

CULTURAL GENOCIDE RECONSIDERED

Robert van Krieken*

I Introduction

One aspect of the *Bringing them Home* Report¹ that has caused considerable controversy was its appeal to the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*² ('UNGC') to characterise the removal of Aboriginal children as state-sponsored genocide.³ This utilisation of the UNGC having been debated in the wake of the *Bringing Them Home* Report, there is now general agreement that it was deeply problematic. Before the *Bringing Them Home* Inquiry had been undertaken, Hal Wootten, as Commissioner for the Royal Commission into Aboriginal Deaths in Custody, was one of the first to identify the perception among Aboriginal people of the removal of their children as 'falling within the modern definition of genocide';⁴ but later he also assessed the *Bringing Them Home* Report's reliance on the UNGC to address the question of genocide in the history of Australian settler-colonialism as a misjudgement.⁵

Four years after the *Bringing Them Home* Report, its Chair, Sir Ronald Wilson, admitted that '[w]ith hindsight, I think it was a mistake to use the word genocide ... once you latch onto the term "genocide", you're arguing about the intent and we should never have used it'.⁶ When you think about it, the UNGC was really an unlikely ally for any attempt to deal with the harms inflicted by the removals of Aboriginal children from their families, having been produced by an organisation, the United Nations, that was broadly in support of the full assimilation of Indigenous peoples in a range of settler-colonial settings.⁷ Although opinions were divided among the different nations making up the United Nations, on balance it was opposed to the notion of 'cultural genocide' and the application of the genocide convention to the treatment of Indigenous peoples, seeing that as an issue to be dealt with under the heading of 'minority rights'.⁸

However, this does not mean that the concept of genocide has no further role to play, not least because Indigenous people themselves continue to see it as capturing a central part of their experience of assimilation into European society. When the UNGC was being put together, the distinction between *cultural* and *physical* destruction was actually highly unstable. The clause concerning the forcible transfer of children, art 2(e) of the UNGC, to which the *Bringing Them Home* Report referred,⁹ was a prime example of this instability. It had been moved around from one category of genocide to the other in the drafting of the UNGC.¹⁰ We may need to recognise that the concept 'genocide' can have different meanings depending on what we want to say and which problems we want to address. It is possible to have both a narrow, legally legitimate conception of genocide, but also a broader one that does justice to the violence at the heart of the settler-colonial project. Rather than organising our understanding around the UNGC, it may be necessary to reflect more deeply on the basic problem confronting non-Indigenous Australians – how to be a 'good' colonist – a problem which is today still not being confronted to real effect.

II The UNGC Definition of Genocide, Legal Definition is Unhelpful

The *Bringing Them Home* Report argued that the removal of Aboriginal children from their families constituted acts defined as genocide by art 2(e) of the UNGC.¹¹ Under art (2), these are 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group ... [including] [f]orcibly transferring children of the group to another group.' In relation to the Stolen Generations, the relevant Australian legislation allowed for the removal of Aboriginal children without parental consent.¹² This means

that such removals could be seen as falling within the possible acts of genocide identified in the ‘forcible transfer of children’ component of art 2(e) of the UNGC.

It can be argued that the first component of art 2(e), that of the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’, was also satisfied by the overall objective of assimilationist Aboriginal policy among the State, Territory and Commonwealth Governments up until the 1970s. The aim was to engineer the effective disappearance of Aboriginal culture as a distinct basis of individual and collective identity; its ‘swallowing up’ by a European way of life.

However, in *Kruger v Commonwealth*¹³ this argument fell on stony legal ground. The position taken by the Gaudron J in High Court was that because genocide is ‘so fundamentally repugnant to basic human rights acknowledged by the common law’ any legislation needs to make it extremely clear that this is its aim in order to satisfy the ‘intent’ requirement.¹⁴ Similar sentiments were expressed by the other judges.¹⁵ All of the relevant legislation was always formulated in terms of ‘welfare’, making it very difficult to impute an ‘intent to destroy’.

The *Bringing Them Home* Report had turned to the ‘forcible transfer of children’ clause in the UNGC as an ally in its engagement with child removal as a central dimension of the experience of settler-colonialism. The problem was that this was not the way in which the United Nations itself approached that clause and the acts it was intended to deal with. The United Nations, which produced the UNGC, was, at the time when the UNGC was developed, no real friend of Indigenous peoples. During the debates on the Convention, for example, the New Zealand delegate pointed out how central concepts of assimilation and integration – if need be, forced – were to the United Nations’ own understanding of the place of Indigenous peoples within processes of progress and social improvement.¹⁶ To apply the UNGC definition of ‘genocide’ to the Stolen Generations is an interpretation of the UNGC that is alien to its overall intent, and it is clear that ‘genocide’ has a particularly restricted range of application in law. This is not, however, where the story should end. The often triumphalist insistence on the virtues of a narrower conception of genocide consistent with the UNGC has underpinned an odd kind of deafness to what is being said on the other side.

