Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)

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The 1948 Genocide Convention, Article 2(e) declares that the forcible transfer of children from a protected group to another group is an act that amounts to genocide when it is conducted “with intent to destroy” the group, “as such,” at least “in part.” Although listed co-equally with mass killing and forced sterilizations, and despite what appear to be repeated violations, this provision has received little attention.

This Article lays out the prima facie elements that must be satisfied to bring a claim of genocidal forcible child transfer. It asserts that a perpetrator’s mixed intents or benevolent motivations toward the individual children involved will not absolve the perpetrator when forcible child transfers amount to genocide. This Article also places Article 2(e) in historical context by considering the factors that led to its inclusion in the Genocide Convention, and contextualizes 2(e) within the emerging international case law on genocide.

In addition, by fully developing the arguments around Article 2(e), this Article broadens current conceptions of genocide. In particular, it challenges current doctrine, which limits culpability to purely physical and biological destruction, by exploring the manner in which forcible child transfer has cultural effects that destroy protected groups. Finally, this Article highlights several programs, including the American Indian boarding school program and Australia’s Aboriginal removal programs, and argues that these could be considered genocide.

I. Introduction

You first taught me the white man’s road. I am now very poor and disconsolate. All you gave me is gone, and if you can send me any clothes or something to work in I will be thankful. I have no tools to work with, or plows to work the ground to make corn. Can you send me some? I am again a Comanche. I was compelled to go back to the old road, though I did not want to, but I had no pants and had to take leggings. I never have any money, for I cannot earn it here, and my heart told me to come to you for help, and perhaps you could send these things to me. I have no piece of ground for my own, and now when I want to work the white man’s road and learn it, I have nothing to do it with. I am working first on this man’s ground, then on somebody else’s, and I am

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never settled in any place. I have made a great many rails so you see I have not forgotten what you told me. I haven’t a horse of my own. I am very poor. When you come to see us I shall have nothing to show you—no corn—no house—nothing at all. A poor country and a bad ground. I don’t sleep well. I am afraid.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention"), Article 2(e), declares that the forcible transfer of children from a protected group to another group is an act that amounts to genocide when it is conducted "with intent to destroy" the group, "as such," at least "in part." Forcible child transfer is one of five acts declared to constitute genocide and is listed co-equally with acts of killing and forced sterilization, among others.

Article 2(e) lay dormant for nearly fifty years and was generally regarded as a legal anachronism. However, the 1997 publication of the Australian Human Rights and Equal Opportunity Commission report, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ("Bringing Them Home"), brought new attention to this obscure provision. Bringing Them Home ignited a firestorm of controversy in Australia by declaring, "]t]he policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labeled 'genocidal' in breach of binding international law."


Art. 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .

(e) Forcibly transferring children of the group to another group.

3. Id. The other four prohibited actions are:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group.

Id. But see THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD 53–55 (2007) (arguing that killing is the “crucial core” of genocide and that the “nonlethal group harms” delineated in Article 2(b)–(e) should only be considered acts of genocide when conducted in conjunction with acts of genocidal killing).

4. COLIN TATZ, WITH INTENT TO DESTROY: REFLECTING ON GENOCIDE 132–41 (2003) [hereinafter TATZ, INTENT TO DESTROY].

Article 2(e)’s dormant and anachronistic status is surprising given the apparent closeness of fit between the language contained in this provision and the many programs of mass child removal that have been carried out over the past several centuries. Given Article 2(e)’s potential applicability to these situations, one would expect it to resonate more than it has with scholars and activists beyond Australia.

A full understanding of Article 2(e) can also inform our understanding of the Genocide Convention as a whole. For instance, a careful reading of the Convention and its drafting process reveals that issues related to children and their custody play a central role in the conceptualization of genocide. Focusing on a nonlethal act like forcible child transfer demonstrates the Genocide Convention’s group protections. Specifically, this focus challenges the current doctrine on genocidal destruction by pointing out that the boundaries between cultural, physical, and biological destruction are often indistinct; a culturally mediated form of destruction, like forcible child transfer, may nonetheless cause a group’s physical or biological destruction.

A. Short Survey of Forcible Child Transfer

Forcible child transfer has been surprisingly common. While accounts of such programs date at least to Biblical accounts of Moses’s childhood,6 the practice probably reached its zenith with the age of modernity. Presaging modernist removal programs, in 1656 Oliver Cromwell’s occupying forces contemplated “taking Irish children away from their parents at the age of ten in order to bring them up in industry and protestantism.”7 In the mid-nineteenth century, Australia, Canada, and the United States each began programs that removed indigenous children to missions or schools where they were stripped of their group’s culture.8 These programs continued into the 1970s. From the mid-1920s to the 1970s, the Swiss removed Roma

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6. THE LIVING TORAH: THE FIVE BOOKS OF MOSES 146 (Aryeh Kaplan trans., 1981); Exodus 1:16 (“He [the Pharaoh] said, ‘When you deliver Hebrew women, you must look carefully at the birthstool. If [the infant] is a boy, kill it; but if it is a girl, let it live.’”); Exodus 1:22 (“Pharaoh then gave orders to all his people: ‘Every boy who is born must be cast into the Nile, but every girl shall be allowed to live.’”).
children, who were institutionalized and similarly de-acculturated. 9 Also in the 1920s, the Soviet Union removed indigenous Siberian children and placed them in distant boarding schools.10

During World War II, Heinrich Himmler’s Nazi forces scoured the occupied eastern lands for “racially valuable” children to export back to Germany,11 a program intended to deprive targeted groups of these children. According to the warped Nazi logic, the removal of such children would render future generations of the targeted groups politically impotent, as they would be deprived of natural leaders to oppose Nazi rule.

In 1953, two relatively short-lived removal programs were directed against dissident religious groups in North America. In the first, Arizona state officials removed children from a polygamist Mormon group in the town of Short Creek.12 This program is notable because it allowed mothers to accompany their children into foster placement,13 and it lasted less than two years.14 In the second program, provincial officials in British Columbia removed children from the Sons of Freedom, a dissident terroristic faction of the Doukhobors, a Christian group of Russian origin that espoused the anti-materialist beliefs of Leo Tolstoy.15 The Sons of Freedom children were held in a dormitory where they were prohibited from speaking Russian and practicing their group’s religion.16 Finally, in 1959, the Chinese conducted child

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13. Id. at 131–37.

14. See id. at 159 (Probation for those criminally charged ended on November 30, 1954, allowing them to resume previous arrangements.).


removals during their invasion of Tibet.\textsuperscript{17} This list is not exhaustive, and more programs will likely emerge as attention is focused on Article 2(e).

B. Definitions: Reconsidering Genocide

These programs are now almost uniformly regarded as horrible mistakes, but are they genocide?\textsuperscript{18} Certainly, the idea that child removals can constitute genocide does not accord with popular conceptions of genocide. However, lay understandings are often at odds with genocide’s legal definition as codified in the Genocide Convention.\textsuperscript{19} Popular conceptions commonly ignore the Genocide Convention’s group orientation, associating genocide only with the most brutal incidents of mass killing, regardless of whether the killings were committed against a protected human group. Most people are also unaware that the Genocide Convention prohibits not just mass killings, but a range of other group-destroying actions, including the forcible transfer of children.\textsuperscript{20} Instead, when most people consider genocide, they picture the dried corpses of Auschwitz, the meticulously stacked skulls of the Cambodian killing fields, or the more recent mass graves of the Srebrenica massacre.\textsuperscript{21}

Against these images it seems incongruous, perhaps even obscene, to place forcible child transfers in the same category of crime as these more horrific incidents. However, the Genocide Convention was established not only to punish the worst forms of violence, but also to protect human groups. Although they may lack the power to seize our imagination in the manner of mass murder, forcible child transfers are an effective means of group destruction.

Designating both the forcible transfer of 600 Roma children and the murder of six million European Jews as genocide may rankle many who are concerned with comparisons within the continuum of human brutality. As Colin Tatz put it, though the Genocide Convention does not account for “[g]rades or levels” of genocide, “for all of us, death is absolute: serious bodily or mental harm is something else; children forced into conversion

\textsuperscript{17} See International Criminal Law, 11 Whiteman DIGEST § 2, at 872–74 (citing evidence that the Chinese forcibly transferred thousands of Tibetan children to China proper and that the aim of these transfers was to turn the children against their own culture, traditions, and religion).

\textsuperscript{18} These practices may violate a number of other provisions of international law as well. See generally Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 BERKELEY J. INT’L L. 213 (2003) (arguing that a constellation of international law provisions combine to indicate an emerging norm against forced family separations).

\textsuperscript{19} See Roger S. Clark, Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia’s Invasion of East Timor, 8 OHIO N.U. L. REV. 321, 327–28 (1981) (distinguishing between “everyday genocide,” which may be simply reckless or negligent, and “criminal genocide” under the Genocide Convention, which requires intent).

\textsuperscript{20} Genocide Convention, supra note 2.

\textsuperscript{21} I have borrowed some of this imagery from Colin Tatz, Genocide in Australia, 1 J. GENOCIDE RES. 315, 315–16 (1999) [hereinafter Tatz, Genocide in Australia].
may well become coerced Catholics or Muslims, but they live.” 22 In fact, the children detained in several of these programs suffered staggering mortality rates, reaching at least fifty percent in some facilities.23 However, Tatz’s point remains apt. Whatever these programs’ effects, they were not constructed to kill individuals—an important distinction.

The Genocide Convention was framed to fulfill dual purposes, to stigmatize the worst forms of violence and to provide affirmative protections for group viability.24 Stigmatization has drawn the better share of attention, as scholars have been horrorstruck by the recent brutality humanity has inflicted on itself. However, four of the five acts prohibited in Article 2 of the Genocide Convention deal with mass killing, but with the nuts and bolts of protecting human groups: genocide can be accomplished without killing even a single individual.25 Throughout this Article, I will argue for a more nuanced reading of the Genocide Convention that looks beyond mass killing and focuses instead on its deeper purpose of protecting human groups.

C. Outline

Interpretive debates on the Genocide Convention frequently devolve into discussions of the framers’ intent, and a basic understanding of the ratification process is invaluable in parsing these arguments. The first major section of this Article provides an overview of the drafting process. The crime of genocide is commonly understood as encompassing two major components: the physical act, or \textit{actus reus}, and the mental state accompanying that act, or \textit{mens rea}.

22. Tatz, \textit{Intent to Destroy}, supra note 4, at 146. At least two scholars have proposed amending the Genocide Convention to include “gradations” or a “scale” of genocide akin to the ranking of unlawful killings from aggravated murder to involuntary manslaughter. See Ward Churchill, \textit{A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present} 431–37 (1997); Tatz, \textit{Genocide in Australia}, supra note 21, at 316.

23. \textit{See Miller}, supra note 8, at 133 (documenting Canada’s underfunding of the First Nations residential schools system). At one point, Canada’s Deputy Superintendent General of Indian Affairs stated, “It is quite within the mark to say that fifty per cent [sic] of the children who passed through these schools did not live to benefit from the education which they had received therein.” \textit{Id.} Compare this mortality rate in Canadian boarding schools with the rate described in U.N. Econ. & Soc. Council [ECOSOC], \textit{Draft Convention on the Crime of Genocide}, 25, U.N. Doc. E/447 (June 26, 1947) [hereinafter Secretariat’s Draft] (“Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is thirty per cent [sic] to forty per cent [sic], the intention to commit genocide is unquestionable.”).

24. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (“It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.”).

25. Only one of the five prohibited acts addresses killing individuals. \textit{See Genocide Convention}, supra note 2, art. 2.

third addresses mens rea. Mens rea is pivotal in any discussion of genocide, for it is the intent to destroy a group that distinguishes genocide from all other crimes. The third section attempts to ground the discussion of genocidal intent in a more general understanding of mens rea, demonstrating that “good” intentions or benevolent motives toward children will not save an otherwise genocidal act of forcible child transfer from amounting to genocide.

The fourth section challenges several arguments that have been invoked to shield forcible child transfer programs from accusations of genocide. According to the most prominent argument, forcible child transfers usually will not amount to genocide because the resultant destruction is cultural, a type of destruction the Genocide Convention is said not to cover. Another argument suggests that forcible child transfers cannot amount to genocide if they are conducted as part of larger assimilation efforts, which are said to be excused from the Genocide Convention’s prohibitions. However, as we will see, that perpetrators often intended to destroy the children’s group through culturally mediated processes does not save these programs from amounting to genocide. Similarly, far from negating culpability, the fact that perpetrators sometimes labeled these programs “assimilative” may help prove genocide.

D. Interpretive Hierarchies: A Short Note on Methodology

Article 38 of the Statute of the International Court of Justice is regarded as providing the most “authoritative statement” on the sources of public international law. Article 38(1) lists these sources as:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Each of these sources of international law has proven important in interpreting the Genocide Convention, and each is used in the discussion below.


1. International Conventions

Two international conventions guide interpretation of the Genocide Convention: the Genocide Convention itself and the Vienna Convention on the Law of Treaties ("Vienna Convention"). The Vienna Convention contains an article limiting its application "to treaties which are concluded by States after the entry into force of the present Convention," an event which occurred in 1980, more than thirty years after the Genocide Convention was adopted. However, the Vienna Convention not only establishes a prospective interpretive standard but also ratifies the customary standards of treaty interpretation extant at its drafting. In addition, because the customary international rules of treaty interpretation codified by the Vienna Convention were also current at the time of the Genocide Convention's drafting, the ICJ has recognized that the rules embodied in Articles 31 and 32 of the Vienna Convention should guide interpretation of the Genocide Convention, even though the latter predates the former by more than thirty years. This approach has proven non-controversial, and courts routinely rely on Articles 31 and 32 of the Vienna Convention in interpreting the Genocide Convention.

According to the Vienna Convention, a treaty should be interpreted according to its "ordinary meaning" unless such a reading "leaves the meaning ambiguous or obscure." Therefore, the Genocide Convention's actual text should be considered the preeminent source for assessing genocidal culpability. However, like any statute, the Genocide Convention is unclear in parts, and even where the language appears clear, it is often subject to conflicting interpretations. As a result, recourse to other interpretive sources, including drafting materials, scholarly opinions, and genocide case law, is permitted in some circumstances.

detailed discussion of the hierarchy of interpretive sources relevant to an interpretation of the Genocide Convention).

31. Id. art. 4.
34. Vienna Convention, supra note 30, arts. 31–32.
35. See Bosn. & Herz. v. Serb. & Mont., supra note 32, ¶ 160. According to the ICJ, obligations under the Genocide Convention depend on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting for that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion.

Id.
2. International Custom Reflected in Genocide Case Law

The growing body of genocide case law serves as evidence of the customary international law of genocide. Little of the existing case law directly addresses Article 2(e) of the Genocide Convention. However, the genocide case law from the ICJ, the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") adds nuance to current scholarly interpretations of Article 2(e) and establishes broad principles of interpretation specific to the Genocide Convention.

