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Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation

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ABSTRACT

This paper examines the use of the concept of cultural genocide to understand one particular episode in Australian legal political and social history, the removal of Aboriginal children from their families, mostly during the 20th century. After outlining the approach of Australian courts to the idea of cultural genocide, the paper examines the construction of the UN Genocide Convention, particularly the clause concerning the forcible removal of children, which illustrates the underlying instability of the boundary between a cultural and a physical understanding of genocide. It then explores how this instability was manifested in the development of early 20th century Australian legislation concerning the 'protection' of Aborigines, indicating the underlying racially-oriented coerciveness of conceptions of Aboriginal 'welfare', and concludes by reflecting on the wide range of ways in which the concept of genocide can and should be used, especially in capturing the experience of Indigenous peoples under settler-colonialism.

INTRODUCTION

The Spaniards, 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 marvelous 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 (de Tocqueville 2000:325).

The word 'genocide' was introduced by the Polish jurist Raphaël Lemkin in 1944 to capture an essential dimension of Nazi Germany’s legal and administrative practices in its occupied territories, well before Auschwitz. The foundations of his conception of genocide were laid as the National Socialists came to power in 1933, when Lemkin used the concept of the crime of ‘barbarity’ to capture ‘oppressive and destructive actions directed against individuals as members of a national, religious, or racial group’, and that of ‘vandalism’ to refer to ‘malicious destruction of works of art and culture’ (Lemkin 1944:91), and his formulation of the crime of ‘genocide’ combined these two into one. Ever since, however, there have been tensions between broader and narrower understandings of what constitutes genocide. A narrow conception essentially restricts the definition of genocide to the various forms of killing and physical annihilation, whereas the broader conception allows for a wider variety of ways in which human groups can be ‘eliminated’, including the destruction or undermining of their culture and physical environment. Some of these tensions are certainly generated by the occasional excessive political enthusiasm for calling something seen as destructive in some way or another ‘genocidal’. Michael Ignatieff has characterized such enthusiasm as a tendency...
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towards banalization and therefore a weakening of the concept’s practical effectivity: rather
than operating as a ‘validation of every kind of victimhood,’ it should, he suggests, be
reserved for ‘genuine’ horrors and barbarisms (Ignatieff 2001:27).

Among the supporters of an understanding which goes beyond outright killing, howev-
er, there remains such a heartfelt and persistent sense of organized inflicted violence, pain
and suffering, that it is perhaps ill-advised to stand too stubbornly on the conceptual purity
of a ‘correct’ definition of genocide. It is significant, for example, that the argument for a
broader conception of genocide has been strongest among Indigenous people subjected to
settler-colonialism (Bischoping & Fingerhut 1996; Churchill 1986; 1997). An important
example of the argument for applying the United Nations Convention on the Prevention and
Punishment of the Crime of Genocide (UNGC) to activities other than killing is the Aus-
tralian debate around the ‘stolen generations’, those Aboriginal people who were removed
from their families in the course of the twentieth century. Two key focal points of this
debate are the Australian Human Rights and Equal Opportunity Commissions (HREOC)
1997 report on the history of the removal of indigenous children from their families, Bring-
ing them Home (BTH), and the High Court Kruger case.2 The argument put in both contexts
was that the removal of Aboriginal children from their families constituted acts defined as
genocide by Article II of the Convention, ‘acts committed with intent to destroy, in whole
or in part, a national, ethnical, racial or religious group’, including ‘(e) Forcibly transferring
children of the group to another group’.

In law, the pursuit of a broader understanding of genocide has fallen on stony ground
(Saul 2000), with the Australian High Court rejecting the argument that the Ordinance
could be considered as characterized by any intent to ‘destroy’ Aboriginal groups. Heavily
influenced by this legal outcome, the argument has also had a similarly rocky passage in
broader political terms; the Australian discussion has tended simply to polarize between
those who support the applicability of the concept of genocide and those who do not, with
little genuine or informed debate between the two positions (Gaita 1997).