III Cultural Genocide – A Broader Conception

Acknowledging that ‘cultural genocide’ does not fall within the scope of the UNGC does not mean that we cannot remain alive to the concerns which that concept is invoked to address. As Larissa Behrendt has said, the legal ineffectiveness of cultural genocide has done ‘nothing to dispel the feeling Indigenous people have that this is the word that adequately described our experiences as colonised peoples.’¹⁷ The support for an understanding of genocide that goes beyond outright killing is particularly strong among Indigenous peoples subjected to settler-colonialism. There remains such a heartfelt and persistent sense of inflicted violence, pain and suffering at the heart of the settler-colonial project that it may be ill-advised to stand too stubbornly on the conceptual purity of a ‘correct’ definition of genocide.

Perhaps what needs closer attention is the extent to which this distinction between cultural and biological destruction is itself unstable and essentially contested, so that it is actually often hard to tell the difference between what destroys a culture and what kills a people. Even if we agree that cultural genocide should, for particular purposes – especially that of identifying legally cognisable responsibility – be distinguished from physical genocide, and that this distinction is a central feature of the UNGC, such a distinction can obscure the continuity that nevertheless remains between the two concepts.

It is also worth posing the question: is it possible to move beyond a ‘one size fits all’ approach to the concept of genocide? It ought to be possible to distinguish between, on the one hand, the understanding we rely on to attribute criminal responsibility and, on the other hand, the one we use to approach our history and our sense of what it means to be settler-colonial subjects. Is the UNGC really that reliable a guide for a useful understanding of genocide? Or do the attempted mobilisations of the UNGC actually constitute a critique of genocide? It may be important to recognise the many different types of coercion that have characterised the emergence of modern societies up to the present day – including practices of coercion in their apparently ‘benign’ forms as well as their explicitly destructive forms – in order to be able to see how current social institutions and practices might at least address the effects of the various forms of ‘founding violence’ underpinning settler-colonial state formation and nation building.

The Polish jurist Raphaël Lemkin was the architect of the UNGC.¹⁸ Let us look at what he said about the concept of genocide:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation ... It is intended ... to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.¹⁹

However, when these ideas were churned through the process of turning them into a workable United Nations convention, the dominant feeling across the United Nations was to insist that the literal definition of genocide as 'the deliberate destruction of a human group' should be stuck to, rather than expanding the definition to include 'the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.'²⁰

Specifically in relation to the concerns of the *Bringing Them Home* Report, the first draft of the UNGC excluded 'the policy of compulsory assimilation of a national element' from its definition, even if such acts 'may result in the total or partial destruction of a group of human beings'.²¹ A policy of forced assimilation 'does not as a rule constitute genocide'. It was '[t]he system of protection of minorities, if applicable' which was seen as relevant to 'the protection of minorities against a policy of forced assimilation employing relatively moderate methods'.²²

What is interesting about the 'forcible transfer of children' clause is that the practice of child removal was originally understood by Lemkin as part of the *cultural* dimension of genocide, which is how it first entered the UNGC, but it was subsequently redefined as being in actuality an element of physical or biological genocide.²³ It was on this basis that agreement was secured on its place in the UNGC. In supporting the amendment, the US delegate, John Maktos,

rhetorically asked the Ad Hoc Committee charged with drafting the Convention

to consider what difference there was from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth.²⁴

The career of the 'forcible transfer of children' clause shows that the distinctions between 'biology' and 'culture' were by no means clear.

IV Meaning of Destruction of a Human Group

The problem is basically that of how the meaning of the 'destruction' of a human group can vary enormously. Is it necessary to physically kill them, or can they be 'killed' in more subtle and apparently civilised ways? It is useful here to recall Alexis de Tocqueville's observations on the destruction of the North American Indians, and the difference between the approaches of the Spanish and the Americans:

The Spanish, with the help of unexampled monstrous deeds, covering themselves with an indelible shame, could not succeed in exterminating the Indian race, nor even prevent it from sharing their rights; the Americans of the United States have attained this double result with marvellous facility – tranquilly, legally, philanthropically, without spilling blood, without violating a single one of the great principles of morality in the eyes of the world. One cannot destroy men while being more respectful of the laws of humanity.²⁵

This distinction between different modes of destruction remained the one splitting the debates in the United Nations. It continues to divide our understanding between a 'narrow' and a 'broad' view of genocide to this day.