As David Nersessian points out, "[t]he ICJ is the only judicial body that can authoritatively interpret the Convention itself because the ICJ is the primary forum empowered under international law to directly interpret treaty obligations between states." In addition, the Genocide Convention states that "[d]isputes between the Contracting Parties . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." The ICJ has addressed the Genocide Convention in several decisions, including its recent opinion in Bosnia & Herzegovina v. Serbia & Montenegro. However, while the ICJ’s decisions are considered authoritative, they do not bind other courts, national or international. In the words of one commentator:

At the international level . . . there is no . . . organized and centralized [judicial] structure: there is no ‘integrated judicial system operating an orderly division of labour’ among the tribunals. In international law and justice, every tribunal is a self-contained system (unless otherwise provided); there is no hierarchical relationship between the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), the International Criminal Court (ICC), and the ICJ. The Statutes of the for-

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38. Genocide Convention, supra note 2, art. 9.
mer do not provide for any such hierarchy, nor even for any formal relationship.\(^{40}\)

The ICTY and ICTR continue adjudicating accusations of genocide and have built a working body of case law on the subject. The statutes of the International Criminal Court (“ICC”),\(^ {41}\) the ICTY,\(^ {42}\) and the ICTR\(^ {43}\) each incorporate relevant portions of the Genocide Convention. However, in each instance, the Convention’s provisions form only part of a broader statutory scheme that provides jurisdiction and procedure for these courts to prosecute a variety of international crimes. This broader statutory context exerts subtle interpretive pressures on the incorporated portions of the Genocide Convention. For this reason, this case law cannot be said to directly interpret the Genocide Convention despite its contribution to an emerging customary international law on genocide.\(^ {44}\) It should also be noted that, like the ICJ opinions, other courts would not be bound by ICTY and ICTR opinions.\(^ {45}\)

3. **General Principles of Law**

General principles of law are bedrock principles that are common in most of the world’s major legal systems.\(^ {46}\) They are one of the primary sources of international law.\(^ {47}\) They also form the background against which international law is evaluated and aid in the interpretation of treaties like the Genocide Convention.\(^ {48}\) In particular, general principles of law help in establishing the Genocide Convention’s “ordinary meaning.”

4. **Scholarly Opinion**

Scholarly opinions not only guide the interpretive debates in international law; they are regarded “as subsidiary means for the determination of rules of

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\(^{44}\) See Nersessian, *Contours*, supra note 29, at 276. According to Nersessian, “[t]he mission of the tribunals is to apply international law as it is, not to develop new principles of international humanitarian law. The tribunals interpret their reciprocal provisions on genocide co-extensively with the clearest possible formulation of customary international law, rather than according to the Genocide Convention itself.” Id.

\(^{45}\) See generally Schabas, *Criminal Tribunals*, supra note 27, at 107–12 (discussing the role of precedent in the ad hoc tribunals). The Trial Chambers of the ICTY and ICTR treat Appeals Chamber decisions as authoritative. Id. at 107. However other courts, including the ICJ or the ICC, would regard them as merely persuasive. See id.


\(^{48}\) Id. at 736.
This Article canvasses scholarly opinion and discusses major areas of disagreement within the academic literature. Because scholarly opinion plays an important role in forming international law, I have devoted extensive consideration to what I feel are significant scholarly missteps.

5. Preparatory Materials

The Vienna Convention prescribes limited circumstances under which preparatory materials may be relied upon in treaty interpretation. Under Article 32 of the Vienna Convention:

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation . . .
  - (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.

According to an International Law Commission (“ILC”) commentary, an exception like this “must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms.” However, the Genocide Convention does contain ambiguities, and even those parts that appear clear have been the subject of conflicting interpretations.

Because the Vienna Convention permits recourse to preparatory materials only under very limited circumstances, these materials are covered below with the caveat that they will rarely be dispositive in establishing or adjudicating the law of genocide. The documents and proceedings from the earlier stages of the drafting process, while conceptually interesting, were frequently criticized and ignored in subsequent stages. Therefore, although I will present an overview of the entire drafting process, I will rely on the later stages when interpreting the Genocide Convention’s ambiguities. Specifically, I will focus on the U.N. Third Session Sixth (Legal) Committee (“Sixth Committee” or “Committee”) proceedings, which produced the unanimously adopted final draft. As the discussion below will illustrate, the Sixth Committee debates were also fraught with conflict and compromise, and as a result, these documents are likely to cause their own interpre-

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49. Statute of the International Court of Justice, supra note 28, art. 38(1); see also Schabas, Criminal Tribunals, supra note 27, at 112 (asserting that although the ad hoc tribunal judges rarely cite scholarly opinion, “the judges and their assistants [do] consult these authorities in the preparation of their opinions”).
50. Vienna Convention, supra note 30, art. 32.
tive controversies. Therefore, I will use the preparatory materials to add context to various interpretive issues but will continue to stress the Genocide Convention’s actual text as the primary source in defining the crime of genocidal forcible child transfer.

II. Antecedents and Legislative History

The Genocide Convention was born abruptly of the historical rupture that followed World War II, but its antecedents can be found in much earlier provisions of international law. Although World War II’s atrocities focused new attention on the precarious position of minority groups, international protections for internal minorities actually date to the 1648 Treaty of Westphalia, which granted rights of religious freedom to religious minorities. More extensive minority group protections were codified following World War I. In the Minorities Treaties of Versailles, signed between 1919 and 1920, the Allied Powers required many of the conquered states to guarantee certain rights to religious, linguistic, and ethnic minorities. Among these required rights were protections against state discrimination based on group membership and provisions placing an affirmative burden on the state to provide resources that promote group viability. For instance, Article 9 of the treaty with Poland stated:

Poland [must] provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given


The history of the international protection of groups—domestic protection is to a large extent the result of international protection—can be divided into three major periods: (1) an early period of non-systematic protection consisting mainly of the incorporation of protective clauses, particularly in favor of religious minorities, in international treaties; (2) the system established after World War I, within the framework of the League of Nations; and (3) developments following World War II, in the United Nations (UN) era.

Id. Early treaties protecting minorities included:

[T]he Treaty of Oliva (1660), in favor of the Roman Catholics in Livonia, ceded by Poland to Sweden; the Treaty of Nimeguen (1678), between France and Spain; the Treaty of Ryswick (1697), protecting Catholics in territories ceded by France to Holland; and the Treaty of Paris (1763), between France, Spain and Great Britain, in favor of Roman Catholics in Canadian territories ceded by France.

Id. (footnotes omitted).


57. Id. at 119.
to the children of such Polish nationals through the medium of their own language.58

These Minorities Treaties provided a rough prototype for those who would later advocate the international criminalization of genocide.59

A. The Genocide Convention: A Short Legislative History

Working in the dark shadow of Nazi atrocities, the United Nations began debating the issue of genocide in 1946 and unanimously adopted the Genocide Convention on December 9, 1948.60 The Genocide Convention stands out among international human rights provisions in that its origin can be traced to the work of just one individual: the Jewish, Polish expatriate legal scholar Raphael Lemkin.61 In 1933, Lemkin had submitted a proposal to the League of Nations’ International Conference for the Unification of Criminal Law “to declare the destruction of racial, religious or social collectivities a crime (of barbarity) under the law of nations.”62 Fleeing the Nazi advance that eventually killed most of his family,63 Lemkin left Poland in 1941 for the United States, where he published Axis Rule in Occupied Europe (“Axis Rule”) in 1944,64 coining the word “genocide.”65

For Lemkin, genocide was not a crime committed against individuals because they belonged to a particular group; it was a crime committed against

58. Minorities Treaty Between the Principal Allied and Associated Powers and Poland art. 9, June 28, 1919, 225 Consol. T.S. 412.
59. See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENTS, PROPOSALS FOR REDRESS 90–93 (1944) [hereinafter LEMKIN, AXIS RULE].
60. Raphael Lemkin, Totally Unofficial Man: The Autobiography of Raphael Lemkin, in PIONEERS OF GENOCIDE STUDIES 365, 384–86, 394 (Steven L. Jacobs & Samuel Totten eds., 2002) [hereinafter LEMKIN, UNOFFICIAL MAN]. Lemkin declares that the Legal Committee, in discussing the passage of U.N. General Assembly Resolution 96 (I), was “swimming in the sea of humanitarian enthusiasm. They were trying to outdo one another . . . .” Id. at 386.
62. LEO KUPER, GENOCIDE: ITS POLITICAL USES IN THE TWENTIETH CENTURY 22 (Yale Univ. Press 1982) (1981); see also Lemkin, Unofficial Man, supra note 60, at 372. In 1933 Lemkin also submitted a report to the secretariat of the Bureau for the Unification of Criminal Laws, outlining two crimes: “barbarity” and “vandalism.” Id. Vandalism “consisted in destroying works of culture, which represented the specific genius of (these) national and religious groups. Thus, [Lemkin] wanted to preserve both the physical existence and the spiritual life of these collectivities.” Id.
63. See POWER, supra note 61, at 49. The only members of Lemkin’s family to survive were his brother, his brother’s wife, and their two children. At least forty-nine others were killed. Id. Lemkin described the Genocide Convention as an “epitaph on his mother’s grave.” Id. at 60.
64. See LEMKIN, AXIS RULE, supra note 59; see also LEMKIN, UNOFFICIAL MAN, supra note 60, at 373–78 (recounting Lemkin’s harrowing flight from Poland as the German army advanced).
65. LEMKIN, AXIS RULE, supra note 59, at 79 (“This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word genos (race, tribe) and the Latin cide (killing) . . . .”); see also Steven Leonard Jacobs, Genesis of the Concept of Genocide According to Its Author from the Original Sources, 3 HUM. RTS. REV. 98 (2002).
the group itself. Lemkin viewed this phenomenon as “an old practice in its modern development” that had always been a factor in human existence. To Lemkin, “[g]enerally speaking, genocide does not necessarily mean the immediate destruction of a nation” but “is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.” In addition to destroying the group’s social and political institutions, genocide might also destroy “the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.” To Lemkin, genocide was not restricted to incidents of mass killing but also included nonlethal acts that would erode group viability. Among these “techniques of genocide,” Lemkin described acts of political, social, cultural, economic, biological, physical, religious, and moral genocide. Under Lemkin’s broad protections, nearly any step taken with the aim of destroying a protected group would amount to genocide.

Genocide is also unique for the speed with which it developed from one man’s conception to become fixed within the popular lexicon and codified in international law. On December 11, 1946, the first session of the U.N. General Assembly unanimously adopted Resolution 96 (I) condemning genocide, a mere two years after Lemkin had coined that neologism. The U.N. General Assembly Resolution 96 (I) (“Resolution 96 (I)”) affirmed:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Resolution 96 (I) is notable in that it does not include a list of proscribed genocidal acts but rather seems to include any act that denies the “right of existence” to a human group.

66. Lemkin, Axis Rule, supra note 59, at 79 (“Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”).
67. Id.
68. Id.
69. Id.
70. See id.
71. Id. at 82–90; see also Lemkin, Unofficial Man, supra note 60, at 391. Acts of political genocide should not be confused with acts taken against political groups, which Lemkin opposed protecting under the Genocide Convention. See id.
72. See Power, supra note 61, at 40–45 (tracing international acceptance of the concept of genocide).
74. See id.
At that point, the framers began a speedy but convoluted process of formulating an international convention against genocide. In conjunction with the Secretariat’s staff, three international law experts (including Raphael Lemkin) compiled a draft convention with substantial commentary. This draft was passed to an Ad Hoc Committee comprised of representatives of China, France, Lebanon, Poland, the United States, the Soviet Union, and Venezuela. The Ad Hoc Committee was the scene of vigorous debate, but it eventually produced another draft convention, which was submitted to the General Assembly’s Sixth Committee for consideration. The Sixth Committee also held spirited debates, rejecting most of the Ad Hoc Committee’s work and compiling its own draft. This report was submitted to the General Assembly, where it was considered in two plenary meetings. The General Assembly approved it without change on December 9, 1948.

B. The Ill-Fated Cultural Genocide Provisions

Whether to include prohibitions on cultural genocide was one of the most contentious issues dividing the Convention delegates. Cultural genocide is generally considered to consist of prohibitions on the use of a protected group’s language, restrictions on religious practice, and destruction of cultural institutions including places of worship and libraries. Physical genocide, on the other hand, is generally regarded as the extermination of the group by killing its individual members, while biological genocide consists of measures intended to prevent births within the group, including forced sterilizations and separation of the sexes.
While it is clear that the “to destroy” language in Article 2 is not restricted to acts of killing, the exact meaning of this phrase is ambiguous. The U.N. Economic and Social Council’s Draft Convention on the Crime of Genocide (“Secretariat’s Draft”) originally contained provisions creating three distinct categories of genocidal destruction: physical, biological, and cultural. The physical genocide provision addressed acts “[causing] the death of members of a group or injuring their health or physical integrity.” The biological genocide provision prohibited “systematic restrictions on births,” while the cultural genocide provision prohibited “the destruction by brutal means of the specific characteristics of a group.”

The Ad Hoc Committee Draft, which followed, combined acts of physical and biological destruction in Article 2, while acts of cultural destruction were contained in a separate article of the same draft. According to the 1947–1948 U.N. Yearbook, the Ad Hoc Committee Draft defined physical/biological genocide as:

[D]eliberate acts committed with the intent of destroying a national, racial, religious or political group by killing its members, impairing their physical integrity, inflicting on them conditions aimed at causing their deaths or imposing measures intended to prevent births within the group.

The Secretariat’s Draft had defined cultural genocide as “any deliberate act committed with the intention of destroying the language, religion or culture of a . . . group, such as, for example, prohibiting the use of the group’s language or its schools or places of worship.”

The delegates finally eliminated all reference to cultural genocide from the Genocide Convention during the eighty-third session of the Sixth Committee debates. This provision would have created a broad definition of:

84. See id.
85. Id. at 25.
86. Id. at 26.
87. Id. at 26.
88. See Ad Hoc Committee Draft, supra note 77, at 13–19.
90. Id.
91. See U.N. GAOR, 6th Comm., 3d Sess., 83d mtg. at 206, U.N. Doc. A/C.6/SR.83 (Oct. 25, 1948). During this debate, the Chairman “put to the vote the exclusion of cultural genocide from the convention.” Id. The Committee voted to exclude “[b]y 25 votes to 16, with 4 abstentions.” Id. The deleted provision, which had been suggested in the Ad Hoc Committee Draft, read:

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial, or religious group on grounds of national or racial origin or religious belief such as:
1. prohibiting the use of the language of the group in daily intercourse or in schools, or printing and circulation of publications in the language of the group;
2. destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

Ad Hoc Committee Draft, supra note 77, at 17.
genocide, including measures designed to prevent the group from using its languages and destruction of the group’s cultural institutions. None of these acts would have directly threatened the group’s existence, though they might have gradually eroded the group by eliminating its distinctive features.

Cultural genocide reemerged during the final debates in two General Assembly plenary sessions. Both the Soviet Union and Venezuela proposed cultural genocide provisions to replace the ill-fated cultural genocide provision of the Secretariat’s Draft. Like Article 3 of the Ad Hoc Committee Draft, the proposed Soviet amendment was broad, and the delegates rejected it by a wide margin. The Venezuelan amendment was comparatively narrow, but the Venezuelan delegate withdrew it because of a perceived lack of support.

The Sixth Committee Draft, which the U.N. General Assembly unanimously adopted, did not mention any of the three types of genocide, and the words “physical,” “biological,” and “cultural” were all but absent. In place of these categories of destruction, the final draft simply listed five prohibited acts: murder, physical or mental harm, infliction of destructive living conditions, birth prevention, and forcible child transfer.

C. Protected Rights and Interests

The Genocide Convention has been interpreted as protecting several rights and interests. First, it protects the community of nations’ traditional
interest in international stability by prohibiting acts that might provoke inter-state hostilities. Such hostilities tend to arise when one state is aligned with a victimized group within another state’s borders and feels the need to defend that group against host-state aggressions. Additionally, it protects individuals from being singled out for mistreatment of the type proscribed by Article 2, sub-paragraphs (a)–(e), because of their identification with a protected group.

In addition to the protections described above, the Genocide Convention protects two innovative interests: the right of protected groups to their continued existence and humanity’s interest in maintaining unique human groups. Resolution 96 (I), which holds its own status as international law and has been incorporated by reference into the Genocide Convention, states that the loss of any human group “results in great losses to humanity in the form of cultural and other contributions represented by these human groups.” Therefore, the international community may intervene not only to protect a group’s interest in its own continued existence, but also to protect humanity’s interest in maintaining diverse human groups.
D. An “Enigmatic” Provision: The Politics of Article 2(e)

William A. Schabas calls Article 2(e) “enigmatic,” pointing out that “[p]aragraph (e), ‘[f]orcingly transferring children of the group to another group,’ was added to the Convention almost as an afterthought, with little substantive debate or consideration.” LeBlanc agrees, noting that:

It is the one provision that seems strangely out of place in the convention. This is not to say that the acts that Article II (e) aims to prevent and punish are not reprehensible. Surely they are. But it is debatable whether or not they should be considered to fall within the meaning of genocide. Experience suggests that perpetrators of genocide will not consider children of groups worthy of survival any more than adults. . . .

