdom and the United States. This centre was reported in 2016 for subjecting children as young as 13 to these devices and pinning them to the floor.[155] Despite this in 2017 the Royal Commission recommended that spit hoods be banned, but thus far federal legislation has failed to do so. South Australia legislation banned their use in 2021 and the Australian Federal Police announced an operational ban in April 2023. However, the last reports suggest continued usage until as recently as February 2023. [156]

In 2023, the Youth Justice Act 1992 was amended to make lawful the longstanding practice of holding children in watchhouses until beds become available in youth detention centres,

[150] Australian Institute of Health and Welfare, 'Youth Detention Population in Australia 2023'.
[151] United Nations General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia'.
[152] Matthews, 'The Colonial Logic of Child Removal', 557.
[153] United Nations General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia', 13.
[154] Cultural Survival, 'Observations on the State of Indigenous Human Rights in Australia'.
[155] Helen Davidson, Paul Karp, and Ellie Hunt, ''Abu Ghraib'-Style Images of Children in Detention in Australia Trigger Public Inquiry', *The Guardian*, 26 July 2016.
[156] Adeshola Ore, '"Dehumanising": Aboriginal Teen Subjected to Spit Hood at Victorian Prison', *The Guardian*, 8 November 2023.

extend and expand the trial of electronic monitoring devices as a condition of bail for a further two years, expand the list of offences with a presumption against bail, empower a sentencing court to declare a child a 'serious repeat offender', allows a court to take into account the young person bail history when sentencing'.[157] It also introduces a new offence of breaching their bail conditions. Since implementation, 112 out of the 169 people charged by May 2023 belong to First Nation peoples communities demonstrating the disproportionate application of legislation.[158] These measures contravene the Queensland Human Rights Act which was suspended to enable the legislation to be passed through, demonstrating the dismissive attitude of parliamentarians towards the fundamental guarantee of human rights.

It is not only domestic human rights law that is suspended against First Nation peoples' rights. Due to the lack of juvenile detention facilities especially in remote areas, which predominantly impact First Nations communities, detained children often share a cell and amenities with adults. To enable this, Australia reserved against Article 37(c) of the Convention on the Rights of the Child, the most universally ratified Convention. However, this remains a violation of Article 10 of the International Covenant on Civil and Political Rights. [159] A violation was found against Australia following a complaint to the Human Rights Council in 2006. [160] Whilst not legally binding, Australia has failed to remedy or compensate the victim as recommended. This failure to take appropriate action causes an additional injustice of violating a victim's right to remedy.

Thus, despite Human Rights legislation, First Nations peoples remain vulnerable to welfare and criminal laws and policies that continue to dehumanise and infantilise them. The impacts, both individual and intergenerational recorded by the BTH are replicated when children are removed from their communities regardless of the welfare or criminal justification namely, increased vulnerability to crime, mental health challenges, dependence on substances and inability to be present for their children. Thus, the cycle continues, whether intentionally or not continuing the colonial aims of nation-building, elimination of 'other' cultures and profit.

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[157] Department of Youth Justice Queensland Government, 'Changes to the Youth Justice Act 1992', *Https://Desbt.Qld.Gov.Au/Youth-Justice/Reform/Changes-Act*, 24 August 2023.
[158] Eden Gillespie, 'Two-Thirds of Children Charged with Queensland's New Breach of Bail Offences Are Indigenous', *The Guardian*, 30 May 2023.
[159] General Assembly resolution 2200A (XXI), International Covenant on Civil and Political Rights, 16 December 1966.
[160] Brough v. Australia (Human Rights Committee 27 April 2006).

Summary

This section has explained how the establishment of the settler colonial state was conducted through policies and structures of violence intended to eliminate the First Nations peoples in favour of nation-building. The continued use of 'protection' and welfare legislation is 'an unhelpful lens' to enhance First Nations children's rights.[161] It not only continues the paternalistic settler narrative but has failed to address the cause of issues facing First Nations peoples which are rooted in the nation-building of non-indigenous Australia. The next chapters shall explain the shortcomings of the State in addressing genocide and historical injustices.

[161] Matthews, 'The Colonial Logic of Child Removal'.

Chapter 3: Stolen Generations under the Convention

They even had us scrubbing – trying to scrub the black skin off our face… We had to cross a lot of barriers, not only me, all my other people. We had to cross a lot of barriers to get through to where we are now. And this is what hurts our children, you see.

*Glenys Ward[162]

The genocide label has become a politically charged concept.[163] However, the legal definition of genocide remains important, as it is precise. The Stolen Generations questions the popular understanding of the term genocide demonstrating that genocide can occur without any physical killing, with mixed motives and without the total destruction of a group.[164] Establishing the removals as genocide under the Convention allows a discussion on how to repair the unique wrong of seeking to eliminate the characteristics, existence and presence which define a group as a group.[165] It opens a conversation not merely on accountability, but culture, history and the legitimacy of a state.

This chapter shall consider whether the removal policies of the Stolen Generations abide by these definitions before considering the applicability of the Convention to the ongoing removals. In concluding that the ongoing removals may not constitute genocidal practice, but at times, human rights violations, this chapter will analyse how the descendants of the stolen generation and the wider community are owed redress as a result of the historic genocidal practices. Understanding the historical human rights violations as genocide defined by the Convention is important to understand the corresponding duties to prevent and redress victims, survivors and descendants' claims as will be explored in the following chapters.

[162] Glenys Ward, removed from the Ningana tribe to St Vincent's Foundling Home, then Wandering Mission, Western Australia 'Stolen Generations' Testimonies'.
[163] Maja Munivrana Vajda, 'Symposium on the Genocide Convention: Codification of the Crime of Genocide – a Blessing or a Curse?', *EJIL:Talk! Blog of the European Journal of International Law*, 15 May 2019.
[164] Chris Cunneen, 'Criminology, Genocide and the Forced Removal of Indigenous Children from Their Families', *Australian & New Zealand Journal of Criminology* 32, no. 2 (August 1999): 124–38, https://doi.org/10.1177/000486589903200203.
[165] Ana Filipa Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity', *European Journal of International Law* 22, no. 1 (2011), https://doi.org/10.1093/ejil/chr003.

A genocide: the Stolen Generations

Many scholars have debated whether the policies under the Stolen Generations constitute 'genocide' To establish that the removal of children in Australia constitutes genocide, the 'actus reus' and 'mens rea' must be determined. That is the specific act of the crime and the genocidal intent. In this case, the act is the forcible transfer of children of a distinct national ethnical, racial or religious group. The policies and removals of the Stolen Generations constituted the forced transfer of First Nations children from their communities to non-indigenous homes and institutes.

Actus Reus

The requirement that children are forcibly transferred does not necessitate that 'physical force' is used. The Trial Chamber in *Akayesu* considered the 'forcible' element holding that 'acts of threats or trauma which would lead to the forcible transfer of children from one group to another' was sufficient.[166] The Preparatory Commission for the ICC held that forcible may also include any 'threat to force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power … or by taking advantage of a coercive environment.'.[167] Therefore, even removals which parents conceded to may fall under the genocide. Analogous to McGraths assessment of sexual consent within the coloniser-colonised relations, it is questionable whether the consent of parents is valid given the context of removals. Some parents stated they consented to removals or even took children themselves to institutions in the hopes that they would be treated better and allowed to see them.[168] Therefore, whilst they were not forcibly removed in a physical sense, the removal was still induced by fear of abuse of violence and abuse of asymmetric relations of power.

[166] The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), No. ICTR-96-4-T (International Criminal Tribunal for Rwanda 2 September 1998) 509.
[167] UN Preparatory Commission for the International Criminal Court, 'Finalized Draft Text of the Elements of Crimes', Report (New York: New York, 6 July 2000), 7.
[168] Australian Human Rights Commission, 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'.

Other removals were undertaken more explicitly by officers in the form of kidnapping or trickery, despite legalising legislation. [169] As parents became aware of the removal policies, many would attempt to hide their children or darken their faces. As a result, Children were removed from hospitals, and schools or taken in the middle of the night.[170] Jacobs records that for parents and children separation was 'undoubtedly a deeply painful experience' incurring a 'despairing sense of powerlessness against the strong arm of state authority'.[171]

The Convention does not require that children are removed for any period of time as the source of harm to children and the protected group is the fact of the transfer itself. However, it does require that the transfer is from a protected group to another group. Under the removal policies, children were placed in a combination of institutes led by the state or missionaries or non-indigenous adoptive homes. Thus, the act of transfer from First Nations homes to white society was completed.

Mens Rea

The mens rea requirement is whether there was 'intent to destroy a group in whole or in part'. This intent requirement of the Convention has presented a 'formidable evidentiary threshold' and is also referred to as the 'dolus specialis' recognising the 'special' level of intent required. The main argument against recognising the removals as genocide is that there was no intent to destroy but rather benevolent intentions in the children's best interests Scholars including Attwood concede that by today's standards, the acts were misguided but rested on the assumption that assimilation was for the good of First Nations people generally.[172] The High Court of Australia in 1997 came to the same conclusion in the case of *Kruger v Commonwealth.* This case considered the constitutional validity of the Northern Territory's Aboriginals Ordinance 1918 which between 1925 and 1949 allowed the Chief Prosecutor to forcible removal of 'Aboriginal or half-case' children from their homes into Aboriginal institutions and reserves. The court found that the Ordinance did not authorise acts of genocide as it required the powers of removal to be conducted in the best interests of the child. However, many commentators believe the High Court erred in their findings and runs

[169] Cunneen, 'Criminology, Genocide and the Forced Removal of Indigenous Children from Their Families'.
[170] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[171] Jacobs, 179.
[172] See, Bain Attwood, 'In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History', *Public Culture* 20, no. 1 (1 January 2008): 75–95, https://doi.org/10.1215/08992363-2007-017.

contrary to the objectives of the Convention. Diamadis states that 'it matters not that the intent was to be for the children's benefit. What matters is whether they were forcibly removed. They were.'[173] This statement is overly simplistic as intent is still required. However, Diamandis correctly states that the perceived concept of children's benefit does not matter. By doing so, the *Kruger* judgement conflates motivation within intent.

When drafting the Convention the delegates considered whether motive should be included in 'intent'. The starting point was that domestic penal codes do not ordinarily consider motive as a factor within intent. Yet, the ad hoc committee draft originally included a motive element which was ultimately removed. Schabas held that for genocide to be found, the act must have been committed out of 'hatred' for the group.[174] However, this was argued to be misleading and could enable guilty parties to avoid a genocide charge. Regarding forcible child transfers, groups have been subjected to such policies perhaps not out of a specific 'hatred' but perceived laziness, shiftlessness, and godlessness. Mundorff argues that these programmes viewed characteristics as backwards and that a group's destruction was a small price to pay to eradicate such characteristics.[175] This may not necessarily be described as a 'hatred'. Thus, the motivation requirement was ultimately rejected as 'once the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege'. Any prevailing 'best interest' reasons do not preclude a finding of genocide as long as the intention to destroy a group is found the standard is met.[176]

Some commentators argue that forcible child transfers do not amount to genocide when they are part of a larger assimilation scheme. However, the Convention does not include an assimilation or best-interest exception. [177] Thus, such an exception should not be read into the Convention. Further, Lemkin distinguished between assimilation in the sense of mildly coercive policies from its more severe forms which can constitute genocide.[178] Survivors of the Stolen Generations experienced mass trauma, and ongoing mental and physical impacts

[173] Panayiotis Diamadis, 'Children and Genocide', in *Genocide Perspectives IV: Essays on Holocaust and Genocide,* ed. Colin Tatz (University of Technology, Sydney, 2012), 312–52, https://doi.org/10.5130/978-0-9872369-7-5.i.
[174] Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide', 102.
[175] Mundorff, 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide'.
[176] Mundorff.
[177] Mundorff.
[178] Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress*.

and had significantly reduced mortality rates. This suggests that even if it is acknowledged that some assimilation schemes are acceptable, the Stolen Generations experienced the more severe forms of assimilation that constitute genocide.