On the one side are the arguments that genocide should be narrowly conceived, restricted to the approach adopted by the Spanish in South America, and on the other are proposals that we should understand genocide more broadly, and recognise what is problematic about the techniques adopted by the Americans in North America; what remains violent and destructive about the apparently civilised management of the process of settler-colonisation within the rule of law.

What might the broader approach wish to identify as the genocidal element in the child removal policies? I would

argue that the genocidal element lies less in an unambiguous 'intent to destroy' a human group than in the presumption that there was not much *to* destroy. For example, Aboriginal culture and its way of life, especially once it had encountered European civilisation, was presented by Paul Hasluck²⁶ and, it can be argued, almost every other administrator in Aboriginal affairs, as inherently flawed, fragile and basically worthless, producing only illness, disease, drunkenness, filth and degeneracy in the 'thousands of degraded and depressed people who crouch on rubbish heaps throughout the whole of this continent'.²⁷

Aboriginality was constructed simply as a 'primitive social order' composed of 'ritual murders, infanticide, ceremonial wife exchange, polygamy'.²⁸ It was in this sense that the practices of settler-colonisation were able, in the minds of their executors, to escape from the concerns normally attached to an abhorrence of something like genocide. It was in this sense that it was possible for the destructive dimensions of nation building, what Rennard Strickland calls 'genocide-at-law',²⁹ to take place, as de Tocqueville wrote, 'tranquilly, legally, philanthropically, without spilling blood, without violating a single one of the great principles of morality in the eyes of the world'. The recognition that genocide has limited legal application does not change the fact that there remain significant problems of legitimacy surrounding colonisation and all its attendant practices, including child removal. This is why the Stolen Generations debate generates so much heat, emerging from the collision of the two central ways of dealing with this issue – how to be a legitimate coloniser?

Some people have said that this heat has been produced by the idea that it is unfair to accuse people with basically good intentions of doing terrible things.³⁰ But I disagree. I think it is more plausible to see the public resistance to the idea of genocide as a reaction to the suggestion that white Australians' self-image may be tarnished, that our 'civilisation' has a dark side to it, and that European Australians are indeed colonisers.

Albert Memmi, in his book *The Colonizer and the Colonized*, has pointed out that the problem with being a coloniser is that one's identity is essentially that of a usurper; colonisers are constantly concerned with trying to legitimise their usurpation – of land, of space, of power, and of bodies:

to possess victory completely he [the coloniser] needs to

absolve himself of it and the conditions under which it was attained. This explains his strenuous insistence, strange for a victor, on apparently futile matters. He endeavours to falsify history, he rewrites laws, he would extinguish memories – anything to succeed in transforming his usurpation into legitimacy.³¹

Respect for 'the laws of humanity', such as those surrounding genocide, is clearly significant. But it does not guarantee that we avoid inflicting violence and pain on each other.

V Conclusion

There is a powerful tendency in liberal democracies to see society as a kind of organism where everyone follows the same way of life, where all individuals think and feel the same way, and where 'the nation' is the only appropriate communal, shared identity – anything else is basically nostalgia. But all the testimony gathered by the *Bringing Them Home* Report also made it crystal clear how painful and destructive the pursuit of cultural homogeneity can be. In challenging a monocultural conception of liberalism, it is true that one can go too far the other way, that 'culture' can operate just as destructively to shield infringement of basic human rights and dignities, to underpin the infliction of other kinds of pain and violence. As Amartya Sen has recently argued:

cultural generalizations ... can also present astonishingly limited and bleak understandings of the characteristics of the human beings involved. When a hazy perception of culture is combined with fatalism about the dominating power of culture, we are, in effect, asked to be imaginary slaves of an illusory force.³²

Nonetheless, it is also true human beings are not 'pure' isolated individuals: we cluster into groups with different positions in the nation's history, different claims to legitimacy, and different senses of who we are, even if there are also similarities and overlaps.

A balance between universalistic norms and moral principles and the specifics of real people's location in time, space and history will only be achieved with the cultivation of a form of liberalism that can conceive of individuals as integral parts of collectivities, with their communal identity an essential rather than expendable element of their relationship to the state and society. Without this balance, it is unlikely that people, especially Indigenous Australians, will cease to find

themselves as the objects of one or other form of systemic violence, regardless of whether it is appropriate to call it 'genocide'.