Although Article 2(e) received little debate, it was formulated in the direct aftermath of World War II, when awareness of the importance of groups remained high and memories of Himmler’s campaign to steal children for the Reich had not yet faded.

Recent events had drawn attention to the Nazi child-stealing scheme specifically and to issues of child custody and group viability more generally. With Germany’s collapse, it became apparent that the Nazis had removed perhaps hundreds of thousands of children from Eastern Europe. In fact, the first international convictions for genocide, in the trial of United States v. Greifelt, included acts of forcible child transfer. Addressing the forcible

105. Schabas finds 2(e) enigmatic “because the drafters clearly rejected the concept of cultural genocide.” Schabas, Genocide, supra note 75, at 175. Perhaps Schabas’s assessment comes because he understates the salience of forced child transfer to the drafters, mistakenly claiming that Himmler’s vows to kidnap racially valuable children to raise them as Germans “were, apparently, only threats.” Id. at 178. But see Robert van Krieken, Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation, 75 OCEANIA 125, 135–36 (2004) (hereinafter van Krieken, Rethinking) (criticizing Schabas for labeling the inclusion of the forcible child transfer clause enigmatic).


108. Nicholas, supra note 11, at 302–13 (citing the United Nations Relief and Rehabilitation Administration records).

109. See United States v. Greifelt (the RoSHA case), 5 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 102–08 (1950) (Military Tribunal, Nuremberg, Germany, Oct., 1946–Apr., 1949). The other acts defendants were indicted for included: b) Encouraging abortions among Eastern workers, c) Infanticide of Eastern workers’ babies, d) Executing or imprisoning Eastern workers who had sex with Germans (potentially diluting German blood), e) “Preventing marriages and hampering reproduction of enemy nationals,” f) Acts that would now be referred to as ethnic cleansing, g) Forced labor, h) Plundering property, and i) “Participating in the persecution and extermination of Jews.” United States v. Greifelt (the RoSHA case), 4 Trials of War
child transfer allegations, Prosecutor Neely in his opening statement proclaimed:

The outrages committed by the Nazis against the inhabitants of the occupied countries would have been considered incredible except for captured orders and reports showing the fidelity with which these crimes were executed. All who cared to read have been informed of the mass killing of the Jews, the atrocities in concentration camps, the savage medical experiments, and many more ruthless forms of torture and extermination practised by the Nazi fanatics. But now we turn to a crime which in many respects transcends them all . . . the crime of kidnaping [sic] children.110

Several defendants were convicted of genocide, which was treated as a subspecies of crimes against humanity, for, among other actions, removing “racially valuable” Polish children from their families and placing them in German orphanages or with German families, to be raised as Germans.111

Heinrich Himmler, who directed the program, stated its underlying rationale:

It is obvious that in this mixture of peoples some very good racial types will appear every now and then. I think it our duty in these circumstances to take these children, even if we have to rob or steal them. This may painfully affect our European sensibility, and many people will say to me: How can you be so cruel as to want to take a child from its mother? To that my answer is: How can you be so cruel as to be willing to leave a brilliant future enemy on the other side who will kill your son and grandson? Either we recover this superior blood and use it ourselves or—we must destroy it. We cannot take the responsibility of leaving this blood on the other side, enabling our enemies to have great leaders capable—
ble of leading them. It would be a crime if the present generation hesitated to make a decision and left it to its descendants.112

Following the war, surviving families and communities demanded the speedy return of their children. To address this humanitarian crisis, the “upper echelons in both the British and American zones . . . authorize[d] special Child Search teams to scour the German countryside” for children misappropriated by the Germans.113 The inconceivable stories gathered from the surviving children piqued interest and support at the highest levels, including that of Eleanor Roosevelt.114 Lemkin also showed an interest, requesting reports on the child searchers’ activities as he gathered information for the war crimes trial in his role as “an adviser to the Judge Advocate General’s Office of the U.S. War Department.”115

In a similar case, the Supreme National Tribunal of Poland convicted the defendant of genocidal acts including the “germanization of Polish children racially suited to it.”116 Additionally, in the Velpke Children’s Home Case, the British Military Court convicted several defendants of separating children from their Polish worker mothers “to advance the work on nearby farms in order to maintain the supply of food in the year 1944.”117 Following their removal, the children were kept in a state of extreme deprivation, causing eighty to die within six months.118

Given these contemporaneous events, it is probably unsurprising that all three experts collaborating on the Secretariat’s Draft agreed that the Genocide Convention should prohibit forcible child transfers.119 Despite this unanimity, prohibitions on the forcible transfer of children were temporarily

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112. Hillel & Henry, supra note 11, at 148–49.
113. Nicholas, supra note 11, at 505.
114. Id. at 512.
115. Id. at 506.
117. Trial of Heinrich Gerike and Seven Others (the Velpke Children’s Home Case), Case No. 42 (1946) (British Military Court), reprinted in 7 REP. OF TRIALS OF WAR CRIMINALS 76, 76 (1948). The transcript of this trial can be found in Trial of Heinrich Gerike, Georg Hessling, Werner North, Hermann Muller, Gustav Claus, Richard Demmerich, Fritz Flint, Valentina Bilien (The Velpke Baby Home Trial) 3–345 (George Brand ed., 1950) [hereinafter Trial of Heinrich Gerike].
118. See Trial of Heinrich Gerike, supra note 117, at xxii. These actions would probably not be considered genocidal because the removals were conducted for reasons of expediency and not with intent to destroy the group, but this case does demonstrate that the Allies were paying attention to issues of children and their custody as they sought justice following the war. See id. at xxii.
119. See Secretariat’s Draft, supra note 25, at 27. “The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents’ This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time. The experts were agreed that this point should be covered by the Convention on genocide, but their agreement did not go further than that.” Id.
swept away early in the drafting process, only to be added again by Greece to the Convention’s final draft.\(^\text{120}\)

At the time of drafting, the Greek government was involved in an intractable diplomatic struggle to repatriate Greek children from the Balkans. According to LeBlanc, “the Greek amendment . . . addressed the abduction of thousands (by some estimates, 28,000) of Greek children by communists at the close of World War II and their transfer to several countries in Eastern Europe under communist control.”\(^\text{121}\) The Greeks hoped to use the genocide charge in this struggle to retrieve children from the Balkans, and the political agenda behind this amendment was clear.\(^\text{122}\)

A number of objections were made to the amendment. According to Mr. Lachs of Poland, though “[t]he transfers carried out by the Germans during the Second World War were certainly to be condemned,” the word “transfer” might also be taken to mean evacuations during a time of war.\(^\text{123}\) Mr. Morozov of the U.S.S.R. asserted that there was no historical evidence “of forced transfer constituting genocide.”\(^\text{124}\) The Belgian representative felt the amendment was vague and objected on grounds that population transfers did not necessarily entail the group’s destruction.\(^\text{125}\)

Because the Secretariat’s Draft had originally categorized forcible child transfers as cultural genocide,\(^\text{126}\) the Sixth Committee delegates that favored this provision attempted to dissociate it from the ill-fated cultural genocide provisions. The Greek delegate asserted that forcible child transfer was “not primarily an act of cultural genocide. Although it could in certain cases be considered as such, it could be perpetrated rather with the intent to destroy or to cause serious physical harm to members of a group.”\(^\text{127}\) The Uruguayan delegate concurred, stating that, since measures to prevent live births had been included, “there was reason also to condemn measures intended to destroy a new generation through abducting infants, forcing them to change


\(^{121}\) LeBlanc, The United States, supra note 107, at 114.

\(^{122}\) Id.; see also U.N. GAOR, 6th Comm., 3d Sess., 82d mtg., U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948). According to Mr. Vallindas, “the Greek delegation had in mind not only a specific case such as the forced transfer of Greek children. History recorded cases in which Christian children were abducted and taken to the Ottoman Empire. A discussion of the Greek case was not, however, appropriate in a committee engaged in drafting a convention.” Id. at 188. According to Mr. Lachs of Poland, “[b]y referring to the abduction of Greek children, the Greek representative had given the matter a rather distinct political bent.” Id. at 189.


\(^{124}\) Id. at 187. He also insisted that the amendment went beyond the scope of the other offenses enumerated in Article 2. See id. at 190.

\(^{125}\) Id. at 188–89 (statement of Mr. Kaeckenbreck).

\(^{126}\) See Secretariat’s Draft, supra note 23, art. I(3)(a).

\(^{127}\) U.N. GAOR, 6th Comm., 3d Sess., 82d mtg. at 188, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948) (statement of Mr. Vallindas of Greece). Mr. Vallindas later emphasized that his proposed amendment “was not connected with cultural genocide, but with the destruction of a group—physical genocide.” Id. at 189.
their religion and educating them to become enemies of their own peo-

ple.” Mr. Maktos of the United States stressed that there was little “dif-
fERENCE . . . FROM THE POINT OF VIEW OF THE DESTRUCTION OF A GROUP BETWEEN
MEASURES TO PREVENT BIRTH HALF AN HOUR BEFORE THE BIRTH AND ABDUCTION HALF AN HOUR AFTER THE BIRTH.” It is significant that the United States and France, two states that had opposed the cultural genocide provisions, did not oppose the prohibition of forcible child transfers.

Ultimately, the opposition arguments proved unpersuasive, and the Greek amendment was adopted by twenty votes to thirteen, with thirteen abstentions. Many of those voting against the amendment stated that they did so because it was vague; indeed, the intervening years have done little to clarify this very short debate.

Perez Perozo, a Venezuelan diplomat who was influential throughout the Sixth Committee debates, later gave Article 2(e) yet another gloss:

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.

128. Id. at 187 (statement of Mr. Manini y Ríos of Uruguay).
129. Id. Mr. Maktos also stated that, “in the eyes of a mother, there was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth.” Id. at 189. He pointed out that forcible child transfers seemed to be out of place when considered alongside the other measures of cultural genocide, which concerned the preservation of religion, language, and monuments. Id. at 190. He also felt the Greek amendment “should stand on its own merits and not be associated too closely with cultural genocide,” asserting that, “a judge considering a case of the forced transfer of children would still have to decide whether or not physical genocide were involved.” Id. at 189.
130. See id. at 186.
132. Prince Wan Waithayakon of Siam, Mr. Kaeckenbeeck of Belgium, and Mr. Zourek of Czechoslovakia each voted against the amendment because they found it to be vague. See id. at 190–91. Mr. Bartos of Yugoslavia voted against it because he felt it to be an issue of cultural genocide. See id. at 191. Mr. Lachs of Poland “voted against the amendment because he considered that the way in which it had been presented suggested implications which he deemed out of place.” Id.
Although Article 2(e) is "enigmatic" in that its framers left little material by which to interpret the provision, it is easily locatable within the context of the Genocide Convention. While the Genocide Convention represents a broad expansion of international human rights law, it also taps several hundred years of increasing international protections for domestic minority groups. Protecting group viability is integral to the Genocide Convention, and by codifying protections against forcible child transfers, the Convention recognizes the centrality of a group’s right to custody of its children in assuring that viability. In addition, contemporaneous events, including the Nazi abduction trials and the Greek child repatriation struggle, informed the debates and established the relationship between child custody and group viability. Thus, although some may now consider Article 2(e) out of place alongside the other acts prohibited by the Genocide Convention, Article 2(e) makes sense in the context of the debates and is a logical step in protecting groups.

III. MATERIAL ELEMENTS

Article 2(e) implies several material elements that must be satisfied in bringing a forcible child transfer claim. Parsing these elements also deepens our understanding of the Genocide Convention and the place of Article 2(e) within it.

A. The Group’s the Thing: The Genocide Convention as a Protector of Group Viability

For the acts prohibited in Article 2 to amount to genocide, they must be carried out against a discernable, protected human group—not merely against a number of individuals who belong to a protected group. Under the Genocide Convention, actions taken against a number of individuals belonging to a protected group precisely because of their membership in that group still would not amount to genocide unless these actions were accompanied by intent to destroy their group, at least in part. For instance, selectively killing individuals because of their race is certainly homicide and may well be a hate crime, but only becomes genocide when the killings are committed with the requisite group-destroying intent.

134. See William Shakespeare, Hamlet act 2, sc. 2:
I'll have grounds
More relative than this—the play’s the thing
Wherein I’ll catch the conscience of the King.

135. See Bosn. & Herz. v. Serb. & Mont., supra note 32, ¶ 193. According to the court, for a group to be protected under the Genocide Convention, it “must have particular positive characteristics—national, ethnical, racial or religious . . . .” Id.

Looking to the preparatory materials, there is ample evidence that the Genocide Convention’s framers intended to protect groups as groups. First, Resolution 96 (I) states: “Genocide is a denial of the right of existence of entire human groups . . . .”137 Second, the pivotal Sixth Committee debates convey the delegates’ assumption that the instrument they were drafting would protect groups and not merely individuals who happened to belong to protected groups.138 According to Mr. Azkoul of Lebanon, “while genocide, like the other crimes, resulted in the physical destruction of one or several individuals, it involved a new factor, namely, the intention to destroy a group as such.”139 Mr. Bartos of Yugoslavia stated his belief that “the main characteristic of genocide lay in the intent to attack a group. That particular characteristic should be brought out, as in it lay the difference between an ordinary crime and genocide.”140 Mr. Chaumont of France held a contrary view, that “[t]he group was an abstract concept; it was an aggregate of individuals; it had no independent life of its own; it was harmed when the individuals composing it were harmed.”141

Here, it seems the delegates may have strayed into “[o]ne of the most basic [ontological] disputes” in social theory “about what the constituents of the social world are”; whether societies—or groups—have an independent social reality, or whether they “are nothing over and above the collection of individual people who make [them] up.”142 However, while


137. G.A. Res. 96 (I), supra note 73, at 188.


[T]he draft convention had the further advantage that, for the first time in an international or constitutional document, mention was made in it of the protection of the human group as such and not only of the individual, whether or not he belonged to a minority. The inherent value of the human group had at last been recognized as well as its contribution to the cultural heritage of the human race.

Id. at 33.


142. TED BENTON & IAN CLAIB, PHILOSOPHY OF SOCIAL SCIENCE: THE PHILOSOPHICAL FOUNDATIONS OF SOCIAL THOUGHT 5 (2001). Of the classical theorists, Weber is probably the quintessential “ontological individualist,” as he considers groups to exist only insofar as they are treated as existing. Id. at 76–80. By contrast, Durkheim views groups as durable social facts into which we are born and which largely determine us. Id. at 25.
sociologists may quarrel, the issue should not stir controversy in genocide law. The French delegate was in the minority, and most delegates clearly expressed their assumption that group destruction is the hallmark of genocide. Resolution 96 (I) as well as the preparatory materials clearly demonstrate the delegates’ intention to protect groups as something more than mere collections of individuals.

International tribunals have also recognized the Genocide Convention’s group orientation. In *Prosecutor v. Akayesu* ("Akayesu"), the ICTR determined:

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

The ICJ recently weighed in, similarly declaring that "[t]he words ‘as such’ emphasize [the] intent to destroy the protected group."

Finally, but most importantly, Article 2 of the Genocide Convention states, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." Individual “members of the group” are mentioned, but only in connection with the enumerated acts, as a means of measuring the loss to a group through the mistreatment of its members.