It is argued that the policies were not in the best interest of the children, or First Nations peoples but rather the best interest of the colonial state. Children were removed specifically to institutions and homes designed to assimilate children into non-indigenous society to the destruction of their cultural and ethnic heritage. Those removed were both actively and passively encouraged to abandon their identities and assimilate into non-indigenous society.[179] As described in the previous chapter, siblings were divided, native languages forbidden, and traditional practices banned; Names were changed, hair cut and clothes were destroyed to eradicate any trace of their First Nations identity.[180] In eradicating the children's connections to their people, the hope was that the children would assimilate into white society to the detriment and demise of First Nations peoples.

Within the context of settler-colonialism, the fact of colonisation itself is an indicator of the intent requirement. Wolfe distanced settler colonialism from genocide stating settler colonies were not invariable genocidal, but inherently eliminatory.[181] This distinction suggests that colonialism itself does not equate to genocide. However, he also stated that elimination can manifest as genocide, finding that settler colonialism may be a strong indicator of genocide.[182] In a similar vein, Curthoys finds that the death of indigenous peoples is a function of colonisation but not the intention of it.[183] Therefore, whilst the existence of settler-colonial society may not immediately result in the intention requirement being fulfilled, it can be a strong indicator. In Australia, genocidal intent may have been most explicit within the initial colonising practice as recognised by the 1837 Select Committee or statements of Neville during the 1930s. However, Tatz argues all of the legislation before 1970 which applied to First Nations people that purported to be for their protection, became the opposite in practice.[184]

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[179] Diamadis, 'Children and Genocide'.
[180] Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*.
[181] Wolfe, 'Settler Colonialism and the Elimination of the Native'.
[182] Wolfe.
[183] Ann Curthoys referenced in Damien Short 'Australia: A continuing Genocide?' Oxford Transitional Justice Research Seminars (8 February 2011)
[184] Tatz, 'Genocide in Australia'.

This section has demonstrated that the Stolen Generations policies constituted genocide under the definition provided by the Convention. As time passes, the likelihood of accountability for the Stolen Generations decreases, however, the last chapter demonstrated that the impacts of the Stolen Generations and their colonial roots, remain ongoing manifesting in further removals.

An Ongoing Genocide?

Chapter 2 demonstrated how First Nations children are removed disproportionately from their families into out-of-care homes and detention centres. Thus, it must be considered what differentiates these removals from those prior.

Actus reus

First Nations children are removed from their homes at disproportionate rates. However, to fall under the Convention children must be transferred from First Nations communities to another group. Since 1984, the Child Placement Principle has required that child placements be prioritised to ensure children remain within their families, if not their communities. In analysing the genocidal impacts of policies, Tatz finds that 'the administrative machinery has stopped most policies of equality from coming to fruition but has ensured that most policies of inequality emerge as true, often beyond the letter of the law.'[185] This suggests that despite changes in official legislation and policy, welfare and criminal justice administration have resulted in the same impacts occurring. Chapter 2 described that despite the Child Placement Principle, the majority of children are still placed in non-Indigenous homes. Thus, children are still in effect out of the protected group to non-indigenous society.

The 'forcible' nature of removals is difficult to ascertain. Whilst the practice of 'kidnapping and trickery' may not be present, detention under the criminal justice system may inherently be described as forceful and nonconsensual. Regarding out-of-home care, children are removed according to due process, however, it may still be said that a parent disagrees with their removal. However, children are forcibly removed from their homes under many jurisdictions, justified in their best interest or in the context of criminal law. The fundamental distinction from genocidal practice lies in the intent.

[185] Tatz, 31.

Mens Reus

Short argues that it is not a conceptual overstretch to state that genocide is ongoing in Australia. He argues that genocide is still occurring in an Australian state which has failed to decolonise and continues to assimilate First Nations peoples.[186] However, his analysis is predominantly concerned with ongoing land dispossession rather than the removal of children. Therefore, his rationale is limited within this context. In considering whether the current practice of child removal constitutes genocide, we may first consider Australia as an ongoing colonial settler state. As argued by Wolfe, the continuation of the settler-colonial lands may indicate genocidal intent, but this alone is not sufficient evidence of intent.

The policies and practices discussed in Chapter 2 whilst incurring human rights abuses do not prima facie have genocidal intent. Whilst motive cannot be used to displace genocidal intent, it also should not be used to substantiate intent. Conservative scholar, Attwood states that the best interest motive used in the Stolen Generations continues within the culture today. [187] This thesis disagrees with his assessment that the best interest motive displaces the intent to destroy, however, it can be agreed that the 'best interest' narrative has continued. As demonstrated, this narrative may disguise practices that constitute violations of human rights, but there is a lack of evidence of the special intention to destroy First Nations peoples as a whole or in part.

Human Rights Violations

Whilst the ongoing removals may not be defined as genocide, some of the child welfare and criminal justice practices and policies constitute human rights violations. Matthews argues that 'whether on a mission or in a cell' the movement of First Nations children is restricted to prevent the 'transfer of language, knowledge, ceremony and culture' between generations.[188] Thus, the contemporary laws have the same impact as the Stolen Generations, despite lacking the special intent. The forcible transfer of children is a violation of numerous international instruments including the Convention on the Rights of the Child and the UN Declaration on

[186] Damien Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project', *Citizenship Studies* 7, no. 3 (2003): 291–312, https://doi.org/10.1080/1362102032000098887.
[187] Bain Attwood, 'In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History', *Public Culture* 20, no. 1 (1 January 2008): 75–95, https://doi.org/10.1215/08992363-2007-017, 94.
[188] Matthews, 'The Colonial Logic of Child Removal', 552.

the Rights of Indigenous Persons (Henceforth "UNDRIP"). UNDRIP provides the explicit right in Article 7 for children not to be removed from another group and in Article 8 not to be subjected to forced assimilation or destruction of their culture. UNDRIP further recognises the right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children. The disproportionate removal of children into out-of-home care denies children the ability to be raised by their community, and parents the ability to carry out their caring responsibilities.

The Convention on the Rights of the Child adopted in 1989 and ratified by Australia in 1990 requires states to respect parents' rights and responsibilities. Article 9 holds that children should not be separated from their parents against their will except when necessary for the best interests of the child. Where separation does occur, the state shall respect the right of the child to maintain personal relations with their parents. The disproportionate representation of children within out-of-home care represents a violation of parental rights. Whilst the removal of some First Nations children may be legitimately in their best interest, the failure to implement the Child Placement Principle and initiate federal programmes to prevent the removal of children represents an incursion into parental rights. Rather, the removals indicate that contemporary laws are still practised to address 'the Aboriginal Problem' which aims to eliminate the threat of difference that First Nations people represent to the majority state.[189] Rather than respecting First Nations practices of childrearing or addressing the cause of parents' circumstances of poverty, removals and policing still have the effect of controlling the First Nations population.

The ongoing violations of human rights cannot be addressed without contextualising them in the aftermath of the Stolen Generations genocide and colonial policies. The negative effects of such continue to persist and explain current exclusions and inequalities faced by First Nations people; the disproportionate poverty, the mistrust of government authorities, and the ongoing removals by child welfare officers and police. The ongoing removals, the acts themselves, the conditions children are subjected to, and the root causes of the removals violate First Nations human rights. The nexus between historical injustices and present human rights violations can be difficult to prove, especially as time passes, however,

[189] Matthews.

Thompsons' theory of 'special obligations' can be used to bridge historical injustices with the present.

A 'special obligation' owed

The current removals are intrinsically tied to the past. Whilst the genocidal legislation may have been removed, the impacts permeate the current inequality and injustices that First Nations people face. Addressing such requires challenging colonial narratives that have legitimised injustice and settler domination under euphemisms such as 'discovery… and sacred missions of civilisation'.[190] This section shall extend Thompson's' theory based on, Rawls's Theory of Justice, to argue that Stolen Generations, their communities and their descendants are entitled to 'special obligations' by the state.

Thompson argues that historical injustices can 'cast a long shadow' with descendants likely to lack resources or opportunities they may otherwise have held due to the intergenerational impacts of removal.[191] Rawls states that in an intergenerational society, relations exist between both contemporaries and generations, this latter relationship may be conceived as forming a 'family line'. As individuals care about their descendants, they are obliged to save and pass on resources, as such their descendants are entitled to these resources and opportunities. These obligations are conceived as 'everlasting' throughout generations.[192] When policies undermine the ability of individuals to maintain family relations, carry out their obligations and obtain their entitlements as a member of a family, this is not merely an individual injustice but an injustice against 'the family line'. In Thompson's theory, a family line is not just the succession of generations but can embody the community as a whole. This reflects the nature of First Nations communities, which often do not exist within the traditional Western stereotype of the 'nuclear family'.

When a person is removed from the family, the line is disadvantaged by the rupture. Those next in line are denied opportunities and resources and the family is likely to suffer 'anger,

[190] Felipe Gómez Isa, 'Repairing Historical Injustices: Indigenous Peoples in Post-Conflict Scenarios', in *Rethinking Transitions*, ed. Gaby Oré Aguilar and Felipe Gómez Isa, 1st ed. (Intersentia, 2011), 265–300, https://doi.org/10.1017/9781839700743.012.
[191] Janna Thompson, 'Historical Injustice and Reparation: Justifying Claims of Descendants', *Ethics* 112, no. 1 (October 2001): 114–35, https://doi.org/10.1086/339139, 116.
[192] Thompson, 133.

regret, sadness or insecurity'. [193] In the context of the Stolen Generations such opportunities and resources may have constituted land, language, and culture just as much as the opportunity to be raised and loved by their parents. Such feelings should not be dismissed as 'overly sensitive' but taken seriously in recognition of the impact of historical injustices upon family and individual identity.

However, Thompsons conclusions are limited. Her assessment of 'special obligations' owed to descendants does not extend to providing disadvantaged descendants with more social resources than other group members nor does she substantiate what the obligations consist of. [194] Further, her analysis does not extend to consider the unique obligations that Thompson's analysis does not explicitly consider 'genocide' nor the forcible removal of children thus, the unique severity of the crime is not considered.

However, the value of Thompsons' argument lies in her assessment that the injustice caused to family lines ought to be remedied by societies that aim to be just. She finds that redress may alleviate the impacts of harm but to comprehensively address the claims of descendants and that it is essential to consider the original causes of suffering to make sufficient reparations.[195] Thus, the 'special obligation' owed is ongoing and may require multiple, complex actions to be discharged over time. For the descendants of the Stolen Generations, this means addressing the original injustices of both colonialism and the removal policies, to address the continuing effects of these events.

Summary

Gomez Isa argues that special obligations owed for historical injustices are not only legal, political and moral responsibilities.[196] This chapter has demonstrated how the Stolen Generations and First Nations communities subject to removals are owed legal and moral obligations through an analysis of the Convention and Thompsons' theory. It has concluded the removals of the Stolen Generations which sought to eradicate First Nations peoples which constitutes genocide. Whilst the ongoing removal may not represent ongoing genocidal practices, they exist in the legacy of the removal policies and may be seen as a direct result of

[193] Thompson, 134.
[194] Thompson.
[195] Thompson.
[196] Isa, 'Repairing Historical Injustices'.

the colonial environment in which the Stolen Generations' policies also existed. Finally, this chapter has shown that the descendants of the Stolen Generations, inclusive of First Nations communities, are owed 'special obligations' for the historical injustices. The next chapter shall explain how Australia's legal framework limits the ability of individuals to hold the state accountable for historical injustices to discharge this obligation, the impact of human rights law on seeking accountability and begin to question the legitimacy of the state.

