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# Searching for Justice for Australia's Stolen Generations

Keila Mayberry\*

## Abstract

*Until the early 1970s, Australian federal and state government agencies forcibly removed tens of thousands of Aboriginal and Torres Strait Islander children from their families and placed them up for adoption or in group homes and church missions. These children are known as the "Stolen Generations." Domestic remedies have proven insufficient in securing justice for the Stolen Generations and international adjudication may be a viable alternative. This Comment examines whether Australia may be haled before the International Court of Justice (ICJ) for violations of the Genocide Convention for its Stolen Generations policies. Australia's policies likely constituted a violation of Article II(e) of the Genocide Convention, which prohibits the forcible transfer of children from one group to another with the intent of destroying the original group. The ICJ would likely have jurisdiction to hear this claim but would likely rule against the claimant were the Court to apply its reasoning from prior genocide cases. This is because the ICJ's genocide jurisprudence is fundamentally flawed. By setting an unreasonably high bar for proving and inferring genocidal intent in state responsibility claims, the Court has essentially foreclosed Article II(e) claims from adjudication, in contravention of the Convention's object and purpose. This Comment argues that a claim brought on behalf of the Stolen Generations at the ICJ could correct the Court's jurisprudential errors in its application of the Genocide Convention and enable the Stolen Generations to achieve justice.*

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## I. INTRODUCTION

From the 1890s to the 1970s,<sup>1</sup> Australian state and federal government agencies forcibly and systematically removed tens of thousands of Aboriginal and Torres Strait Islander children from their families.<sup>2</sup> Agencies placed these children up for adoption or put them in group homes and church missions.<sup>3</sup> These children are known as the “Stolen Generations.”<sup>4</sup>

The forced removal left behind a legacy of trauma that continues today.<sup>5</sup> One member of the Stolen Generations, in response to a national inquiry, wrote:

We may go home, but we cannot relive our childhoods. We may reunite with our mothers, fathers, sisters, brothers, aunties, uncles, communities, but we cannot relive the 20, 30, 40 years that we spent without their love and care, and they cannot undo the grief and mourning they felt when we were separated from them. We can go home to ourselves as Aboriginals, but this does not erase the attacks inflicted on our hearts, minds, bodies and souls, by caretakers who thought their mission was to eliminate us as Aboriginals.<sup>6</sup>

Family ties were often severed in the process. Many, if not most, of the since-grown children never came to know their birth parents or siblings.<sup>7</sup> The policies severely disrupted the transmission of First Nations<sup>8</sup> culture, leaving the Stolen Generations “completely disconnected from the communities in which they were born, undermining their sense of cultural identity.”<sup>9</sup>

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<sup>1</sup> Jens Korff, *A Guide to Australia's Stolen Generations*, CREATIVE SPIRITS (Nov. 21, 2020), <https://perma.cc/T8AR-9FWX>.

<sup>2</sup> Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 215 (2003); *The Stolen Generations*, COMMON GROUND, <https://perma.cc/4S99-MI7K>.

<sup>3</sup> Starr & Brilmayer, *supra* note 2, at 234.

<sup>4</sup> *Id.* See also Korff, *supra* note 1.

<sup>5</sup> See *The Stolen Generations*, AUSTRALIANS TOGETHER, <https://australiantogether.org.au/discover/australian-history/stolen-generations> (last visited Oct. 21, 2021).

<sup>6</sup> HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES 11 (1997) [hereinafter BRINGING THEM HOME REPORT].

<sup>7</sup> Starr & Brilmayer, *supra* note 2, at 234.

<sup>8</sup> “First Nations” refers to Aboriginal and Torres Strait Islander peoples, and many Aboriginal and Torres Strait Islander peoples today prefer the use of this term. See Jeff Korff, *What is the Correct Term for Aboriginal People*, CREATIVE SPIRITS, <https://perma.cc/U8A8-8SA5>; *Aboriginal and Torres Strait Islander Peoples, Style Manual*, AUSTRALIAN GOV'T, <https://www.stylemanual.gov.au/accessible-and-inclusive-content/inclusive-language/aboriginal-and-torres-strait-islander-peoples> (last visited Dec. 20, 2021). However, preferred and acceptable terminology may be in flux. See generally *Researcher's Note, Australian Aboriginal peoples*, BRITANNICA, <https://perma.cc/9JAN-V2MM>.

<sup>9</sup> *Id.* at 234–35.

The removal policies are almost ubiquitously considered part of a shameful chapter in Australian history.<sup>10</sup> A longstanding debate continues on whether, and to what extent, government actions enforcing these policies amounted to genocide.<sup>11</sup> First Nations Australians who were forcibly removed or had family members forcibly removed continue to file cases in domestic courts with lackluster success. Public apologies and reparations schemes have been incomplete and slow-going.

Although Australia's forced removal policies were "particularly egregious, [they were] not unique in kind."<sup>12</sup> The U.S. and Canada, for example, had similar policies. The U.S. Civilization Fund Act of 1819 allowed Native American children to be forcibly placed in boarding schools.<sup>13</sup> The purported goal of the Act was to infuse America's Indigenous population with "good moral character" and vocational skills.<sup>14</sup> One notable general, however, said the policy was actually intended to "kill the Indian" and "save the man."<sup>15</sup> Children were "virtually imprisoned in the schools" and experienced a "devastating litany of abuses, from forced assimilation and grueling labor to widespread sexual and physical abuse."<sup>16</sup> Some have suggested that the removals qualified as genocide.<sup>17</sup> Congress only outlawed the forced removal of Native American children in the late 1970s.<sup>18</sup>

In Canada, thousands of First Nations children were taken from their homes, placed in foster homes, and eventually adopted by white families in accordance with a series of provincial child welfare policies known as "the Sixties

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<sup>10</sup> See, e.g., JOHN STAPLETON, CHAOS AT THE CROSSROADS (2010) ("[the forced removal] policy [is] now almost universally condemned as one of the darkest stains on the nation's history, racist and inhumane"); Frances Mao, *Australia's Apology to Stolen Generations: 'It Gave Me Peace'*, BBC NEWS (Feb. 13, 2018), <https://perma.cc/7Q36-W2US> (describing the policies as "a shameful national chapter").

<sup>11</sup> See Rosemary Sorensen & Ashleigh Wilson, *Stolen Generations Listed as Genocide*, AUSTRALIAN (March 24, 2008), <https://perma.cc/LB59-MR28>.

<sup>12</sup> Starr & Brilmayer, *supra* note 2, at 236.

<sup>13</sup> See Alia Wong, *The Schools That Tried—But Failed—to Make Native Americans Obsolete*, ATLANTIC (Mar. 5, 2019), <https://perma.cc/G92K-XQ4L>.

<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

<sup>16</sup> Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, AMNESTY INT'L MAG. (2007), <https://perma.cc/QX49-5XN6>.

<sup>17</sup> See, e.g., Angelique Townsend EagleWoman, a professor of law at the University of Idaho, who suggested that the U.S. government's forcible removal of Native American children from their tribal communities, cultures, and nationalities amounted to genocide. Angelique Townsend EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the UN Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L.J. 424, 445 (2015). See also Donald A. Grinde Jr., *Taking the Indian Out of the Indian: U.S. Policies of Ethnocide through Education*, 19 WICAZO SA REV. 2, 25 (2004).

<sup>18</sup> See Wong, *supra* note 13.

Scoop.”<sup>19</sup> The policies began in the mid-1950s and extended well into the 1980s.<sup>20</sup> In addition, from 1883 until 1998, Canada sent over 30% of Indigenous children to government-sponsored residential schools, where many were physically, culturally, and sexually abused.<sup>21</sup> Over 3,000 students died of mistreatment or neglect while attending these schools.<sup>22</sup> Justice Murray Sinclair, the eventual chair of the government-established Truth and Reconciliation Commission of Canada, wrote that the Indian Residential School policy was “an act of genocide under the U.N. Convention.”<sup>23</sup>

This Comment focuses on Australia’s Stolen Generations policies and argues that the policies give rise to a plausible claim of genocide under Article II(e) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).<sup>24</sup> Article II(e) states that forcible transfers of children from one group to another—if committed with the intent to, in whole or in part, destroy a national, ethnical, racial, or religious group—amount to genocide.<sup>25</sup> While haling Australia into the International Court of Justice (ICJ) would be theoretically possible, the ICJ would likely rule in Australia’s favor based on the Court’s reasoning in prior genocide cases. This Comment argues that the existing ICJ caselaw is flawed because the Court: 1) fails to adequately consider relevant differences between violations of state responsibility and crimes; and 2) imposes an unnecessarily burdensome standard of proof and test for inferring genocidal intent in state responsibility cases. As a result, the Court has effectively made Article II(e) claims impossible to win on the merits, in contravention of the object and purpose of the Genocide Convention.

This Comment proceeds in four parts. Section II provides a brief history of the Stolen Generations policies, relevant cases brought in Australian courts, and attempted non-judicial remedies. This Section also demonstrates that thus far, domestic attempts to address the injuries of the Stolen Generations have produced inadequate results. Section III discusses the ICJ’s jurisdiction to hear claims regarding Australia’s potential breaches of the Genocide Convention. Section IV summarizes Australia’s obligations under the Genocide Convention

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<sup>19</sup> Christopher Dart, *The Sixties Scoop Explained*, CBS DOCS POV, <https://www.cbc.ca/cbcdocspov/features/the-sixties-scoop-explained> (last visited Dec. 10, 2021).

<sup>20</sup> *See id.*

<sup>21</sup> Ian Austen, *Canada’s Forced Schooling of Aboriginal Children Was ‘Cultural Genocide,’ Report Finds*, N.Y. TIMES (June 2, 2015), <https://perma.cc/584S-M52J>.

<sup>22</sup> *Id.*

<sup>23</sup> David Macdonald, *Five Reasons the TRC Closes ‘Cultural Genocide,’* GLOBE & MAIL (July 6, 2015), <https://perma.cc/J2KZ-YVQL>.

<sup>24</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>25</sup> *Id.*

and the potential merits of the claims that could be brought on behalf of the Stolen Generations at the ICJ. Finally, by analyzing how the Stolen Generations claims would be resolved under the Court's existing standards for genocidal intent, Section V highlights deficiencies in, and recommends changes be made to, the ICJ's genocide jurisprudence.

## II. FACTUAL BACKGROUND

### A. Historical Overview of Stolen Generations Policies

British settlement of Australia dates back to 1788 and, as was typical of colonial histories, the mistreatment of Indigenous peoples began shortly thereafter.<sup>26</sup> A large number of Aboriginal and Torres Strait Islander peoples were killed by disease and conflict during the “pacification by force” period, which extended into the 1880s.<sup>27</sup> In Australia's southeast, the Aboriginal population declined so rapidly that it was commonly believed that they would soon die out.<sup>28</sup> Other First Nations Australians were driven to the bush or left in settlements on the fringes of cities and towns, compelled to join Australia's labor force.<sup>29</sup> In New South Wales in the 1790s and in Tasmania in the 1810s, private individuals began separating First Nations children from their families.<sup>30</sup>

Forced separation did not become a governmental process until the twentieth century, when “it was much more serious—on a much larger scale.”<sup>31</sup> “Governments had assumed that Aborigines were dying out—that evolution had dictated that they would eventually disappear,” said Australian historian Henry Reynolds.<sup>32</sup> “The number of what they called ‘full-blooded Aborigines’ was declining. It appeared to be proving their scientific theories.”<sup>33</sup> Eugenics had gained popularity in the country around this period.<sup>34</sup> Its basic premise was that “through breeding” and removing “bad characteristics,” the “race of the nation” would be “improve[d].”<sup>35</sup> In Australia, eugenics often took the form of trying to “breed out the color.”<sup>36</sup> Those First Nations peoples with at least some European

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<sup>26</sup> See Robert Tonkinson, *The Europeans, Australian Aboriginal Peoples*, BRITANNICA, <https://perma.cc/2L3A-3MG9>.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See* STOLEN GENERATIONS at 01:02–01:12 (Ronin Films 2000), <https://perma.cc/9MR4-XTR8>.

<sup>31</sup> *Id.* at 01:21–01:29.

<sup>32</sup> *Id.* at 01:32–01:40.

<sup>33</sup> *Id.* at 01:40–01:49.

<sup>34</sup> *See id.* at 05:15–05:22.

<sup>35</sup> *Id.* at 05:21–05:29.

<sup>36</sup> *Id.* at 05:37–05:42.

“blood” were seen as having value to non-Indigenous society, particularly as a cheap labor source.<sup>37</sup> If children of mixed descent could be removed from their families and communities and sent to white communities, it was thought that over time the mixed-descent population would “merge” with the non-Indigenous population.<sup>38</sup>

Eugenics took hold in high levels of Australian political society. In 1937, A. O. Neville, Western Australia’s Chief Protector of Aborigines,<sup>39</sup> believed “the pure black” would be extinct within the century but that the “half-caste problem”—referencing those with mixed Indigenous and European heritage—was only increasing year over year.<sup>40</sup> Neville reportedly viewed “[t]he pure blooded Aboriginal [as] not a quick breeder, . . . [but the] half-caste was.”<sup>41</sup> Neville’s solution, according to Brisbane’s *Telegraph* newspaper, was to segregate “pure blacks,” who were beyond saving, and “absorb the half-castes,” who could shed their Aboriginal identity and be accepted into white society.<sup>42</sup> In 1933, Dr. Cecil Cook, the Chief Protector of Aborigines for the Northern Territory,<sup>43</sup> said:

Generally, by the fifth and invariably by the sixth generation, all native characteristics of the Australian aborigine are eradicated. The problem of our half-castes will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white . . . . The

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<sup>37</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 24.

