

# Residential School Graves, Canada's "Slow" Genocide & the International Criminal Court

by Selen Kazan

*Note: The following contains information related to colonial violence and Canada's Indian Residential School system, which may be distressing for some readers.*

**THE MATTER OF** Indian Residential Schools (IRS) came to the forefront many times in the past year. More recently, on April 1st, 2022, several Indigenous delegations went to the Vatican to hear an apology from the Pope. The **apology** — albeit half in nature and passive in language — shows remorse for the few “bad apples” that were members of the Catholic Church and working in the IRS. Yet, he failed to take responsibility for the IRS system as a whole, the ideology behind it, and the Catholic Church's major role in instigating them.

The final report of the Truth and Reconciliation Commission (TRC), on the other hand, found that Canada's IRS system was an act of **cultural genocide**, something former **Chief Justice McLachlin** viewed as an admission of guilt. While this is a widely shared view, questions around physical genocide are more contentious.

The Indian Residential Schools Settlement Agreement, which mandated the creation of the TRC, did not provide the TRC with legal authorities such as subpoena power, identifying perpetrators, or the ability to judge whether a physical or biological genocide occurred. Doing so could have resulted in the Canadian government having subsidiary legal responsibilities.

That being said, the introductory section of the TRC's final report makes clear that the IRS system was not a physical genocide, which they define as “the mass killing of the members of a targeted group, and biological genocide is the destruction of the group's reproductive capacity.” Cultural genocide made more sense at the time, given the emphasis on “the destruction of those structures and practices that allow the group to continue as a group.” This can happen by seizing land, prohibiting Indigenous languages, and attacking culture and spirituality. The main element of cultural genocide is the transgenerational aspect — the forceful separation of children from their families, breaking a chain of generations, as was infamously intended and **stated** by John A. Macdonald, Canada's first prime minister, in 1883.

**Yet, almost seven years and thousands of uncovered graves on residential school grounds later, this question should be re-visited. What do we make of Canadian genocide now?**

## CULTURAL GENOCIDE IN INTERNATIONAL LAW

While the IRS system is increasingly depicted as genocide by scholars ([here](#), [here](#), and [here](#)) the specification of what kind of genocide occurred is not settled. Cultural genocide is still a contested legal term and issue because of political constraints. Polish-Jewish jurist Raphael Lemkin coined the term genocide in 1944, asserting that genocide does not solely refer to the immediate destruction of a national group but rather a “coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups.” The initial talks of including the concept as Article III in the [UN Genocide Convention](#) (UNGC) in 1948 have also resulted in the omission of cultural genocide. Cultural genocide is, [so went the argument](#), the final goal — and physical genocide is one means to achieve it.

However, the majority contended that the physical destruction of a group could not be placed on the same level as, for example, the prohibition of a language. [Per a telegram](#) from (what was then) the Canadian Secretary of State, the Canadian delegation was instructed to vote against UNGC as a whole if cultural genocide were to be integrated. With the removal of the cultural genocide clause, Canada signed the UNGC in 1949. However, cultural genocide as a concept was not dismissed entirely: Article II (e) “forcible transfer of children to another group,” which entails both cultural and physical aspects of genocide, was still included.

## A SLOW CANADIAN GENOCIDE

The debate about whether a cultural or physical genocide occurred in the IRS system can distract from the real issue at hand. Indeed, the National Inquiry into Missing and Murdered Indigenous Women and Girls’ (NIMMIWG) supplementary [report](#) on genocide also deems this debate as misleading for the Canadian context.

### **They say no matter which offence is chosen – cultural or physical genocide – both encompass Canada’s past and current actions toward Indigenous peoples.**

However, there is a distinction that matters. Genocide under the UNGC tends to focus on genocide in the context of war, such as the Holocaust, Rwandan Genocide, or Srebrenica. This leaves out the possibility of a ‘slow’ destruction of a group through means outside of war. The MMIWG Inquiry, therefore, defined the term colonial genocide, which encompasses more gradual processes. They argue that the intent to destroy Indigenous peoples in Canada was implemented over time and erratically, utilizing several tactics against various Indigenous communities. The difference to the popular notion of genocide is that the policies fluctuated in time and space and, to some extent, are still ongoing, though less quantifiable. Nevertheless, the concept of “[temporal jurisdiction](#)” complicates the matter, as stated [here](#), because at any court, national or international, the state must be bound by the obligation in question when the act occurred. In other words, Canada had to be legally bound to the UNGC when the acts took place.