Chapter 4: Accountability in Australia

I was given a number, 33, and they called me by that for eight years, not my name. And so I really lost just about everything. You know, I lost my family, I lost everything… We were kids. Who could we tell, you know? We couldn't tell anybody.

*Bill Simon[197]

The Convention aimed to prevent genocide from occurring and punish those who committed acts of genocidal. As a crime, it is said to be punishable wherever and whenever it occurs. It is a crime with no immunities, subject to no defences, and hindered by no statute of limitations. However, this statement does not reflect the reality of the crime in Australia; a State which assumed that genocide would never have any domestic relevance. As stated by Archie Cameron during the parliamentary debates of the ratification of the Convention, 'No one in his right senses believes that the Commonwealth of Australia will be… asked to answer for any of the things which are enumerated in this Convention.'[198] This was not merely rhetoric, this chapter will demonstrate that the Australian legal system systematically fails to address genocide and human rights abuses.

This chapter will demonstrate the limitations of the Convention within Australia due to judicial interpretation, an unwillingness to implement the Convention and insufficient implementation legislation. This chapter will then analyse how the legal framework may be developed to seek justice for the Stolen Generations and ongoing removals. Ultimately, it shall conclude that the current legal system is insufficient and creative alternatives are needed to tackle state-led abuse.

When was Genocide a crime in Australia?

Australia was one of the first countries to ratify the Convention in 1949, having been a 'keen supporter' during the drafting process. However, it would be 50 years before the Convention would take domestic effect in 2002. The Convention obliges Contracting parties in Article 5 to undertake to enact the necessary legislation to give effect to the Convention and to provide effective penalties for those convicted of Genocide Crimes as articulated in Article three. As

[197] Bill Simon, removed from Biripi Peoples to Kinchela Boys Home in Kempsey, New South Wales 'Stolen Generations' Testimonies'.
[198] Hansard, House of Representatives, vol 203, 30 June 1949, p. 1871.

such, states ratifying the Convention ought to have questioned whether their domestic legal systems provided for the crime of genocide and if not, how would the Convention be implemented. However, the invitation in Article 5 was not welcomed in states such as Australia that believed that genocide 'has never been tolerated in Australia and never will be'[199].

Scholars including Scott, question whether, despite good intentions to incorporate the Convention, the delay was due to neglect or purposeful inaction.[200] He concludes that regardless for the first 50 years, Australia existed in breach of the Convention existing in a 'grim black hole' failing to protect potential victims of genocide and potentially creating a haven for perpetrators.[201] However, legally, a breach does not render a treaty invalid, thus the treaty remains to have an effect within the jurisdiction regardless. Breaches of international treaties may give grounds to other states holding that the treaty ought to be terminated. However, no state has attempted to terminate the Convention due to any breach of the treaty. Thus, the lack of implementation may not be conclusive of the legal status of the Convention in Australian law.

Regardless, in the case of *Nulyarimma v Thompson [1999] FCA 1192* the parties agreed that the Convention was not incorporated into domestic law before 2002. Thus, the question of whether or not genocide existed as a crime in Australia before 2002, became a question of customary international law. The applicants in this matter argued that genocide was still a crime under domestic law due to its status as a jus cogens norm under customary international law. A jus cogens norm is a principle of international law that is fundamental and as such, requires no codification to be deemed binding and non-derogable. Jus cogens norms include slavery, torture and genocide. It is understood that regardless of domestic or international legislation, such crimes have always been forbidden.

Customary international laws form over time through state practice and the understanding that states behave according to a belief that they are legally compelled to do so (opinio juris). Soft laws such as Declarations, can often provide the evidence of opinio juris and contribute

[199] House of Representatives, 'The Hansard, 18th Parliament, 2nd Session', *The Hansard*, 30 June 1949.
[200] Shirley Scott, 'Why Wasn't Genocide a Crime in Australia? Accounting for the Half Century Delay in Australia Implementing the Genocide Convention', *Australian Journal of Human Rights* 10, no. 1 (2004): 159–78, https://doi.org/10.1080/1323238X.2004.11910775.
[201] Ben Saul, 'The International Crime of Genocide in Australian Law', *Sydney Law Review* 22, no. 4 (October 2000): 527–84, 529.

to the development of hard law. As with Treaties, there are numerous approaches to how customary international law is adopted into the domestic legal order. The status of customary international law within the Australian legal order falls between two theories of incorporation or transformation. The former holds that international law is a part of domestic law without the enactment of specific legislation or judicial adoption as long as it does not conflict with statute law. The latter treats customary international law only as part of domestic law after a positive act of adoption by legislation or judicial decision.

The majority in *Nulyarimma* found that genocide was not a crime, however, Saul asserts that the reasons given by the majority lack coherence and show discomfort with the influence of customary international law on common law.[202] The majority judgement held that the transformation theory combined with the effect of s1.1 of the Criminal Code 1995 (Cth) which provides that the courts cannot create new criminal offences renders the Convention inapplicable until specific legislation is enacted. However, the dissent of Judge Merkel suggested that genocide was an offence of common law and could potentially be prosecuted. He reasoned that under transformation theory a rule can be adopted in Australian law if a court determined it was not inconsistent with existing legislation, common law or public policy. He rejected that the court would be making a new offence as Genocide is an existing offence under international law as a universal crime.[203] He further rejected the rationale under the s1.1 Criminal Code. He stated that s1.1 was intended to abolish Commonwealth Common law offences, not custom. The policy reasons for the prohibition did not extend to cover international crimes nor was this considered by the authorities when legislating S1.1.[204] Finally, he concurred that where domestic law is ambiguous the international law approach is to be preferred. As such, as there is no express opposing legislature, the crime ought to be given effect.[205]

Despite the majority in *Nulyarimma* determining that genocide was not a crime until the enactment of positive legislation in 2002, many academics argue that Genocide was potentially a crime in Australia from the late 1930s and definitely by 1949.

[202] Saul.
[203] Nulyarimma v Thompson, No. 1192 (Federal Court of Australia 1999) [167].
[204] Nulyarimma v Thompson [177].
[205] Nulyarimma v Thompson [163-165].

Markovich concludes that genocide was a crime in Australia as early as the late 1930s.[206] Firstly he holds that Article 1 of the Convention provides that the crime of genocide already existed as customary international law. Secondly, the trials in Nuremberg under the Charter of Military Tribunal in 1946 held that the Charter applied to acts of war between 1939 and 1945. However, Article 6(c) of the Charter was not intended to draw a nexus between the acts of crimes against humanity and war. Thus, the acts that constitute genocide even if committed in time of peace would have been contrary to international law following 1939.

The argument that genocide was a recognised crime in Australia from 1949 is more convincing. Firstly, by ratifying the Convention, Australia explicitly acknowledged Genocide as a universal wrong and as a violation of the international legal standards of the day. Not only genocide as a concept, but genocide as defined in the Convention including the forcible removal of children. Saul, states that the Senate Committee Inquiry found an exchange of letters which explicitly recognised the removal of children in Australia as a violation of both the Universal Declaration of Human Rights and the Convention. This act of recognition in ratification is evidence of opinio juris, suggesting that Australia believed the content of the Convention to be obligatory and as such is customary international law.

Further evidence of opinio juris is found in the official response of Australia's stance on the domestic force of the Convention in 1952. Officially it was held that Australian law provided 'substantially for the punishment of the classes of acts described in the Convention'.[207] Regardless of whether this statement is accurate, in and of itself it demonstrates a belief that the acts described in the Convention should be and were already suitably criminalised in 1952.

Secondly, in 1948 the UN General Assembly Resolution 96(I) confirmed genocide as a crime under international law. This would suggest that at this time, genocide was contrary to international law. As genocide was universally condemned from this point, no individual could have acted under any assumption to the contrary following 1948. Finally, Markovich

[206] Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty'.
[207] External Affairs to the Secretary, 'KCO Shann for Secretary', *Prime Ministers Department* (Prime Minister's Department, 14 August 1952).

holds that Australia's obligations under the Convention would have become erga omens from the moment the Treaty came into force on 12 January 1951.[208]

Therefore, it can be established that by 1949 the latest, the forcible transfer of children with the intent to destroy a group constituted genocide within international law and Australian domestic law. Yet, Australia continued to practice the policy of removals. Cunneen suggests that Government officials would have been under no disillusion that they were in breach of their international legal obligations.[209] Despite this understanding, there were no effective mechanisms available for First Nations communities to seek accountability or challenge the removal policies.

Stolen Generations Accountability

It was hoped that the implementation of the Convention in 2002 would open the door to litigation. In establishing the jurisdiction to hold individuals accountable for the crime of genocide, the amendment to the Criminal Code 1995 (Cth) was already limited in its to provide justice for the Stolen Generations as many of the perpetrators, both legislators and practitioners of removal policies were deceased. However, the amendment ultimately closed the door on the ability of Stolen Generations members to seek accountability for genocide as a domestic crime.

For the Convention to impact the Stolen Generations, its implementation needed to be retrospective. This would enable criminal accountability and encourage non-adversarial settlements to be made completely avoiding 'protracted, uncertain, emotionally painful and costly litigation'.[210] However, the legislation failed to establish a retrospective scope. Ordinarily, new crimes follow the principle of non-retroactivity. This recognises the principle of nullum crimen sine lege that you should not be held responsible for a crime that you did not know existed. Thus, for a crime to be retrospective in effect, legislators must use exceptionally clear language. In this case, it was not done so. Those legislating would have been aware that that providing for a retroactive crime would open the possibility of allegations against the policymakers of the removal policies. Whilst debating the Anti-Genocide Bill 1999 it was submitted to the Inquiry that to allow for retroactive application

[208] Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty'.
[209] Saul, 'The International Crime of Genocide in Australian Law'.
[210] Saul, 571.

would be 'intolerable… an embarrassment and a minefield.'[211] However, Saul argues that such arguments do not align with international principles of justice. Rather it would be unjust for Australian courts not to punish genocide after the crime entered into international law.[212] Just as those charged in Nuremberg were charged with crimes that violated existing principles of law, whether or not specifically legislated for in Nazi Germany. As demonstrated, by the 1930s and the latest in 1949 it ought to have been clear that the assimilation policies and removals were criminal.