### B. Protecting the Group as an Entity

In *Axis Rule*, Lemkin wrote that "[g]enocide is directed against the national group as an entity." Following Lemkin’s lead, interpreters of the Genocide Convention have been drawn to the “entity” language, and pro-

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143. See supra note 138.
145. *Bosn. & Herz. v. Serb. & Mont.*, supra note 32, ¶ 187; *see also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) ("The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups. . . .").
146. Genocide Convention, *supra* note 2, art. 2 (emphasis added).
147. *See id. art. 2(a)–(b)*; *ILC*, [1996] Draft Code, *supra* note 136, at 45 ("The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.").
tection has been extended to groups as "separate and distinct entities." The ILC, in its commentary to the Draft Code of Crimes Against the Peace and Security of Mankind, stated that "the intention must be to destroy the group 'as such,' meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group." Furthermore, according to the Trial Chamber in Prosecutor v. Krstić ("Krstić"): 

[T]he intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.

Protecting the group as an entity has meant protecting groups from the selective killing of important group members, including cultural, political, or religious leaders, or military-aged men. It has also meant protecting small, geographically isolated segments of a larger group, even when there is no intent to destroy the larger group. Finally, it has meant that protection does not stop at categories of persons, but covers "the prohibited acts when committed with the necessary intent against members of a tribal group." This expansive view accords with the Genocide Convention's purpose of protecting the unique cultural resources possessed by each human group, but is often contrary to dominant perceptions that tend to lump discrete groups into meta-groups of, for instance, "Indians" or "Aboriginals."

C. In Whole, or in Part?

A perpetrator may commit genocide even though he or she lacks the intent to destroy a protected group in toto—so long as a perpetrator acts with intent to destroy the group at least "in part," genocide can be found. The phrase "in whole or in part" was added to the Convention as the result of a

149. See Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 665 (Jan. 17, 2005) ("The Trial Chamber recalls that the specific intent for the crime of genocide must be to destroy the group as a separate and distinct entity."); Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 79 (Dec. 14, 1999); ILC, [1996] Draft Code, supra note 136, at 45 (taking "as such" in Article 2 of the Genocide Convention to mean "as a separate and distinct entity").
152. See id. ¶ 595; see infra text accompanying notes 297–301.
155. See, e.g., discussion infra text accompanying notes 316–325.
Norwegian initiative.156 According to Schabas, “[w]hat the [term does] is undermine pleas from criminals . . . that they did not intend the destruction of the group as a whole.”157 As he points out, during the Armenian genocide the Turkish government only intended to destroy Armenian groups within its borders, not the entire Diaspora; not even the Nazis were deluded enough to believe they could eliminate every Jew on Earth.158 Although there is wide agreement that perpetrators need not intend an entire group’s destruction, the relevant passage of the Convention is vague and has generated controversy.159 During ratification debates in the U.S. Senate, many expressed fear that “in part” might include cases of “murder of a single individual.”160 But according to the dominant interpretation, “in part” requires the targeting of a substantial part of the group. Special Rapporteur Benjamin Whitaker stated that “‘[i]n part’ would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.”161

D. Limiting Protections to “Biological” Groups Illuminates the Central Role of Children

Whether protected groups should be enumerated and, if so, which ones should be protected, were two of the most controversial issues the framers faced.162 The groups mentioned in this Article as having been targeted for forcible child transfers all fall into the final list of protected groups, and their right to protection is not in doubt.163 However, reviewing the rhetoric


157. SCHABAS, GENOCIDE, supra note 75, at 253.


159. See Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 581–99 (Aug. 2, 2001) (summarizing the ongoing controversy and finding that this controversy left the Trial Chamber with “a margin of discretion in assessing what is destruction 'in part' of the group”).


163. Argentina’s disappeared children might have qualified as an Article 2(e) violation had political groups been included. This program ran from 1976–1983 and was administered by Argentina’s military junta, which held pregnant dissidents until they gave birth before killing the mothers and then dispers-
in this debate clarifies the central, if often implied, role that children play in the Genocide Convention.

All previous documents, including Resolution 96 (I), the Secretariat’s Draft, and the Ad Hoc Committee Draft, provided protection to political groups. However, after a long debate the Sixth Committee limited protections to “national, ethnical, racial or religious” groups, leaving political groups unprotected.164

Delegates favoring exclusion of political groups argued that the Genocide Convention should only protect those groups in which membership tended to be hereditary and involuntary.165 Mr. Lachs of Poland stated the majority argument: “[t]he object of the convention was to outlaw genocide. That was the crime consisting in the destruction of those groups of human beings which were the product of circumstances beyond the control of their members.”166 According to Mr. Perozo of Venezuela, the Convention could not encompass “any and every group; if that were the case, other groups of workers, artists, scientists, etc., should also be taken into consideration.”167 He also pointed out the realpolitik of the situation: a number of states were so deeply opposed to including political groups that their inclusion would threaten ratification.168

Sir Shawcross of Britain emerged to lead the efforts in favor of including political groups by acknowledging that “[n]o one should be persecuted because of the accident of his birth within a certain group.”169 He went on to question “whether a fascist state, for instance, should be entitled to destroy the lives of persons because they happened to be members of a communist group.”170 Sir Shawcross also pointed out that while political groups clearly “did not have the same stable characteristics as racial or national groups,” this would not stop “certain States” from attacking them as if they did.171

Mr. Demesmin of Haiti argued that all genocide is political and that one must “realize that strife between nations had now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial

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164. Compare G.A. Res. 96 (I), supra note 73, at 189 (including protections for political groups), and Ad Hoc Committee Draft, supra note 77, at 13 (including protections for political groups), with Genocide Convention, supra note 2, art. 2 (omitting political groups from the list of protected groups).

165. See also Lemkin, Unofficial Man, supra note 60, at 391. Lemkin also vehemently opposed the inclusion of political groups. Id.


168. See id.

169. Id. at 60.

170. Id.

171. Id.
or religious hatred, but in the name of ideas and the faith to which they gave birth.”\footnote{172} Ultimately these powerful arguments failed, and political groups were voted out of the Convention.\footnote{173}

While these debates did not address the subject of children’s custody, the result of the delegates’ focus on immutable characteristics was to distinguish groups that propagate through “biological” processes (i.e. childrearing) from groups that tend to reproduce through recruitment. By drawing this distinction, the framers highlighted the central role children play in the Genocide Convention, which only protects those groups that reproduce through childrearing.\footnote{174}

Admittedly, the line between biological groups and those propagating through recruitment is often fuzzy. As Helen Fein points out, “[b]eing an Italian working-class Communist Party member may be just as heritable a characteristic as being an Italian church-going Roman Catholic.”\footnote{175} Not surprisingly, this exclusion has generated considerable controversy, as activists and scholars have argued that any proper definition of genocide should include political and social groups, as well as the disabled and the elderly—all targets of exterminatory policies at some point.\footnote{176} However, although often arbitrary in practice, the exclusion from the Genocide Convention of political, economic, and age-specific groups, as well as those coalescing around issues of sexual orientation (which do not perpetuate themselves directly through childrearing), does elevate issues of children and their custody to a place of central importance.

\section*{E. There Is No Minimum Duration Requirement}

Article 2(e), which simply prohibits “forcibly transferring the children of the group to another group,” contains no apparent minimum duration requirement for the period of time during which children are separated from children. See id. In addition to Article 2(e), Article 2(d) prohibits “[i]mposing measures intended to prevent births within the group.” Id.\footnote{175}

\begin{quoting}
\footnote{173} See U.N. GAOR, 6th Comm., 3d Sess., 128th mtg. at 663–64, U.N. Doc. A/C.6/SR.128 (Nov. 29, 1948) (The Committee voted to remove political groups from the Convention “by 22 votes to 6, with 12 abstentions.”); see also LA BLANC, THE UNITED STATES, supra note 107, at 64–67 (discussing how political groups came to be voted out of the Convention).
\footnote{174} See Genocide Convention, supra note 2, art. 2. Two of the five prohibited acts directly address children. See id. In addition to Article 2(e), Article 2(d) prohibits “[i]mposing measures intended to prevent births within the group.” Id.
\footnote{175} Helen Fein, Genocide: A Sociological Perspective, in GENOCIDE: AN ANTHROPOLOGICAL READER 74, 81 (Alexander Laban Hinton ed., 2002); see Schabas, Groups, supra note 162, at 382 (asserting that “three of the four categories in the Convention enumeration, national groups, ethnic groups, and religious groups seem to be neither stable nor permanent.”); see also CAROLINE FOURNET, THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE: THEIR IMPACT ON COLLECTIVE MEMORY 59 (2007) (Fournet pushes this analysis even further, insisting that the use of “racial” in the Convention is “ambiguous and problematic” because “there are no such groups except in the minds of the perpetrators.”).
\footnote{176} See SCHABAS, GENOCIDE, supra note 75, at 148–49; see also David L. Nersessian, The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention, 36 CORNELL INT’L L.J. 293 (2003) (hereinafter Nersessian, Razor’s Edge) (discussing how the protected groups have been defined in international case law); Van Schaack, supra note 162.
\end{quoting}
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their group.177 Where the Genocide Convention is silent on the issue of duration, Gerhard Werle implies a permanency requirement. Werle states that this provision “encompasses permanent transfer done with the specific intent of destroying the group’s existence.”178 However, principles of statutory interpretation argue against implying a restrictive term where none is readily apparent.179 There also is very little in the Convention’s preparatory materials that would imply such a restriction.180 The better approach would consider the perpetrator’s intent, finding genocide where children were forcibly transferred from one group to another, for any length of time, so long as the perpetrator intended the separation to destroy the group.181

F. Transfer

Article 2(e) prohibits “transferring children of the group to another group.”182 Therefore, the two “essential elements” of an Article 2(e) violation would seem to involve separating children from their group and placing them with another group.183 However, according to Claus Kreß:

The prohibited act in question is completed if at least one child has been distanced from the group to which it belongs. This result may be achieved by confining the child to a location outside the realm of the group from which it comes; it is not required that the child concerned is introduced into a different group, for example by way of adoption.184

As Kreß illustrates, Article 2(e) does not require the children to be fully integrated into another group. Instead, Article 2(e)’s requirement that children be transferred “to another group” should be considered satisfied when the children are in another group’s control. It would be absurd to allow a perpetrator to defeat a charge of genocide by keeping children in an orphanage, away from their group of origin but also not integrated into another group.

177. See Genocide Convention, supra note 2, art. 2(e).
179. See Vienna Convention, supra note 30, arts. 31–32.
181. See ILC, [1996] Draft Code, supra note 136, at 46 (Referring to what ultimately became Article 2(e) of the Genocide Convention, the ILC noted, “The article clearly indicates that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.”).
182. Genocide Convention, supra note 2, art. 2(e).
183. See Werle, supra note 99, at 203.
G. Children

Although it does not define “children,” the Genocide Convention may be assumed to protect children of up to eighteen years, the age-range designation established by the Convention on the Rights of the Child (“CRC”).185 Subsequent to the CRC, international treaties covering children have increasingly recognized eighteen years of age as the transition point from child to adult, and this standard appears to be gaining status as an international norm.186 Despite this growing consensus, some have asserted that Article 2(e) was actually intended to protect against the practice of transferring children for purposes of re-acculturation and that therefore older teens should not be protected because they are not as susceptible to such influences.187 However, this stance seems to overlook historical context. The children removed in several prominent forcible child transfer schemes—including those in the Swiss and Nazi programs—were prevented from returning home at any age. When conducted in this manner, forcible child transfers mirror Article 2(d), which prohibits “[i]mposing measures intended to prevent births within the group.”188 In these cases, the age of removal is irrelevant; the removal of older children is just as harmful to the group as the removal of young children—both are stripped from the group, affecting its ability to reproduce. Finally, the Genocide Convention does not require forcible child transfers to be conducted for re-acculturation purposes, only that they are conducted with intent to destroy the group. Therefore, because the provision itself contains no age-range or purpose restrictions, and because the removal of older children has in certain instances been just as harmful to the group as the removal of younger children, the better approach would adhere to the internationally accepted standard of eighteen years of age.

As we have seen, children occupy a central place in the consideration of genocide. Those who framed the Genocide Convention intended it to pro-

185. See Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”).
187. See SCHARAS, GENOCIDE, supra note 75, at 176; see also Valerie Oosterveld, The Elements of Genocide, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 41, 54 (Roy S. Lee & Hakan Friman eds., 2001) (discussing the controversy surrounding the definition of children in the offense of forcible child transfer during the Rome Statute ratification debates; proposed age-range designations ranged from fifteen to twenty-one years of age, and the delegates finally compromised on eighteen.).
188. Genocide Convention, supra note 2, art. 2(d); see also ILC, [1996] Draft Code, supra note 136, at 46 (“Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under sub-paragraph (c).”).
vide robust group protections, and assuring the group’s right to custody of its children was integral to those protections. The Genocide Convention treats groups not as mere collections of individuals sharing particular traits, but as entities whose existence hangs on the continued function of their constituent parts. The existence of any ethnic, religious, racial, or national group depends on the ability of that group to acculturate its children.

IV. MENS REA

The current debate on forcible child transfer often reduces to one basic argument: that the transfers were conducted with benevolent intentions and therefore, “by definition,” cannot constitute genocide. Of course, intention is pivotal to any discussion of genocide, as an action must be conducted with intent to destroy the group if it is to amount to genocide under the Genocide Convention. This issue becomes even thornier with forcible child transfers, where genocidal actions have often been infused with the earnest belief that they were in the interests of the targeted group’s children. This section seeks to clarify genocidal intent by grounding the discussion in a basic understanding of criminal intent. Through this discussion it should become clear that whether perpetrators of forcible child transfer also intended to benefit the affected children is irrelevant in assessing culpability; what matters is whether they intended to destroy the children’s group. Similarly, whether perpetrators were motivated by a desire to “save” children should not matter, as these motives are irrelevant in assessing genocidal culpability.

Intent and motive are parts of a broader concept, mens rea, which is one of the most contested concepts within criminal law. Crimes are commonly considered to consist of two primary parts: the act, known as the actus reus, and the mental element, known as the mens rea. The prosecutor must gen-

189. See Colin Tatz, Confronting Australian Genocide, 25 Aboriginal Hist. 16, 25 (2001) (summing up “an issue in the current debate about the Stolen generations”). For additional thoughts on this point, see Reynolds, supra note 106, at 174, noting that:

The argument [surrounding Australia’s program of forcibly transferring Aboriginal children] would benefit from a consideration of the critical matter of intent; we should ask the question: “What did the participants believe they were doing?” When they were quite conscious trying to breed out the colour in the name of White Australia, the charge of genocide has to be taken very seriously. When the motives were much more mixed and the emphasis was on what was thought—often erroneously—to be in the best interests of the child, we move much further away from genocidal intention.

190. See Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 974 (1931) (“No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the definition of the precise mental element or mens rea necessary for crime.”). See generally Rollin M. Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905 (1938) (recounting the many ways in which intent and mens rea have been conflated and misunderstood).

191. See WAYNE R. LAFAVE, CRIMINAL LAW 303 (4th ed. 2003) (“One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of the act, or of an omission where there is a legal duty to act, is required too.”).
erally prove both elements—that the act was committed and that it was committed with the requisite mens rea. Mens rea, in turn, encompasses all of the disparate elements that comprise the mental part of the crime, including intent and motive. We commonly understand criminal intent to mean the purposive state of mind accompanying or animating a prohibited action. Motive is commonly distinguished from intent and is defined as "a desire prompting conduct." Because this distinction is critical to understanding genocidal intent, intent and motive will be more fully explained below.

A. Intent

Jerome Hall defines intent by distinguishing it from negligence. Regarding intent, he explains that "the actor seeks the forbidden end; he directs his conduct toward that end or knows that it is very likely to occur. . . . 'Intended harm' includes all harms that resulted because they stood in the way of the actor's objective—to his knowledge." Negligence, on the other hand, "implies inadvertence, i.e., that the actor was completely unaware of the dangerousness of his behavior although actually it was unreasonably increasing the risk of the occurrence of a proscribed harm.