<sup>38</sup> *Id.*

<sup>39</sup> The Chief Protector of Aborigines—an official position that existed in Western Australia from 1898 until 1936—served as the legal guardian of every Aboriginal child under the age of sixteen in the state. *Chief Protector of Aborigines (1898 – 1936)*, FIND & CONNECT RES. PROJECT COMMONWEALTH AUSTL. (Jan. 8, 2019), <https://perma.cc/6MTK-3RW2>. The Chief Protector had the power to remove Aboriginal children from their homes to place them in group homes or in “service” (work). *Id.* The role became the Commissioner for Native Affairs in 1936, and then Commissioner of Native Welfare in 1954, before being abolished in 1972. *Commissioner of Native Welfare (1954 – 1972)*, FIND & CONNECT RES. PROJECT COMMONWEALTH AUSTL. (Jan. 21, 2019), <https://perma.cc/H9Z8-QQBJ>. Neville served as the state’s Chief Protector and then Commissioner for Native Affairs for thirty-five years, from 1915 to 1940. *Auber O. Neville*, EUGENICS ARCHIVE, <https://perma.cc/K2M9-9PPD>.

<sup>40</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 24.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The Chief Protector of Aborigines was an official position in the Northern Territory from 1911 to 1939, before being replaced by the Director of Native Affairs in 1939 and then the Director of Welfare in 1953. *Chief Protector of Aborigines, Northern Territory (1911 – 1939)*, FIND & CONNECT RES. PROJECT COMMONWEALTH AUSTL. (May 9, 2014), <https://perma.cc/P58G-HNRR>; *Director of Welfare (1953 – 1970)*, FIND & CONNECT RES. PROJECT COMMONWEALTH AUSTL. (Oct. 11, 2017), <https://perma.cc/3NNG-QA4Q>. The Protector was the legal guardian of every Aboriginal child in the State. *Chief Protector of Aborigines, Northern Territory (1911 – 1939)*, FIND & CONNECT RES. PROJECT COMMONWEALTH AUSTL. (May 9, 2014), <https://perma.cc/P58G-HNRR>. Dr. Cecil Cook served as the Chief Protector for twelve years, from 1927 to 1939. Tony Austin, *Cecil Cook, Scientific Thought and ‘Half-Castes’ in the Northern Territory 1927-1939*, in 14 ABORIGINAL HISTORY 1 (1990).

Australian native is the most easily assimilated race on earth, physically and mentally.<sup>44</sup>

By 1911, almost all Australian states had protectionist legislation that granted the state's Chief Protector or Aboriginal Protection Board extensive powers to control First Nations peoples.<sup>45</sup> Some states—including Western Australia and the Northern Territory—granted the Chief Protector legal guardianship over all Aboriginal children, displacing the rights of parents.<sup>46</sup> Other states, such as New South Wales, allowed First Nations children to be removed from their homes without the state proving what was typically required under general welfare legislation: the child's "neglect," "destitut[ution]," or "uncontrollab[ility]."<sup>47</sup>

State governments strictly regulated First Nations marriage rights, employment decisions, and movements within and outside of reserves.<sup>48</sup> Government-appointed managers or missionaries ran reserves, and police officers enforced protectionist policies at the local level.<sup>49</sup> First Nations children were housed in dormitories, and their contact with their families was strictly limited as states attempted to distance children from their First Nations "lifestyles" and encourage them to convert to Christianity.<sup>50</sup> One Aboriginal woman, Sheila Humphries, told her story of being placed in a Catholic orphanage by her mother at age four.<sup>51</sup> Sheila's mother believed the orphanage would be the best place for Humphries and her six-year-old sister to be educated.<sup>52</sup> When Sheila was eight

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<sup>44</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 118. *See also Caught up in a Scientific Racism Designed to Breed out the Black*, SYDNEY MORNING HERALD (Feb. 14, 2008), <https://perma.cc/9LTY-7XSV>.

<sup>45</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 23. Tasmania, which did not have this specific kind of legislation, effectively segregated First Nations families from white society, having removed most First Nations families to Cape Barren Island before the turn of the twentieth century. *Id.* First Nations families living on the Island were left relatively undisturbed until the 1930s, when the state began using general child welfare legislation to remove First Nations children from the islands and send them to non-Indigenous institutions and foster families. *Id.* at 26. Until the 1960s, the Tasmanian government denied even having an Aboriginal population, claiming to have only had some "half-caste people." *Id.* at 23.

<sup>46</sup> *See Starr & Brilmayer, supra* note 2, at 235. BRINGING THEM HOME REPORT, *supra* note 6, at 23.

<sup>47</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 27. Some states—like Victoria—changed the definition of "Aboriginal." By increasing the threshold proportion of First Nations "blood" for someone to qualify as Aboriginal, Aboriginals with sufficiently European heritage were excluded from the right to live on reservations. As a result, a number of mixed-race children were cut off from their communities. *Id.* at 25.

<sup>48</sup> *See id.* at 23.

<sup>49</sup> *See id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See* Sheila Humphries, *My Stolen Childhood, and a Life to Rebuild*, TEDx PERTH (Nov. 2017), <https://perma.cc/9DN6-SNMZ>; Lucy Jarvis, *Nyoongar Artist Sheila Humphries Shares Stories of the Stolen Generations with Mindarie Students*, N. COAST TIMES (Aug. 17, 2016), <https://perma.cc/E4XM-SSYR>.

<sup>52</sup> *See* Humphries, *supra* note 51.

years old, her mother, no longer believing the education to be adequate, attempted to pull Sheila and her sister out of the orphanage.<sup>53</sup> The moment Sheila and her sister left the orphanage, the Western Australian police issued a state alert calling for their arrest.<sup>54</sup> Sheila and her sister were eventually seized by the police and taken back to the orphanage.<sup>55</sup> Sheila, like many First Nations children during this period, never saw her mother again.<sup>56</sup>

Assimilation went from being an ad hoc state-by-state policy to an official national policy during the first Commonwealth-State Native Welfare Conference in 1937.<sup>57</sup> The Conference concluded that the “destiny of the natives of aboriginal origin, but not of the full blood, lies in ultimate absorption . . . with a view to their taking their place in the white community on an equal footing with the whites.”<sup>58</sup> Where “merging” was essentially a passive process of nudging Aboriginal and Torres Strait Islander peoples towards integration and denying their communities government assistance communities, assimilation<sup>59</sup> was a “highly intensive process necessitating constant surveillance” until First Nations peoples could be ensured to be sufficiently European.<sup>60</sup>

At the third Native Welfare Conference in September of 1951, Paul Hasluck, the newly appointed federal Minister for Territories, acknowledged that Australia’s treatment of First Nations peoples was making a mockery of Australia’s promotion of human rights at the international level.<sup>61</sup> Australian states agreed to take a more unified approach to their welfare policies.<sup>62</sup> In a seemingly revisionist manner, they agreed that the goal of “native welfare measures” was assimilation: “[a]ssimilation means, in practical terms, that, in the course of time, it is expected

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<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See BRINGING THEM HOME REPORT, *supra* note 6, at 26 (the conference resolved that “efforts of all State authorities should be directed towards the education of children of mixed aboriginal blood at white standards, and their subsequent employment under the same conditions as whites with a view to their taking their place in the white community on an equal footing with the whites”).

<sup>58</sup> *Id.* Neville’s model of “absorption” referred to biological integration of Aboriginal and Torres Strait Islander Australians into white Australian society. *Id.* at 27.

<sup>59</sup> Assimilation refers to a social-cultural model of integrating First Nations peoples into white society. *Id.* at 27.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 28.

<sup>62</sup> See Verbatim Record of Proceedings, Native Welfare Conference, 177 (Jan. 26–27, 1961) (Austl.), [https://aiatsis.gov.au/sites/default/files/catalogue\\_resources/20782.pdf](https://aiatsis.gov.au/sites/default/files/catalogue_resources/20782.pdf) (the conference concluded the need for the adoption of national policies and closer cooperation among Australian Governments in all aspects of native welfare).

that all persons of aboriginal blood or mixed blood in Australia will live like other white Australians do.”<sup>63</sup>

Other states adopted New South Wales’s 1940s approach to Indigenous welfare: instead of removing Aboriginal and Torres Strait Islander children without cause, children were to be removed according to general child welfare laws, which required a court’s determination of neglect, destitution, or uncontrollability of the child.<sup>64</sup> In practice, “[s]tate government child welfare practice[s] [were] marked more by continuity than change.”<sup>65</sup> Perhaps counterintuitively, even *more* Aboriginal and Torres Strait Islander children were removed from their families under the guise of assimilation in the 1950s and 1960s than were removed in prior decades.<sup>66</sup> So many children were removed from their homes that institutions housing First Nations children could not keep up with the influx.<sup>67</sup> As a result, these children were increasingly placed with non-Indigenous foster families, where their identities were further denied or disparaged.<sup>68</sup>

By the 1960s, assimilation was clearly not occurring, in spite of government efforts to encourage it.<sup>69</sup> Discrimination by non-Indigenous individuals and the resilience of First Nations peoples in maintaining their cultures thwarted efforts at assimilation and cultural erasure.<sup>70</sup> The political landscape had also changed.<sup>71</sup> In 1967, the Constitution was amended to include Aboriginal and Torres Strait Islander peoples in the census for the first time and grant the Commonwealth joint control with states over Aboriginal affairs.<sup>72</sup> The Commonwealth increased funding for First Nations welfare programs and established a national Office of Aboriginal Affairs.<sup>73</sup> With greater access to funding and the support of legal

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<sup>63</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 28.

<sup>64</sup> *See id.* at 27.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 28.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.* at 29.

<sup>71</sup> *See, e.g.*, Commonwealth, Native Welfare Conference, House of Representatives, 20 April 1961 (George Nelson, Representative for the Northern Territory) (Austl.), <https://perma.cc/EK6R-WEDT> (“[I]he eyes of the world are shifting from the South African episode [which was in the midst of Apartheid] to our own country and its policies. In particular, we want to see, at this stage, something concrete emerging from conferences of this nature, so that we can reassure not only our own people in Australia but also the rest of the world, that we are in earnest when we say we are doing our utmost as a nation to assist our native people.”).

<sup>72</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 29; The 1967 Referendum, Australians Together (Nov. 17, 2020), <https://australiantogether.org.au/discover/australian-history/1967-referendum/> (last visited Dec. 20, 2021).

<sup>73</sup> *See* BRINGING THEM HOME REPORT, *supra* note 6, at 29.

services, First Nations communities began to challenge removal orders, which restricted the number of forced removals that otherwise would have been able to take place.<sup>74</sup> By 1969, all states had repealed their statutes that allowed for the permissive removal<sup>75</sup> of First Nations children from their homes.

Between one-tenth and one-third of First Nations children are estimated to have been forcibly removed from their families and their communities from 1910 to 1970.<sup>76</sup> The effects of removal have been devastating. A study conducted in Melbourne during the 1980s found that those removed were much less likely than First Nations children who were raised by their families or communities to have stable living conditions, were three times as likely to say that they had no one to call in a crisis and were twice as likely to report current use of illicit substances.<sup>77</sup> They also were “less likely to have a strong sense of their Aboriginal cultural identity, were more likely to have discovered their Aboriginality later in life[,] and [were] less likely to [have] know[n] [ ] their Aboriginal cultural traditions.”<sup>78</sup>

A national study conducted by the Australian Bureau of Statistics in 1994 found that First Nations peoples who had been separated as children, compared with those who had not, were significantly more likely to have been arrested and to report having worse health outcomes.<sup>79</sup> The study suggested that institutionalization had measurable damaging effects on the emotional development and sense of self-worth of those who had been separated.<sup>80</sup>

In 1997, the Australian Human Rights Commission, an independent body established by the Australian Government, delivered the landmark *Bringing Them Home Report*.<sup>81</sup> The report was the result of a national inquiry into the Stolen Generations policies and was a “significant milestone” in recording the testimonies of members of Stolen Generations.<sup>82</sup> The report notably concluded that:

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<sup>74</sup> *See id.*

<sup>75</sup> That is, administrative removal pursuant to broad grants of discretion, see *id.* at 226 (listing statutory sources granting agents fiduciary obligations that allowed them to remove children for, among other things, their “moral, intellectual, and physical welfare,” and “care, custody, and education”), and sometimes not even subject to prior judicial scrutiny, see *id.* at 220–21.

<sup>76</sup> The number of Indigenous children who were forcibly removed is difficult to estimate with precision. Records have been lost or destroyed, and many surviving records fail to document the Aboriginality of the removed children. *Id.* at 30–31.

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 12–14.

<sup>80</sup> *See id.*

<sup>81</sup> *See generally* BRINGING THEM HOME REPORT, *supra* note 6. *See also* ABOUT, AUSTRALIAN HUM. RTS. COMM’N, <https://humanrights.gov.au/about> (last visited Dec. 14, 2021).

<sup>82</sup> ABORIGINAL AND TORRES STRAIT ISLANDER HEALING FOUNDATION, BRINGING THEM HOME 20 YEARS ON: AN ACTION PLAN FOR HEALING 4, 6 (2017).

The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.<sup>83</sup>

The finding of genocide has attracted particular controversy and will be further examined in Section IV.B.

## B. Disappointing Results of Stolen Generations Claims in Australian Courts

Australia's highest court, the High Court of Australia, deliberated on a genocide claim in *Kruger v Commonwealth*.<sup>84</sup> The 1997 case was the first brought by members of the Stolen Generations in Australian courts.<sup>85</sup> *Kruger* concerned a constitutional challenge to the Northern Territory's Aboriginals Ordinance of 1918.<sup>86</sup> The ordinance allowed the Northern Territory's Chief Protector to forcibly remove "Aboriginal or half-caste" children from their families and place them in Aboriginal institutions and reserves.<sup>87</sup> Child removals pursuant to the Aboriginals Ordinance of 1918 occurred between 1925 and 1949, with the last Aboriginal detention ending in 1960.<sup>88</sup> The plaintiffs, who were children or the parents of children removed from their homes, challenged the ordinance's constitutional validity on various grounds, including the implied constitutional right to be free from genocide.<sup>89</sup>

The High Court rejected the claims on all grounds.<sup>90</sup> On the right to be free from genocide, only three of the six judges addressed the existence of such a right, with one judge finding that the right existed and the other two reaching the opposite conclusion.<sup>91</sup> But all judges, relying on the definition of genocide provided by the Genocide Convention, held that the Ordinance did not authorize acts of genocide.<sup>92</sup> Specifically, the Court found that the powers bestowed by the

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<sup>83</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 231.