Additionally to the principle of non-retrospectively, the Criminal Code amendment introducing Genocide has a provision known as the 'Attorney-General's Fiat'. This shields the government from accountability by enabling the Attorney-General to veto the commencement of genocide proceedings. In 2024 Senator Thorpe introduced the Criminal Code Amendment (Genocide, Crimes against Humanity and War Crimes) Bill 2024 to remove the requirement of the Attorney-General's consent to initiate proceedings related to genocide and atrocity crimes. However, as it stands, the implementation of the Convention has undermined the ability of the Stolen Generations to hold the state accountable for genocide. Its function as a 'punishing' power is deterred by legal technicalities undermining the force of the Convention. As such, those seeking accountability have turned to other forms of liability under civil torts. The *Trevorrow* case is the only successful Stolen Generation court case and relied upon the specific circumstances of Bruce Trevorrow rather than asserting any collective wrong. Other civil cases such as *Cubillo v The Commonwealth* failed largely due to evidential difficulties.[213] The court found in *Trevorrow* that the Crown was vicariously liable for the removal without consent which constituted the tort of misfeasance and that the state breached their duty of care. However, it did not find it found that the removal constituted false imprisonment as Bruce had been sufficiently cared for.[214]

Trevorrow set a valuable precedent as it expanded on the duty of care owed by the APB and the principles of misfeasance in public office. However, it did not address whether the

[211] Dr Leadbetter, 'Humanity Diminished: The Crime of Genocide Inquiry into the Anti-Genocide Bill 1999', *Submission to the Senate Legal and Constitutional References Committee* (Senate Legal and Constitutional References Committee, June 2000).
[212] Saul, 'The International Crime of Genocide in Australian Law'.
[213] *Cubillo v The Commonwealth* [2001] FCA 1213
[214] Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations', *University of Tasmania Law Review* 30, no. 2 (2011): 32–52.

removal was part of genocidal policy and continued to assess the policy based upon the standards of the time. This approach is inherently flawed, as the standards of the time were based on colonial logic. *Trevorrow* did not lead to an increase in litigation claims as despite success, accessibility barriers remain for First Nations peoples to access justice. Financial difficulties prevent individuals from ascertaining legal assistance and where the First Nations Advocacy Funds is sought, the type of case pursued is limited by the Funds mandate. The lack of successful litigation and meaningful compensation may also contribute to litigation being viewed as futile. In 2023 Queensland class actions were initiated alleging racial discrimination against a modern 'stolen generation'. However, these cases remain ongoing and so shall not be commented upon within this thesis. It is worth noting, however, the critique of class action claims undertaken by Michael Legg. He has extensively questioned the ethics of class actions and the companies that sponsor the litigation. He argues that class actions do not always benefit the victims seeking compensation, but rather the companies sponsoring the litigation.[215] Further, the fact that such cases are required indicates the failure of the State to proactively remedy the historical wrongs that have been well documented and acknowledged.

The eventual implementation of the Convention rather than facilitating accountability, has prevented genocide claims from being made against the State. Rather than protect groups against the acts of their own governments, legal technicalities have undermined its ability to provide accountability to First Nations peoples.

Human Rights For Some But Not For All

Traditionally, human rights have been used as an extra-governmental force to counteract the repressive capacity of the state[216] However, in Australia human rights have been underdeveloped to the detriment of First Nation peoples, refugees, LGBTQIA+ and women in favour of the majority population. [217] The lack of human rights legislation may stem from the perceived lack of threats to the rights of individuals within the new Federal State. Stemming from English constitutional tradition, the perceived threat to individual rights was

[215] Legg, 'Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations.' See also Legg M, 2021, 'The Rise and Regulation of Litigation Funding in Australian Class Actions', *Erasmus Law Review*, 14, pp. 221 - 234, http://dx.doi.org/10.5553/elr.000213.
[216] Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project'.
[217] Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge: Cambridge University Press, 2009).

not from the Parliament but from the Crown, however, this was no longer a threat to those inhabiting the new territories. Rather, Chappell argues that the need to establish human rights would have been perceived as an insult to the civilised society they created; the parliament and common law were more than sufficient to protect the freedoms of recognised citizens.[218]

The insufficient protection of human rights has continued into the modern day as the Australian approach to human rights demonstrates the ongoing unwillingness to address historical injustices and treatment of First Nations people. Australia is one of the few states not to have a domestic Bill of Rights, however, the Inquiry into Australia's Human Rights Framework 2024 recommended that a federal Human Rights Act be enacted. Traditionally, the relationship between the individual and the state has been regulated by articles of the Constitution, statutes and common law. The Federal State, established in 1901, formed a liberal democracy which held that the Commonwealth Government would be accountable to the Parliament and the people. However, the definition of 'peoples' under the constitution excluded 'Aborigines' from being counted in the census under Section 127 and Section 51 (xxvi) empowered the Federal Parliament to make laws in respect to the 'people of any race, *other than the aboriginal race'*. Following the 'doomed race' theory, First Nations people were excluded based on the belief that there was no need to make provisions for First Nations peoples in an enduring document.[219] Over time, legislation such as the Native (Citizenship Rights) Act 1944 regulated the citizenship of First Nations individuals based on their fulfilment of certain requirements including the dissolution of their 'Tribal and Native' associations and adoption of 'civilised' life.[220] This Act was not repealed until 1971. First Nations people were not included in the official population governed by the Commonwealth until the 1967 referendum which removed section 127 and the italicized part of section 51 (xxvi) from the constitution officially signalling the end of the 'doomed race' myth.

The most profound domestic protections for the individual are the laws relating to anti-discrimination which were introduced by The Racial Discrimination Act 1975 which makes all forms of discrimination illegal. This legislation was seen as a direct response to Australia's ratification of the International Covenant Against Racial Discrimination. However, anti-discrimination laws do not equate to proactive protection of First Nations

[218] Chappell, Chesterman, and Hill.
[219] Legg, 'Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations.'
[220] Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty'.

peoples' rights or empowerment as provided by the UNDRIP. Cavanagh takes this argument further and states that in the context of settler colonial states, democracy plus anti-discrimination laws does not equal liberation.[221] Further undermining the protection of anti-discrimination, the Racial Discrimination Act 1975 has been suspended in instances to implement controversial policies such as the Northern Territories Intervention of 2007.[222] This was the same year that Australia refused to sign UNDRIP along with other colonial settler states such as Canada. In 2009 Australia endorsed UNDRIP, however, the reluctance in implementing the rights domestically may be seen in the vote against a UNDRIP Bill in 2023.[223]

Australia's Human Rights Commission Act 1986 created a body responsible for overseeing and reporting on the protection of human rights within Australia, this system is limited. This body has a complaints mechanism and may investigate infringements of anti-discrimination legislation. Whilst anti-discrimination legislation is important, there are few mechanisms to create binding obligations to forward and promote human rights. Further, the commission places great emphasis on reconciliation as opposed to any form of criminal prohibition or rights enforcement to prevent forcible transfers. [224] This narrative fails to recognise that reconciliation depends on a utopic setting to 'return to'. In the context of Australia where there was no mutual relationship between First Nations and non-indigenous peoples, Short argues that *conciliation* ought to focus on the 'original sin of colonisation without consent and its legacy'.[225] The narrative of reconciliation does not allow for the withdrawal of consent from First Nations people. Rather, it depends on both parties moving forward together in tandem. Thus, First Nations people are denied the right to feel the anger, regret, sadness or insecurity to which Thompson holds they are entitled or allow it to manifest into rejection or discontent with the proposed path forward. This continues to control the trajectory of the group, which coincidentally enables the ongoing domination of non-indigenous society and exploitation of land and labour. [226]

The opportunity to enact a contemporary Federal Human Rights Act, taking a comprehensive, context-specific approach is not to be undermined. Short argues it is the history of citizenship

[221] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice'.
[222] Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework'.
[223] Parliamentary Joint Committee on Human Rights.
[224] Saul, 'The International Crime of Genocide in Australian Law'.
[225] Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project'.
[226] Short.

rights, imposed and regulated by the settler state, that promoted the acceptance of UNDRIP as an articulation of Indigenous rights.[227] A federal Human Rights Act, developed in collaboration with Indigenous groups could promote indigenous rights, and counter the lacuna of protection within present domestic law. To be effective it ought to be accompanied with enhancements to the Commission, beyond the recommendations of the Inquiry into Australia's Human Rights Framework, to ensure they are a suitable, independent body to investigate allegations of human rights violations, initiate proceedings and hold the State to account.[228] A modern text should adopt emerging standards and take inspiration from relevant international documents including the preamble of the UNDRIP which acknowledges historical injustices, including genocide, as a result of colonisation. Applying the human rights norms established by UNDRIP to the domestic sphere may require the state to question the legitimacy of the law developed in the context of colonisation and that enabled the Stolen Generations.[229] A legal text of this nature would explicitly reject the past legal euphemisms which disguised profiteering, exploitation and control with the language of 'protection' and 'integration'. In doing so it can promote a Human Rights Act capable of fulfilling the 'special obligations' to the First Nations community manifesting as the right to reparation, tackling structural inequalities, and systematic discrimination. The tangible substance of these obligations may be inspired by an analysis of TJ, particularly the guarantee of nonrecurrence explored in the final chapter.

Summary

Thus, the implementation of human rights and the Convention in Australia maintains the narrative that genocide is a crime in faraway places, perpetrated by faraway powers. This hypocrisy is further demonstrated by Australia's foreign policy which has shown a willingness to punish and prevent genocide in East Timor and Cambodia. Yet, the credibility of human rights hinges on the willingness of states 'to rectify inequalities in the global distribution of privilege and disadvantage handed down through the generations.'[230] Thus, to comprehensively address the ongoing removals in Australian society, the state needs to

[227] Short.
[228] Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework', 271-272.
[229] Isa, 'Repairing Historical Injustices'.
[230] George Ulrich, 'Introduction: Human Rights with a View to History', in *Reparations: Redressing Past Wrongs, Human Rights In Development Yearbook 2001*, by George Ulrich and L.K Boserup (The Hague/Oslo: Kluwer Law International and Nordic Human Rights Publications, 2003).

radically question its colonial history and legitimacy. This chapter has analysed the Australian legal framework to understand the relationship between the individual and the state. It can be seen that the legal order never intended to protect minorities within Australia but rather served the ruling non-indigenous majority. This chapter has provided the argument that genocide existed as a crime in Australian law at the latest by 1949, however, the mechanisms do not exist to punish genocide in Australia sufficiently. The failure to recognise genocide as a crime undermines the ability of victims to receive the 'special obligations' that are owed to them. This failure creates a lack of impetus to challenge the legal order which continues to abuse pockets of the population. The current legal order, as described appears insufficient and unwilling to tackle both historical and contemporary removals. The final chapter shall consider how TJ may assist in adequately responding to the historical injustices of colonialism and the Stolen Generations and prevent ongoing human rights abuses from occurring.

Chapter 5: Never Again

Sorry about what? Was this going to be just for the Stolen Generation or for changing a complete culture? A beautiful culture. A loving culture.

*Harold Harrison[231]

The prevailing issue is the ongoing removals of First Nations children. Whether a separate incident of genocide, a continuation of the Stolen Generations or a manifestation of the environment created by colonialism and stolen generation policies, the Australian framework has failed to address the issue. The failure to address represents a separate human rights violation of the right to reparations. The right to reparation has been developed by the UN General Assembly's basic Principles and Guidelines on the Right to a Remedy and assisted through the development of the TJ discipline.

This chapter will assess how the right to remedy may assist in the Australian context, and how applying a colonial lens to TJ, particularly the guarantee of non-recurrence may address the persisting structural discrimination and disempowerment of First Nations people. It shall analyse the shortcomings of reparations measures including BTH, the National Apology and compensation before proposing how the guarantees of nonrecurrence (Henceforth "GNR") may be of greater value. The fourth pillar of TJ, GNR is inextricably tied to the narrative of 'never again' prevalent in genocide rhetoric. Yet, the literature is relatively underdeveloped in considering how TJ studies may assist in the post-colonial context in addressing historical injustices, and genocide in particular. Ultimately, this chapter shall demonstrate how preventing further human rights abuses requires meaningfully addressing the past.

Repairing Historical Injustices

Thompson's theory resulted in her envisioning 'special obligations' to be owed to descendants of historical injustices, beyond mere redress. This recognises that the effects of past abuses such as colonialism, and expropriation of indigenous lands, are still felt and determine present inequalities and structural discrimination.[232] It acknowledges that the

[231] Harrold Harrison removed from Cumeragunja to Bomaderry Children's Home then Kinchela Boys Home 'Stolen Generations' Testimonies'.
[232] Isa, 'Repairing Historical Injustices'.

genocide of the Stolen Generations was rooted in a colonial narrative and that the ongoing removals exist in an environment where these historical injustices were not meaningfully addressed. The present wrongs not only repeat the experiences and impacts of the Stolen Generations but are a direct product of the original historical wrong.