However, the mere insistence on the virtues of the narrower conception of genocide
does not in itself solve the problem of how to respond to claims based on the broader
approach. Acknowledging that ‘cultural genocide’ does not fall within the scope of the
UNGC, and that it provides no effective foundation of an action in law, does not mean that
we cannot remain alive to the concerns which that concept is invoked to address, as well as
recognizing that there may still be a problem requiring some other sort of engagement, both
conceptually and practically. For example, one approach has been to invoke, instead of ‘cul-
tural genocide’, the term ‘ethnocide’, described by Pierre Clastres as ‘the systematic
destruction of the modes of life and thought of a people who are different from those who
carry out this destructive enterprise…genocide kills their bodies, while ethnocide kills their
spirit’ (1988:52). Rather than simply dismissing the claims regarding cultural genocide and
ethnocide because they are ineffective in law, this paper works towards returning from an
engagement with those claims with a deeper and broader understanding of the various
forms of state-sponsored force. The aim is to recognize the many types of coercion charac-
terizing state formation up to the present day, in order to contribute to the identification of
ways in which current social institutions and practices might better avoid or at least address
the more problematic outcomes of such organized violence.

ABORIGINAL CHILD REMOVAL, THE BRINGING THEM HOME REPORT
AND THE KRUGER CASE

By the last quarter of the nineteenth-century, it had become widely accepted among Euro-
pean Australians that the Aborigines were a ‘dying race,’ and this was based on the notion
of the essential ‘fragility’ of Aboriginal culture in contact with Europeans (Brantlinger
1995; McGregor 1997). Extinction was thus simply a matter of time, so that the most Euro-
peans could do was to ‘smooth the dying man’s pillow’ (Bates 1944). Around the turn of the century, however, it turned out that ‘traditional’ Aborigines were not dying as quickly as anticipated, and as European settlement spread across the continent, so did contact between Europeans and Aborigines, including sexual contact, which of course had its inevitable consequence — children. The resultant mixed-blood population was itself very fertile, so that by around the 1890s European Australians were becoming increasingly concerned about what came to be defined as the ‘half-caste problem’. ‘There was a growing realisation,’ writes Russell McGregor, ‘that the descendants of a dying race might continue to haunt a White Australia for generations’ (1997:134).

One key element to the resultant ‘civilizing offensive’ on the part of both State and Church, which aimed to protect as well as advance civilization by completely eliminating Aboriginality in this hybrid form from a ‘White Australia’, was to turn to an existing social technology designed to deal with problems of social discipline, revolving around the concept of ‘rescuing the rising generation’ (van Krieken 1992). A policy of removing mixed-blood Aborigal children was introduced in all the Australian states in order to address the dangers of the hybridity of mixed-bloods, their threat to the boundaries between the civilized and the savage. The state was made the legal guardian of all children of Aboriginal descent, overriding Aboriginal parents common-law rights over their children, who were to be removed at official will and sent to a mission or a child welfare institution, or to be fostered with a white family if sufficiently light-skinned. The legislation enabling this was introduced in relatively weak form between 1886 and 1909 in all Australian states, strengthened around 1915, and further reinforced in the 1930s, by which time, in legal terms, the state had become the custodial parents of virtually all Aboriginal children (Haebich 1988:350).

The actual number of Aboriginal children removed from their families is unclear, partly because the records kept were patchy, with no accounting for Aboriginal children sent to homes not specifically designated for Aborigines; some were removed ‘unofficially’ and placed in the care of church agencies or individuals. Also difficult to quantify, as Peter Read reminds us, were ‘those who went away to white people for a ‘holiday’ and did not return’ (1983:8). Rowena MacDonald suggests that in the period 1912–1962, ‘probably two out of every three part-descent children spent some of their lives away from their parents as a result of the policy of removal’. The HREOC report sums up its estimation as lying between one in three and one in ten in the period between 1910 and 1970, and points out both that ‘not one indigenous family has escaped the effects of forcible removal’ and that ‘most families have been affected, in one or more generations, by the forcible removal of one or more children’ (HREOC 1997:37).

This assertion of legal guardianship by the state over all indigenous children only ceased in the 1960s. The primary and overarching concern was to ‘solve’ the ‘half-caste problem’ by breeding out the colour of both body and mind through this program of social engineering, and in this sense the removal of Aboriginal children meshed with the first strategy of controlling sexual relations and reproduction among adult Aborigines. This was certainly the most strongly articulated argument in the writings of the politicians, administrators and anthropologists central to the development of the various forms of legislative and administrative action. ‘Merging’, ‘absorption’ and ‘assimilation’ into the ways of ‘civilization’ were the key concepts around which this discourse was organized. In 1936 a conference of the leading authorities in Aboriginal affairs declared its belief ‘that the destiny of the natives of aboriginal origin, but not of full blood, lies in their ultimate absorption by the people of the Commonwealth’ (Commonwealth of Australia 1937:3).