<sup>84</sup> (1997) 146 ALR 126 (Austl.).

<sup>85</sup> See Starr & Brilmayer, *supra* note 2, at 238.

<sup>86</sup> *Kruger*, 146 ALR at 133, 266.

<sup>87</sup> *Id.* at 133.

<sup>88</sup> *Id.* at 143.

<sup>89</sup> See *id.* at 172. See also Chris Cunneen & Julia Grix, *The Limitations of Litigation in Stolen Generations Cases*, 15 AUSTL. INST. ABORIGINAL & TORRES STRAIT ISLANDER STUD. RSCH. DISCUSSION PAPER 1, 7 (2004).

<sup>90</sup> See *Kruger*, 146 ALR at 245–46.

<sup>91</sup> Sarah Joseph, *Kruger v Commonwealth: Constitutional Rights and the Stolen Generations*, 24 MONASH U. L. REV. 487, 495–96 (1998).

<sup>92</sup> See Cunneen & Grix, *supra* note 89, at 12. The Genocide Convention will be discussed in depth in Section IV.

Ordinance were required to be exercised in the best interests of those concerned and the Aboriginal population more broadly.<sup>93</sup> Therefore, genocidal intent was not met.<sup>94</sup> The Court concluded that:

the measures contemplated by the legislation of which the plaintiffs complain would appear to have been ill-advised or mistaken, particularly by contemporary standards. However, a shift in view upon the justice or morality of those measures taken under an Ordinance which was repealed over 40 years ago does not itself point to the constitutional invalidity of that legislation.<sup>95</sup>

*Kruger* faced criticism. The policies at issue had continued well past World War II. Genocide, including forced child transfer, was contrary to international law even “according to the prevailing contemporary legal values of the time.”<sup>96</sup> Eugenic practices were especially rejected as legally valid after World War II, when the horrors justified by the theory were on full display.<sup>97</sup> Therefore, the Court’s finding that the Northern Territory’s government had acted with good intentions according to prevailing moral views at the time was arguably misguided—the policy was considered wrong, and could be considered illegal, even when it was enacted.<sup>98</sup> The Court privileged a history of justification, a defense of colonial history, over the history of harm experienced by First Nations Australians.<sup>99</sup>

Regarding the Court’s legal interpretation, some have criticized the High Court as misunderstanding the Genocide Convention’s group protections in this case:

[T]he Genocide Convention does not just protect individuals or the racial groups to which they belong; it protects groups “as separate and distinct entities.” . . . [G]roup 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.<sup>100</sup>

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<sup>93</sup> See *Kruger*, 146 ALR at 111.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* at 147.

<sup>96</sup> Cunneen & Grix, *supra* note 89, at 25. See, e.g., United States v. Greifelt (the RuSHA case), 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 674 (1950) (Military Tribunal, Nuremberg, Germany, Oct. 1946–Apr. 1949) [hereinafter *Greifelt*]; *In re Greiser*, 13 ANN. DIG. & REPORTS OF PUBLIC INT’L L. CASES 387, 389 (H. Lauterpacht ed., 1946) (decision of the Supreme National Tribunal, Posman, Poland) (first international convictions for genocide, including acts of forcible child transfer).

<sup>97</sup> Cf. Cunneen & Grix, *supra* note 89, at 25.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> Kurt Mundorff, *Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT’L L.J. 61, 118–19 (2009).

While *Kruger* was disappointing, its dampening effect on Stolen Generations litigation was limited: the case only decided the specific validity of the Ordinance and not the validity of similar governmental exercises of power in practice.<sup>101</sup>

In *Nulyarimma v Thompson*<sup>102</sup> in 1999, the Federal Court of Australia<sup>103</sup> held that “in the absence of appropriate legislation, [genocide is not] cognisable in an Australian court.”<sup>104</sup> The Federal Court, however, agreed that genocide gave rise to a “non-derogable obligation by each nation State to the entire international community.”<sup>105</sup> Furthermore, it concluded that Australia is bound under international law for the crime of genocide through its treaty obligations and responsibility not to commit *jus cogens* violations.<sup>106</sup>

With genocide being ruled incognizable in Australian courts, later claims have had to rely on state tort claims rather than on the Genocide Convention.<sup>107</sup> Courts continue to foreclose remedies for victims by failing to hold governments liable for Stolen Generations policies—the basic finding that these policies were enacted under good intentions remains undisturbed.<sup>108</sup> Moreover, actions in tort give rise to statute of limitations issues that compound the evidentiary, financial, and emotional barriers claimants face in bringing suits.<sup>109</sup>

*Cubillo v Commonwealth*<sup>110</sup> was the first civil damages suit brought on Stolen Generations claims.<sup>111</sup> Like *Kruger*, it was based on the 1918 Aboriginals Ordinance. Lorna Cubillo and Peter Gunner, the plaintiffs,

were removed as young children from their families and communities. They were taken hundreds of kilometers from the countries of their birth. They were prevented from returning. They were made to live among strangers, in a strange place, in institutions which bore no resemblance to a home. They lost, by the actions of the Commonwealth, the chance to grow among the

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<sup>101</sup> See Joseph, *supra* note 91, at 495.

<sup>102</sup> (1999) 165 ALR 621 (Austl.).

<sup>103</sup> The Federal Court is a superior court of record and sits below the High Court in the hierarchy of Australia’s federal courts.

<sup>104</sup> *Nulyarimma*, 165 ALR at 627.

<sup>105</sup> *Id.* at 627. See also *id.* at 655 (“[A]lthough the ratification of the treaty does not incorporate it into Australian domestic law as such, it is nevertheless confirmation of Australia’s recognition of the status of genocide as a universal crime under international law.”).

<sup>106</sup> See *id.* at 632, 655.

<sup>107</sup> See generally Cunneen & Grix, *supra* note 89, at 5.

<sup>108</sup> See Amelia E. Noble, *An Unnecessary Hindrance? A Critical Examination of the Appropriateness of Statutory Limitation Periods in Stolen Generations Compensation Claims*, 8 ANU UNDERGRADUATE RSCH. J. 105 (2016). Julie Cassidy, *Unhelpful and Inappropriate?: The Question of Genocide and the Stolen Generations*, 13 AUSTL. INDIGENOUS L. REV. 114, 119 (2009).

<sup>109</sup> See Maithri Panagoda, *The Stolen Generations: A Struggle for Justice*, MONDAQ (Feb. 9, 2017), <https://perma.cc/GJP2-U68L>.

<sup>110</sup> [No. 2] (2000) 174 ALR 97 (Austl.).

<sup>111</sup> See Starr & Brilmayer, *supra* note 2, at 239.

warmth of their own people, speaking their people's languages and learning about their country. They suffered lasting psychiatric injury. They were treated as orphans when they were not orphans. They lost the culture and traditions of their families.<sup>112</sup>

Cubillo and Gunner claimed that their removals amounted to wrongful imprisonments and deprivations of liberty.<sup>113</sup> They alleged that the statutory duties, duties of care, and fiduciary duties owed to them by the Commonwealth and the Northern Territory Director of Native Affairs had been breached.<sup>114</sup> The Federal Court did not sway from the Australian judiciary's original position, referring to the removals as serving a legitimate "welfare and protection" policy that, though "badly misguided," was "well-meaning."<sup>115</sup>

Even in *Trevorrow v South Australia*,<sup>116</sup> a 2007 case in which the state government was held vicariously liable in tort for the harm it had caused the plaintiff by its removal policy, South Australia's Supreme Court accepted the benevolent intent of the lawmakers.<sup>117</sup>

*Trevorrow* did not mark a new era in providing compensation for Stolen Generations plaintiffs. A few years later, in what was considered a "landmark Stolen Generations test case," the Collards, a Western Australian couple who had nine children removed from their care in the 1950s and 60s, lost their bid for compensation.<sup>118</sup> The Supreme Court of Western Australia held that the "evidence did not support the conclusion that when the Children were made wards, that that action was carried out in the pursuit of a policy of assimilation, of the kind

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<sup>112</sup> *Cubillo*, 174 ALR at 114.

<sup>113</sup> *See id.* at 102.

<sup>114</sup> *See id.* at 101–02.

<sup>115</sup> *Id.* at 154, 484, 581. *See also Williams v Minister, Aboriginal Land Rights Act 1983* [1994] 35 NSWLR 497 (Austl.); *Claim of Valerie Linow* (Victims of Crime Compensation Tribunal, New South Wales, File Reference 73123, 15 February 2002) (Austl.).

<sup>116</sup> [No. 5] [2007] SASC 285 (Austl.). In this case, the plaintiff, Bruce Allan Trevorrow, was removed from his parents at one years old by the Aborigines Protection Board of South Australia (APB) and sent to live with a foster family until the age of ten. His biological mother repeatedly requested that the APB return her son. Eventually, the APB complied. The plaintiff remained with his family for the next fourteen months, before spending the remainder of his childhood in and out of State institutions to treat a range of emotional and physical problems associated with his separation. The removal of Trevorrow from his parents was held to have been *ultra vires*, and the State was held responsible vicariously for the misfeasance and wrongful imprisonment perpetrated by its agents, as well as directly for breaching its fiduciary duties and the standard of care owed to Trevorrow. *Id.*

<sup>117</sup> *See id.* ¶ 53; Randall Kune, *The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations*, 30 U. TASMANIA L. REV. 32, 43 (2011).

<sup>118</sup> *Landmark Stolen Generations Test Case Begins in Perth*, ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA. (Feb. 4, 2013), <https://perma.cc/VWY9-SAC3>. *Collard v State of Western Australia* [No. 4] [2013] WASC 455 (2013) (Austl.).

described by counsel for the plaintiffs.”<sup>119</sup> Instead, the removal decisions had been based on a finding of neglect in accordance with general child welfare legislation.<sup>120</sup>

Litigation efforts remain ongoing.<sup>121</sup> With limited success to date, and with the time horizon between the Stolen Generations policies and domestic adjudication only widening, First Nations Australians have effectively exhausted domestic judicial remedies.

### C. Late Public Apologies and Reparation Attempts

The *Bringing Them Home* report<sup>122</sup> recommended that Australian state parliaments officially acknowledge and apologize for the forcible removal policies and actions of their predecessors and make reparations to the Stolen Generations.<sup>123</sup>

Though states and territories swiftly issued formal apologies,<sup>124</sup> the national response was disheartening. Prime Minister John Howard, in his own words, “apologise[d] in a sense” by delivering a statement of regret to Parliament.<sup>125</sup> But Howard refused to accept the conclusion of the report that a genocide had occurred against Aboriginal and Torres Strait Islander peoples. “I didn’t believe genocide had taken place,” Howard said in 2014, adding, “I still don’t.”<sup>126</sup>

It wasn’t until 2008, twenty-one years after the release of the *Bringing Them Home* report, that the federal government issued a formal apology. Prime Minister Keven Rudd apologized for the “profound grief, suffering and loss” inflicted on Aboriginal and Torres Strait Islander peoples by the laws and policies of Australian governments, especially apologizing for the removal of children from

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<sup>119</sup> *Id.* at ¶ 14.

<sup>120</sup> *See id.* But see *supra* Section II.A, which discusses how Indigenous children were more permissively removed from their homes under general child welfare policies than non-Indigenous children.

<sup>121</sup> *See, e.g.*, Cameron Gooley, *Northern Territory Stolen Generations Compensation Calls Grow Ahead of Possible Class Action*, ABC NEWS (Oct. 6, 2020), <https://perma.cc/5WTJ-9YMS>.

<sup>122</sup> *See* discussion *supra* Section II.A.

<sup>123</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 246.

<sup>124</sup> *See Bringing Them Home: Apologies by State and Territory Parliaments 2008*, AUSTL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/bringing-them-home-apologies-state-and-territory-parliaments-2008> (last visited Mar. 16, 2021).

<sup>125</sup> Helen Davidson, *John Howard: There Was No Genocide Against Indigenous Australians*, GUARDIAN (Sept. 22, 2014), <https://perma.cc/FN48-CFAT> (“‘I did apologise in a sense; I delivered a statement of regret to the parliament,’ Howard said. ‘But it’s very easy to apologise for other people’s mistakes.’”).

<sup>126</sup> *Id.* *See also* Shuba Krishnan, *John Howard Has Criticized Kevin Rudd’s 2008 Apology to the Stolen Generations*, SBS NEWS (Jan. 1, 2022), <https://perma.cc/A9WM-FHEN> (“‘Former prime minister John Howard says the national apology to the Stolen Generations was ‘meaningless’ and he stands by his decision not to consider a treaty with Indigenous Australians’”).

their families.<sup>127</sup> He did not address the issue of genocide, or even “cultural genocide.”<sup>128</sup> The apology was an important step in national reconciliation, but the long delay between the end of forcible removals and meaningful government acknowledgement, as well as the lack of full acknowledgement of the genocidal nature of these policies, left much to be desired. Moreover, progress since this apology by way of concrete policy changes has been modest.<sup>129</sup>

For example, reparations have largely not been implemented, even though their distribution would indicate to many victims “a genuine commitment to addressing the harm propagated by the government, more so than the public apology.”<sup>130</sup> The federal government has largely deflected responsibility for compensation to churches and state government welfare agencies.<sup>131</sup> Some states—Tasmania, South Australia, New South Wales, and Victoria—have adopted some redress for members of the Stolen Generations.<sup>132</sup> However, these schemes have been slow to start and have generally made “patchy offerings.”<sup>133</sup> Victoria, which created its first compensation scheme in 2020, offered AUD \$10 million for the approximately 1,000 survivors in the state—about AUD \$10,000 per person;<sup>134</sup> this is deficiently low. For context, Bruce Trevorrow, the plaintiff in *Trevorrow*,<sup>135</sup> received an AUD \$525,000 compensation order for the harms the state had inflicted on him by his forced removal.<sup>136</sup>

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<sup>127</sup> *National Apology*, NAT'L MUSEUM AUSTL. (Mar. 13, 2020), <https://perma.cc/3MAC-UJYM>.