As Fletcher illustrates, intent's technical legal meaning is broader than ordinary understandings of this term. In most jurisdictions, for instance, results are held to be intended when the actor knew his or her actions were likely to cause the forbidden result, even though the actor was ambivalent about, or may even have regretted, that result. Fletcher provides this example: "If a prisoner in an effort to escape blows up the prison wall with knowledge that guards are present and one of the latter dies in the explosion, we would not say that the prisoner intentionally killed the guard." However, as Fletcher points out, "in legal systems across the Western world, the concept of 'intention' is interpreted broadly to include these probable side-effects of intentional conduct."198

B. Genocidal Intent

In order for an act to qualify as genocide, one must prove that the act has been committed with "two distinct mental elements," namely, "the general intent requirement which pertains to the material elements [listed in sub-

192. See BLACK'S LAW DICTIONARY 825 (8th ed. 2004) ("intent").
194. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 215 (1947).
195. Id. at 216.
197. Id.
198. Id.
paragraphs (a)–(e) of Article 2] and the special intent requirement pursuant to which the perpetrator must act with the *special* intent to destroy, in whole or in part, a protected group as such.”

These two discrete mental states reference different subjects and are therefore assessed independently. The general mental state requirement for each prohibited act is considered to be enunciated or implied in Article 2, sub-paragraphs (a)–(e).

According to the ICJ:

It is well established that the acts—

"(a) Killing members of the group;

(b) Causing serious bodily harm or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group; [and]

(e) Forcibly transferring children of the group to another group”

themselves include mental elements. “Killing” must be intentional, as must “causing serious bodily or mental harm.” [sic] Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended” [sic] . . . and forcible transfer too requires deliberate and intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts.

Although the ICJ treats the proposition that each of the five prohibited acts defines a corresponding culpable mental state as unproblematic, confusion abounds, at least where Article 2(e) is concerned.

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200. See Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT’L L. 339, 403 (2001). But see Schabas, *Genocide*, supra note 75. Schabas regards genocide as a specific intent crime and applies the specific intent requirement to each element of the offense. *See id.* at 241–45. For instance, Article 2(c), deliberately inflicting conditions of life calculated to destroy the group, “includes the specific intent that these be deliberately calculated to destroy the group.” *Id.* at 243. However, as Schabas notes, this approach causes confusion and lexical redundancy. *See id.* The better approach would seem to regard the mental state of the prohibited act’s *actus reus* and the further mental element encapsulated in the words “intent to destroy” as discrete mental states. *See id.* at 243–45.


C. Forcible

To constitute genocide, children must be forcibly transferred to another group. The meaning of “forcible” has not been directly at issue in genocide case law, though several courts and committees have opined on the issue. Until the ICJ announced a much narrower standard, there had been wide agreement that the term “forcible” encompassed both direct force and non-direct force.

Through its decisions, the ICTR has demonstrated a broad understanding of force, going so far as to sanction non-direct acts leading to the transfer of children. The ICTR’s stance on force was best stated in Akayesu, in which the Trial Chamber explained that “the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”203

The Preparatory Commission for the ICC proposed an even broader standard by stating:

The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.204

It also prohibits child transfers even when actors conducting them did not create the conditions of force that led to the transfers.205 Taken together, these sources endorse a broad understanding of the force element that prohibits taking advantage of coercive situations to transfer children, regardless of the circumstances under which coercion is established.

The ICJ recently announced a narrower standard when it declared that, “forcible transfer . . . requires deliberate intentional acts.”206 The court reached this conclusion by determining that “the acts [listed in Article 2] themselves include mental elements,” and “are by their very nature conscious, intentional or volitional acts.”207

The ICJ appears to overreach in determining that “forcibly” necessarily entails deliberate and intentional action. The ICJ is correct that the mental elements for the crimes listed in Article 2 sub-paragraphs (c) and (d) are

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203. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 509 (Sept. 2, 1998); see also Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 54 (Dec. 6, 1999); SCHARAS, GENOCIDE, supra note 75, at 176–77.
205. See KRIANGSAK KITICHAIKANEE, INTERNATIONAL CRIMINAL LAW 82 (2001) (The ICC standard incorporates the ICTR pronouncements mentioned above and harmonizes them with the existing international law on force.).
207. Id.
"made explicit," while the mental element for Article 2(e) is not.208 In the absence of an explicit statement, it is not clear why the ICJ would jump to such a restrictive interpretation of Article 2(e)—one that appears to be at odds with the Genocide Convention’s ordinary meaning.209 The better approach is the standard established by the ICTR and the Preparatory Commission for the ICC, which recognizes culpability when a perpetrator takes advantage of conditions of force to transfer children. This approach better harmonizes "force" with both the genocide case law210 as well as international law generally,211 and it better accords with ordinary understandings of "force."212

D. “With intent to . . .”

Article 2’s "with intent to destroy" language is commonly understood as making genocide a 'specific intent' crime. For instance, the Trial Chamber in Akayesu found:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."213

208. See id.

209. Because, under general principles of law, criminal culpability generally attaches only to intentional action, there may be grounds for reading an intent requirement into criminal prosecutions of Article 2(e) violations. However, as the discussion above illustrates, legal standards of intent are broad and encompass knowing and reckless acts, not merely deliberate acts. See supra text accompanying notes 194–198.


211. See, e.g., Convention Concerning Forced or Compulsory Labour art. 2(1), adopted June 28, 1930, 39 U.N.T.S. 55 (defining forced or compulsory labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily").

212. See BLACK’S LAW DICTIONARY 673 (8th ed. 2004). According to Black’s Law Dictionary, “deliberate” actions are those that are “[i]ntentional; premeditated; fully considered,” while "forcible" means only “[e]ffected by force or threat of force against opposition or resistance." Id. at 459, 674. Additionally, "force" means only "[p]ower, violence or pressure directed against a person or thing." Id. at 673.

213. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 498 (Sept. 2, 1998); see also id. ¶ 518:

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.

Following Akayesu, international courts have embraced this language and have routinely reaffirmed the proposition that genocide is a crime requiring *dolus specialis*, specific intent, or special intent. 214

E. Two-Step Intention Inquiry

Designating genocide as a specific intent crime implies a two-step inquiry into intention,215 whereby the fact finder first determines whether the perpetrator conducted the prohibited action with the requisite mental state, and then whether that action was intended to achieve some “further consequence . . . beyond the conduct or result that constitutes the *actus reus* of the offense.”216 LaFave demonstrates the increased burden of proving specific intent as follows, using larceny as an example:

Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant’s mental state as to this act must be established, but in addition it must be shown that there was an “intent to steal” the property. Similarly,

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Neither the “Roman-continental systems” nor the legal family of the common law can be relied upon for a clear cut and uniform concept of *dolus specialis* (“*dol special*”, “*specific intent*”, “*Absicht*”/*erweitertener Vorsatz*, “*dolo especifico*”, “*oogmerk op*”, “*ammos dolos/iskopo*” etc.) as meaning [sic] aim, goal, purpose or desire. It is thus highly improbable whether a valid comparative law argument could be developed in support of the assertion put forward in Akayesu.

Id. at 494 (footnote omitted).


[There is] a three-runged ladder of proof for the *mens rea* of genocide by killing:

(a) it must be proved that a national, ethnical, racial or religious group was selected and targeted (or persecuted) by the accused;
(b) the accused must have formed a specific intention to eradicate all or part of the group . . .
(c) it must be proved that the accused intended to kill the individual members of the group that he did in fact kill.

Id.

216. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 147 (4th ed. 2006) (emphasis added) (footnote omitted). According to Dressler, there are two instances in which a crime is considered to be one of “specific intent” rather than “general intent.” Id. “Generally speaking, a ‘specific intent’ offense is one in which the definition of the crime expressly: (1) includes an intent or purpose to do some future act, or to achieve some future consequence [beyond the *actus reus* of the crime], or (2), provides that the actor must be aware of a statutory attendant circumstance,” for instance, when a statute prohibits receiving stolen goods with the knowledge that they are stolen. Id. at 147–48 (footnote omitted). Violations of the Genocide Convention fall into the first of Dressler’s two specific intent categories. Id.; see also Perkins, supra note 190, at 924 (“[T]he phrase ‘specific intent’ is used to connote something more than the intentional doing of the *actus reus* itself—an intent which is specifically required for guilt in a particular offense, as in assault with intent to murder, burglary, using the mails with intent to defraud, or criminal attempt.”).
common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted "with intent to commit a felony therein."\textsuperscript{217}

In French law, \textit{dol spécial} is similarly said to require proof of an additional mental element. For instance, "[i]f one takes the offence of theft, the general intent required is the desire to take property belonging to another . . . while the special intent required is the intent to behave as the owner of the property belonging to another."\textsuperscript{218} German law specifies a similar category of crimes: theft requires the "intention of appropriation," and fraud requires "the intention to benefit unjustly."\textsuperscript{219}

The ICJ in \textit{Bosnia & Herzegovina v. Serbia & Montenegro} recently ratified this approach when it held that a genocide conviction requires proof that the perpetrator possessed "additional intent" above the mental elements listed for each of the offenses in Article 2.\textsuperscript{220}

\section*{F. Purpose or Knowledge?}

A fierce debate rages in the academic literature as to whether the further mental element implies that the perpetrator must act with a group-destroying purpose, or whether a perpetrator's knowledge that his or her actions are certain to destroy a group is sufficient to trigger culpability. Common law lawyers are tempted to turn to the American Law Institute's ("ALI") Model Penal Code ("MPC") to help parse this distinction.\textsuperscript{221} According to the ALI, purposeful action entails the person's "conscious object to engage in conduct of that nature or to cause such a result," while "a person acts knowingly" when he or she is aware that his or her conduct "is practically certain" to cause the forbidden result.\textsuperscript{222} However, drafting for the MPC only began in 1952, well after the Genocide Convention was adopted and entered into force,\textsuperscript{223} so it is inappropriate to use the MPC as a guide for interpreting the Genocide Convention. At the time of its drafting, common law lawyers would likely have understood the "with intent to" language in Article 2 to be more ambiguous.\textsuperscript{224} Indeed, it was exactly "the awkward concept of 'spe-
pecific intent’" that the MPC drafters meant to clarify when they distinguished purpose from knowledge.225

Scholars have assailed the purpose-based standard for genocidal intent. Alexander Greenawalt argues that the Genocide Convention itself contains no overt specific intent requirement and that there is little in the preparatory materials from which to infer such a requirement.226 Instead, Greenawalt proposes that "principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions."227 Otto Triffterer similarly points out that although all definitions of genocide require “intent to destroy,” none mention "an additional adjective like specific, special, particular, or general intent.”228 Triffterer argues the perpetrator "[w]ho kills a group or part of it by a massacre for sadistic motives, but knowing that it may eliminate the group by the act, and who merely agrees to this additional consequence . . . fulfil[s] [sic] the minimum requirements for genocidal intent . . . ."229

In contrast, the ICTR and ICTY have tended to embrace the purpose-based standard of culpability, finding genocide predominantly in cases in which the prosecutor can prove the defendant acted with the “aim”230 of destroying the targeted group.231 As John Quigley points out, however, the criminal tribunals have been very uneven in applying this standard.232 Akayesu, which declared that genocide was a specific intent crime, also applied a knowledge-based standard, stating that “[t]he offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”233 Further, the Appeals Chamber in

bomb expert prays for the others to survive, “he knows the bomb will destroy the aeroplane.” Vest goes on to state that:

According to the usual understanding of purpose in the narrow meaning of the Model Penal Code, “the killing of [the bomb expert’s] wife was ‘purposeful’ because it was [his] conscious object to take [her] life, but the deaths of the remaining passengers were not purposeful.” The ordinary common-law definition of specific intent is broader and a jury could very well be convinced that D intended the deaths of the other victims as well . . . . English law shows a strong tradition “that intention includes no only purpose but also foresight of certainty” as there is “little social or moral difference” between these two scenarios.

id. (internal citations omitted).


227. Id. at 2259.

228. Triffterer, supra note 200, at 404.

229. Id. at 405.


231. Nersessian, Contours, supra note 29, at 264 ("Decisions from the international criminal tribunals explicitly reject a knowledge standard for acts of genocide."); see also Vest, supra note 224, at 794.


Prosecutor v. Jelisić ("Jelisić") only tentatively accepted the specific intent designation, stating in a footnote that it "does not attribute to this term any meaning it might carry in a national jurisdiction."234 Most recently, the ICJ took great pains not to weigh in on this dispute and only halfheartedly endorsed the proposition that genocide is a specific intent crime.235 Instead, the ICJ stated that the additional intent "is often referred to as a special or specific intent or dolus specialis."236 Like the Jelisić court, the ICJ accepted the specific intent designation conditionally—as shorthand for the further mental element in genocide—and resisted the importation of any national legal doctrine to supply meaning to this provision.

The result is ongoing ambiguity. The Genocide Convention and preparatory documents are ambiguous and provide no clear guidance.237 Nor are we likely to find any definitive answers in the general principles of law. While many legal systems contain a category of crime requiring a further mental element, such as a dolus specialis or a specific intent, these terms are not interchangeable.238 Rather, the terms are interpreted in the context of a complex national legal schema.239 Not only may specific intent differ significantly from dolus specialis, but specific intent in the United States may differ significantly from specific intent in Britain.240 For this reason, many commentators have advocated abandoning the laden language of specific intent. Instead, they advocate developing an intent standard that is organic to the Genocide Convention.241

Any answer probably lies in the realm of policy. That is, do we find it acceptable to excuse a perpetrator because he or she acted with some purpose other than the group’s destruction, even if he or she is acting with the certain knowledge that these actions will destroy a group? Applied to forcible child transfers, we might ask if a perpetrator who places children in residential schools to remove their group from prized land, but knows that the removal and schooling will destroy the group, ought to be excused. Is this perpetrator any less culpable than the perpetrator who transfers children with the singular purpose of destroying the group? The better standard would incorporate intent in its more ambiguous sense, encompassing actions that are both purposeful and knowing.

237. See Greenawalt, supra note 226, at 2266.
240. See Vest, supra note 224, at 787.
G. Proving Genocidal Intent in International Law

Adjudication of genocidal intent raises obvious questions of proof. How is the prosecutor to prove objectively the accused’s internal thought processes? Few perpetrators follow Hitler’s lead in declaring their intention to commit genocide and providing a blueprint for its completion. It is not surprising that when direct evidence is lacking in genocide prosecutions, courts have granted prosecutors substantial latitude to present evidence from which this intent could be inferred. For example, in *Prosecutor v. Karadžić & Mladić*, the ICTY addressed the evidentiary issues surrounding genocide and specific intent, stating that “[t]he intent which is peculiar to the crime of genocide need not be clearly expressed. . . . [I]t may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts.” The ICTY listed ethnic cleansing, rape, and actions typically considered to be cultural genocide, among other facts establishing intent. For example, “[t]he destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population.”

The ICTR and ICTY thus hold that it is proper to consider the wider context of the crimes in evaluating intent. Systematic discrimination based on group affiliation, methodical planning, political doctrine animating the crimes, anti-group slurs, and acts normally considered to be instances of


245. See Prosecutor v. Akayesa, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sept. 2, 1998); see also Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 159 (June 1, 2001); Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgment, ¶ 525 (May 26, 2003) (“[M]aking anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing *dolus specialis* . . . . [E]stablishing such a fact may, nonetheless, facilitate proof of specific intent.”); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 513 (May 15, 2003); cf. Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Separate and Dissenting Opinion of Judge Mehmet Günay, ¶¶ 62–64 (June 7, 2001) (finding liability for arrest and murder of two Tutsis on the basis of circumstantial evidence).
cultural genocide may all serve as evidence of the specific intent to commit genocide.