Endnotes

- * Robert van Krieken is Associate Professor of Sociology, University of Sydney, author of *Children and the State* (1991); 'The Barbarism of Civilization: Cultural Genocide and the "Stolen Generations"' (1999) 50 *British Journal of Sociology* 297; 'Is Assimilation Justiciable? *Lorna Cubillo and Peter Gunner v the Commonwealth*' (2001) 23 *Sydney Law Review* 239. This paper draws on a longer version published as 'Cultural Genocide in Australia' in Dan Stone (ed), *The Historiography of Genocide* (2008) 128.
- 1 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (*'Bringing Them Home Inquiry'*), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997) (*'Bringing Them Home Report'*).
- 2 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951).
- 3 *Bringing Them Home Inquiry*, above n 1, 270–5.
- 4 Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Charles Smith* (1989) 5.
- 5 Hal Wootten, 'Ron Brunton and *Bringing Them Home*' (1998) 4 (12) *Indigenous Law Bulletin* 4, 6.
- 6 *The Bulletin* (Sydney), 12 June 2001, 27.
- 7 Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993' (1994) 16 *Human Rights Quarterly* 1, 24–32
- 8 Johannes Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights' (1999) 21 *Human Rights Quarterly* 1009; Patrick Thornberry, *International Law and the Rights of Minorities* (1991).
- 9 *Bringing Them Home Inquiry*, above n 1, 271–2.
- 10 William A Schabas, *Genocide in International Law: The Crime of Crimes* (2000) 175–89.
- 11 *Bringing Them Home Inquiry*, above n 1, 270–5.
- 12 In one sense the state always has the power to remove children against parental consent; it is a matter of whether its exercise can be defined as exercising 'care'. The 'background' legal power is the state's *parens patriae* jurisdiction over any subject defined as unable to care for themselves, particularly children and the mentally ill: John Seymour, '*Parens Patriae* and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159. In every State the relevant body charged with responsibility for the Aboriginal population (Protector, Aborigines Protection Board, Director of Native Affairs, etc) was in any case empowered through child welfare legislation to remove, without parental consent, children found to be 'neglected' by a magistrate, and 'neglect' was often very broadly interpreted. More specifically in relation to Aboriginal children, in New South Wales, the *Aborigines Protection Act 1909* (NSW) was amended in 1915 to give the Aborigines Protection Board the power to make this decision without having to go before a magistrate: Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in NSW, 1883 to 1969* (1983). In the Northern Territory, the *Aboriginals Act 1918* (NT) gave the Chief Protector the power to assume the 'care, custody, or control' of any Aboriginal or 'half-caste' person if he considered it in their interests. The Western Australian *Aborigines Act 1905* (WA) granted similar powers to the Chief Protector, and simply transferred guardianship of all mixed-descent children to the Protectors. In Queensland, the Director of Native Affairs became the guardian of all Indigenous children under 21 in 1939: *Bringing Them Home Inquiry*, above n 1, 72.
- 13 (1997) 190 CLR 1.
- 14 *Ibid* 105 (Gaudron J).
- 15 *Ibid* 70 (Dawson J), 88 (Toohey J), 159 (Gummow J).
- 16 UN GAOR, 6th Comm, 3rd sess, 83rd mtg, 201 UN Doc A/C.6/SR.83 (1948).
- 17 Larissa Behrendt, 'Genocide, the Distance between Law and Life' (2001) 25 *Aboriginal History* 137.
- 18 Raphaël Lemkin, 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 145.
- 19 Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944) 79.
- 20 *Draft Convention on the Crime of Genocide*, UN ESCOR, UN Doc E/447 (1947), Prevent Genocide <<http://www.preventgenocide.org/law/convention/drafts/>> at 20 March 2008.
- 21 *Ibid* 53.
- 22 *Ibid* 24.
- 23 More detailed discussion can be found in van Krieken, 'Cultural Genocide in Australia' in Dan Stone (ed), *The Historiography of Genocide* (2008) 128.
- 24 UN GAOR, above n 16, 187.
- 25 Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop trans and eds, first published 1835/1840, 2000 ed) 325 [trans of *De la démocratie en Amérique*].
- 26 Paul Hasluck served as the Commonwealth Minister for Territories (1951–63), Minister for Defence (1963–64), Minister for External

Affairs (1964–69) and Governor-General (1969–74).

- 27 Paul Hasluck, 'Policy of Assimilation', NTAC 1976/137, National Archives of Australia (1951) 2 (copy held on file with author). This document was an early statement of Hasluck's as Minister for Territories on his approach to assimilation.
- 28 Ibid.
- 29 Rennard Strickland, 'Genocide-at-law: An Historic and Contemporary View of the Native American Experience (The Langston Hughes Lectures)' (1986) 34 *University of Kansas Law Review* 721.
- 30 See, eg, Inga Clendinnen, 'First Contact', *The Australian's Review of Books, The Australian* (Sydney), 9 May 2001, 6–7.
- 31 Albert Memmi, *The Colonizer and the Colonized* (1965) 52.
- 32 Amartya Sen, *Identity and Violence: The Illusion of Destiny* (2006) 103.