<sup>128</sup> *Id.* Cultural genocide refers to a long-term, intergenerational process of destroying a human group, mainly through assimilationist and “dispersionist” policies. ELISA NOVIC, *THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE* 5 (2016). Though originally conceived by Raphael Lemkin—who coined the term genocide—as being “centre stage” to the crime of genocide, cultural genocide—after significant debate—was excluded from the Genocide Convention. See Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29 EUR. J. INT'L L. 2, 373–74, 376, 389 (2018). As such, cultural genocide is not prohibited by the Genocide Convention and does not induce liability under the Convention's provisions.

<sup>129</sup> Cf. Daniella Stoltz & Beth Van Schaack, *It's Never Too Late to Say "I'm Sorry": Sovereign Apologies Over the Years*, JUST SEC. (Mar. 16, 2021), <https://perma.cc/6LMK-VFD8>; *National Stolen Generations Reparations Scheme Needed*, AUSTL. HUM. RTS. COMM'N (Nov. 21, 2017), <https://humanrights.gov.au/about/news/media-releases/national-stolen-generations-reparations-scheme-needed> (last visited Dec. 20, 2021).

<sup>130</sup> Stoltz & Van Schaack, *supra* note 129.

<sup>131</sup> See Calla Wahlquist, *'Unfinished Business' of Stolen Generations Puts More Children at Risk – Report*, GUARDIAN (May 22, 2017), <https://perma.cc/2JL7-QSS5>.

<sup>132</sup> See James Rischbieth, *Redress for Stolen-Generations Victims in the State of Victoria, Australia*, LEUVEN TRANSITIONAL JUST. BLOG (July 1, 2020), <https://perma.cc/X5TE-2T3Z>; Gooley, *supra* note 121.

<sup>133</sup> Calla Wahlquist, *Rudd's Apology, 10 Years On: the Elusive Hope of a 'Breakthrough Moment'*, GUARDIAN (Feb. 11, 2018), <http://perma.cc/5A5H-CXDV>.

<sup>134</sup> Rischbieth, *supra* note 132.

<sup>135</sup> See *supra* note 116 and accompanying text.

<sup>136</sup> Rischbieth, *supra* note 132.

Western Australia and Queensland provided general compensation funds for those subjected to child abuse while in state care, rather than the Stolen Generations specifically. In Western Australia, half the claimants for the scheme were members of the Stolen Generations.<sup>137</sup> Western Australia's scheme specifically was criticized as being "outrageously low" when it initially offered an AUD \$80,000 maximum per person.<sup>138</sup> The payout was then slashed to AUD \$45,000 per person in 2009 for budgetary reasons, "retraumatizing [ ] victims."<sup>139</sup>

The Northern Territory had no applicable compensatory system for members of the Stolen Generations until August 2021.<sup>140</sup> The scheme suffers the "same fatal flaw as similar schemes in other states in that not every eligible person will qualify"; most survivors, lacking state documentation of their custodial time, are estimated to be ineligible.<sup>141</sup> Additionally, it offers up to only AUD \$75,000 per person.<sup>142</sup>

The delay in declaratory and compensatory relief suggests the importance of turning to international fora for the full acknowledgement of the genocidal acts against the Stolen Generations. Moreover, turning to the international stage would draw attention to the need for the Australian government to financially compensate the still relatively recent, and still largely unremedied, harms of its forced removal policies.

### III. JURISDICTION OF AND RELIEF CLAIMED AT THE INTERNATIONAL COURT OF JUSTICE

The domestic legal framework for bringing forth genocide claims is limited, litigation results have been disappointing, and the non-judicial remedies have been delayed and deficient. The Stolen Generations and their families have exhausted avenues for domestic recourse<sup>143</sup> and have yet to receive justice. Given that there

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<sup>137</sup> Victoria Laurie, *Redress Payment Mistake Could Be Repeated, Stolen Generations Members Warn*, AUSTRALIAN (Dec. 20, 2017), <https://perma.cc/QZF6-DGP3>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Peter Read & Lizzie May, *The Government's Stolen Generations Redress Scheme is Piecemeal and Unrealistic*, CONVERSATION (Aug. 29, 2021), <https://perma.cc/4SML-MYG2>.

<sup>141</sup> *Id.*

<sup>142</sup> Cameron Gooley, *Territory Stolen Generations Survivors to Share \$380 Million Reparation Scheme*, SYDNEY MORNING HERALD (Aug. 5, 2021), <https://perma.cc/72L8-XFE2>.

<sup>143</sup> The general requirement that local remedies be exhausted before a complaint be brought forth for international adjudication is not legally relevant for Stolen Generations claims brought at the ICJ. The applicant bringing the claims would be a nation state, and state-to-state claims are accepted as being excluded from the exhaustion requirement, see Tamás Kende, *Distant Cousins: The Exhaustion of Local Remedies in Customary International Law and in the European Human Rights Contexts*, ELITE L.J. 127, 130 (2020), as they cannot meaningfully be pursued in domestic courts.

is a plausible claim of genocide, the Stolen Generations should attempt to secure redress at the International Court of Justice.

### A. The ICJ Has Jurisdiction to Hear Stolen Generations Claims

Australia has broadly accepted the jurisdiction of the ICJ. Article 36 of the Statute of the International Court of Justice provides that States Parties may declare that they recognize as “compulsory ipso facto and without special agreement” the jurisdiction of the Court in all disputes concerning “the interpretation of a treaty,” “any question of international law,” “the existence of any fact which, if established, would constitute a breach of an international obligation,” and “the nature or extent of the reparation to be made for the breach of an international obligation.”<sup>144</sup> Australia agreed to this provision without any reservations, understandings, or declarations (RUDs) from 1954 until 2002.<sup>145</sup> Before 1954, and even before the establishment of the ICJ in 1945, Australia recognized the compulsory jurisdiction of the Court and its predecessor, the Permanent Court of International Justice.<sup>146</sup> Since 2002, Australia has continued to recognize compulsory jurisdiction but has stipulated that countries bringing cases against Australia must demonstrate a commitment to the process of compulsory jurisdiction.<sup>147</sup> For an applicant state to demonstrate this commitment, Australia requires the applicant to have accepted compulsory jurisdiction for at least one year prior to the filing of the dispute’s application and to have done so in whole rather than for the purposes of a particular dispute.<sup>148</sup> The seventy-four countries accepting the Court’s compulsory jurisdiction would accordingly qualify to bring forth a claim against Australia.<sup>149</sup>

The Court specifically has jurisdiction to hear claims arising from Australia’s obligations under the Genocide Convention. The Genocide Convention was “intended to confirm obligations that already existed in customary international law”;<sup>150</sup> however, jurisdiction of the Court may only be “based on the consent of

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<sup>144</sup> Statute of the International Court of Justice art. 36, ¶ 2, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

<sup>145</sup> See generally *Australia’s Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice*, UNIV. OF MELB., <https://perma.cc/CRY9-C3JN>.

<sup>146</sup> *Id.*

<sup>147</sup> *Declarations Recognizing the Jurisdiction of the Court as Compulsory: Australia*, INT’L CT. OF JUST. (Mar. 21, 2002), <https://perma.cc/A2PZ-MBEA>.

<sup>148</sup> *See id.*

<sup>149</sup> *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT’L CT. OF JUST., <https://perma.cc/8NG2-YKZN>.

<sup>150</sup> *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. Rep. 3, ¶ 95 (Feb. 3) [hereinafter *Croatia-Serbia Genocide case*].

the parties.”<sup>151</sup> The ICJ can only hear genocide claims if the respondent state has provided for jurisdiction through Article IX of the Genocide Convention.<sup>152</sup> Australia ratified the Convention without any RUDs that would otherwise interfere with the ICJ’s ability to adjudicate a genocide dispute.<sup>153</sup> Australia was an early supporter of the Convention; it ratified the Genocide Convention on July 8, 1949,<sup>154</sup> and the Convention officially entered into force on January 12, 1951.<sup>155</sup> In sum, because Australia is bound to uphold the Genocide Convention, and Australia has consented to ICJ jurisdiction in general and for Convention claims specifically, the Court has the jurisdictional basis to hear claims against Australia arising under the Convention.

## B. An Applicant State Would Have Standing

The Stolen Generations would need an applicant state to sponsor their claims as only states may be parties in cases before the ICJ.<sup>156</sup> A state that meets Australia’s requirements for bringing suit against Australia—acceptance of compulsory jurisdiction for a sufficient amount of a time and in whole<sup>157</sup>—would have standing to bring a claim on behalf of the Stolen Generations.

States parties have standing to bring claims for violations of *erga omnes* (“towards all”) obligations, even in the absence of direct harms.<sup>158</sup> States typically, as a matter of practice, bring claims when directly injured.<sup>159</sup> However, this is not a legal requirement.<sup>160</sup> An example of a case in which an applicant state challenged an *erga omnes* violation is the *Gambia-Myanmar Genocide* case, which, at the time of this writing, is pending before the ICJ.<sup>161</sup> Gambia brought a claim against

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<sup>151</sup> *Id.* ¶ 88.

<sup>152</sup> Genocide Convention, *supra* note 24, art. IX.

<sup>153</sup> *See supra* note 143 and accompanying text.

<sup>154</sup> Status of the Convention on the Prevention and Punishment of the Crime of Genocide, U.N.T.S. (Dec. 30, 2020), <https://perma.cc/Q6ZF-ET3F>.

<sup>155</sup> *Id.*

<sup>156</sup> ICJ Statute, *supra* note 144, art. 34.

<sup>157</sup> *See* Section III.A.

<sup>158</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. 8, ¶ 41 (Jan. 23) [hereinafter *Gambia-Myanmar Genocide* case].

<sup>159</sup> *See* Craig Eggett & Sarah Thin, *Clarification and Conflation: Obligations of Erga Omnes in the Chagos Opinion*, EJIL:TALK! (May 21, 2019), <https://perma.cc/ASW9-FNDR>. *Cf.* Priya Urs, *Obligations Erga Omnes and the Question of Standing Before the International Court of Justice*, 34 LEIDEN J. INT’L L. 505 (Mar. 1, 2021).

<sup>160</sup> *See* Eggett & Thin, *supra* note 159.

<sup>161</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* I.C.J., <https://perma.cc/GH8L-CBRV> (last visited Dec. 28, 2021).

Myanmar for Myanmar's alleged genocide against the Rohingya people.<sup>162</sup> The Court, in response to Gambia's request for the indication of provisional measures, emphasized that the absence of direct harm is not a bar to bringing an *erga omnes* claim for a breach of the Genocide Convention:

[A]ll the States [P]arties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention . . . It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* [under the Genocide Convention], and to bring that failure to an end.<sup>163</sup>

It is possible that the *Gambia-Myanmar Genocide* case will proffer a feasible path for more states to seek the enforcement of international law by bringing claims of indirect harm. With the Court underscoring that direct injury need not be present, the barriers to bringing forth *erga omnes* claims are now strictly political. Given the right international relations conditions, a state's calculus may tip in favor of bringing a genocide claim on behalf of the Stolen Generations.

### C. Declaratory and Monetary Relief Should Be Sought

The applicant state pursuing claims on behalf of the Stolen Generations should seek reparation in the forms of satisfaction and compensation.

Satisfaction is a relatively straightforward form of relief: so long as Australia is found to have breached its obligations under the Genocide Convention, the Court will likely provide “a declaration in the [ ] Judgment that the Respondent [ ] failed to comply with the obligation imposed by the Convention to prevent the crime of genocide.”<sup>164</sup>

Securing compensation for the violation of a state's responsibilities under the Genocide Convention is a more difficult task. In principle, damages can and

<sup>162</sup> See *Gambia-Myanmar Genocide*, *supra* note 158. “[A]gainst the backdrop of longstanding persecution and discrimination,” in October 2016, Myanmar's military and other security forces began widespread and systematic “‘clearance operations’—the term Myanmar uses—against the Rohingya group. The genocidal acts included mass murder, rape, and other forms of sexual violence, as well as the systematic destruction by fire of their villages.” Application Instituting Proceedings and Request for the Indication of Provisional Measures (*Gam. v. Myan.*), Application, 2019 I.C.J. 2, ¶ 6 (Nov. 11). Since 2016, hundreds of thousands of Rohingya have fled across the border into Bangladesh in what the U.N. has labeled a “textbook example of ethnic cleansing.” *Myanmar Rohingya: What You Need to Know About the Crisis*, BBC NEWS (Jan. 23, 2020), <https://perma.cc/CY9P-3X8N>.

<sup>163</sup> *Gambia-Myanmar Genocide*, *supra* note 158, ¶ 41.

<sup>164</sup> See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 463 (Feb. 26) [hereinafter *Bosnia-Serbia Genocide* case].

should be awarded for breaches of the Genocide Convention. The Court acknowledges that “reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed.”<sup>165</sup> If restitution is not possible, the Court should award an injured state monetary compensation for the damages inflicted by a state that has engaged in an internationally wrongful act.<sup>166</sup>

But the Court has yet to award damages for breaches of obligations under the Genocide Convention and imposes an additional requirement that must be met before an applicant is to be awarded monetary compensation. The Court requires a “sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant . . . caused by the acts of genocide.”<sup>167</sup> In effect, applicants have the burden of establishing that genocide would not have occurred but for the respondent state’s noncompliance with its legal obligations.<sup>168</sup> If the respondent state did not have the sufficient means to influence the direct genocidal actor, a causal nexus is not proven and financial compensation is considered inappropriate.<sup>169</sup> The Court applied this reasoning to the *Bosnia-Serbia Genocide* case, and concluded that while Serbia bore responsibility for failing to prevent the Srebrenica massacre, Bosnia was not entitled to monetary compensation as Serbia lacked “significant means of influencing the Bosnian Serb military and political authorities”—the direct perpetrators of the massacre.<sup>170</sup>

Stolen Generations policies, Australia’s breach of the Convention in failing to prevent genocide, and the injuries associated with forced removal likely meet the nexus requirement. The direct perpetrators of forced removals were clearly acting under the color of state and federal law, which likely violated Australia’s obligations under the Convention. But for the systematic removal policies, First Nations Australians would not have been separated from their families at as large

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<sup>165</sup> *Id.* ¶ 460.