H. The ICJ Inferred Intent Approach

The ICJ, in *Bosnia & Herzegovina v. Serbia & Montenegro*, recently “endorse[d] the observation made” by the ICTY in *Krstić* that “attacks on the cultural and religious property and symbols of the targeted groups,” when conducted in tandem with “physical” or “biological” attacks, “may legitimately be considered as evidence of an intent to destroy the group.”246 Yet at the same time, the ICJ may have raised substantially its standard for proving intent to destroy, especially when inferring intent.247 The ICJ held that:

The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.248

This passage has generated significant uncertainty. Awn Shawkat Al-Khasawneh, the Vice-President of the ICJ, criticized the judgment for departing from the ICTY’s considerable case law on inferred intent by appearing not to find that Serbia possessed genocidal intent.249 Others have asserted that the ICJ was merely applying the “beyond a reasonable doubt” standard that it applied throughout the decision when dealing with Articles 2 and 3 of the Genocide Convention.250 If so, this standard would be the same as that applied by the ICTY and ICTR.

I. Motive Is Not Intent As Such

In interpreting the Genocide Convention, it is necessary to distinguish motive from intent, a task made difficult by a tendency to conflate the two concepts. LaFave distinguishes between intent and motive by explaining, “when A murders B in order to obtain B’s money, A’s intent was to kill and his motive was to get the money.”251 Hall explains the distinction by arguing:

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247. *Id.* ¶¶ 570–78; *see also Bosn. & Herz. v. Serb. & Mont.*, *Al-Khasawneh*, *supra* note 242, ¶¶ 40–47.
251. *LaFave*, *supra* note 191, at 257; *see also Black’s Law Dictionary* 825 (8th ed. 2004) (“Intent” is defined as “[t]he state of mind accompanying an act, esp. a forbidden act. While motive is the induce-
The most common of all human traits is the direction of conduct toward the attainment of goals. Such conduct involves (a) the end sought; (b) deliberate functioning to reach the end, which manifests the intentionality of the conduct; and (c) the reasons or grounds for (the "causes" of) the end-seeking, i.e., its motivation.\footnote{HALL, supra note 194, at 141.}

Motive has little relevance in assessing a prima facie violation of the criminal law. Hitchler argues that, "[a]s a general rule, no act otherwise lawful becomes criminal because done with a bad motive; and, conversely, no act otherwise criminal is excused or justified because of the motives of the actor, however good they may be."\footnote{Id. at 109.}

The reluctance to consider motive does not result from the difficulty of establishing motives, but rather of evaluating them.\footnote{HALL, supra note 194, at 160.} According to Hall, in evaluating motives:

[T]he actor’s own estimate of his motivation could hardly be accepted even if he had undoubtedly followed his conscience—unless we are prepared to say that every fanatic morally has carte blanche to wreak whatever harm he decides to inflict. Moreover there are no easily applied rules available to aid such judgment. . . . Hence such a provision would imply a repudiation of legal adjudication as traditionally understood.\footnote{Id. at 160–61.}

As Hall illustrates, requiring a perpetrator to possess an untoward motive would establish a subjectivist standard of guilt, allowing "fanatics" to invoke their idiosyncratic worldview to escape culpability.\footnote{However, Hall overstates the point, as it is well accepted that motivation is often vital in determining punishment. See Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1995 UTAH L. REV. 635, 640–61 (1995) (highlighting the differential role that motive should play in both offense and defense definitions).} Therefore, it is not surprising that in Gardner’s history of motive in the criminal law, he finds that the law, “with a few exceptions,” continuously rejected the claims “of those contending their criminal acts were precipitated by benign motives of euthanasia or religious obligation.”\footnote{Id. at 666–67.} To assess whether the actions were genocidal, we must determine if they were conducted with the further intent of destroying the group as such; other motives simply do not come into play.

\footnote{252. HALL, supra note 194, at 141.} \footnote{253. Hitchler, supra note 193, at 109.} \footnote{254. See HALL, supra note 194, at 160.} \footnote{255. Id. at 160–61.} \footnote{256. However, Hall overstates the point, as it is well accepted that motivation is often vital in determining punishment. See Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1995 UTAH L. REV. 635, 640–61 (1995) (highlighting the differential role that motive should play in both offense and defense definitions).} \footnote{257. Id. at 666–67. Claims by the accused that they were unaware that their actions violated the law were also consistently rejected. Id.}
J. Motive Is Irrelevant

The debate over whether to include a motive element was among the most divisive issues the framers faced. The Ad Hoc Committee Draft did include a motive element, which required that acts be based “on grounds of the national or racial origin, [or] religious belief . . . of its members.”

However, the Ad Hoc Committee Draft also stated that these motives were non-restrictive and were provided “only by way of illustration.” Delegates in the subsequent Sixth Committee deliberations exhibited little agreement on how to address perceived defects with the Ad Hoc Committee’s motive element. These deliberations were characterized by disagreement over whether to include a motive element and what practical effect a motive requirement would have, and by confusion over whether the substitution of the phrase “as such” would “retain or remove a motive requirement.”

A number of delegations supported a motive provision, arguing that motive was central to the crime of genocide. However, the United Kingdom’s representative Gerald Fitzmaurice led a small but vocal faction within the Sixth Committee that fiercely opposed it. According to Mr. Fitzmaurice, “[t]he phrase was not merely useless; it was dangerous, for its limitative nature would enable those who committed a crime of genocide to claim that they had not committed that crime ‘on grounds of’ one of the motives listed in the article.”

Even among those arguing for including a motive element, there was wide disagreement over its proper contours and likely effect. The Czech representative seemed to think that deleting a motive element would both mutilate the definition so that it would not catch cases it was intended to encompass and unduly broaden the definition so that “perfectly legal situations might be covered by it.” Several delegates agreed that motive was essential; otherwise, mass killings and other group-destroying actions undertaken for political or other non-genocidal motives might be considered gen-

259. Id. at 14. By agreeing on this provision, the delegates rejected a proposal that would have read “particularly on grounds of.” Id.
260. Greenawalt, supra note 226, at 2276–79. Greenawalt argues that from the Ad Hoc Committee debates through ratification there was never “any sustained discussion about what exactly ‘intent’ or ‘motive’ [meant]. . . . Most significantly, while some delegates did explicitly phrase the issue as one of motive, much of the discussion appears to collapse motive and specific intent . . . .” Id. at 2275.
Mr. Noriega of Mexico felt that a motive element would “clarify the concept of protected groups which article II sought to define and not merely to enumerate.”

At this point, the debates became extremely confused as the delegates contradicted each other on the fundamentals of criminal law. Mr. Gross of the United States summarized the ongoing confusion:

At first he had thought that a statement of motives would result in ambiguity, in repetition or in a limitation. As a result of the discussions which had just taken place, he thought that a statement of motives would create ambiguity. The representative of the USSR had declared that the deletion of that statement would limit the scope of the convention, whereas other representatives had thought that such a deletion would extend its scope. As those assertions could not both be right, [he] feared that the inclusion of a statement of motives might give rise to ambiguity.

As the debate continued, it became clear that a majority vote could not be mustered to enumerate culpable motives or to completely exclude a motive element. The Belgian delegation expressed concern that the lengthy and convoluted debates on motive would obscure the Committee’s intent and would make future interpretations of the Convention unduly difficult.

Looking for compromise, the delegates took up a Venezuelan proposal that inserted the words “as such” so the provision would read: “genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, racial or religious group as such.” The compromise garnered the necessary support but left the delegates largely unsure of the provision’s meaning.

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265. U.N. GAOR, 6th Comm., 3d Sess., 76th mtg. at 125, U.N. Doc. A/C.6/SR.76 (Oct. 16, 1948). The French proposed their own non-limitative motive element, which would have substituted “by reason of its nature” for “as such.” Id. at 127 (statement of Mr. Chaumont of France). If the French proposal had been adopted, Article 2 would have read: “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group by reason of its nature.”

266. Id. at 123–24.

267. Id. at 125 (statement of Mr. Kaeckenbeeck of Belgium); see also id. (statement of Mr. Manini y Ríos of Uruguay).


269. DROST, supra note 75, at 83 (according to Drost, even as they voted in favor of the Venezuelan provision, the Sixth Committee remained divided as to its meaning, with several delegates voting “against the amendment precisely because the final words did not make any mention of motives for the commission of the crime.”); see also U.N. GAOR, 6th Comm., 3d Sess., 76th mtg., U.N. Doc. A/C.6/SR.76 (Oct. 16, 1948).
Although the motive discussion had consumed an inordinate amount of time, this debate only seemed to obscure the role of motive in genocide. At one point, in apparent frustration, Mr. Manini y Ríos of Uruguay pointed out that:

[T]he vote [for the “as such” language] had given rise to three different interpretations. Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group perpetrated for any motives whatsoever, had wanted the emphasis to be transferred to the special intent to destroy a group, without enumerating the motives, as the concept of such motives was not sufficiently objective.\(^{270}\)

Mr. Manini y Ríos then proposed a working group “to find out what the intention of [the Committee’s] members had been” in voting for the Venezuelan amendment.\(^{271}\)

These complex debates make it impossible to discern any overriding legislative intent on the issue of motive. While it is clear that a majority of the delegates rejected the enumeration of culpable motives out of fear that this would unduly limit the Convention’s scope,\(^{272}\) it is just as clear that a majority wanted to include some sort of non-restrictive motive element.\(^{273}\) However, even if we take the vote in favor of the “as such” language to indicate that a majority of the delegations preferred including a motive element, it remains impossible to determine how that motive element should be applied, or even if it would expand or limit the definition of genocide.

Commentators and courts have been similarly perplexed, generally disregarding the preparatory debates as too indeterminate to be useful and deferring instead to the Genocide Convention’s “ordinary meaning.” In 1985, Special Rapporteur Benjamin Whitaker noted that “[m]otive . . . is not mentioned as being relevant [in the Genocide Convention].”\(^{274}\) In Jelisić, the
Appeals Chamber recalled the necessity to distinguish specific intent from motive. Similarly, in Prosecutor v. Kayishema, the tribunal noted that the existence of a personal motive did not preclude the perpetrator from also having the specific intent to commit genocide.

K. Schabas’s “Hatred” Proposal

In his widely influential work Genocide in International Law, William A. Schabas takes a contrary view and argues in favor of a motive requirement. Given his well-deserved renown in the field of international criminal law, any proposal Schabas makes will receive serious consideration by both scholars and the courts. For this reason, it is important to rebut what I feel is a significant scholarly misstep. Moreover, this issue is likely to be pivotal in the consideration of forcible child transfers, where genocidal actions have often been steeped in benevolent motives.

Schabas argues that, although there is near consensus among scholars and courts in favor of omitting motive, "the reasoning is rarely very compelling. Little in the way of justification is offered to support this view, the main rationale being essentially pragmatic, namely that it can only further complicate prosecutions of genocide." Schabas’s proposal seems far broader than any of the proposed motive elements, requiring that, for genocide to be found, the act must have been committed out of “hatred” for the group. He paraphrases Article II of the Ad Hoc Committee Draft, which was cut
before the final draft, in his proposal that to prove motive, “[t]he organizers and planners [of genocide] must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole.” While Schabas would not allow personal motives to excuse an act of genocide, he would make the collective motive of the organizers of a genocidal act an element of the crime. He would require that “the prosecution . . . establish that genocide, taken in its collective dimension, was committed ‘on the grounds of nationality, race, ethnicity or religion.’” The crime must, in other words, be motivated by hatred of the group.”281

Schabas is on extremely shaky ground when he equates “on grounds of” with “hatred of the group.” “On grounds of” is subject to many interpretations. It could be taken to mean that the group’s nationality, race, ethnicity, or religion is different, irritating, inconvenient, or stands in the way of profit taking. It might also mean that the group’s nationality, race, ethnicity, or religion is “hated”—but this is only one of many interpretations that could attach to this phrase.

Historically, most forcible child transfer programs have targeted groups “on grounds of” their national or racial origin. That is, group members were selected for discriminatory treatment because of their particular “racial” or “national” characteristics, including perceived laziness, shiftlessness, godlessness, etc.282 Often, those implementing the programs viewed these characteristics as backward—so much so that the group’s destruction might be a small price to pay to rid individuals of these undesirable characteristics—but this did not necessarily lead them to “hate” the group. Schabas’s hatred proposal might represent an obstacle in proving genocide in some instances of forcible child transfer because it would require the prosecutor to prove actual hatred of the group. However, because these programs have each been directed at the group, in its capacity as a group, all would appear to qualify as genocide under any of the less restrictive proposed motive elements.

If a motive requirement is read into the Genocide Convention, it should not be restricted to “hatred” of the group’s character. Neither the Genocide Convention itself, nor the logic of the Convention, nor the preparatory materials support such a reading. Instead, we should remember that the Genocide Convention is intended to guard humanity’s interest in maintaining diverse human groups. It matters little whether that destruction was motivated by the difference, inconvenience, or unprofitability of the group.

281. SCHABAS, GENOCIDE, supra note 75, at 255.

282. See CHILD, supra note 8, at 74 (quoting H.B. Pears, Assistant Superintendent of the Haskell boarding school: “The school is the only place for the Indian child to learn. He learns nothing of value at home; nobody there is competent to teach. He learns nothing from his neighbors; nobody with whom he associates does anything better than he finds in his own home.”); HAEBICH, supra note 8, at 202–03 (discussing “[p]owerful negative perceptions of Aboriginal families held by most white Australians served to endorse the escalating practice of removing and institutionalizing their children”); MILLER, supra note 8, at 184–90 (discussing the role of race and a discourse that infantilized First Nations individuals in justifying the Canadian First Nations residential schools system).
or by hatred of the group itself; in any case the group has been destroyed and humanity has suffered an irreparable loss. Moreover, stringent intent requirements will adequately protect those who have “inadvertently” committed acts that would otherwise be considered genocide. To avoid these sources of confusion, the better reading would omit any motive requirement and focus instead on the perpetrator’s intent.

As we have seen, the “with intent to” language establishes a formidable evidentiary threshold, requiring the prosecutor to prove that one of the prohibited actions listed in Article 2 was committed with the mental state specific to that act and that the act was animated by a further intent to destroy the group. Most of those who have planned and implemented forcible child transfer programs believed, earnestly yet erroneously, that this was in the “best interests” of the children involved. But, as Professor Sayre says, “[s]ocial and public interests require protection from those with dangerous and peculiar idiosyncrasies as well as from those with evil designs.”283 Allowing a perpetrator’s subjective belief to trump criminality would set a dangerous precedent, especially in light of genocide’s history, in which perpetrators have often committed heinous acts to pursue their vision of the greater good.

V. A GENOCIDE BY ANY OTHER NAME

It is curious that several parties involved in drafting the Genocide Convention clearly understood forcible child transfers to be genocidal, but apparently failed to realize that their own longstanding practices might violate Article 2(e). For instance, the United States, which rallied parties against the cultural genocide provisions, lobbied for including forcible child transfers among the prohibited actions284 without seeming to realize that this provision might implicate its American Indian residential school program, which by 1948 had been operating for eighty years.285 Other potentially culpable states also apparently failed to notice their ongoing violations, and opposition to Article 2(e) was tepid.286 In the Sixth Committee debates, Mr. de

283. Sayre, supra note 190, at 1018; see also Gardner, supra note 256, at 715.
284. U.N. GAOR, 6th Comm., 3d Sess., 82d mtg. at 186, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948) (Mr. Vallindas of Greece pointed out that while opposed in principle to the inclusion of cultural genocide, the United States delegation “had nevertheless made an exception in the special case of the forced transfer of children”). Opposing the cultural genocide provision in the Ad Hoc Committee meetings, the United States stated, “[t]he prohibition of the use of language, systematic destruction of books, and destruction and dispersion of documents and objects of historical or artistic value, commonly known in this Convention to those who wish to include it, as ‘cultural genocide’ is a matter which certainly should not be included in this Convention.” Ad Hoc Committee Draft, supra note 77, at 18. In its own draft convention, the United States had included forcible transfers in a provision parallel to the one addressing “compulsory restriction of births.” ECOSEC, Secretariat, Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat, at 55, U.N. Doc. E/623 (Jan. 30, 1948).
285. See generally Adams, supra note 1.
Beus of the Netherlands did question whether compulsory attendance at schools, which would immerse children in a “different language or religion,” would constitute genocide, but the other delegates did not respond to his inquiry.287

This lack of clear direction has led, or perhaps allowed, many scholars to resist labeling these programs genocide. Indeed, many have struggled to find a way to label them something other than genocide. They have claimed that these programs cannot amount to genocide because they were animated by benevolent motives; because they were intended to help, not harm, the removed children; or because forcible child transfer causes cultural destruction, a type of destruction not prohibited by the Genocide Convention. They have also claimed that these programs were intended to assimilate the targeted group, a goal they assert the Genocide Convention was not intended to cover.288 This section addresses each of these rhetorical moves, arguing that the plain meaning of Article 2(e) should not be avoided.