Some academics, including Thompson, argue that difficulties arise in establishing the causal nexus between present-day victims and historical events such as colonialism and slavery as multiple events may have occurred to cause an individual's specific circumstances. Thus it is difficult to conceptualise what position an individual may be in 'if it were not for colonialism'. However, the more recent the injustice, the easier it is to establish a wrong. This thesis has demonstrated how policies and legislation evolved from colonisation to the present day, control and subordinate First Nations peoples and cultures. The settlers imposed an environment of poverty, dependence and control to exploit and dispossess First Nations peoples of the land. These systems continue to permeate as no steps were taken to meaningfully address the dynamic between First Nations and the non-indigenous community. Rather than empower First Nations peoples with the right to self-development, the state continued to impose measures such as the North Territories Emergency Plan which continued to perpetrate abuse and violate human rights. Within international law, there is an increasing acceptance to acknowledge the impact of colonialism on the modern day. The Durban Conference 2001 specifically acknowledged the ongoing obligations owed by colonial states for historical injustices. The declaration recognised that historical injustices 'undeniably contributed' to poverty, underdevelopment, marginalisation and economic disparities and recognised the need for programmes to develop the social and economic development of affected societies.[233] Further, Fabian Salvioli as Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition stated during a Human Rights Council Interactive Dialogue that the duty to provide effective remedies to victims, ensure accountability, and provide reparation to victims was incumbent on the former colonising power.[234]

[233] World Conference Against Racial Discrimination Xenophobia and Related Intolerance, 'Durban Declaration and Programme of Action' (United Nations, 1 January 2010) 158.
[234] Human Rights Council, 'Acting High Commissioner: Addressing the Legacies of Colonialism Can Contribute to Overcoming Inequalities Within and Among States and Sustainable Development Challenges of the Twenty-First Century' Press Release (28 September 2022) https://www.ohchr.org/en/press-releases/2022/09/acting-high-commissioner-addressing-legacies-colonialism-can-contribute

Thus, the manifestation of 'special obligations' may be realised through analysing the right to remedy. Gomez Isa suggests that the UN General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law, otherwise known as the Van Boven Principles, may be used as a roadmap for historical injustices.[235] The principles take a victim-centred approach in providing concrete actions that can be undertaken to remedy violations through restitution, compensation, rehabilitation, satisfaction and guarantees of non-occurrence. Such principles are to be applied flexibly, adapting to the context and country in which they are being utilised. However, the use of the Van Boven Principles has largely been constricted to and developed by the discipline of TJ. The next section shall explain why TJ and the Van Boven principles should be applied within the Australian context, and how this may manifest to discharge the states' special obligations to descendants.

TJ and settler colonialism

TJ as a conceptual field is traditionally applied to two scenarios: from conflict to peace, and from dictatorship to democracy. [236] It is comprised of four pillars; truth, justice, reparation and guarantees of non-recurrence to substantiate its aims.[237] The measure of success is traditionally assessed through the state of democracy and addressing deficits.[238] However, there is growing attention from scholars such as Short, Balient and Evans on how TJ may assist liberal democracies in addressing pockets of discontent within their society. In these contexts, and specifically within settler-colonial states, the illegitimacy to address is not a deficit of democracy, but the foundation of it. [239] In Australia, this is particularly evident in the lack of treaties between First Nations people and the settlers. By recognising this illegitimacy as inherent to the nation-building process in Australia, historical and contemporary injustices may be meaningfully addressed.

[235] Isa, 'Repairing Historical Injustices'.
[236] Anja Mihr, 'An Introduction to Transitional Justice', in *An Introduction to Transitional Justice*, ed. Olivera Simić, Second edition (New York: Routledge, 2021), 1–28.
[237] Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', Thematic Report (United Nations, 19 July 2021).
[238] Mihr, 'An Introduction to Transitional Justice'.
[239] Short, 'Reconciliation and the Problem of Internal Colonialism'.

The TJ framework may have been overlooked as ordinarily it is applied to address a specific transition or point of rupture, often within a defined time period such as a regime or conflict. However, in the context of the removals, there is no rupture, but rather a long history of violations, policies and colonisation. Whilst the start of colonisation in 1788 may provide a starting point, Balient and Evans argue that there is no identifiable endpoint to colonialism. [240] Further, Evans argues that the state's prevailing sovereignty and human rights violations continue to fail First Nations peoples.[241] Thus, it can be difficult to pinpoint a specific time period to assess. As such, the tools of TJ may need to be reconceptualised to address the structural harms of colonialism and the legal, institutional and governmental institutions which enabled genocide.

To be most effective TJ processes must follow inclusive models and be supported by meaningful political intentions.[242] This means that all actors, victims, perpetrators and survivors are involved in the TJ process. Mihr posits that allowing blame and responsibilities to be put on all sides forwards stability and legitimacy, not merely those who 'lost' the conflict..[243] Sarkin finds that the success of TJ measures can depend on an appropriate model being selected and the political will and ability of a state to dedicate resources to ensure full implementation and inclusivity. [244] Whilst, Australia may be at an advantage as having sufficient means and resources, there still needs to be genuine political will and motivation for measures to be effective.

The Australian government have not formally implemented TJ measures. However, quasi-TJ tools have been adopted, including truth inquiries, apologies, and compensation schemes. Such tools are distinct yet complementary to GNR and can mutually reinforce the ability of

[240] J. Balint, J. Evans, and N. McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach', *International Journal of Transitional Justice* 8, no. 2 (1 July 2014): 194–216, https://doi.org/10.1093/ijTJ/iju004, 196.
[241] Balint, Evans, and McMillan.
[242] Mihr, 'An Introduction to Transitional Justice'.
[243] Mihr, 3.
[244] Jeremy Sarkin, 'Towards A Greater Understanding of Guarantees of Non-Repetition (GNR) or Non-Recurrence of Human Rights Violations: How GNR Intersects Transitional Justice with Processes of Democratic Governance, State Rebuilding, Reconciliation, Nation Building, and Peace Building', *Stanford Journal International of International Law* 57, no. 2 (2021): 191–229.

institutions to prevent violations.[245] However, their impact has been limited due to the failure to be inclusive or be backed by political will.

Truth Commissions

Truth-telling is an essential part of TJ as it acknowledges the magnitude of the crimes committed. Cunneen holds that an effective truth commission can reshape the mainstream narrative and potentially create a breaking point with past oppression by restoring dignity to those targeted by violations.[246] BTH as a form of truth commission failed to incur such an impact as it lacked inclusivity and political will to place blame on all sides.

The significance of BTH ought not to be diminished as it gave a voice to victims and exposed the reality of the Stolen Generations. However, whilst it included the oral and written testimony from 535 victims, it excluded the victims from having any decision-making capacity within the inquiry itself. [247] In choosing victims as the subjects of the inquiry, the report examined victim experiences rather than assess the actions of policy-makers, legislators or administrators of the removals. [248] By excluding them from the inquiry, the report failed to make any recommendations to investigate the criminal accountability of such actors. The narrow scope further excluded the legacy of colonialism being assessed when understanding the cause of removals. Whilst it acknowledged the history of the state, it did not attribute the poverty experienced by First Nations peoples to the dispossession of land, and reliance imposed upon them by settlers. In doing so, Maddison argues that BTH attempted to draw a line under a 'shameful aspect of Australia's colonial past'.[249] As a truth commission, it did not show a willingness to place blame on all sides but rather told only part of the truth and eradicated the colonial history from the narrative. Following BTH, the government failed to recognise its findings or implement the recommendations. This limited

[245] Alexander Mayer-Rieckh, 'Guarantees of Non-Recurrence: An Approximation', *Human Rights Quarterly*, The Johns Hopkins University Press, 39, no. 2 (May 2017): 416–48, https://doi.org/10.1353/hrq.2017.0024.
[246] Valeria Vegh Weis and Chris Cunneen, 'Can Indigenous Truth Commissions Overcome the Legacies and Contemporary Effects of Colonialism?: A Study on the Australian-Canadian Experience to Explore Possible Paths in Argentina', *The International Journal of Restorative Justice* 7, no. 1 (April 2024): 43–64, https://doi.org/10.5553/TIJRJ.000195.
[247] Vegh Weis and Cunneen.
[248] Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations'.
[249] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice', 269.

the success of BTH and diminished the trust between First Nations and non-indigenous communities.

In recent years more effective truth commissions have been initiated by individual states. The Yoorrook Justice Commission's mandate is to investigate historical and ongoing injustices against First Nations people in Victoria since colonisation. The full report is expected in 2025. Similarly, the Queensland government launched a Truth Telling and Healing Inquiry as part of The Path to Treaty Act with Joshua Creamer a Barrister of Waanyi/Kalkadoon origin appointed as the Chief of the Inquiry. However, the state-based inquiries do not fill the lacuna of an effective nationwide inquiry; The First Nations people population in Victoria is recorded to be 8%, and 4.6% in Queensland.[250] Further, thus far no inquiry has been conducted in collaboration with the colonial powers aka Britain or the Holy Sea whose Catholic institutions were a prevalent part of the removals.[251] Until a truth commission is conducted in a comprehensive, fully inclusive manner and creates tangible changes, the production of information will be limited in its ability to discharge the 'special obligation' owed to First Nations peoples.

The National Apology

As a reparative tool of TJ, the political act of apology construes a narrative, defines victims and perpetrators and can influence how society remembers the past, which impacts the present and future.[252] The impact of an apology depends upon the inclusion of affected communities in the process and the perception of the apology as authentic.[253]

In 2008 Prime Minister Kevin Rudd issued a National Apology to the Stolen Generations. Whilst it was widely received at the time, criticism of the National Apology has arisen as it neglected to recognise the removal practices as genocide. In doing so, it failed to acknowledge the full extent of the harm suffered by the community. Further, the language adopted placed the onus upon the First Nations people to accept the apology, and 'turn a new

[250] Australian Bureau of Statistics, 'Queensland' https://www.abs.gov.au/census/find-census-data/quickstats/2021/IQS3 (2021).
[251] Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence'.
[252] Damien Short, 'When Sorry Isn't Good Enough: Official Remembrance and Reconciliation in Australia', *Memory Studies* 5, no. 3 (July 2012): 293–304, https://doi.org/10.1177/1750698012443886.
[253] Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence'.

page'.[254] Maddison argues that whilst First Nations people may have hoped that the National Apology would open a doorway to conversations on collective rights, the apology drew the line to forget the past and 'move forward'.[255] In fulfilling the obligation to apologise, the government placed the onus upon First Nations people to forgive and disregarded any further obligation to address historical injustices.

However, an apology alone is not sufficient. The failure of the National Apology to be accompanied by a federal compensation scheme undermines its effectiveness as a TJ measure. In a comparative study of Australian and Argentinian reparations, Colsell and Simić concluded that reparation must be both symbolic and material. In some states, financial reparation has been viewed as 'blood money', however, other states view it as a tangible form of recognition and a practical way to improve the lives of current and future generations.[256] In the context of the Stolen Generations, a federal compensation programme would alleviate the need for individuals to seek the redress that they are owed, which can be expensive and a form of re-traumatisation. Whilst, individual states have adopted compensation schemes, these have been criticised as being delayed, inaccessible, and having limited monetary value.[257] The Court in the *LaGrand* case affirms the responsibility of a State to undertake positive acts beyond apologies in the context of GNRs. In this case, the court found a bilateral understanding of responsibility, restitution, compensation and satisfaction was required to restore the status quo to the injured state.[258] As shall be demonstrated, the return to the 'status quo' may not be sought in this context, however, the rationale remains.