<sup>166</sup> *See id.*

<sup>167</sup> *Id.* ¶ 462.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See id.* The Court’s application of the nexus requirement has faced criticism. Notably, Christian Tomuschat—a Professor of International Law at Humboldt University, former member of the U.N. Human Rights Committee, and former Chairman of the U.N. International Law Commission—argues that the ICJ should have shifted the standard of proof onto Serbia to prove that it was not responsible for the actions of the Bosnian Serb Army of the Republika Srpska. Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J. INT’L CRIM. JUST. 905 (2007). As the genocidal actions were not unforeseen, Serbia should have taken initiative to prevent or otherwise avert the tragedy. *Id.* at 908. Moreover, the relationship between the Government of the Former Republic of Yugoslavia and the Republika Srpska authorities was shrouded in secrecy, so it would be unfair to require the Applicant to prove that Serbia’s compliance with its Genocide Convention obligations would have affected the outcome in Srebrenica. *Id.*

a scale—a scale that threatened the very existence of Aboriginal and Torres Strait Islander peoples. Therefore, an applicant state can and should seek declaratory and monetary relief.

#### IV. MERITS OF CLAIMS AGAINST AUSTRALIA UNDER THE GENOCIDE CONVENTION

The Genocide Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>171</sup>

##### A. The *Actus Reus* of Article II(e) Has Been Met

Australia's Stolen Generations policies incontrovertibly led to the forced transfer of a substantial number of First Nations children to non-Indigenous households and communities, which is prohibited by Article II(e) of the Genocide Convention.

Article II(e) claims have yet to be brought before the ICJ, and some scholars have argued that the provision is a "legal anachronism."<sup>172</sup> In early drafts of the Convention, genocide was conceived as having physical, biological, and cultural components.<sup>173</sup> After significant debate, cultural genocide provisions, including one prohibiting forced child transfer, were cut during the drafting process.<sup>174</sup> Forced child transfer, however, was added back into the Convention's final draft.<sup>175</sup> Some scholars have argued that forced child transfer was "strangely out of place"<sup>176</sup> and added "almost as an afterthought, with little substantive debate or consideration."<sup>177</sup>

However, forced child transfer, like other acts included in the Convention, is an integral component of genocide. The Genocide Convention is intended to

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<sup>171</sup> Genocide Convention, *supra* note 24, art. 2.

<sup>172</sup> Mundorff, *supra* note 100, at 62.

<sup>173</sup> *See id.* at 75–77. *See also supra* note 128 and accompanying text.

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 115 (1991).

<sup>177</sup> WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 175 (2000).

provide broad, “affirmative protections for group viability.”<sup>178</sup> It does more than just stigmatize mass killings; four of the five acts of genocide the Convention prohibits may be accomplished without the killing of a single individual.<sup>179</sup>

The forced child transfer provision was also thoroughly evaluated before its adoption in the Convention’s final draft. A significant margin of delegates adopted the amendment to re-include forced child transfer.<sup>180</sup> The Greek delegate who lobbied in favor of the amendment<sup>181</sup> during the Sixth Committee of the U.N. General Assembly<sup>182</sup> persuasively argued that forcible child transfer was “not primarily an act of cultural genocide . . . it could be perpetrated[ ] with the intent to destroy or to cause serious physical harm to members of the group.”<sup>183</sup> The French and American delegates, who had opposed the Convention’s inclusion of cultural genocide, were amongst those voting in the amendment’s favor. According to the French delegation, the forced transfer of children was a “serious” and “barbarous” act with “physical and biological effects since it imposed on young persons conditions of life likely to cause serious harm or even death.”<sup>184</sup> The American delegation felt that forced transfer was a “special case . . . exception” to the exclusion of acts of cultural genocide.<sup>185</sup>

Forced child transfer also went against the weight of contemporary international morality and law. At the Convention’s drafting, “awareness of the importance of groups remained high,” and memories of Heinrich Himmler’s campaign to steal and “Germanize” “racially valuable [Polish] children” had “not yet faded.”<sup>186</sup> One of the first convictions for the crime of genocide, in *United States v. Greifelt*<sup>187</sup> at Nuremberg, involved allegations against Nazi officials of

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<sup>178</sup> Mundorff, *supra* note 100, at 66.

<sup>179</sup> See Genocide Convention, *supra* note 24, art. II(b)–(d) (providing for genocidal liability where members of a group are caused serious “mental harm,” intentionally subjected to destructive life conditions, or prevented from conceiving or giving birth to children.).

<sup>180</sup> U.N. GAOR, 6th Comm., 3d. Sess. 182, 190, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948).

<sup>181</sup> At the time Greece had lobbied for the re-addition of the forced child transfer provision, Greece was embroiled in a diplomatic struggle to secure the repatriation of thousands of Greek children who had been taken by communist forces to the Balkans at the close of World War II. Greece envisioned the charge of genocide would serve as a useful bargaining chip in ensuring the return of these children. LEBLANC, *supra* note 176.

<sup>182</sup> The two committees that did the most important work on the Convention included the Ad Hoc Committee of the Economic and Social Council, and the Sixth Committee of the General Assembly. Lawrence LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13 YALE J. INT’L L. 268, 270–71 (1988).

<sup>183</sup> U.N. GAOR, *supra* note 180, at 188 (statement of Mr. Vallindas of Greece).

<sup>184</sup> *Id.* at 186.

<sup>185</sup> *Id.*

<sup>186</sup> Mundorff, *supra* note 100, at 64, 79. See also SCHABAS, *supra* note 177.

<sup>187</sup> *Greifelt*, *supra* note 96.

<sup>188</sup> *Id.* at 674.

forced child transfer. In *Greifelt*, Prosecutor Neely remarked that “[t]he outrages committed by the Nazis against the inhabitants of occupied countries” were incredible: “the mass killing of the Jews, the atrocities in concentration camps, the savage medical experiments, and many more ruthless forms of torture and extermination practiced by the Nazi fanatics.”<sup>188</sup> He continued, “[b]ut now we turn to a crime which in many respects transcends them all . . . the crime of kidnap[ing] children.”<sup>189</sup>

Therefore, despite the relative underutilization of Article II(e) in practice, forced child transfer, like that which occurred under the Stolen Generations policies, is enough to confer genocidal liability.

## B. Australia Likely Had Genocidal Intent

With the *actus reus* of genocide established, the next issue is whether Stolen Generations policies were enacted with the intent to destroy First Nations Australians. The *mens rea* for genocide is the intent to destroy a group in whole or in substantial part—also referred to as the *dolus specialis*.<sup>190</sup>

Australian scholars arguing against the genocide hypothesis have focused on the assimilative aims of government policies: because forced child transfers were not intended to destroy Aboriginal and Torres Strait Islander peoples, the Australian government lacked the requisite genocidal intent. Dirk Moses, a genocide scholar, argued that “[c]onservative commentators and the current federal government . . . absolve[] the colonial and national governments of responsibility, and [] insist[] that while the policies of child removal may have been misguided by today’s standards, they were well intentioned.”<sup>191</sup> Robert Manne is one such conservative commentator. Manne, a professor of politics and culture at La Trobe University, claimed that forced removal policies were not genocidal: “assimilation has never been regarded in law as equivalent to genocide.”<sup>192</sup> Bain Attwood, a leading scholar in cross-cultural history, concurred, arguing that “Aboriginal children were not separated by governments pursuing a policy of genocide”—instead, assimilation efforts were “premised on the

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<sup>188</sup> *Id.* at 674.

<sup>189</sup> *Id.*

<sup>190</sup> See *Bosnia-Serbia Genocide case*, *supra* note 164, ¶¶ 198–99. *Croatia-Serbia Genocide case*, *supra* note 150, ¶ 132.

<sup>191</sup> Nuriyeni Kartika Bintarsari, *The Cultural Genocide in Australia: A Case Study of the Forced Removal of Aborigine Children from 1912-1962*, 54 SHS WEB OF CONFS. 1, 4 (2018).

<sup>192</sup> Sorensen & Wilson, *supra* note 11 (quoting Robert Manne). See generally Robert Manne, *In Denial: The Stolen Generations and the Right*, 1 Q. ESSAY 1 (2001); Ron Brunton, *Betraying the Victims: The ‘Stolen Generations’ Report* (IPA Backgrounder Vol. 10/1, 1998).

assumption that this was for the good of Aboriginal people, an assumption that is still prevalent in much of settler Australian culture today.”<sup>193</sup>

But many genocidal policies are shrouded in “benevolent intentions.” Just because a perpetrator is able to frame a policy as having an intent other than to destroy a group does not negate the genocidal quality of the perpetrator’s actions. Perpetrators of genocide use euphemistic language to:

make their evil respectable and, in part, to reduce their personal responsibility for it. By camouflaging their evil in innocuous ways or sanitizing jargon, the evil loses much of its moral repugnancy. In this way, language can obscure, mystify, or otherwise redefine acts of evil.<sup>194</sup>

In the prototypical example of genocide, Nazis during the Holocaust cloaked their barbarous actions in good intentions. The Holocaust was premised on principles of eugenics—literally *eu*-(good) and *-genos* (birth).<sup>195</sup> Rather than acknowledging their actions as a campaign to massacre particular groups of peoples, Nazis often claimed that their actions were targeted at reducing human suffering through “breeding out’ . . . so-called undesirable characteristics from the human population”—for example, one’s Jewish, Roma, Slavic or “Asiatic” ethnicity.<sup>196</sup> During the Holocaust, Nazis rarely used express genocidal language for their Article II(a) acts; mass killing was labeled as “the final solution,” “special treatment,” “evacuation,” “spontaneous actuations,” “resettlement,” and “special installations.”<sup>197</sup> Historian Raul Hilberg examined tens of thousands of Nazi documents without ever encountering the word “killing.”<sup>198</sup> But just because some Nazis may have been able to articulate a “benevolent intent”—that is, one other than the destruction of a group—does not mean that the intent to wipe out various populations was not present or predominant. The drafters of the Genocide Convention must have intended for the horrific acts committed during the Holocaust to qualify as genocide under the Convention; the Convention was created in response to the Holocaust to ensure that such heinous acts would unambiguously violate international law, and legal consequences would stem as a

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<sup>193</sup> Cristopher Cook, *The Stolen Generations: Competing Histories*, 4 EMERGING SCHOLARS AUSTL. INDIGENOUS STUD. 27 (2018), <https://perma.cc/NL3L-TPXE>.

<sup>194</sup> JAMES WALLER, BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING 211 (2007).

<sup>195</sup> *Eugenics* (*n.*), ONLINE ETYMOLOGY DICTIONARY, <https://perma.cc/SG5Y-HWRQ>.

<sup>196</sup> *Mosaic of Victims: In Depth*, HOLOCAUST ENCYCLOPEDIA, <https://perma.cc/8783-68ER>. Nazis rarely used express genocidal language for their Article II(a) acts; mass killing was labeled as “the final solution,” “special treatment,” “evacuation,” “spontaneous actuations,” “resettlement,” and “special installations.” WALLER, *supra* note 194, at 211–12.

<sup>197</sup> WALLER, *supra* note 194, at 211–12. *But see* Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT’L L. 3, 553, 572–73 (2006) (sampling language expressing the intent to kill by Julius Streicher, a Nazi sentenced to death by the International Tribunal at Nuremberg for crimes against humanity).

<sup>198</sup> Years later, he eventually discovered the word, but in reference to an edict concerning dogs. WALLER, *supra* note 194, at 212.

result. Thus, alone, whether perpetrators thought they were doing a “good” thing in perpetrating genocidal acts cannot reasonably obviate genocidal intent.

The Stolen Generations policies had similar express goals to the Holocaust: if “undesirable characteristics”—color—could be “bred” out of Australian society, the nation would “improve.”<sup>199</sup> Extending the above analysis, the fact that some Australians may have had “good intentions”<sup>200</sup> does not exclude or excuse the presence of a barbarous and “deliberate plan to breed the Aborigines out.”<sup>201</sup>

A more crucial issue is whether genocidal intent existed in Australia after the Genocide Convention had taken effect; the answer implicates whether the Court has jurisdiction to hear Stolen Generations claims. Given the statements of high officials such as Neville and Cook, genocidal intent plainly appears in the 1930s.<sup>202</sup> According to Henry Reynolds, this intent likely continued through the 1940s.<sup>203</sup> Paul Bartrop, the co-author of the Dictionary of Genocide, agreed.<sup>204</sup> According to Bartrop, “the use of the term genocide can be ‘sustained relatively easily’ when describing the Stolen Generations,” both during and after the 1940s.<sup>205</sup>

Australia’s 1950s adoption of a national assimilation policy during the third Native Welfare Conference<sup>206</sup> should not be found to sever genocidal intent—finding the contrary would defeat the object and purpose of the Convention. If a statement suggesting an alternative intent for genocidal actions was sufficient to transform acts of genocide into assimilation, then genocidal actors would always have the option of retroactively obfuscating their intent to evade liability. If erasing genocidal intent were this easy, the Genocide Convention would cease to effectively constrain the reprehensible acts the Convention targets. The Convention’s drafters could not have intended such a result. Instead, requiring a

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<sup>199</sup> See Section II.

<sup>200</sup> Some Australians thought light-colored children “should be brought into white society and their level of civilization raised”; other Australians felt the conditions in camps were bad, “as they were,” so they reasoned that Aboriginal and Torres Strait Islander children would benefit by being removed from reservations. *STOLEN GENERATIONS*, *supra* note 30, 04:34–04:22.

<sup>201</sup> *Id.*

<sup>202</sup> See Section II.A.

<sup>203</sup> See *STOLEN GENERATIONS*, *supra* note 30, 04:23–04:35.

<sup>204</sup> See Sorensen & Wilson, *supra* note 11 (quoting Paul Bartrop).