Some claim that the forcible transfer of children as practiced in most of these programs was really a form of cultural genocide or ethnocide, and is therefore excluded from a convention that addresses only physical and biological genocide.289 A more nuanced version of this argument posits that if perpetrators intend to destroy a group physically or biologically, forcible child transfers should be regarded as a form of genocide. However, if the perpetrators intend to destroy a group as a cultural unit, forcible child transfers, though reprehensible, are beyond the Genocide Convention’s reach.290 This section draws on current genocide case law to argue that the forcible transfer of children, as conducted in the disputed programs, was a physical act intended to destroy the group as a physio-biological entity. Therefore,

287. Id. at 189.
290. See ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide, ¶¶ 89–92, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978) (prepared by Nicodeme Ruhashyanikko) (citing Jean Graven, Les Crimes Contre l’Humanité, in ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, RECUEIL DES COURS 501–02 (1950)); see also van Krieken, Rethinking, supra note 105, at 144. Van Krieken seems to endorse this proposition, recognizing that forcible child transfers can be both “cultural” and “biological.” Regarding Australia’s forcible child transfers, van Krieken says these acts were, “actually alien to [the Genocide Convention’s] overall intent, particularly its concern to exclude the question of ‘cultural’ genocide. In this sense, then, it is clear that ‘genocide’ has only restricted range of application of law.” Id.
this practice amounts to genocide, even though the means of destruction were often culturally mediated.

B. The ILC Destruction Approach

The ILC interprets the failure of the cultural genocide provisions as demonstrating that the delegates had excluded all forms of cultural destruction from the Convention. According to the ILC:

As clearly shown by the preparatory work for the [Convention], the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word “destruction,” which must be taken only in its material sense, its physical or biological sense. . . . [T]he text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of “cultural genocide” contained in the [earlier] two drafts and simply listed acts which come within the category of “physical” or “biological” genocide.291

The ILC approach has been persuasive, and the ICJ, ICTY, and ICTR have generally cited it approvingly.292 Commentators, especially those addressing the Australian programs, have also implicitly adopted the ILC’s approach to


Article 2 of the Statute indicates that the perpetrator must be shown to have committed the enumerated prohibited acts with the intent to “destroy” a group. The drafters of the Genocide Convention, from which the Tribunal’s Statute borrows the definition of genocide verbatim, unequivocally chose to restrict the meaning of “destroy” to encompass only acts that amount to physical or biological genocide. See also Prosecutor v. Brückner, Case No. IT-99-36-T, Judgment, ¶ 694 (Sept. 1, 2004); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 25 (Apr. 19, 2004) (“The Genocide Convention and customary international law in general, prohibit only physical or biological destruction of a human group.”). But see Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, ¶¶ 48–54 (Apr. 19, 2004). Judge Shahabuddeen criticizes the ILC approach as failing on several counts. First, it contravenes well-established rules of treaty interpretation by disregarding the Genocide Convention’s ordinary meaning. As Judge Shahabuddeen points out, except for Articles 2(c) and (d), the Genocide Convention “does not require an intent to cause physical or biological destruction of the group in whole or in part.” Id. ¶ 48. Also, looking to the preparatory materials as the ILC does, Judge Shahabuddeen is “not satisfied that there is anything in them which is inconsistent with [his] interpretation of the Convention.” Id. ¶ 52. Judge Shahabuddeen states, “[i]t is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention . . . provided that [the] intent attached to a listed act . . .” Id. ¶ 49. See also Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶¶ 665–66 (Jan. 17, 2005) (endorsing Judge Shahabuddeen’s approach).
claim that forcible child transfers, as conducted in Australia and elsewhere, cannot amount to genocide.\textsuperscript{293} According to this logic, because these forcible child transfers were intended to immerse the children in a new culture, they cannot amount to physical or biological genocide.

\textbf{C. The Developing Case Law on Culturally Mediated Destruction}

The ICTR and ICTY continue to reiterate that the Genocide Convention does not address cultural genocide. However, on at least three issues—rape, selective killing, and forced deportations—tribunals have recognized that the line between cultural and physio-biological genocide is blurry, as acts aimed at destroying the group physically or biologically remain deadly to the group, even though these acts may destroy through cultural processes.\textsuperscript{294} This case law destabilizes the ILC’s distinction between physio-biological and cultural genocide and indicates that forcible child transfers, as conducted in Australia and elsewhere, could amount to physical or biological genocide even though the destruction they inflict is often created through cultural processes.

1. \textit{Selective Killing}

Killing is the first and least controversial means of group destruction listed in Article 2.\textsuperscript{295} As discussed above, for killings to amount to genocide they must be conducted with intent to destroy a substantial part of a protected group.\textsuperscript{296} In \textit{Jelisić}, the Trial Chamber determined that “substantial” could have both a qualitative and a quantitative meaning.\textsuperscript{297} That is, a group might be destroyed either by killing a significant proportion of the group’s members or by selectively killing an important segment of the population, especially its leaders.\textsuperscript{298} According to the Trial Chamber:

Genocidal intent may . . . manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to
destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group “selectively.”

In Krstić, the Trial Chamber similarly found that “the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of the two or three generations of men would have on the survival of a traditionally patriarchal society . . . .” By emphasizing the highly patriarchal characteristics of Bosnian Muslim society, the Tribunal explicitly recognized the importance of culturally mediated processes of group destruction. It also recognized that perpetrators might target their genocidal actions so as to exploit a group’s particular cultural characteristics. Although killing is unquestionably a physical act, in this instance the group destruction it caused depended heavily on cultural factors. Similarly, in selectively killing a group’s leadership, the perpetrator does not intend to cause the group’s immediate physical destruction but rather to weaken the group culturally, thereby facilitating its ultimate physical destruction.

2. Forced Deportations

The Trial Chamber in Prosecutor v. Blagojević surveyed the issues surrounding forced deportations and found that, although they are not listed among the acts that Article 2 specifically prescribes, and although they do not directly cause the death of group members or deliberately prevent members from reproducing within the group, forced deportations still constitute genocide when conducted with intent “to destroy the group as a separate and distinct entity.” According to the Trial Chamber:

[T]he physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group.

301. Cf. Kreß, The Crime of Genocide, supra note 101, at 492 (arguing that recognizing the killing of military-aged Bosnian-Muslim men as genocide “comes dangerously close to precisely that social concept of destruction which the ICTY chambers were . . . at pains to reject”).
302. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 665 (Jan. 17, 2005); see also ILC, [1996] Draft Code, supra note 136, at 46 (determining that “when carried out with intent to destroy the group in whole or in part,” forced deportations violate Article 2(c) of the Genocide Convention). Contra Bosn. & Herz. v. Serb. & Mont., supra note 52, ¶ 190 (according to the ICJ, “ethnic cleansing” “can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention”).
The Trial Chamber could have found that forced deportations amount to genocide only insofar as they disperse the group and make it difficult for group members to reproduce within the group. In this sense, forced deportations would constitute a violation of Article 2(d) of the Genocide Convention, which prohibits "[i]mposing measures intended to prevent births within the group." However, the Trial Chamber espoused a much broader proposition, highlighting the manner in which forcible deportation destroys the group by attacking its "history, traditions, the relationship between its members, the relationship with other groups, [and] the relationship with the land." The Trial Chamber emphasized that it was not reading the Genocide Convention as encompassing cultural genocide, but was instead attempting "to clarify the meaning of physical or biological" genocide. According to this interpretation, forced deportation—like selective killing—is a physical act that operates culturally to destroy the group physically or biologically. However, the Trial Chamber’s stance has proven controversial and has not been supported in subsequent decisions.

3. Rape

Rape is a horrifying physical act that, when conducted systematically against a human group, has obvious bio-genocidal consequences. However, like selective killing and forced deportation, courts have determined that, in conjunction with its immediate physical and biological effects, rape also achieves genocidal results through cultural processes. In Akayesu, the Trial Chamber specifically cited cultural factors to support its determination that rape can amount to genocide. According to the Trial Chamber:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure in-
tended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.309

According to the Trial Chamber, systematic forced impregnation of the women of a protected group amounts to genocide because the culture of highly patriarchal societies prevents children of such rapes from being accepted into the group. Later, the Trial Chamber linked rape with the destruction of families and the group as a whole, stating that:

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.310

As with forced deportations, the Tribunal might have reached a much more limited holding that rape amounts to genocide only insofar as it causes the victimized woman to suffer physical or psychic harm that would prevent her from reproducing within the group. Such a holding would have endorsed a narrow definition of genocidal destruction, one exclusively limited to physical or biological genocide. Instead, the Tribunal seemed to endorse a much broader conception of genocidal destruction, recognizing the crucial role of cultural factors in maintaining the group’s physical and biological existence. According to the Tribunal, rape not only inflicts tremendous suffering on the victimized woman but also affects the viability of the family structures of which she is a part.311 The decision is vague about the mechanisms through which rape destroys the victimized woman’s family, community, and group as a whole, but it seems apparent that cultural factors are at play.

The Tribunal’s emphasis on rape as a medium of group destruction312 points to the crucial role of families in assuring group viability. Measures that weaken family structures weaken the group, making it more susceptible to outside aggression. Similarly, removing children also weakens families, weakens groups, and makes them vulnerable to outside aggression. While the Akayesu Trial Chamber did not clearly enunciate its rationale for how rape endangers group viability, its characterization of rape as genocide has

310. Id. ¶ 731.
311. See id.
312. Id.
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been widely accepted by subsequent tribunals and appears relatively non-controversial.313

Although generally reaffirming the ILC approach, the case law of the ICTR and ICTY does not indicate that acts intended to destroy the group physically or biologically through culturally mediated processes are somehow excluded from the Genocide Convention. Rather it indicates that proscribed acts conducted with intent to destroy the group as a separate and distinct physical or biological entity amount to genocide, even where that destruction was mediated through cultural processes. Under this standard, destroying libraries, preventing the use of museums and places of religious worship, or prohibiting daily intercourse in the group’s language do not amount to genocide. On the other hand, proscribed acts conducted with intent to destroy the group as an entity would amount to genocide.

This approach is largely in line with the framers’ intent in forwarding and then rejecting the many proposed prohibitions on cultural genocide. The rejection of these provisions does not imply that a specifically proscribed act like forcible child transfer is somehow excused when that act destroys the group through culturally mediated processes. Forcible child transfer, like forced deportation, selective killing, and mass rape, is a physical act that often operates to destroy the group culturally. It does so biologically, by preventing children from reproducing within the group, and physically, by discouraging children from returning to their group. Often, the intended destruction was culturally mediated—the children were held away from the group and forced to internalize the dominant culture. However, in each case the ultimate goal was not merely to destroy libraries or prevent language use, but to destroy the group as a separate and distinct physio-biological entity. Therefore, even under the ILC destruction standard, the forcible child transfer programs discussed in this Article would amount to genocide.

D. Group, Not Individual Protections

Despite the Genocide Convention’s clear emphasis on group protection, Russell McGregor asserts that because the perpetrators of Australia’s post-war Aboriginal policies lauded Aboriginal population increases, their behavior was “incompatible with genocidal intent.”314 This assertion reflects a


misunderstanding of genocidal intent. While a decline in the number of its individual members is of evidentiary interest, an increase in the population of a group does not negate genocidal intent. There is no requirement that a perpetrator intend for the number of individual descendants of the group to decline. The group is the victim. As we have seen, the ICTR and ICTY determined that mass rape and forced deportations can amount to genocide when conducted with intent to destroy the group, even when neither is necessarily lethal to group members.\textsuperscript{315}

In \textit{Kruger v. Commonwealth of Australia}, the High Court of Australia similarly misunderstood the Genocide Convention’s group protections.\textsuperscript{316} According to the High Court of Australia, allegations of post-1951 Article 2(e) violations fail because powers under the 1918 Aboriginals Ordinance,\textsuperscript{317} which authorized the forcible child transfers, "were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally."\textsuperscript{318} Under the court’s logic, any acts intended to harm Aboriginals were committed outside the authority of this legislation, and therefore the Commonwealth bears no responsibility for those acts. According to Justice Toohey:

\begin{quote}
Each of the “acts” which spells out genocide is qualified by the opening words “with intent to destroy.” There is nothing in the Ordinance, according to it the ordinary principles of construction, which would justify a conclusion that it authorised acts “with intent to destroy, in whole or in part” the plaintiffs’ racial group.\textsuperscript{319}
\end{quote}

However, the Genocide Convention does not just protect individuals or the racial groups to which they belong; it protects groups “as separate and distinct entities.”\textsuperscript{320} Moreover, these protections extend to each tribal group. According to the standards of the time, group-destroying actions like removing children from their communities were sometimes thought to be in

\textsuperscript{315}. See supra text accompanying notes 302–313.
\textsuperscript{317}. An Ordinance Relating to Aboriginals, No. 9 (June 12, 1918) (N. Terr. Austl. Ord.) [hereinafter 1918 Aboriginals Ordinance].
\textsuperscript{318}. \textit{Kruger}, 146 A.L.R. at 161 (Dawson, J.).
\textsuperscript{319}. \textit{Id.} at 175; see also \textit{id.} at 190 (Gaudron, J.).
\textsuperscript{320}. \textit{Supra} text accompanying notes 149–150.
the interests of Aboriginal individuals, or even the Aboriginal “population” or "racial group" as a whole. According to this thinking, Aboriginals were harmed by contact with their group, and removing the individual from it, thereby destroying the group, could be thought to be in the individual’s, or even the population’s, interest.\textsuperscript{321} However, group destruction can never be in the interests of the affected group itself, which according to the Genocide Convention holds a right of and interest in its own existence.

While Justice Toohey refers only to “the plaintiffs’ racial group,”\textsuperscript{322} the Genocide Convention should extend protection to each tribal group.\textsuperscript{323} A. Dirk Moses refers to this kind of rhetorical move as a “homogenizing discourse,”\textsuperscript{324} and, as he points out, allowing a perpetrator to escape culpability by broadly defining the targeted group would heap perversity on top of atrocity. According to Moses:

If somehow Aborigines had colonized Europe and attempted to exterminate, say, the Slovenians, every subsequent European scholar of genocide would visit ridicule and scorn on the proposition that no genocide had in fact taken place, and that it was just an isolated incident because no intention could be identified to exterminate all Europeans.\textsuperscript{325}

Therefore, in assessing allegations of Australian genocide, it is proper to inquire not whether all of Australia’s indigenous inhabitants were targeted, but whether any of the discrete tribal groups had been targeted, at least in part.

E. Misguided Benevolence Does Not Excuse

As the history of the American Indian boarding school program illustrates, where forcible child transfers are concerned, benevolent motives can easily become intertwined with genocidal intent. For instance, Richard Henry Pratt, Superintendent of the Carlisle Indian School and visionary behind the U.S. off-reservation boarding school program, was a fearless advocate for American Indians. He complained that the U.S. Constitution would remain incomplete until it granted American Indians full equality\textsuperscript{326} and

\textsuperscript{321} See Stuart Bradfield, ‘From Empires to Genocide Chic: Coming to Terms with the Stolen Generations in Australia,’ in GENOCIDE PERSPECTIVES II: ESSAYS ON HOLOCAUST AND GENOCIDE 243, 254 (Colin Tatz et al. eds., 2003) (Bradfield points out that “[p]aradoxically, the destruction of Aboriginality was seen to be ‘in the best interests’ of Aboriginal people . . . . Removing Aboriginal children with some ‘European blood’ was to ensure their ‘emancipation’ from the prison of Aboriginality.”).