As a discipline, TJ is renowned for its ability to adapt, be flexible and develop. Many of the current tools adopted by modern practitioners would have been inconceivable in years prior. Cunneens argues that a reimagination of TJ mechanisms and conceptualisation can 'give birth to a new epoch of respect of Indigenous rights'.[259] A re-imagination needs not only to adopt a decolonial and transformative approach but should incorporate the Convention. The

[254] The National Apology, 13 February 2008.
[255] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice'.
[256] Tony Barta, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide', *Journal of Genocide Research* 10, no. 2 (2008), https://doi.org/10.1080/14623520802065438.
[257] Keziah Colsell and Olivera Simić, '"It's Not About the Money—Stop the Trauma": Victims' Responses to Reparations in Argentina and Australia', *Human Rights Review* 23, no. 2 (June 2022): 163–81, https://doi.org/10.1007/s12142-021-00633-1.
[258] Germany v. United States of America, ICJ 446 (International Court of Justice 2001).
[259] Vegh Weis and Cunneen, 'Can Indigenous Truth Commissions Overcome the Legacies and Contemporary Effects of Colonialism?',4.

preventative potential of TJ has not always been identified in the literature however, the tools engaged by TJ may also be described as those that fulfil the duty to prevent under the Convention. Kamatali argues that this duty is promoted through constitutional and legal reforms and building a culture of human rights.[260] Thus, the combination of disciplines ought not to be disregarded, but embraced. In pushing the boundaries of TJ, it develops away from its traditional framework, towards a more transformative TJ discipline which may be more suitable for addressing historical and contemporary injustices.[261] In 2006 Wolfe alluded to the relationship between genocide and settler-colonialism remarking that attention ought to be paid to setter and occupied states to prevent genocide such as Palestine. The combination of these disciplines could be critical for tackling past historical injustices and expanding upon the underdeveloped 'prevent' mechanism of the Convention. Essential to this analysis, is the fourth pillar of guarantees of nonrecurrence which is transformative in tackling these issues.

Guarantees of Non-Recurrence

The appointment of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence cemented GNR as the final pillar of TJ. However, the value of GNR as a TJ tool has been comparatively underdeveloped to the other pillars. Having previously existed as a tool of diplomatic practice within international law, it was adopted by international human rights law as an element of reparations.[262] Within the TJ framework and developed by the Van Boven Principles, GNRs were reconceptualised as victims' rights to reform institutional, societal, and cultural structures.[263] More than mere assurances, GNRs oblige a state to take a variety of specific and concrete, yet open-ended, measures to prevent future violations.[264] Davidovic criticises GNRs as lacking empirical data to support their claims of transformative effects. However, this may be attributed to the reforms under GNR being identified as tools of reconciliation, nation-building, or 'advancing

[260] Jean-Marie Kamatali, 'Accountability for Genocide and Other Gross Human Rights Violations: The Need for an Integrated and Victim-Based Transitional Justice', *Journal of Genocide Research* 9, no. 2 (June 2007): 275–95, https://doi.org/10.1080/14623520701368685, 286.
[261] See Mayer-Rieckh for an extended analysis of how GNR develop TJ into a transformative discipline.
[262] Maja Davidovic, 'The Law of "Never Again": Transitional Justice and the Transformation of the Norm of Non-Recurrence', *International Journal of Transitional Justice* 15, no. 2 (30 October 2021): 386–406, https://doi.org/10.1093/ijTJ/ijab011.
[263] Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence'.
[264] Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?', in *From Transitional to Transformative Justice*, ed. Paul Gready and Simon Robins, 1st ed. (Cambridge: Cambridge University Press, 2019), 105–30, https://doi.org/10.1017/9781316676028.005.

democratic processes'.[265] The lack of empirical data ought not to dissuade practitioners from utilising GNR frameworks, but it should justify more studies to be conducted to isolate the factors which directly impact GNR success.

Mayer-Rieckh conceives GNR as the conceptual bridge between the aims of TJ to repair past violations and ensure a peaceful future.[266] However, he highlights that it is misleading to assert that non-recurrence can be fully guaranteed. Rather their true value lies in building trust between communities and the State. Within the post-conflict setting, GNRs are seen as necessary to incur harmony within a society in which victims are expected to live alongside perpetrators of human rights violations and mass atrocities such as in Srebrenica. Whilst victims may have no other alternative, a lack of GNR can cause tension and resentment within the community which can manifest as discrimination and even violence. [267] In the Australian context, this dynamic is replicated between First Nations and non-indigenous communities. The shortcomings of BTH, the National Apology, and compensation schemes combined with the ongoing removals by police and child protection officers serve as reminders of past abuses and continue to diminish faith for a future where removals do not occur. The ongoing 'Closing the Gap' strategy has not been assessed by this thesis as it does not specifically target the Stolen Generations. However, as with the above measures, its failure to reduce the health, education and economic opportunities disparity between First Nations and the non-indigenous community may be attributed to its failure to consider historical injustices, colonialism or the impact of intergenerational traumas in its measures, failure to operate inclusively and the lack of political will in carrying out its targets. [268]

The aim of GNR is to prevent the recurrence of a specific violation by considering the root cause of violations and undertaking institutional to prevent the same violation from occurring again. Thereby distinguished from the other three pillars which take a retrospective approach, GNRs are forward-looking. Within the colonial context, Fabian Salvioli asserts that measures ought to address the legacy of human rights violations while reversing the situation of

[265] Sarkin, 'Towards A Greater Understanding of Guarantees of Non-Repetition (GNR) or Non-Recurrence of Human Rights Violations: How GNR Intersects Transitional Justice with Processes of Democratic Governance, State Rebuilding, Reconciliation, Nation Building, and Peace Building', 196.
[266] Mayer-Rieckh, 'Guarantees of Non-Recurrence: An Approximation'.
[267] Sarkin, 'Towards A Greater Understanding of Guarantees of Non-Repetition (GNR) or Non-Recurrence of Human Rights Violations: How GNR Intersects Transitional Justice with Processes of Democratic Governance, State Rebuilding, Reconciliation, Nation Building, and Peace Building'.
[268] Joint Council, "National Agreement on Closing the Gap," July 2020.

domination over colonised peoples.[269] Thus, the reforms undertaken do not merely provide restitution of where a victim *would* be if not for the violation but seek to place individuals where they *should* be, to prevent further violations.[270] In acknowledging that past violations may endure if not dealt with, GNRs do not aim to return to the status quo but to fundamentally change it.[271] Regarding the ongoing removals, this means addressing the continuing effects of colonisation, and intergenerational impacts of the Stolen Generations through realising the right to self-development, right to remedy and non-discrimination.

Moving Forward

In the Australian context, addressing the ongoing removals through GNRs requires confronting the state's colonial history, including the genocide of the Stolen Generations. Whilst this thesis has demonstrated the linear between colonisation and ongoing removals, the timeline of violations is complex and intertwined with the act of removals, subsequent failures to address them and producing impacts that continue to affect victims, survivors, descendants and communities. The number of recognised members of the Stolen Generations is still increasing with the number of survivors recorded by the Australian Institute of Health and Welfare doubling between 2018 and 2021.[272] With the recognition of each survivor, the special obligations owed become increasingly apparent as individuals come to terms with historical traumas. The acknowledgement of genocide empowers victims to seek the claims that they are owed and opens the door to greater questions about self-determination and the status of First Nations people in Australia. Cunneen argues that the acknowledgement of genocide would render the unthinkable knowable in a way that has previously not been acknowledged.[273] The 'unthinkable' matter in this context is the establishment of the state. Without such consideration, it is difficult to address the ongoing legacy of colonisation which continues to manifest in the removal of children from First Nations communities, continues to conflate colonial-induced poverty with negligence and continues to disregard First Nations ways of being. Considering the 'unthinkable' provides the impetus to seek GNR measures and enact institutional change.

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[269] Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence'.
[270] Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice'.
[271] Sarkin, 'Towards A Greater Understanding of Guarantees of Non-Repetition (GNR) or Non-Recurrence of Human Rights Violations: How GNR Intersects Transitional Justice with Processes of Democratic Governance, State Rebuilding, Reconciliation, Nation Building, and Peace Building'.
[272] The Healing Foundation, 'Make Healing Happen: It's Time to Act', May 2021, A17.
[273] Cunneen, 'Criminology, Genocide and the Forced Removal of Indigenous Children from Their Families', 130.

However, the political will to address the 'unthinkable' may be lacking. In assessing the ongoing domination of non-indigenous communities in settler colonial states, Maddison states there is no intention that the country as a whole will undergo structural decolonisation.[274] In the Australian context, such reform would be radical as the decision not to establish treaty relations created a unilateral relationship of control between the settler and First Nations peoples. As described in Chapter 2, this failure enabled the nation-state to the exclusion of First Nations people. Rather, in building the modern state, First Nations peoples were systematically eliminated, controlled and appropriated.[275] Elimination enabled the establishment of the settlement, appropriation enabled the colonial state to assert independence from the mother country and control enabled the colonial population to grow, absorbing mixed-race children into non-indigenous society. The distinction between the doomed 'full-bloods' and mixed-race children requiring saving, weakened the connection of mixed-race children to First Nations heritage, land, family and the distinction from settler culture. Hypocritically, this simultaneously enabled the nation to build its own identity, appropriating symbols of Aboriginality to create a nation separate from its British origins.[276]

The Queensland Path to Treaty to establish some form of treaty relations between First Nations and non-indigenous peoples demonstrates a willingness to undertake radical reform. Despite the ultimate goal of developing a treaty, the *Path to Treaty Act 2023* is limited to establishing a Truth-telling and Healing Inquiry, and First Nations Treaty Institute. Further, there is no such conversation at the Federal level. The rejection of the ' The Voice' referendum in 2023 suggested that society as a whole is not yet willing to embrace greater self-determination for First Nations peoples. Yet, 'special obligations' remain owed to First Nations peoples. Taking inspiration from Lemkins' conception of genocide, the key to prevention, and nonrecurrence lies in the meaningful protection of cultural rights and the protection of the family units. In applying a GNR analysis to the singular issue of the removal of children, tracing the causes of contemporary poverty, through the intergenerational impacts of the Stolen Generations and back to colonisation, the areas of institutional, societal and cultural reform become evident. It lies in promoting indigenous languages, heritage, and land rights, reforming the education system to be more inclusive and teaching more

[274] Maddison and Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice'.
[275] Wolfe, 'Settler Colonialism and the Elimination of the Native'.
[276] Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project'.

comprehensive and undistorted histories. It may be found in allocating more resources to implement the Child Placement Principle and reforming the relationship between police and First Nations communities.

Summary

This section has explained how TJ, particularly the guarantee of nonrecurrence, is essential to the discussion of preventing and addressing the ongoing impacts of genocide in First Nations communities. It has analysed how the TJ tools utilised have been limited due to their exclusivity and failure to accept blame on all sides. It has considered how radical reimagining is required to address the fundamental causes of the Stolen Generations. However, undertaking a thorough GNR analysis of the Stolen Generations specifically can open the door to smaller, more practical areas of reform which can build trust and lead to bigger conversations.

CONCLUSION

In 1944 Raphael Lemkin gave the 'crime with no name' a label.[277] The crime of genocide recognises that the value of diversity within humankind should not be taken for granted. It recognises the value of community and identity inherent to individuals. These values begin in the family unit and pass through the generations by sharing histories, cultures, languages and most significantly identities. The destruction of groups not only encompasses the destruction of physical bodies but also ideas, relationships and belongings, values which are fundamental to one's sense of dignity and life.