Although there had almost always been at least some European Australians who were as disturbed as Aboriginal people themselves by the ways in which Aboriginal children were removed from their families, critiques of the legitimacy of Aboriginal child removal policies and practices only began to gather effective broader strength during the 1980s. The
work of CD Rowley (1962; 1972a; 1972b) laid the foundations in the 1970s, and in the
1980s Peter Read (1983) and Richard Chisholm (1985b) mounted powerful arguments
against the ways in which Aboriginal children had been perceived and treated by white
Australians. Of particular concern was the assumption within the assimilationist view of the
world, that Aboriginal culture and ways of life had no inherent value whatsoever, and that
the welfare of the rising generation of Aboriginal children was best pursued by the complete
elimination of Aboriginality as any part of a distinct social and cultural identity. Richard
Chisholm, for example, wrote that the New South Wales Aborigines Protection Board
‘administered a separate system of Aboriginal child welfare based explicitly on policies
involving the eventual disappearance of Aboriginal people’ (1985a:1).

In 1989, the Royal Commission into Aboriginal Deaths in Custody focused attention
on how many Aboriginal prisoners had a long history of institutionalisation, beginning with
their removal from their families. Commissioner J.H. Wooten, in his report on the death
(‘suicide’) of one particular Aboriginal prisoner, Malcolm Smith, spoke of ‘a life destroyed,
not by the misconduct of police and prison officers, but in large measure by the regular
operation of the system of self-righteous and racist destruction of Aboriginal families that
got on under the name of protection or welfare well into the second half of this century’
(Royal Commission into Aboriginal Deaths in Custody 1989:1). Commissioner Wooten
got on to draw attention to the fact that ‘the attempt to “solve the Aboriginal problem” by
the deliberate destruction of families and communities … is seen by many Aborigines as
falling squarely within the modern definition of genocide’ (p.5). By 1995 it was possible for
the Full Court of the Family Court of Australia to say that, just as Deane and Gaudron JJ
had spoken in the Australian High Courts Mabo native title decision of the dispossession of
Aboriginals from their land as leaving ‘a national legacy of unutterable shame’, there can
be ‘little doubt that at a more directly personal level the policy of colonial, and later State,
administrations in Australia to systematically remove aboriginal children from their parents
and place them in institutions or other care and the consequences of that can be described in
equally strong terms’.4

By the time the Human Rights and Equal Opportunity Commission (HREOC) was
requested by the Attorney-General, Michael Lavarch, in August 1995, inter alia, to ‘trace
the past laws, practices and policies which resulted in the separation of Aboriginal and Tor-
res Strait Islander children from their families by compulsion, duress or undue influence,
and the effects of those laws, practices and policies’, the concept of genocide had already
become part of the vocabulary used to understand Aboriginal child removal, and the
HREOC Commissioners, Sir Ronald Wilson and Michael Dodson, developed its utilisation
still further in the report released on 27 May 1997, Bringing them Home (BTH).

The fact that the legislation allowed for the removal of Aboriginal children without
parental consent5 meant that such removals could be seen as constituting acts identified as
one of the possible acts of genocide — the second leg of the Conventions definition — that
is, clause (e) of Article II of the UNGC, ‘forcibly transferring children of the group to
another group’. The first leg of the definition, that of the relevant acts being committed
‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as
such’ was also satisfied, argued the BTH report, by the overall objective of assimilationist
Aboriginal policy among all State and Commonwealth Governments up until the 1970s: the
effective disappearance of Aboriginal culture as a distinct basis of individual and collective
identity, its ‘swallowing up’ by a European way of life. This objective had been clearly
articulated in 1937, when AO Neville, Chief Protector in WA, posed the rhetorical question,
‘Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we
going to merge them into our white community and eventually forget that there ever were
any aborigines in Australia?’ (Commonwealth of Australia 1937:11) It continued, in lan-
guage of liberal citizenship, in the thinking of Paul Hasluck, Minister for Territories
(1951–1963), who told the House of Representatives in 1950 that ‘[t]heir future lies in asso-

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ciation with us, and they must either associate with us on standards that will give them full opportunity to live worthily and happily or be reduced to the social status of pariahs and outcasts living without a firm place in the community’ (1953:6).