<sup>205</sup> *Id.* See also Paul Bartrop, *The Holocaust, the Aborigines, and the Bureaucracy of Destruction: an Australian Dimension of Genocide*, 3 J. GENOCIDE RSCH. 75, 83 (2001) (“I am not convinced that the policy was abandoned after 1940.”); PAUL BARTROP & SAMUEL TOTTEN, *DICTIONARY OF GENOCIDE* 29 (2008) (finding that Australia’s policies of forced transference of those of part-Aboriginal descent to non-Aboriginal environments which continued until the 1970s constituted genocide according to Article II(e) of the Genocide Convention); Michael Perry, *A Stolen Generations Cries Out*, REUTERS (May 20, 1997), <https://perma.cc/CZG6-AMXB> (quoting Ronald Wilson as having said that the Stolen Generations policies were attempted genocide as it was “believed that the Aboriginal people would die out”).

<sup>206</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 28. See also Section II.A.

more forceful renunciation to cut off genocidal intent would be more consistent with the Convention's object and purpose. An analogy to criminal law is instructive. Defendants are generally afforded a *locus poenitentiae*—an opportunity to abandon an attempted crime by voluntary and complete renunciation before the criminal act has occurred.<sup>207</sup> Here, the genocidal actions continued—and an assimilationist intent does not necessarily foreclose a genocidal intent. Therefore, absent Australia's clear denunciation of prior policies, the intent that existed prior to the Native Welfare Conference—genocidal intent—continued: renunciation was not complete.

Further, even if the adoption of assimilation as a national policy in the third Native Welfare Conference amounted to complete renunciation, Australia could be held liable for genocide. In January of 1951, the Genocide Convention took effect, and Australia's specific obligations under the Convention began.<sup>208</sup> However, Australia was most likely obligated to refrain from acts which would defeat the object and purpose of the treaty, such as committing genocide, from the time it signed the Convention, in July of 1949.<sup>209</sup> The Native Welfare Conference—the first *locus poenitentiae* opportunity—took place in September of 1951.<sup>210</sup> Therefore, Australia is responsible for any acts of genocide that occurred from early 1951 (when the Genocide Convention took effect)—potentially even from mid-1949 (when Australia signed the Convention)—until late 1951 (when the third Native Welfare Conference took place).

Overall, there is a colorable claim that the Stolen Generations policies were effectuated with the necessary genocidal intent.

### C. Australia Violated Its Responsibility to Refrain from Perpetrating Genocide

States must refrain from committing genocide. In 2007's *Bosnia-Serbia Genocide* case, the ICJ inferred that the Genocide Convention confers state

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<sup>207</sup> See, e.g., *Gollan v Nugent* (1988) 82 ALR 193, 205 (Austl.) (“[t]he law does not penalise intention. On the contrary, it recognises a locus poenitentiae and assumes that the opportunity for repentance may be exercised”). See also *Taylor v. Bowers* (1876), 1 QBD 291 (App. Cas.) (U.K.); *Perpetual Executors and Trustees Association of Australia Ltd. v Wright* (1917) 23 C.L.R. 185 (Austl.); *Spring Co. v. Knowlton*, 103 U.S. 49, 60 (1881); MPC § 5.01(4) (2019); *Zimmerman v. Letkeman* (1978) 79 D.L.R. (3d) 508, 522 (Can.); *Watson v. Miles* [1953] N.Z.L.R. 958, 969–71 (N.Z.).

<sup>208</sup> Genocide Convention, *supra* note 24.

<sup>209</sup> See Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Though the Vienna Convention on the Law of Treaties (VCLT) entered into force in 1980, the VCLT is a persuasive reflection of the state of customary international law and an instructive tool in understanding and interpreting treaties. Australia has been a signatory to the VCLT since 1974. *Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION, <https://perma.cc/XU9U-Y6AY>.

<sup>210</sup> BRINGING THEM HOME REPORT, *supra* note 6, at 28.

responsibility for the crime of genocide, despite no express provision in the Convention establishing state responsibility. The *Bosnia-Serbia Genocide* case concerned Serbia's alleged attempts to exterminate Bosnia and Herzegovina's Muslim population during the Bosnian war.<sup>211</sup> Serbia contended that the Genocide Convention only prescribed duties to prevent and punish genocide when committed by non-state actors.<sup>212</sup>

The Court held that States Parties to the Genocide Convention are "bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them."<sup>213</sup> The obligation of states to prohibit genocide stems from Article I, read in light of the Convention's purpose. Article I states that the "Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish."<sup>214</sup> The Convention's preamble says that "The High Contracting Parties . . . [h]ereby agree to prevent and punish the crime as hereinafter provided."<sup>215</sup> The Court reasoned that because genocide is categorized as an international crime, the States Parties must be undertaking not to commit the act described.<sup>216</sup> Further, the obligation expressly stated in the Convention to prevent genocide must indicate that states are forbidden from committing genocidal acts through their own organs or through persons over whom the state exercises such firm control as to make those persons' conduct attributable to the state.<sup>217</sup> Essentially, the obligation to prevent genocide implies the prohibition of its commission.

Although the perpetrators of the Stolen Generations policies are long dead,<sup>218</sup> their actions represented Australian policy. Australia can continue to be held liable at the ICJ on a theory of state responsibility for its failure to refrain from committing, preventing, and prosecuting genocide.

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<sup>211</sup> *Bosnia-Serbia Genocide* case, *supra* note 164.

<sup>212</sup> *Id.* ¶ 156.

<sup>213</sup> *Id.* ¶ 167.

<sup>214</sup> Genocide Convention, *supra* note 24, art. 1.

<sup>215</sup> *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 164 (emphasis in original).

<sup>216</sup> *Id.* ¶ 161.

<sup>217</sup> *Id.* ¶ 166.

<sup>218</sup> There would be no statutory limitations bar to bringing forth a genocide claim. As state responsibility is not itself criminal in nature, these claims are not subject to criminal procedural requirements. *Id.* ¶ 170. Further, as suspect rights are not of concern when the perpetrator of a wrongful act is a state, the conclusion that statutes of limitation do not apply is intuitive. One may wonder whether such a conclusion—indefinite state responsibility—would be fair, but there is in practice a limit for the occurrence of prosecution—the signing of the Genocide Convention. Though genocide is a *jus cogens* violation that was likely illegal at the time of the Convention's signing, a state may only be held liable at the ICJ from the point in which that state consented to be bound to the text of the Convention. See *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 88.

#### D. The Lack of Domestic Implementing Legislation Is Irrelevant

Article V of the Genocide Convention requires States Parties to enact necessary legislation to give effect to the Convention's provisions, and "in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in [A]rticle III."<sup>219</sup> Australia did not pass legislation making genocide a crime domestically until 2002. Some have argued that implementing legislation was necessary to give the Convention domestic effect.<sup>220</sup>

Australia's delay in passing implementing legislation cannot circumvent Australia's obligations under the Genocide Convention. Australia's failure to pass implementing legislation is certainly a breach of the country's obligations under the Convention. A breach, however, does not imply the treaty's invalidity—which would render the treaty as never having had legal effect.<sup>221</sup> Instead, a breach generally only allows for the treaty to be terminated—which affects the state's prospective obligations—and only by *other* states: a breach may not be invoked by the breaching party to justify that state's unilateral termination or suspension of

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<sup>219</sup> Genocide Convention, *supra* note 24, art. 5. Article III of the Convention specifies that acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide shall be punishable. *Id.* art. 3.

<sup>220</sup> Ben Saul suggested that the legislature, more concerned with domestic affairs than giving effect to an international treaty, prioritized a domestic legislative agenda over passing the Convention's implementing statute. Ben Saul, *The International Crime of Genocide in Australian Law*, 22 SYD. L. REV. 527, 540 (2000). On the other hand, Shirley Scott, a lecturer of international law and international relations at the UNSW Canberra, posited that Australia had not passed implementing legislation due to sensitivity surrounding the Commonwealth's constitutional power to implement treaties. Shirley Scott, *Why Wasn't Genocide a Crime in Australia? Accounting for the Half Century Delay in Australia Implementing the Genocide Convention*, 10 AUSTL. J. HUM. RTS. 22, 201 (2004). The Australian Constitution was unclear about whether the Commonwealth had the capacity to legislate to implement treaties, particularly those treaties with subject matters that typically fell within the jurisdiction of Australian states. *Id.* Moreover, the government felt that the Convention's definition of genocide was imprecise. *Id.* As a result, the government believed that it "would have to go beyond the Convention in order to get a definition adequate for the purposes of criminal law." *Id.* As time went on, the issue of implementing legislation simply became "too hard." *Id.* Domestic and international pressure mounted in the 1980s and 1990s, leading Australia to eventually pass the International Criminal Court (Consequential Amendments) Act 2000 to give effect to the crime of genocide. *Id.* The Act was passed to implement the Rome Statute, but the definition of genocide provided in the Rome Statute is the same as that given in the Genocide Convention. Accordingly, some have interpreted the Act to be the necessary implementing legislation for the Genocide Convention. *See id.*

<sup>221</sup> A treaty will be declared invalid if it violates fundamental internal law in an objectively evident way, the State is otherwise considered not to have consented to the treaty, there was an error in the basic premise of the treaty, the treaty was signed under fraudulent or coercive circumstances, or the treaty violated a *jus cogens* norm. A breach is not one of the bases for making a treaty void. *See* VCLT, *supra* note 209, arts. 46–53, 60.

the treaty.<sup>222</sup> No state, including Australia, has attempted to terminate or withdraw from the Genocide Convention because of any alleged breach by Australia of the treaty. Therefore, Australia's lack of implementing legislation is irrelevant to its obligations under the Convention.

Additionally, the Genocide Convention textually requires legislation be enacted only *if necessary* to give effect to the Convention, and implementing legislation was likely not necessary for Australia to be bound by the Convention.<sup>223</sup> A treaty is an instrument of international law; states may require statutes to give effect in domestic municipal law. However, a violation of state responsibility is an international law rather than municipal offense and constrains states themselves instead of private actors in domestic territories. Because obligations accrue to states (the same parties bound by the treaty) and apply everywhere (regardless of territory), implementing legislation is likely unnecessary to give effect to state responsibility obligations.

Furthermore, the Convention could be considered part of Australian law from its entry into force in the early 1950s until the High Court seemingly altered its domestic legal effect in 1999. At the time of the Convention's ratification, and for a long while after, the crime of genocide was widely considered to be incorporated into Australian law through common law and existing statutes; therefore, there was no perceived need to criminalize genocide domestically.<sup>224</sup> The Australian government appeared to adopt this position. When the Commonwealth Government was asked about Australia's stance on the domestic force of the Genocide Convention in 1952, and then again in 1992, the official response was that the laws already in force in Australia provided "substantially for the punishment of the classes of acts described in the Convention."<sup>225</sup> It was only

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<sup>222</sup> See *id.* art. 60.

<sup>223</sup> Genocide Convention, *supra* note 24, art. 5.

<sup>224</sup> See Saul, *supra* note 220, at 541.

<sup>225</sup> Scott, *supra* note 220 at 169. However, the departments of the Attorney General's and External Affairs expressed internal skepticism that genocide should be considered a domestic crime absent implementing legislation. *Id.* at 164. It is also possible that the government did not fully weigh the possibility of the Stolen Generations policies amounting to genocide, so took an uninformed stance in publicly stating the Convention had effect in Australian law. Australia was perceived as a "civilized country"—the notion that Australia would need to provide implementing legislation for genocide was an offensive suggestion. Saul, *supra* note 220, at 540. "Nazi type 'Final Solutions'" could not occur in Australia, it was thought, so there was no need to implement obligations of the Convention into domestic law. Timothy L. H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 723–24 (1997). Some, such as Shirley Scott, have also argued that "[t]he failure of the Australian government" to even consider that national and state governments had committed genocide through its Stolen Generations policies "confirms the shuttered vision and arrogance of White Australia towards Indigenous Australians in the 1940s and 1950s." Scott, *supra* note 220, at 174. Some have claimed that "[m]ore than likely, some governments were afraid that accusations of genocide would be made against

in 1999 that the Australian High Court in *Nulyarimma* indicated a contrary view: that genocide was not incorporated into common law absent an implementing statute.<sup>226</sup> Judge Merkel, dissenting from the court in *Nulyarimma*, argued that the weight of Australian law supported the Convention being automatically incorporated into common law through Australia's ratification of the treaty; in his view, the Convention's did not require implementing legislation to be executed in Australia.<sup>227</sup> Therefore, the Convention should be considered to have had domestic effect during the relevant Stolen Generations period, before the High Court's abrupt shift away from the widespread, long-standing view of the irrelevance of implementing legislation for domestic effect.

## V. ISSUES WITH THE ICJ'S JURISPRUDENCE

State responsibility is theoretically separate and distinct from criminal law, which the ICJ recognizes to an extent.<sup>228</sup> The Court states that “the responsibilities of States that would arise from breach of [Genocide Convention] obligations [] are obligations and responsibilities under international law. They are not of a criminal nature.”<sup>229</sup> The Court also recognizes that while state responsibility for genocide can exist only if the predicate crime of genocide were committed, a criminal conviction of genocide is not required for state attribution.<sup>230</sup> If a conviction were required, the Court acknowledges that there would be no legal recourse in many conceivable circumstances of genocide—for example, where states, because of their complicity, refuse to prosecute their own individuals for genocide.<sup>231</sup>

But the ICJ does not extend the distinction between the crime of genocide and state responsibility far enough. The Court has imposed procedural requirements on claims of state responsibility that should only apply in the criminal context. First, the Court imposes the same “certainty” standard of proof as is required in the criminal context; second, the Court establishes a test for genocidal intent which requires that genocidal intent be the only reasonable

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them by First Nations Australians for ‘child removal’ policies, and wanted to avoid legal responsibility and compensation.” Saul, *supra* note 220, at 541. *But see* Scott, *supra* note 220, at 174 (concluding that the absence of implementation for the Genocide Convention “did not stem from willful intent to commit with impunity acts of genocide against Indigenous Australians.”).