This thesis has demonstrated how the international powers reshaped Lemkins' conception of genocide. Evolved from his physical, social, cultural, and biological techniques, the Convention stripped back the protection of minorities through the exclusion of culture and reparations.[278] Such protection could have presented an obstacle to the international powers' colonial objectives and empowered the colonies to utilise the Convention against them. These limitations further undermine the ability of the Convention to prevent genocide at its earliest stages, which begins the dehumanisation and destruction of groups' heritage, culture and rights. Article 3 (e) was retained, perhaps as an oversight by the powers who failed to recognise their assimilation schemes as genocide. The genocidal reality of these historical injustices was veiled behind the language of 'civilisation' and 'protection'. Ironically, accepted as an amendment intending to the Greek conflict due to the apolitical nature of children's rights, the identification of Article 3(e) within Australia has been prevented due to a lack of political willingness to address and acknowledge historical wrongs. As such it may be concluded that rather than a universal crime to protect all individuals, the Convention was only intended to protect some individuals, in some contexts, from some evils.

For First Nations children in Australia, their plight has been overlooked. The dehumanisation and exclusion of First Nations people during settler-colonialism justified removals for decades. Whilst there is now an abundance of literature on the Stolen Generations, certain scholars and public opinion, remain persuaded that the removal policies were in children's

[277] 'Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt' (https://www.ibiblio.org/pha/policy/1941/410824a.html., 24 August 1941).
[278] Lemkin, 'Genocide - A Modern Crime'.

best interests. This thesis has demonstrated that such arguments are misguided and ignore the history and inherent eliminatory nature of colonialism. Ultimately it has concluded that the genocide of the Stolen Generations must be contextualised within the settler-colonial history of the state and viewed as the precursor to ongoing removals.

The removals themselves were forcible, both physically and psychologically. Children were denied the basic right to be raised by their parents, share in their culture and learn how to exist within their communities. Whilst some were lucky, the majority suffer ongoing trauma and the impacts have crossed generations. However, the specific harm of genocide that Lemkin sought to describe was not merely the experience of the individual child. The removals disrupted and destroyed First Nations peoples as a protected group; familial relations were broken into disrepair, land claims forgotten, and generations denied the right to be raised by their families, inheriting the traits that make them a group. The protected groups are named as such as they have traits that are deemed inherent to oneself and the group to which you belong. Such ties can only be broken through death, the removal of conditions to reproduce and the removal of children, the most vulnerable of individuals within a group. Thus, the destruction of the group conducted through removals may be seen in not only the reduction in the First Nations population but also the loss of language, land, knowledge and identity. The continued removals constitute human rights violations existing in the legacy of the Stolen Generations and are a direct result of the unaddressed genocide, the failure to make reparations and the failure to engage with the concept of modern Australia as a colonial-settler state.

The genocidal policies did not start in 1901 as asserted by BTH but found their roots in the colonisation of Australia. Thus, addressing the Stolen Generations and ongoing removals requires a comprehensive analysis of the structures that have developed since the arrival of settlers to Australia in 1788. The current Australian framework is not designed to do this. The state despite reconciliation rhetoric remains unwilling to effectuate meaningful empowerment of First Nations peoples. This is demonstrated by the insufficient implementation of the Convention, the lack of a human rights framework, the rejection of the implementation of UNDRIP and most significantly by the failed ‘The Voice’ Referendum in 2023. As a result, First Nations people are discouraged from challenging the state and disenfranchised by Inquiries and apologies that fail to provide meaningful redress to the community.

This thesis has argued that the GNR provide a framework to analyse historical injustices and prevent their recurrence. Such a framework requires looking to the past to answer present and future harms and may recommend:

1. ***Raise the criminal age of responsibility to 14 years old.***
2. ***Pass the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 to eradicate the Attorney-General's veto power.***
3. ***Legislate a Federal Human Rights Act based upon the recommendations of the Inquiry into Australia's Human Rights Framework and inspired by international documents including UNDRIP and the Guarantees of non-recurrence.***
4. ***Establish a federal compensation scheme, exercised independently and without temporal restraints to compensate for all economically assessable damage including lost opportunities of employment, education and social benefit***
5. ***Reform the Education Curriculum to include the history of settler-colonialism, Stolen Generations and First Nations history in Australia pre-dating 1788.***
6. ***Reform the Education system to respect First Nations languages, ways of sharing knowledge and cultural values. This includes teaching in First Nations languages.***
7. ***Recognise the right of First Nations peoples to be included in non-indigenous society as their choice and respect the alternative lifestyles, ways of learning, and societies as equal to non-indigenous groups***
8. ***Initiate conversations regarding Treaty Relations between First Nations and non-indigenous communities at a Federal Level, taking inspiration from the Queensland Path to Treaty journey.***

In bridging the historical and contemporary removals in Australia, this thesis has analysed genocide studies, human rights and TJ; three disciplines united by their rhetoric of 'never again' and aspiration to prevent injustices. Combined with a postcolonial study of Australia, this thesis has highlighted the potential of GNRs to go beyond existing mechanisms and seek out radical and creative solutions to historical injustices. In an increasingly polarised global society, the ability to learn how communities can co-exist in the aftermath of colonial histories, conflict and human rights violations is essential. The value of GNRs does lie in being an unbreakable promise that human rights violations will cease. Rather, the value lies in the tangible actions that build trust between communities and change the status quo. Understanding and implementing such reforms in Australia is not only beneficial to First

Nations peoples but also to all societies affected by historical injustices. By remembering and learning from our histories, we can hope and ensure that they do not repeat.

BIBLIOGRAPHY

ARTICLES:

Arthur, Paige. 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice'. *Human Rights Quarterly* 31, no. 2 (May 2009): 321-367. https://doi.org/10.1353/hrq.0.0069.

Attwood, Bain. 'In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History'. *Public Culture* 20, no. 1 (1 January 2008): 75–95. https://doi.org/10.1215/08992363-2007-017.

Balint, J., J. Evans, and N. McMillan. 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach'. *International Journal of Transitional Justice* 8, no. 2 (1 July 2014): 194–216. https://doi.org/10.1093/ijtj/iju004.

Barta, Tony. 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide'. *Journal of Genocide Research* 10, no. 2 (1 June 2008): https://doi.org/10.1080/14623520802065438.

Bilsky, Leora. 'Cultural Genocide and Restitution: The Early Wave of Jewish Cultural Restitution in the Aftermath of World War II'. *International Journal of Cultural Property* 27, no. 3 (2020): https://doi.org/10.1017/S0940739120000235.

Colsell, Keziah, and Olivera Simić. '"It's Not About the Money—Stop the Trauma": Victims' Responses to Reparations in Argentina and Australia'. *Human Rights Review* 23, no. 2 (June 2022): 163–81. https://doi.org/10.1007/s12142-021-00633-1.

Cunneen, Chris. 'Criminology, Genocide and the Forced Removal of Indigenous Children from Their Families'. *Australian & New Zealand Journal of Criminology* 32, no. 2 (August 1999): 124–38. https://doi.org/10.1177/000486589903200203.

Davidovic, Maja. 'The Law of "Never Again": Transitional Justice and the Transformation of the Norm of Non-Recurrence'. *International Journal of Transitional Justice* 15, no. 2 (30 October 2021): 386–406. https://doi.org/10.1093/ijtj/ijab011.

Ellinghaus, Katherine. 'Absorbing the Aboriginal Problem: Controlling Interracial Marriage in Australia in the Late 19th and Early 20th Century'. *Aboriginal History Journal* 27 (2011): 183-207. https://doi.org/10.22459/ah.27.2011.13.

Guilfoyle, Douglas. 'Nulyarimma v Thompson : Is Genocide a Crime at Common Law in Australia?' *Federal Law Review* 29, no. 1 (2001): 1-36. https://doi.org/10.1177/0067205x0102900101.

Isa, Felipe Gómez. 'Repairing Historical Injustices: Indigenous Peoples in Post-Conflict Scenarios'. In *Rethinking Transitions*, edited by Gaby Oré Aguilar and Felipe Gómez Isa, 1st ed., 265–300. Intersentia, 2011. https://doi.org/10.1017/9781839700743.012.

Joeden-Forgey, Elisa von. 'The Devil in the Details: "Life Force Atrocities" and the Assault on the Family in Times of Conflict'. *Genocide Studies and Prevention* 5, no. 1 (2010): 1-19. 1-19. https://doi.org/10.3138/gsp.5.1.1.

Jonassohn, Kurt, and Ward Churchill. 'A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present'. *The American Historical Review* 104, no. 3 (1999): 867–868. https://doi.org/10.2307/2650994.

Kamatali, Jean-Marie. 'Accountability for Genocide and Other Gross Human Rights Violations: The Need for an Integrated and Victim-Based Transitional Justice'. Journal of Genocide Research 9, no. 2 (June 2007): 275–95. https://doi.org/10.1080/14623520701368685.

Kourtis, Dimitrios A. 'The Greek Civil War and Genocide by Forcible Transfer of Children'. *Journal of Genocide Research*, (2023): 142-163. https://doi.org/10.1080/14623528.2023.2203924.

Kune, Randall. 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations'. *University of Tasmania Law Review* 30, no. 2 (2011): 32-52. ISSN: 0082-2108.

Legg, Michael. 'Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations.' *Berkeley Journal of International Law* 20, no. 2 (2002): 387-435. https://doi.org/10.15779/Z38KM0Q.

Lemkin, Raphael. 'Genocide - A Modern Crime'. *Free World*, New York, April 1945.

Lemkin, Raphael. '*Totally Unofficial*.' Edited by Donna-Lee Frieze. New Haven: Yale University Press, 2013.

Maddison, Sarah, and Laura J. Shepherd. 'Peacebuilding and the Postcolonial Politics of Transitional Justice'. *Peacebuilding* 2, no. 3 (2014): 253-269 https://doi.org/10.1080/21647259.2014.899133.

Markovich, David. 'Genocide, a Crime of Which No Anglo-Saxon Nation Could Be Guilty'. *Murdoch University Journal of Law* 10, no. 3 (2003): 1-66. ISSN: 1321-8247

Matthews, Ingrid. 'The Colonial Logic of Child Removal'. *Australian Journal of Human Rights* 29, no. 3 (2023): 551-557. https://doi.org/10.1080/1323238X.2023.2261172.

Mayer-Rieckh, Alexander. 'Guarantees of Non-Recurrence: An Approximation'. *Human*

Rights Quarterly, The Johns Hopkins University Press, 39, no. 2 (May 2017): 416–48. DOI: 10.1353/hrq.2017.0024

Muldoon, Paul. 'Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonisation'. *Journal of Intercultural Studies* 26, no. 3 (2005): 237-254 . https://doi.org/10.1080/07256860500153518.

Orford, Ann. 'Commissioning the Truth'. *Columbia Journal of Gender and Law* 15, no. 3 (22 September 2006): 850–80. https://doi.org/10.7916/cjgl.v15i3.2534

Powell, Christopher. 'What Do Genocides Kill? A Relational Conception of Genocide'. *Journal of Genocide Research* 9, no. 4 (2007): 527-547. https://doi.org/10.1080/14623520701643285.

Read, Peter. 'The Return of the Stolen Generation'. *Journal of Australian Studies* 22, no. 59 (1998): 8-1. https://doi.org/10.1080/14443059809387421.

Sarkin, Jeremy. 'Towards A Greater Understanding of Guarantees of Non-Repetition (GNR) or Non-Recurrence of Human Rights Violations: How GNR Intersects Transitional Justice with Processes of Democratic Governance, State Rebuilding, Reconciliation, Nation Building, and Peace Building'. *Stanford Journal International of International Law* 57, no. 2 (2021): 191–229. ISSN: 0731-5082

Saul, Ben. 'The International Crime of Genocide in Australian Law'. *Sydney Law Review* 22, no. 4 (October 2000): 527–84. ISSN: 0082-0512

Schabas, William A. 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide'. *International Journal on Minority and Group Rights* 14, no. 2 (2007): 379-397 https://doi.org/10.1163/138548707X208881.