Viewing the matter in temporal terms ignores the fact that Canada’s cultural genocide has led to many other acts that are arguably genocidal in nature. As Cree scholar Tamara Starblanket argues, cultural and physical genocide share a finality because they both remove discernable political distinction from a people by forced assimilation.

### **To build the Canadian state, it was absolutely necessary to dismantle pre-existing Indigenous Nationhoods. This slow form of genocide, cultural or physical, was not only evident in the IRS system and its aftermath but in the colonial system the IRS was embedded in, that also includes the Indian Act, which still enforces the genocidal structures and the ongoing removal of Indigenous children into today’s child-welfare system.**

## CANADIAN BURIAL SITES – A CASE FOR THE INTERNATIONAL CRIMINAL COURT?

The question of whether slow genocide can circumvent the International Criminal Court's (ICC) temporal jurisdiction constraint is left vague. Genocidal acts committed within Canada are only prosecutable if they were committed following the global adoption of the Rome Statute on July 1st, 2002, which would rule out the IRS system. However, legal practice has shown that if the act was not criminalized when it occurred, but its effects are still palpable after it came into force, then it may be prosecutable. Also, the IRS system continued well into the 1990s when UNGC was already in force.

### **More, The Crimes Against Humanity and War Crimes Act (CAHWCA) and Canada's adoption of the Rome Statute could be advantageous and helpful if the ICC opened an investigation against individual abusers, the Canadian government, and the Catholic Church.**

The CAHWCA enables the ICC prosecutor to wield domestic powers that extend the ICC's subpoena powers. The court could open an investigation into the IRS and the mass graves for which it could demand documents that are otherwise not available — such as in the case of the Missionary Oblates of Mary Immaculate that operated 48 IRSs. The Canadian government would not be able to interfere in the investigations as it is legally obliged by the CAHWCA to abstain from ICC's investigation.

Indigenous lawyers and the Native Women's Association of Canada share a similar view because they sent a letter to the ICC requesting an opening of a preliminary examination *proprio motu*, i.e., from his own initiative. However, the letter, which the ICC has acknowledged, argues for the offence of crimes against humanity rather than genocide. The lawyers also acknowledged the temporal jurisdiction problem, which they rebutted by arguing that the temporal jurisdiction of the court can be extended in this situation because the government and churches intended to cover up crimes committed in the past. This in turn, resulted in ongoing, continued misconduct and prolonged the span of the alleged offences, making the ICC the court of last resort.

## PROVING "PHYSICAL" GENOCIDE?

The revelations of more and more graves could be **growing evidence** of mass death in the former schools, and this could alter the legal findings. Canada's Indian Residential School policy was unambiguous on assimilating Indigenous children by forcefully removing them from their families and communities. To distinguish whether a physical or cultural genocide took place, one needs to look at the intent behind the actions.

### **For the crime of (physical) genocide, a specific intent is necessary: were the Indigenous children taken from the families with the distinct purpose of destroying the Indigenous group biologically, or was the cultural extinguishment of the protected group intended?**

Physical genocide would mean that these children were never to return and were specifically and permanently separated from their families by being killed or left to die through neglect; cultural genocide would imply that the separation was temporary — children could indeed return but could not perpetuate their traditions, values, and culture because they were not brought up to understand and learn their culture. Thus, the cultural identity of the group would be "destroyed." The latter appears to be applicable for the IRS. A high death rate in the schools, proven to be intentional, such as spreading sickness, torture, or severe neglect may constitute additional evidence for the specific intent that physical genocide necessitates.

The burial sites may not show how the children died, but they do prove the children never returned home. Thus, it may amount to physical genocide, and the search for further mass graves may disclose more genocidal **evidence**.

## When more mass grave sites are found, what will Canada and Indigenous Peoples decide to do? Will this lead to a reassessment of the cultural genocide conclusion? Could this even lead to a reassessment on the international level?

Physical, cultural, or colonial—the ongoing revelations of child graves and continuing evidence of Canada’s culpability in genocide confirms what Survivors of the IRS system have always known: that death “cast a long shadow” at these institutions.

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Support is available for anyone affected or impacted by Canada’s Indian Residential School system.

- National Indian Residential School Crisis Line  
1-866-925-4419
- 24-hour KUU-US Crisis Line  
1-800-588-8717
- Indian Residential School Survivors Society  
604-985-4464 or 1-800-721-0066

**CITATION:** Kazan, Selen. “Residential School Graves, Canada’s “Slow” Genocide & the International Criminal Court”. *Yellowhead Institute*. 20 April 2022. <https://yellowheadinstitute.org/2022/04/20/residential-school-graves-slow-genocide/>