<sup>226</sup> See *Nulyarimma v. Thompson* (1999) 165 ALR 621, 653 ¶ 131 (Austl.). See also *supra* Section II.B.

<sup>227</sup> See *id.* See also generally Hon. Jus. Michael Kirby, *The Growing Rapprochement Between International Law and National Law*, in VISIONS OF THE LEGAL ORDER IN THE 21ST CENTURY: ESSAYS TO HONOUR HIS EXCELLENCY JUDGE C. J. WEERAMANTRY (G. Sturgess & A. Anghie eds., 1995), <https://perma.cc/8GEG-5EUA>.

<sup>228</sup> See *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 173.

<sup>229</sup> *Id.* ¶ 170.

<sup>230</sup> *Id.* ¶ 182.

<sup>231</sup> See *id.*

inference that may be drawn from the pattern of conduct.<sup>232</sup> The requirements imposed by the ICJ make it difficult to bring forth genocide claims, particularly those reliant on Article II(e). In effect, the Court has, in the words of ICJ Judge Cançado Trindade, “reduc[ed] genocide to an almost impossible crime to determine, and the Genocide Convention to an almost dead letter.”<sup>233</sup> The situation of lawlessness, and “shadow of impunity,” is “contrary to the object and purpose of the Convention.”<sup>234</sup>

“[I]here are reasons for the international criminal tribunals to adopt a restrictive approach to the definition [of the crime of genocide] which are not applicable when one considers State responsibility.”<sup>235</sup> According to Judge Gaja in a separate opinion in the Court’s *Croatia-Serbia Genocide* case, “certain aspects that are specific to State responsibility appear to be underrated.”<sup>236</sup> State responsibility violations are of a civil nature, for example, warranting lower procedural protections than would exist in a criminal context. Additionally, state responsibility violations impose greater evidentiary burdens on applicants than claims of criminality, due to the heightened difficulties in discerning intent and accessing evidence on an equal basis with respondents.

This Comment argues that the ICJ should lower its standard of proof and do away with the “only reasonable inference” intent test for claims of state responsibility. Instead, the Court should implement a weight of the evidence test for proving genocide, and a “reasonable inference” test for genocidal intent.

In hearing a claim on behalf of the Stolen Generations, the Court has the opportunity to enact the recommended adjustments to its genocide jurisprudence. This is the paradigmatic Article II(e) state responsibility case. While the claim of genocide is contested,<sup>237</sup> express genocidal intent—which is exceedingly rare in genocide claims—clearly existed, unrebutted,<sup>238</sup> and the removals occurred on an extraordinary and unusually large scale.<sup>239</sup> The Court can use this case to remedy the shortcomings of its application of the Genocide Convention and expand its ability to decide Article II(e) claims, which the Convention’s drafters envisaged as qualifying as genocide. Moreover, the Court can grant the Stolen Generations a chance to achieve recourse, symbolic or otherwise, for potentially genocidal

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<sup>232</sup> See *id.* ¶¶ 208–09, 373. See also *Croatia-Serbia Genocide Case*, *supra* note 150, ¶ 407.

<sup>233</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 143 (dissenting opinion of Judge Cançado Trindade).

<sup>234</sup> *Id.* ¶ 148 (dissenting opinion of Judge Cançado Trindade).

<sup>235</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 2 (separate opinion of Judge Gaja).

<sup>236</sup> *Id.*

<sup>237</sup> For example, there are reasonable arguments that Australia lacked the requisite genocidal intent or that the evidence establishing such intent is time-barred. See Section IV.B.

<sup>238</sup> See Section IV.B.

<sup>239</sup> See Starr & Brilmayer, *supra* note 2, at 236.

policies. The Court would also signal a commitment to upholding the letter of the Convention and holding all states, no matter how “civilized,” accountable.

### A. Too High a Standard of Proof

Claims of Australia’s Stolen Generations would likely fail to meet the standard of proof established by the ICJ. To prove state responsibility for genocide, the Court requires a “high level of certainty appropriate to the seriousness of the allegation.”<sup>240</sup> Because of the “exceptional gravity” of the claim, the evidence must be “fully conclusive.”<sup>241</sup> In effect, the ICJ requires that the applicant state prove “beyond any reasonable doubt” that the respondent state was responsible for genocide.<sup>242</sup>

Based on the evidence made publicly available, genocidal intent in the Stolen Generations context may be strongly inferred. As previously discussed, in the 1930s, Australian officials tasked with implementing Aboriginal welfare policies advocated for Aboriginals to be “bred out” of Australian society.<sup>243</sup> The continued removal of children in light of the government’s failure to explicitly renounce prior-expressed genocidal intent<sup>244</sup> strongly suggests the existence of genocidal intent. However, the subsequent rhetorical shift of government actors in labeling the child removal policies “assimilative” significantly muddles the intent inference.

The high standard the ICJ requires applicants to meet to prove genocidal intent is not appropriate for state responsibility claims. State responsibility claims were never intended to be “accompanied either by the due process guarantees which must attach to findings of criminal responsibility or by the penal consequences that such responsibility ought to entail,” according to James Crawford, a current judge on the Court and former Special Rapporteur on State Responsibility.<sup>245</sup> Enforcement procedures, special sanctions, and the punishment

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<sup>240</sup> *Bosnia-Serbia Genocide case*, *supra* note 164, ¶ 210.

<sup>241</sup> *Id.*, ¶¶ 208–09 (internal quotations omitted).

<sup>242</sup> Andrea Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment*, 5 J. INT’L CRIM. JUS. 889, 889 (2007).

<sup>243</sup> *See* Sections II.A, III.B.

<sup>244</sup> *See* Section IV.B.

<sup>245</sup> JAMES R. CRAWFORD, *State Responsibility*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2006), <https://perma.cc/7TR4-QHV2>. Crawford was the International Law Commission’s Special Rapporteur on State Responsibility from 1997–2001. During his tenure, in 2001, the ILC adopted the Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter Articles on State Responsibility], a culmination of a 60-year project to codify this area of international law. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts: Historical Background and Development of Codification*, AUDIOVISUAL LIB. INT’L L., <https://perma.cc/HLV8-S8NG>. The ICJ has held at least some of the Articles to be customary international law. *See Bosnia-Serbia Genocide case*, *supra* note 164, ¶ 385. The final 2002 ILC Articles on State Responsibility rejected a proposal to make an international crime of a “serious breach on a widespread scale of an international

of offenders accompany criminal convictions.<sup>246</sup> The classification of state responsibility as a criminal offense would lead to untenable results. If convicted of a crime, states would need to surrender authority and sovereignty to an international court or other states serving the function of a “world police.”<sup>247</sup> States might be required to pay sanctions above the amount required to restore an injured party to the prior state.<sup>248</sup> And states would be punished, which implies correction, reform, deterrence, and incapacitation. Correction, reform, and deterrence have clear corollaries in the state system, but incapacitation does not, absent an extraordinarily costly blockade against a state convicted of criminal behavior.<sup>249</sup> The international community, recognizing that international law functions better as a compensatory, rather than punitive, system, made state responsibility a civil, not criminal, offense.<sup>250</sup> Criminal law procedural protections, such as the “beyond a reasonable doubt” standard, are designed to counterbalance the high costs of criminal liability. Civil liability is relatively less costly, so criminal law protections are inapplicable to civil state responsibility claims.<sup>251</sup>

Moreover, evidentiary burdens are inherently more difficult to meet in the state responsibility context, warranting a lower standard of proof. In criminal law, the intent of individual defendants may be deduced directly from statements on the record. States, on the other hand, are inherently abstract actors, and evidence of a state’s intent is often intangible and diffuse. More of a pattern of conduct is required to construe intent; the statements of one politician will not necessarily reflect the position of their government. States are also uniquely positioned to

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obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid.” Int’l Law Comm’n, Rep. on the Work of Its Twenty-Eighth Session, art. 19(3)(c), U.N. GAOR, 31st Sess., Supp. No. 10, U.N. Doc. A/31/10 (1976). Serbia, relying on this drafting history, argued it could not be found guilty of the crime of genocide because the Convention did not impose criminal liability for state responsibility violations. *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 170. While conceding Serbia’s basic premise that state responsibility was not criminal, the ICJ stated that the lack of criminal responsibility would not negate the obligation of states not to commit genocide. *Id.*

<sup>246</sup> See Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT’L & COMPAR. L. Q. 345, 350 (1990).

<sup>247</sup> *Id.* at 351–52.

<sup>248</sup> See Report by Mr. R. Ago, *Chairman of the Sub-Committee on State Responsibility*, [1963] 2 Y.B. Int’l L. Comm’n 227, 234, U.N. Doc. A/CN.4/152.

<sup>249</sup> See Gilbert, *supra* note 246, at 355.

<sup>250</sup> See F.V. Garcia-Amador (Special Rapporteur), *Rep. on International Responsibility* [1956] 2 Y.B. Int’l L. Comm’n 173, 182 ¶ 47, U.N. Doc. A/CN.4/96 (citing DIONISIO ANZILOTTI, 1 CORSO DI DIRITTO INTERNAZIONALE 416 (Athenaeum, 3rd ed. 1929)). The ILC, in rejecting the criminal status of *ius cogens* violations, and lowering the costs on states for breaches, rejected the application of criminal procedural requirements to state responsibility claims. Crawford, *supra* note 245.

<sup>251</sup> See Ruth Wedgwood, *Bad Day for International Justice*, N.Y. TIMES (Mar. 8, 2007), <https://perma.cc/V9QT-UUHL> (“the International Court of Justice applies the demands of criminal proof to a civil case. The judges insist that even for civil liability, proof against Belgrade has to be ‘fully conclusive’ and ‘incontrovertible,’ with a level of certainty ‘beyond any doubt.’ This standard is well known when the jail door will shut, but it exceeds the demands of civil liability.”).

effectively obscure evidence of their wrongful acts. For grave breaches of human rights, states have “control of the evidence or exclusive knowledge of some or all of the events that took place.”<sup>252</sup> By reason of the “exclusive territorial control exercised by a State within its frontiers,” the applicant state seeking to establish a breach of international law “is often unable to furnish direct proof of facts giving rise to responsibility.”<sup>253</sup> As a result, as noted by Judge Cançado Trindade in a dissent in the *Bosnia-Serbia Genocide* case, the Court imposing as high a threshold of proof in state responsibility claims as criminal claims “discredit[s] the production of evidence.”<sup>254</sup>

Further, the Court’s evidentiary requirements for genocide were established without particular consideration of the unique challenges faced by applicants in domestic genocides. The ICJ’s *Bosnia-Serbia Genocide* and *Croatia-Serbia Genocide* cases, the only Genocide Convention judgments as of January 2022, considered allegations of transnational genocide.<sup>255</sup> The principal genocide allegations concerned acts committed in the applicant states’ territories, so applicant states had uninhibited access to physical evidence and testimony of local residents, and could utilize their full domestic governmental apparatuses, to prepare their cases.<sup>256</sup> Moreover, the Yugoslav wars received extraordinary international attention, in part due to their international effects; this benefited the collection and preservation of evidence. The bloodshed spilled over into neighboring countries and had the potential to destabilize the region, which triggered international military intervention.<sup>257</sup> The U.N. Security Council, in response to the “threat to international peace and security,”<sup>258</sup> created the International Criminal Tribunal for the Former Yugoslavia (ICTY), providing for “extensive

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<sup>252</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 202 (dissenting opinion of Judge Cançado Trindade).

<sup>253</sup> *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 35 (dissenting opinion of Vice-President Al-Khasawneh) (citing *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 18).

<sup>254</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 202 (dissenting opinion of Judge Cançado Trindade).

<sup>255</sup> At the time of this writing, the Court is considering its first “domestic” genocide case, though the international spill-over effects of this alleged genocide are substantial. *See Gambia-Myanmar Genocide* case, *supra* note 158.

<sup>256</sup> In the *Bosnia-Serbian Genocide* case, Bosnia claimed Serbia committed genocide against Bosnians in the Bosnian cities of Sarajevo and Srebrenica, as well as various detention camps set up in Bosnian territory. *Bosnia-Serbia Genocide* case, *supra* note 164, at 44–45. In the *Croatia-Serbia Genocide* case, Croatia claimed that Serbia committed genocide against Croats in Croatia’s Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika, and Dalmatian regions. *Croatia-Serbia Genocide* case, *supra* note 150, at 4–5. In contrast, Serbia’s counterclaim concerned Croatia’s actions against Serbs in what is now the Croatian region of Krajina. *Id.* at 6.

<sup>257</sup> *See Clinton Addresses Nation on Yugoslavia Strike*, CNN (Mar. 24, 1999), <https://perma.cc/H7VG-38JV>.

<sup>258</sup> S.C. Res. 827 (May 25, 1993).

documentation and other evidence” from which Bosnia, Croatia, and Serbia could bring claims and counterclaims.<sup>259</sup>

Domestic genocides, however, present greater barriers for gathering evidence. For domestic genocides, the applicant state represents, but is not itself, the directly injured party. The burden is likely to initially fall on the directly injured party, a group of individuals within a state, to gather strong evidence of genocidal intent. A group of individuals lacks the same capacity and resources as states to collect evidence. By the time the applicant state chooses to sponsor a group’s claim—a risky endeavor given the political fallout and the relatively unprecedented nature of alleging *erga omnes* violations—much of the evidence may have been lost or destroyed. Moreover, for domestic genocides, the genocidal acts occur wholly within the respondent’s territory. Therefore, the applicant state has an inherently lesser ability to access the same evidence as the respondent state. Additionally, there is likely to be less international attention and consequently less international pressure for document preservation where the effects of a genocide occur solely within one nation’s sovereign territory—such as the “island continent” of Australia<sup>260</sup>—and do not produce destabilizing spill-over effects.