It was the absence of recognition of Aboriginal culture underlying assimilationist policies that led the Inquiry to conclude that ‘the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear. This corresponded to what Lemkin had referred to in relation to the German National Socialists as the pursuit of ‘the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of national groups’ (1944:79), with Lemkin’s phrase ‘national groups’ replaced in the BTH report by ‘Indigenous peoples’. The ‘principal aim’, said the Inquiry, was ‘to eliminate Indigenous cultures as distinct entities’, and the removal of Aboriginal children with this objective was genocidal ‘because it aims to destroy the “cultural unit” which the Convention is concerned to preserve’.

The BTH report quoted the argument put by the Venezuelan delegate to the United Nations during the debate on the drafting of the Convention, that:

…the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization and living in conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such cases there would be no question of mass murder, mutilation, torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed. (UN General Assembly 1948–1949: 195).

The Report concluded that the policy of removing Aboriginal children from Aboriginal groups ‘for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled “genocidal” in breach of binding international law from at least 11 December 1946’, when the UN General Assembly adopted its resolution declaring genocide a crime under international law. The point is reiterated on the HREOC web site:

The Inquiry’s examination of historical documents found that the clear intent of removal policies was to absorb, merge or assimilate children so that Aboriginal people, as a distinct racial group, would disappear.

Policies and laws are genocidal even if they are not solely motivated by animosity or hatred. The Inquiry found that a principal aim of removing children was to eliminate Indigenous cultures as distinct entities. The fact that people may have believed they were removing Indigenous children for ‘their own good’ was immaterial. The removal remains genocidal.

The BTH report did not, however, seek the remedy for this breach in litigation: its ‘finding’ of genocide has instead operated more to structure the stolen generations debate and to lend support to arguments for various forms of reparation and compensation (Cuneen 2001), and the term ‘genocide’ has since remained a central element of the way in which many critics frame their understanding of the illegitimacy of Aboriginal child removal.

Running virtually parallel to the BTH Inquiry was a High Court case in which 6 Aboriginal plaintiffs sought legal redress against the Commonwealth on the basis of a challenge to the validity of the Aboriginals Ordinance 1918 (NT). Five had been removed themselves,
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and the sixth was the mother of a child who had been removed. The removals took place between 1925 and 1949, and the latest detention ended in 1960. The most important sections of the Ordinance in the case were sections 6 and 16. Section 6 provided that:

(1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any Aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the Aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the Aboriginal or half-caste is or is supposed to be, and may take him into his custody.

Section 16 provided that:

(1) The Chief Protector may cause any Aboriginal or half-caste to be kept within the boundaries of any reserve or Aboriginal institution or to be removed to and kept within the boundaries of any reserve or Aboriginal institution, or to be removed from one reserve or Aboriginal institution to another reserve or Aboriginal institution, and to be kept therein.

(2) Any Aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or Aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or Aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

The Commonwealth was aided in its defence by the Solicitors-General for the States of New South Wales, Western Australia and South Australia. The part of the plaintiffs arguments relying, like the BTH report, on the UNGC, was that actions taken under the Aboriginals Ordinance were contrary to an implied constitutional right to freedom or immunity from laws or executive acts...constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising (a) the removal and transfer of children of a racial or ethnic group in a manner calculated to bring about the group’s physical destruction in whole or in part; (b) actions which had the purposes, the effect or likely effect of causing serious mental harm to members of the group; and (c) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part ... (p.7)

The Commonwealth pleaded in its defence that:

(a) if the power conferred by s122 of the Constitution was at any material time restricted by any of the constitutional freedoms pleaded by the plaintiffs, the Ordinance was not contrary to any such freedom because it was enacted and amended for the purpose of the protection of persons of the Aboriginal race, and was capable of being reasonably considered or alternatively was appropriate and adapted to the achievement of that purpose;
(b) the constitutional validity of the Ordinance fell to be considered by reference to the standards and perceptions prevailing at the time of its enactment or operation and not by reference to contemporary standards and perceptions. (p.12)

There was, then, no real dispute about whether removals were forced or consensual, largely because it was the Ordinance itself which was at issue, and it clearly granted the power to
execute non-consensual removals. The point of contention in relation to the question of genocide was ‘intent’, and whether the Ordinance conferred powers which aimed at the destruction or harming of Aboriginal people, or at their protection and welfare.