\textsuperscript{322} Kruger, 146 A.L.R. at 190.

\textsuperscript{323} See supra text accompanying note 154.


\textsuperscript{325} Id.

\textsuperscript{326} See PRATT, supra note 8, at 268–70.
campaigned against the Indian Bureau as corrupt and ineffective.\textsuperscript{327} He was clearly moved by the American Indians' plight and viewed it as a circumstance inflicted by heartless, if inevitable, white expansion. Nevertheless, he also advocated the swift and forced destruction of American Indian tribal groups.\textsuperscript{328} For Pratt, the object was to "[k]ill the Indian . . . and save the man."\textsuperscript{329}

Similarly, the 1884 "Friends of the Indian Conference" at Lake Mohonk resolved "[t]hat the organization of the Indians in tribes is, and has been one of the most serious hindrances to the advancement of the Indian toward civilization, and that every effort should be made to secure the disintegration of all tribal organizations."\textsuperscript{330} To that end, they stated that their "conviction ha[d] been strengthened as to the importance of taking Indian youth from the reservations to be trained in industrial schools placed among communities of white citizens."\textsuperscript{331} Like Pratt, attendees of the Friends of the Indian conferences tended to be those most sympathetic to American Indians. However, the sympathy that motivated these activists to "help" American Indians as individuals does not negate the genocidal intent they assumed toward the many American Indian groups they advocated destroying. The Genocide Convention draws a bright line, prohibiting five different group-destroying actions, and contains no exception for acts deemed beneficial to the individuals of the group.

\section*{F. Perpetrators Cannot Capitalize on Conditions of Non-Direct Force}

While many historical forcible child transfer programs were directly coercive, the circumstances surrounding some programs were more ambiguous. For instance, the United States’s American Indian boarding school system abandoned compulsory off-reservation schooling early in the program’s history.\textsuperscript{332} Despite the official policy of “voluntary” attendance, many parents continued enrolling their children in off-reservation residential schools. They did so for a number of reasons. Parents often enrolled their children in distant boarding schools because those schools represented the only chance for their children to gain the skills needed for survival in a rapidly changing world, or simply because conditions on the reservations were so deprived that many parents could not afford to keep the children at home. Reviewing

\begin{itemize}
\item \textsuperscript{327} Pratt complained frequently of the “Bureau oligarchs,” who fight meaningful reform in order to maintain a monopoly of power over matters pertaining to Indians. \textit{Id.} at 272, 283, 291, 312.
\item \textsuperscript{328} \textit{Adams, supra} note 1, at 51–55. \textit{R}
\item \textsuperscript{329} \textit{Id.} at 52.
\item \textsuperscript{330} Second Annual Address to the Public of the Lake Mohonk Conference (Indian Rights Association 1884), \textit{reprinted in Documents of United States Indian Policy} 161, 163 (Francis Paul Prucha ed., 1975). \textit{R}
\item \textsuperscript{331} \textit{Id.} at 164.
\item \textsuperscript{332} \textit{See Adams, supra} note 1, at 65. From 1893 on, “full consent” was required from Native American parents before their children could be sent to an off-reservation school. Importantly, parents could still be compelled to enroll their children in on-reservation schools, which had similarly harsh conditions and were similarly restrictive. \textit{Id.}
\end{itemize}
letters sent between families, students, and faculty at the Flandreau and Haskell boarding schools between 1900 and 1940, Brenda J. Child summarizes the complex conditions that forced American Indian families to enroll their children:

Throughout the boarding school era, Indian parents and students hoped education would provide them with the skill to earn a living in order to cope with reservation conditions. After reservations were reduced in size or allotted, the most frequent result was poverty for Indians. When families could not earn an adequate living on the reservation or in the city, they often enrolled children in boarding schools as a temporary or long-term solution to some of their most pressing problems.

Reservation life proved to be a constant struggle for American Indians in the early twentieth century. Disease and poor health care combined to take the lives of many Indians at a young age. The high death rates reached a crisis point in many Indian communities. Traditional methods of absorbing needy individuals into the larger kinship network were not always possible as early death and increased poverty overwhelmed Ojibwe family life. In many instances Indian parents died young, and children were left without caretakers. Boarding schools often took in needy and orphaned children.

When it dropped compulsory off-reservation education, the U.S. government was no longer deliberately and intentionally transferring these children outside the group. However, in establishing a system of badly managed reservations, where disease, starvation, and desperation were the only alternatives open to children and their families, it seems clear that the federal government took advantage of conditions that forced the children’s transfer.

G. Assimilation Is No Excuse

Some have also argued that the forcible child transfers in Australia cannot amount to genocide because they were actually part of a larger assimilation scheme. According to this logic, because the delegates did not intend to prohibit assimilation, had they considered the later stages of the Australian forcible child transfer program, they would have found it acceptable.

333. Child, supra note 8, at 24. A number of factors including racism at non-segregated schools, economic depression, and high death rates on the reservations pushed American Indian families to enroll their children in boarding schools. According to Child, “[t]he presence of so much disease on reservations widowed women and men before their time, and, ironically, many Indians began to use the boarding school as a refuge for their children during a family crisis.” Id. at 15.
334. See Reynolds, supra note 106, at 174–77; McGregor, supra note 288.
335. Several delegates were concerned that the proposed prohibitions on “cultural” genocide would interfere with their right to assimilate disparate populations. For instance, “[t]he Egyptian delegation
However, because the Genocide Convention contains no assimilation exception, and because the debates do not indicate a clear intention by the delegates to excuse all assimilative actions, there seems to be little to ground this argument.

Henry Reynolds attempts to carve out an assimilation exemption by referring to Lemkin’s commentary to the Secretariat’s Draft. According to Reynolds, “Lemkin, who was so committed to seeing cultural genocide included in the Convention, did not regard assimilation as a major problem.” However, the passage that Reynolds cites actually reads:

Professor Lemkin pointed out that cultural genocide was much more than just a policy of forced assimilation by moderate coercion – involving for example, prohibition of the opening of schools for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on. It was a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.

From this passage we see that, to Lemkin, “forced assimilation by moderate coercion” involved prohibiting groups from: 1) opening schools to educate their young in the group language, 2) publishing newspapers in the group language, or 3) using the group’s language in official documents. To Lemkin, these measures were less serious than cultural genocide, to which he was fervently opposed. It seems unlikely that Lemkin, had he known of it,
would have “accepted as appropriate” Australia’s assimilative policies, especially when those policies involved forcibly and permanently stripping Aboriginal groups of their children.\textsuperscript{339}

Assimilation encompasses a broad spectrum of actions, from mildly coercive requirements that minority communities send their children to state day schools for instruction in the state language, to forced religious conversions, with death and dispossession serving as the penalties for non-compliance. Assimilation programs relying only on moderate coercion were apparently acceptable and would not implicate the proposed cultural genocide provision. In its more severe forms, however, assimilation might constitute a form of outright genocide.

Although Reynolds finds it significant that “no-one condemned assimilationist policies or argued that they had genocidal implications,” the delegates were probably far from united on this matter.\textsuperscript{340} For instance, Sandr Bahadur Kahn of Pakistan said his delegation:

\begin{quote}
[U]nderstood perfectly that new countries desired to assimilate immigrants in order to create a powerful national unit; nevertheless if assimilation was nothing but a euphemism concealing measures of coercion designed to eliminate certain forms of culture, Pakistan formally opposed fascist methods of that kind, which emanated from philosophies that should be repudiated as contrary to the spirit and the aims of the Charter of the United Nations.\textsuperscript{341}
\end{quote}

While Reynolds reads the general lack of attention paid to assimilation as condoning this practice,\textsuperscript{342} it seems just as likely that the delegates simply saw the issue as too contentious and avoided it. Had there been unity on assimilation, the Genocide Convention might have excused forcible child transfer as a necessary task.” Schaller goes on to state, “[t]he way Lemkin has perceived Africans can only be described as racist.” \textsuperscript{359} See John Dock, Raphael Lemkin’s History of Genocide and Colonialisation, United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies (Feb. 26, 2004), http://www.ushmm.org/conscience/analysis/details/2004-02-26/dock.pdf. Reviewing Lemkin’s unpublished writings, he suggests that Lemkin, like many of the educated of his time, had complex and often contradictory views on colonialism and assimilation. Still, he had always been against forcible child transfers, regarding them as a primary form of “biological” genocide. \textsuperscript{359}
transfers and other otherwise genocidal measures when conducted as part of a larger assimilation scheme—but it did not.

As established above, interpretation of the Genocide Convention is governed by the Vienna Convention, which requires treaties to "be interpreted in good faith in accordance with [their] ordinary meaning" unless that meaning is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." In this instance, it is difficult to argue that the Genocide Convention's terms are obscure, absurd, or unreasonable; it simply contains no assimilation exception. Therefore, adherence to the Vienna Convention should preclude recourse to the preparatory materials. There is, after all, no assimilation clause to clarify. Yet even if we do turn to the preparatory materials, as Reynolds does, it is difficult to find a clear intent by the framers to excuse proscribed acts committed as part of larger assimilation schemes.

Far from excusing genocide, evidence that prohibited acts were conducted during a program of forced assimilation may actually help prove culpable intent. Forced assimilation centers on hostility to the targeted group's continued existence as a "separate and distinct entity." It seeks to eliminate the group’s distinctive characteristics as the group is absorbed into another group. In this sense, forced assimilation is akin to "attacks on the cultural and religious property and symbols of the targeted groups," and when carried out in tandem with an act prohibited under the Genocide Convention, can prove the existence of intent to destroy the group.

Echoing Pratt’s comments from a century earlier, Sir Paul Hasluck, the intellectual force behind Australia's post-war assimilation policies, told the Native Welfare Council in 1963 that Aboriginal “tribal culture will be destroyed. We do not want to destroy it precipitately but if they are to become fully civilised, fully assimilated people they will no longer be living a tribal life, they will be living like other Australians.” According to Anna Haebich, this “reflected Hasluck’s ‘liberalism of inclusion’, grounded in a concept of nationhood which viewed racial or culturally distinct entities within the nation to be dangerous . . . .” Further, according to Haebich, the removal of Aboriginal children appears to have increased with the shift to policies of assimilation. Therefore, not only would Hasluck’s vision not excuse these removals, but applying the emerging international standard...
from the ICJ and the ICTY, his assimilationist vision might also serve as evidence of intent to destroy the group.

In sum, although acts of “forced assimilation by moderate coercion” may not amount to genocide, acts specifically proscribed in Article 2 of the Genocide Convention certainly do, and this remains true whether or not the perpetrators justify these acts with assimilationist rhetoric. In fact, the rhetoric of assimilation may actually prove genocidal intent.

VI. Conclusion

Article 2(e) “makes sense” in the context of an international treaty intended to protect the viability of human groups. The Genocide Convention does not protect human groups as loose amalgamations of individuals who happen to bear similar traits; it protects the group itself. Group protection, in turn, requires strict protections against acts that undermine group viability by disrupting the internal processes that are vital to the group’s continued existence as a “separate and distinct entity.” Childrearing is the quintessential process that racial, ethnic, religious, or national groups perform as these groups perpetuate themselves primarily through childrearing. Any instrument protecting these human groups should recognize the central role of children.

The earliest draft of the Genocide Convention contained a provision that would have created a genocide tort and would have assessed “redress of a nature and in an amount to be determined by the United Nations.” Although this provision was not included in the final draft, victim groups with cognizable claims ought to be able to seek compensation through national courts for the wrongs committed against them. Where the law comes up short, leaving victim groups without legal recourse, it is hoped that they can use this analysis in establishing a “moral” claim to recognition.


351. Secretariat’s Draft, supra note 23, art. XIII; see also Drost, supra note 75, at 16–18; Schabas, Genocide, supra note 75, at 54. According to Schabas, despite this rejection, the delegates demonstrated “widespread support for State civil liability” for acts of genocide. Id. at 420–21.


[The] obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principal right these victims are entitled to under international law is the right to effective remedies and just reparations.

van Boven further states: “Under international law, a State that has violated a legal obligation is required to . . . make reparation, including in appropriate circumstances restitution or compensation for loss or injury.” Id. ¶ 46.
and recompense.\textsuperscript{353} Such claims are typically lodged in the press and in the legislature rather than in the courts. As the recent dustup over the Armenian genocide resolution in the U.S. House of Representatives illustrates,\textsuperscript{354} they do resonate with victimized groups and can bring valuable attention to past injustices.

Taken together, the preparatory materials, the genocide case law, and the Genocide Convention itself clearly establish the group as one of two possible victims of genocide. Therefore, although the Genocide Convention has yet to be explicitly interpreted in this manner, the victimized group, and not merely its constituent members, should be regarded as a primary rights holder and should have standing to sue on the grounds of genocidal acts. In addition, because genocidal acts affect the group's long-term viability,\textsuperscript{355} the group should have standing to seek redress after the directly affected individual members of the group have passed away.\textsuperscript{356}

Determining a prima facie violation of Article 2(e) requires a three-step inquiry. First, the fact finder inquires whether children of a protected group were indeed transferred to another group. Next, the fact finder determines whether the transfers were conducted forcibly. Finally, the fact finder determines whether the transfers were conducted with intent to destroy the group as such, at least in part. As we have seen, claims that the transfers were intended to benefit affected children are largely irrelevant. Claims that most forcible child transfer programs cannot amount to genocide because the transferred children were often subjected to processes intended to strip them of their group's culture also do not hold water. Forcible child transfer is a form of physical and biological genocide that, while it may operate through cultural processes, is specifically forbidden under the Genocide Convention.

\textsuperscript{353} By "moral claims," I mean claims directly to our sense of morality or ethics, rather than expressly legal claims. Of course, the line between these divisions is indistinct as our sense of the moral may shape our expectations of legal entitlements and vice versa. On the costs and benefits of the many forms of justice seeking redress following mass atrocity, see Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence (1998).


\textsuperscript{355} See e.g., Bringing Them Home, supra note 5, at 202–21 (discussing the Australian program's group harm).

\textsuperscript{356} The recognition accorded to group rights and group standing should help victim groups escape the hurdle presented by traditional standing doctrine. See In re African-Am. Slave Descendants Litig., 471 F.3d 754, 759 (7th Cir. 2006) (The court denied standing to descendants of American slaves because "there is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants."). To achieve standing under the Genocide Convention, the aggrieved group, rather than an individual, would need to show harm. There should also be no time limitation on genocide claims. See United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; van Boven, supra note 352, ¶ 135. It is also worth noting that in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34, 49–50 (1989), the United States Supreme Court recognized that group rights can be statutorily created, that such rights exist independent of the rights of individual group members, and that "massive" removal of a group's children can harm the group and trigger rights protections.
Even the strongest reading of the Genocide Convention permits states tremendous latitude in their dealings with minority group children. States can continue to remove minority group children for reasons specific to their situation, including allegations of mistreatment, with no apparent danger of violating the Genocide Convention. States can compel education in the dominant culture and language, so long as this education is delivered in day schools and does not transfer custody of the children outside of the group. States can also compel boarding school attendance, so long as the education provided is sensitive to the children’s culture and is not intended to threaten the group’s existence. In short, all that the Genocide Convention seems to say is that if a state is interested in removing children from a protected group, it must do so in a manner that is not intended to destroy the children’s group—hardly an unworkable constraint for states and others hoping to help minority group children. That states have so frequently stumbled over the low obstacle this provision establishes speaks volumes and is deserving of rich and critical inquiry.