Applied to the Stolen Generations claims, evidentiary deficiencies make establishing genocide with the requisite standard of proof particularly difficult. Unlike in the *Bosnia-Serbia Genocide* case and the *Croatia-Serbia Genocide* case, evidence of the Stolen Generations policies wholly rests with the respondent state: Australia. The effects of the policies were confined territorially to the respondent state, rather than some of the effects being felt in the applicant state’s territory. Therefore, an applicant state will have inherently unequal access to evidence. Moreover, Australia controlled the evidence and the narrative around the Stolen Generations policies. There was little international attention, and it took decades before a concerted effort was made to look into the potentially genocidal nature of the policies; even at that point, this effort was made *by* the government. The Australian Human Rights Commission’s *Bringing Them Home Report* essentially *is* the historical record. It was released thirty-seven years after the last Stolen Generations policy was repealed, so an extraordinary delay elapsed between the Stolen Generations policies and the concerted attempt to preserve evidence. Therefore, establishing genocide with “fully conclusive” evidence is virtually impossible in this case but also for cases of domestic genocide generally.

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<sup>259</sup> See *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 206. See also Ivo H. Daalder, *Decision to Intervene: How the War in Bosnia Ended*, BROOKINGS (Dec. 1, 1998), <https://perma.cc/2K74-NZK4>. Julie Malá, *International Intervention in Croatia During the Yugoslav Wars*, E-INT’L RELATIONS (Sept. 16, 2011), <https://perma.cc/GU8W-TKDU>.

<sup>260</sup> The “island continent” is a slight misnomer as Australia is too large to be an island, John M. Cunningham, *Is Australia an Island?*, BRITANNICA, <https://perma.cc/7AKY-3ZPM>, but the point remains that Australia is entirely surrounded by water, which limits potential international effects of Australian domestic policies.

Where genocide claims rely on state responsibility, and particularly where genocide has occurred solely in the territory of the respondent state and the directly harmed persons are individuals who for many years have lacked the capacity and resources to collect strong evidence of genocidal intent against their state, it becomes virtually impossible to prove genocide with near certainty.<sup>261</sup> Without lowering the threshold of proof, the ICJ renders Article II(e) of the Genocide Convention an empty provision, contradicting the Convention's clear aim of punishing all enumerated acts of genocide.

The standard of proof should accordingly be lowered. Judge Al-Khasawneh of the ICJ suggests that the applicant state should be afforded a "more liberal recourse to inferences of fact and circumstantial evidence."<sup>262</sup> Judge Cançado Trindade argues that a "simple balance of evidence," instead of near certainty, would be "appropriate."<sup>263</sup> The Court could borrow a similar balancing test to the one helpfully articulated by the ICTY in *Prosecutor v. Tolimir*.<sup>264</sup> The ICTY in *Tolimir*, an international criminal case, held that the "objective probability" that the imposed conditions of life will lead to the physical destruction of a group should be considered when inferring genocidal intent.<sup>265</sup> The intent to destroy is "rarely overt," so a balance of factors should be weighed, including:

- (a) "the general context of the perpetration of other culpable acts systematically directed against that same group", whether committed "by the same offender or by others";
- (b) "the scale of atrocities committed";
- (c) the "general nature" of the atrocities committed "in a region or a country";
- (d) "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups";
- (e) "the general political doctrine which gave rise to the acts";
- (f) "the repetition of destructive and discriminatory acts"; and
- (g) "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list [of relevant statutorily prohibited acts] but which are committed as part of the same pattern of conduct."<sup>266</sup>

The ICTY only then said that "[t]he existence of a plan or policy [or] a perpetrator's display of his intent through public speeches or meetings with others

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<sup>261</sup> See *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 120 (dissenting opinion of Judge Cançado Trindade) (internal citations omitted).

<sup>262</sup> *Bosnia-Serbia Genocide* case, *supra* note 164, ¶ 35 (dissenting opinion of Vice-President Al-Khasawneh) (citing *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 18).

<sup>263</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 138 (dissenting opinion of Judge Cançado Trindade).

<sup>264</sup> Case No. IT-05-88/2-T, Judgment, ¶ 745 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

<sup>265</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 128 (dissenting opinion of Judge Cançado Trindade) (internal citations omitted).

<sup>266</sup> *Id.* ¶ 130 (dissenting opinion of Judge Cançado Trindade) (internal citations omitted). See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sept. 2, 1998) ("intent is a mental factor which is difficult, even impossible, to determine").

may also support an inference that the perpetrator had formed the requisite specific intent.”<sup>267</sup> Essentially, the weighing of circumstantial evidence and a general pattern of genocidal behavior was enough to find the existence of genocide—the ICTY did not require a smoking gun, even in a criminal context.

Under a *Tolimir*-style balancing test, genocidal intent could likely be inferred in the Stolen Generations policies. Applying the *Tolimir* test, the Stolen Generations policies were systemically directed towards Aboriginal and Torres Strait Islander children (part (a)). The policies had a widespread effect: between one-tenth and one-third of First Nations children were forcibly removed from their households (part (b)).<sup>268</sup> Forced removals occurred generally, throughout the country (part (c)). The children were removed *because* they were Indigenous; for non-Indigenous children to be removed from their families, a much more stringent requirement of court-determined negligence needed to be met (part (d)).<sup>269</sup> The removals were initially conceived as part of a broader scheme to “breed out color” and “improve” Australian society (part (e)). For decades, the removals occurred frequently (part (f)) and were part of a pattern of discriminatory governmental acts aimed at controlling and subjugating First Nations communities (part (g)).<sup>270</sup>

Therefore, by lowering the standard of proof and allowing genocidal intent to be inferred from a weight of the evidence, Australia may be held to account for its likely breach of the Genocide Convention.

## B. Too High a Test for Genocidal Intent

The ICJ has developed an unduly burdensome test for finding genocidal intent in state policies. In the *Croatia-Serbia Genocide* case,<sup>271</sup> the Court held that the applicant must first seek evidence of genocidal intent in the respondent state’s policy.<sup>272</sup> “In the absence of a State plan expressing the intent to commit genocide,” intent may be inferred from a pattern of conduct, but genocidal intent

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<sup>267</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 135 (dissenting opinion of Judge Cançado Trindade) (internal citations omitted).

<sup>268</sup> See Section II.A.

<sup>269</sup> See *id.*

<sup>270</sup> See *id.*

<sup>271</sup> The *Croatia-Serbia Genocide* case was brought by Croatia for alleged acts of genocide that occurred during the Croatian War of Independence. *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 50. Serbia counterclaimed that Croatia had also committed genocide during this period. *Id.* ¶ 51. The Court found that the Serbian-led forces attacked and occupied localities, created a climate of fear and displaced Croat and non-Serb populations through persecutions. *Id.* ¶ 415. However, the Serbian led-forces’ objective was primarily to establish an ethnically Serb territory. *Id.* ¶ 420. Therefore, as genocidal intent was not the only reasonable inference to be drawn, the *mens rea* of genocide could not be inferred. *Id.* ¶ 435.

<sup>272</sup> See *id.* ¶ 143.

must be the “the only reasonable inference to be drawn from that conduct . . .”<sup>273</sup> In effect, the “only reasonable inference” analysis is the only test for genocidal intent. Genocidal intent is rarely stated in official policy or plans, a truth acknowledged by the ICJ’s then-Vice-President Al-Khasawneh.<sup>274</sup> Instead, intent is usually elusive and “carefully concealed.”<sup>275</sup> ICJ Judge Cançado Trindade claimed that, over the course of the twentieth century, successive genocides and atrocities demonstrate that state policies “use [] euphemistic language” in genocidal policies, “dehumaniz[ing] [] the victims.”<sup>276</sup> Intent may also be particularly difficult to establish when the perpetrator of genocide is a state. To infer the intent of a state—an abstract entity—a wealth of conflicting evidence, such as the contradictory statements of two politicians, is relied upon. Distilling only one reasonable intent becomes an almost impossible task.

The Stolen Generations policies would likely fail to meet the ICJ’s test for inferring genocidal intent. As previously discussed, the forced child transfer policies were at least partially premised on assimilative aims.<sup>277</sup> The goal of assimilation has much support in the evidentiary record.<sup>278</sup> Therefore, genocidal intent is not the *only* reasonable intent that can be inferred from these policies.

The “only reasonable inference” test for genocidal intent would also cause Article II(e) acts to broadly be under-adjudicated, in contravention of the object and purpose of the Genocide Convention. Alternative intent arguments are persuasive in almost all Article II(e) claims: it is straightforward to claim benign motives for forcibly transferring the children of one group to another. Heinrich Himmler, during his campaign to transfer “racially valuable” Polish children to German families in World War II, justified the forced separation as necessary for the health and wellbeing of the children.<sup>279</sup> The eventual support of the Sixth Committee’s inclusion of forced child transfer in the text of Article II<sup>280</sup> is likely partially attributed to the delegates’ fresh memories of Himmler’s forced child transfers during World War II.<sup>281</sup> The exclusion from genocidal liability of acts like

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<sup>273</sup> *Id.* ¶¶ 145–46.

<sup>274</sup> See *Bosnia-Serbia Genocide* case, *supra* note 164, Summary of the Judgment, 2 (opinion of Vice-President Al-Khasawneh).

<sup>275</sup> *Id.*

<sup>276</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 147 (dissenting opinion of Judge Cançado Trindade). See generally William Donohue, *There’s a Dark Political History to Language That Strips People of Their Dignity*, MSU TODAY (Aug. 2, 2019), <https://perma.cc/F3HF-4RDK>.

<sup>277</sup> See Section IV.B.

<sup>278</sup> See Section II.B.

<sup>279</sup> ROGER MANVELL & HEINRICH FRAENKEL, HEINRICH HIMMLER: THE SINISTER LIFE OF THE HEAD OF THE SS AND GESTAPO 91–92 (2007).

<sup>280</sup> See Section IV.B.

<sup>281</sup> See Mundorff, *supra* note 100, at 64, 79.

those perpetrated by Himmler, therefore, could not have been an intended result of the Convention's application.

Even under Article II(a), the prototypical "mass killing" genocide scenario, the Court's test produces unsatisfactory results. The ICJ held that the Vukovar massacre, considered one of the "most brutal episodes of the Balkans wars," was not a genocide because the only reasonable inference for the Serbian attack was not the physical destruction of those Croats who were killed.<sup>282</sup> In Vukovar, which bordered Croatia and Serbia, hundreds of people, including the families of hospital staff and some Croatian soldiers, had sought shelter in a hospital after the city fell following a three-month siege.<sup>283</sup> These people believed they would be evacuated in the presence of international observers.<sup>284</sup> Local armed Serbs entered the hospital and transported many of those sheltered in the hospital (mostly Croats) to a farm.<sup>285</sup> At least 264 people were shot at the farm and buried in a mass grave.<sup>286</sup> The ICJ concluded there was no genocidal intent, as the attack was animated by political and/or retributive motives. Judge Bhandari, in a separate opinion, wrote that the Court had committed "a basic error of law."<sup>287</sup> Judge Bhandari argued that "genocidal *intent* may exist *simultaneously* with other, *ulterior motives*."<sup>288</sup> Judge Bhandari also claimed that the finding in the ICTY's *Popović* case that the massacre at Srebrenica, which the Court held constituted genocide in its prior *Bosnia-Serbia Genocide* case, would have come out the other way had the Court applied the "only reasonable inference" test: "[T]he massacre at Srebrenica enclave was in part motivated by the strategic advantage of uniting a 'Greater Serbia.' Never was it suggested that this tactical motivation precluded the attack from possessing genocidal intent."<sup>289</sup>

Furthermore, the Court's "only reasonable inference" test is internally inconsistent with the Court's other reasoning, specifically regarding ethnic cleansing. The Court held in the *Bosnia-Serbia Genocide* case that ethnic cleansing campaigns could amount to genocide, but not always, as forced displacement does not necessarily mean that the state intended to destroy the group.<sup>290</sup> Destruction is also not an automatic consequence of displacement.<sup>291</sup> In the case that

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<sup>282</sup> Alexandra Hudson, *U.N. Tribunal to Rule in Vukovar Massacre Case*, REUTERS (Sept. 25, 2007), <https://perma.cc/8JG3-Z7AV>.

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> *See id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 50 (separate opinion of Judge Bhandari).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *See Bosnia-Serbia Genocide* case, *supra* note 150, ¶ 190.

<sup>291</sup> *See id.*

established the “only reasonable inference” requirement, the *Croatia-Serbia Genocide* case, the Court reiterated this earlier principle from the *Bosnia-Serbia Genocide* case—that the intent of a state to render an area “ethnically homogenous” would not alone suffice for genocide.<sup>292</sup> But under the Court’s “only reasonable inference” test, because a smoking gun hardly ever exists, virtually every ethnic cleansing action would fail to amount to genocide.

If, instead, the Court adopts a “reasonable inference” or “most reasonable inference test,” genocidal intent may be inferred where other coextensive intents exist. This easier-to-meet test for genocidal intent would allow for genocidal intent to be inferred in contexts in which it plainly should exist: for example, for ethnic cleansing events like the Vukovar and Srebrenica massacres, and for Article II(e) claims like Himmler’s conduct in World War II and Australia’s Stolen Generations policies.

## VI. CONCLUSION

This Comment examined whether Australia could be haled into the International Court of Justice on a genocide claim for its Stolen Generations policies. There is a plausible claim of genocide (Section IV). While there would likely not be a procedural bar to hearing such a claim (Section III), the case would almost undoubtedly be decided in favor of the Australian government. However, this Comment argues that the Court’s existing jurisprudence is flawed, especially as applied to the Stolen Generations policies. The ICJ should consider revising its position on the standard of proof and the test for genocidal intent, especially because the existing standards would effectively foreclose Article II(e) claims such as the one that could be brought on behalf of the Stolen Generations (Section IV). This Comment recommended that the Court lower the standard of proof and the threshold for establishing genocidal intent. If the Court were to adopt these changes, it will allow claims reliant on Article II(e), such as Stolen Generations claims, to be meaningfully adjudicated. In so doing, the Court can better align its reasoning with the purposes of the Genocide Convention.

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<sup>292</sup> *Croatia-Serbia Genocide* case, *supra* note 150, ¶ 161.