Scott, Shirley. 'Why Wasn't Genocide a Crime in Australia? Accounting for the Half Century Delay in Australia Implementing the Genocide Convention'. *Australian Journal of Human Rights* 10, no. 1 (2004): 159-178. https://doi.org/10.1080/1323238X.2004.11910775.

Short, Damien. 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project'. *Citizenship Studies* 7, no. 3 (2003): 291-312. https://doi.org/10.1080/1362102032000098887.

Short, Damien. 'Reconciliation and the Problem of Internal Colonialism'. *Journal of Intercultural Studies* 26, no. 3 (August 2005): 267–82. https://doi.org/10.1080/07256860500153534.

Short, Damien. 'When Sorry Isn't Good Enough: Official Remembrance and Reconciliation

in Australia'. *Memory Studies* 5, no. 3 (July 2012): 293–304. https://doi.org/10.1177/1750698012443886.

Tams, Christian. 'Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility'. *Yale Journal of International Law* 27, no. 2 (June 2009): 440–44. http://hdl.handle.net/20.500.13051/6445.

Tatz, Colin. 'Genocide in Australia'. *Journal of Genocide Research* 1, no. 3 (1 November 1999): 315–52. https://doi.org/10.1080/14623529908413964.

Thompson, Janna. 'Historical Injustice and Reparation: Justifying Claims of Descendants'. *Ethics* 112, no. 1 (October 2001): 114–35. https://doi.org/10.1086/339139.

Trivedi, Shanta. 'The Harm of Child Removal'. *New York University Review of Law & Social Change* 58, no. 43 (5 February 2019): 523-566. https://doi.org/10.2139/ssrn.3341033.

van Krieken, Robert. 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation'. *Oceania* 75, no. 2 (December 2004): 121–51. https://doi.org/10.1002/j.1834-4461.2004.tb02873.x

Vegh Weis, Valeria, and Chris Cunneen. 'Can Indigenous Truth Commissions Overcome the Legacies and Contemporary Effects of Colonialism?: A Study on the Australian-Canadian Experience to Explore Possible Paths in Argentina'. *The International Journal of Restorative Justice* 7, no. 1 (April 2024): 43–64. https://doi.org/10.5553/TIJRJ.000195.

Vajda, Maja Munivrana. 'Symposium on the Genocide Convention: Codification of the Crime of Genocide – a Blessing or a Curse?' *EJIL:Talk! Blog of the European Journal of International Law*, 15 May 2019.

Vrdoljak, Ana Filipa. 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity'. *European Journal of International Law* 22, no. 1 (2011). https://doi.org/10.1093/ejil/chr003.

Wolfe, Patrick. 'Settler Colonialism and the Elimination of the Native'. *Journal of Genocide Research* 8, no. 4 (2006): 387-409. https://doi.org/10.1080/14623520601056240.

BOOKS:

Bachman, Jeffrey, First Edition. *Cultural Genocide: Law, Politics, and Global Manifestations*. London: Routledge, 2019. https://doi.org/10.4324/9781351214100.

Bean, Philip, and Joy Melville. *Lost Children of the Empire*. Harper Collins Publishers, 2018 ISBN: 978-1-351-17200-4

Beresford, Quentin, and Paul Omaji. '*Rites of Passage : Aboriginal Youth, Crime and Justice'*. Fremantle Arts Centre Press, 1996. ISBN: 186368137X, 9781863681377

Chappell, Louise, John Chesterman, and Lisa Hill. *The Politics of Human Rights in Australia*. Cambridge: Cambridge University Press, 2009. ISBN: 9780511841545.

Jacobs, Margaret D. *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940*, 2009. ISBN: 080323516X 9780803235168

Lemkin, Raphael. *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington : Carnegie endowment for international peace, Division of international law, 1944. https://doi.org/10.1086/ahr/51.1.117

Neville, A.O. *Australia's Coloured Minority: Its Place in the Community*. Currawong Publishing Company, 1947. https://books.google.es/books?id=qZMrAAAAIAAJ.

BOOK CHAPTERS:

Diamadis, Panayiotis. 'Children and Genocide'. In *Genocide Perspectives IV: Essays on Holocaust and Genocide*, edited by Colin Tatz, 312–52. University of Technology, Sydney, 2012. https://doi.org/10.5130/978-0-9872369-7-5.i.

Dirk Moses, A. 'Empire, Colony, Genocide: Keywords and the Philosophy of History'. In *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, edited by Dirk Moses, First Edition. 3-54. Berghahn Books, New York, 2008. ISBN: 1845457196

McGrath, Ann. 'The White Man's Looking Glass: Aborignal-Colonial Gender Relations at Port Jackson'. In *Pastiche I : Reflections on Nineteenth-Century Australia*, edited by Penny Russel and Richard White, First Edition. 27–44. Allen & Unwin, 1994. ISBN: 1863735356

Mihr, Anja. 'An Introduction to Transitional Justice'. In *An Introduction to Transitional Justice*, edited by Olivera Simić, Second edition. 1-28. Routledge, New York, 2021. ISBN 9780367893668

Roht-Arriaza, Naomi. 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' In *From Transitional to Transformative Justice*, edited by Paul Gready and Simon Robins, First edition. 105–30. Cambridge University Press, 2019. https://doi.org/10.1017/9781316676028.005.

CASES:

Brough v. Australia (Human Rights Committee 27 April 2006).

Germany v. United States of America, (International Court of Justice 2001).

Nulyarimma v Thompson, No. 1192 (Federal Court of Australia 1999).

The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), No. ICTR-96-4-T (International Criminal Tribunal for Rwanda 2 September 1998).

United States of America vs. Ulrich Greifelt and Others (7 July 1947).

NEWS ARTICLES:

Cultural Survival. 'Observations on the State of Indigenous Human Rights in Australia'.

Cultural Survival and The American Indian Law Clinic of the University of Colorado, July 2020. https://www.colorado.edu/law/academics/clinics/american-indian-law-clinic.

Davidson, Helen, Paul Karp, and Ellie Hunt. ''Abu Ghraib'-Style Images of Children in Detention in Australia Trigger Public Inquiry'. *The Guardian*, 26 July 2016.

Gillespie, Eden. 'Two-Thirds of Children Charged with Queensland's New Breach of Bail Offences Are Indigenous'. *The Guardian*, 30 May 2023.

Ore, Adeshola. '"Dehumanising": Aboriginal Teen Subjected to Spit Hood at Victorian Prison'. *The Guardian*, 8 November 2023.

Queensland Government, Department of Youth Justice. 'Changes to the Youth Justice Act 1992'. *Https://Desbt.Qld.Gov.Au/Youth-Justice/Reform/Changes-Act*, 24 August 2023.

LEGAL TEXTS:

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The Convention on the Prevention and Punishment of Genocide

The Convention on the Rights of the Child

The International Covenant on the Civil and Political Rights

The UN Declaration on the Rights of Indigenous Persons

PARLIAMENTARY DEBATES:

House of Representatives. 'The Hansard, 18th Parliament, 2nd Session'. *The Hansard*, 30 June 1949.

REPORTS:

Arney, Fiona, Marie Iannos, Alwin Chong, Stewart McDougall, and Samantha Parkinson. 'Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle'. Child Family Community Australia. Sydney: Australian Institution of Family Studies, August 2015.

Australian Human Rights Commission. 'Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'. Parliamentary Paper No 128, April 1997.

Australian Institute of Health and Welfare. 'Youth Detention Population in Australia 2023'. Australian Institute of Health and Welfare, December 2023.

Australian Law Reform Commission. 'Pathways to Justice - an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples : Final Report', 2017.

Commissioner for Aboriginal Children and Young People. 'Background Paper: THE Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia'. Adelaide: ATSICPP, 2023.

Commissioner for Aboriginal Children and Young People. Preliminary Report: The Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia'. Adelaide: ATSICPP, October 2023.

Commonwealth of Australia. 'Lost Innocents: Righting the Record - Report on Child Migration'. Inquiry. Senate Community Affairs References Committee Secretariat, 2001.

House of Commons. 'Report of the Parliamentary Select Committee on Aboriginal Tribes'. London, 1837.

Parliamentary Joint Committee on Human Rights. 'Inquiry into Australia's Human Rights Framework'. Commonwealth of Australia, May 2024.

UN DOCUMENTS:

Anaya, James. 'Preliminary Note on the Situation of Indigenous Peoples in Australia'. *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*. United Nations, 2009.

Economic and Social Council Secretariat. 'Indigenous Peoples and Boarding Schools: A

Comparative Study'. New York: United Nations, 1 February 2010.

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and Special Adviser to the Secretary-General on the Prevention of Genocide. 'Joint Study on the Contribution of Transitional Justice to the Prevention of Gross Violations and Abuses of Human Rights and Serious Violations of International Humanitarian Law, Including Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity, and Their Recurrence'. Thematic Report. United Nations, 6 June 2018.

Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence. 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence'. Thematic Report. United Nations, 19 July 2021.

UN General Assembly. 'Eighty Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948 : [6th Committee, General Assembly, 3rd Session]'. *A/C.6/SR.83*. Paris, 5 October 1948.

UN Human Rights Council. '"They Came to Destroy": ISIS Crimes Against the Yazidis'. *A/HRC/32/CRP.2*. Human Rights Council, 15 June 2016. https://www.refworld.org/reference/countryrep/unhrc/2016/en/110599.

UN Preparatory Commission for the International Criminal Court. 'Finalized Draft Text of the Elements of Crimes'. Report. New York: New York, 6 July 2000.

United Nations General Assembly. 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia'. *Human Rights Council*. United Nations, 8 August 2017. http://aiatsis.gov.au/explore/articles/first-encounters-and-frontier-conflict.

United Nations General Assembly. United Nations Declaration on the Rights of Indigenous Peoples, 61/295 § (2007).

United Nations Secretariat Draft, "First Draft of the Genocide Convention" (May 6, 1947).

World Conference Against Racial Discrimination Xenophobia and Related Intolerance. 'Durban Declaration and Programme of Action'. United Nations, 1 January 2010.

STATEMENTS AND CONFERENCES:

Commonwealth of Australia. 'Conference of Commonwealth and the Aboriginal Authorities'. Canberra: Commonwealth of Australia, 1937.

Dr Leadbetter. 'Humanity Diminished: The Crime of Genocide Inquiry into the Anti-

Genocide Bill 1999'. *Submission to the Senate Legal and Constitutional References Committee*. Senate Legal and Constitutional References Committee, June 2000.

External Affairs to the Secretary. 'KCO Shann for Secretary'. *Prime Ministers Department*. 14 August 1952.

Prime Minister Kevin Rudd, 'The National Apology' *House of Representatives*, 13 February 2008.

Lemkin, R 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations', Additional Explications to the Special Report Presented to the 5th Conference for the Unification of Penal Law', Madrid, October 1933.

Churchill, W. 'Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt'. https://www.ibiblio.org/pha/policy/1941/410824a.html, 24 August 1941.

WEBSITES AND OTHER RESOURCES:

Docker, John. 'Raphael Lemkin's History of Genocide and Colonialism'. *Paper for United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies*. Washington DC, 26 February 2004.

Human Rights Council, 'Acting High Commissioner: Addressing the Legacies of Colonialism Can Contribute to Overcoming Inequalities Within and Among States and Sustainable Development Challenges of the Twenty-First Century' Press Release (28 September 2022) https://www.ohchr.org/en/press-releases/2022/09/acting-high-commissioner-addressing-legacies-colonialism-can-contribute

Mundorff, Kurt. 'Taking 2(E) Seriously : Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide'. University of British Columbia, 2007.

'Stolen Generations' Testimonies', 2009. https://www.stolengenerationstestimonies.com/.

The Healing Foundation. 'Make Healing Happen: It's Time to Act', May 2021. https://healingfoundation.org.au/make-healing-happen/