It is common knowledge that the rules governing the interpretation of statutes are contested, with the debates usually organized around the distinction between a ‘literal’ and a ‘purposive’ approach. A literal construction rests on a claim to engage entirely and solely with the words of the relevant statute, whereas a purposive construction draws additionally on the identification of the underlying or background purpose of the legislation, the intent of Parliament at the time the legislation was debated and passed. The purposive approach was in one sense statutorily enshrined as a ‘rule’ in the 1981 amendment of s15AA of the Act Interpretation Act (1901) (Cth), which provides that ‘a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object’. However, there remains such considerable judicial variability in actually determining ‘purpose’ or ‘intent’, that Jeffrey Barnes (1994, 1995) characterises statutory interpretation as an exemplary case of what Charles Sampford (1989) has called ‘the disorder of law’.

At the very least Australian courts approach the purpose rule with caution, particularly where legislation appears to be the outcome of a compromise between different purposes or where the identification of purpose fails to solve the problem, and their position lies somewhere between the words of Kirby P:

...the only safe approach to the construction of the web of applicable legislation is an attention to the literal words of the legislation. A ‘purposive’ approach founders in the shallows of a multitude of obscure, uncertain and even apparently conflicting purposes.

and a diligent application of the purpose rule. However, the underlying principles remain, first, that the starting point is always that ‘[t]he Act means what it says, and, what is more important, it does not mean what it does not say’ unless there is some ambiguity or problem in the statute’s application which judicial interpretation is needed to resolve. Second, ‘clear and unambiguous words’ are required before a statute will be interpreted as ‘displaying a legislative intent to achieve a particular result’. This rule of construction applies especially to the modification or removal of fundamental rights, so that the Courts operate with the presumption that it is

in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

Australian courts will not find in the Australian Constitution any restriction of Parliament’s power to abrogate fundamental rights, and they generally regard it as essential to a healthy democracy that they decline to rise to the support of ‘fundamental’ or ‘deeply rooted’ rights in the face of the plenitude of Parliament’s powers to make laws for the ‘peace order and good government’ of the Australian people. ‘If it be conceivable,’ declared the High Court in 1920, ‘that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done’. However, the Courts will also require that the exercise of such power be clearly and unambiguously indicated, and that it be ‘consistent with the wording otherwise adopted by the draftsman’.

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This means that if the Aboriginal Ordinance were to be construed as manifesting an intention to destroy Aboriginals as a human group, this purpose would have to be explicitly and unequivocally indicated by its wording. As Toohey J. explained it,

The notion of genocide embodied in the definition in Art II of the Genocide Convention is so fundamentally repugnant to basic human rights acknowledged by the common law that, by reason of well settled principles of statutory interpretation, an intention to authorise acts falling within that definition needs to be clear beyond doubt before a legislative provision can be construed as having that effect.22

All of the High Court found that it was impossible to put such a construction on s6, which granted the Chief Protector the power to ‘undertake the care, custody, or control of any Aboriginal or half-caste’, on the condition that he had formed the opinion that ‘it is necessary or desirable in the interests of the Aboriginal or half-caste for him to do so’, as well as the power to take Aboriginal people into custody for that purpose, and that purpose only. If any public officials had been charged with seeking the destruction of Aboriginal people as a human group, and had sought protection behind the shield of Parliament on the grounds that the Ordinance had authorised them to pursue that purpose, this argument would have been unequivocally rejected, and for the same reason the Court was unable to find that the Ordinance itself could be declared invalid for displaying such an intent, given, as Dawson J. stated, ‘that they were required to be performed in the best interests of the Aboriginals concerned or of the Aboriginal population’.23 As Gaudron J. put it:

Although it may be taken that the Ordinance authorised the forcible transfer of Aboriginal children from their racial group, the settled principles of statutory construction...compel the conclusion that it did not authorise persons to remove those children ‘with intent to destroy, in whole or in part, ... [their] racial ... group, as such’. It follows that the Ordinance did not authorise acts of genocide as defined in the Genocide Convention...24

Indeed, Gaudron J found that the question of whether any acts were committed with genocidal intent was a different legal question, to which the issue of the validity of the Ordinance was irrelevant.25 Even before getting to the additional issue of the whole relationship between international and domestic law, explored in Nuliyarimma, where the majority of the Federal Court decided in favour of the view that domestic law was necessary to give domestic legal effect to international law, in relation to criminal matters such as genocide, at least,26 the arguments questioning the validity of the Ordinance in relation to international law norms regarding genocide had collapsed on the need to demonstrate clear and unambiguous ‘intent to destroy’.27 The materials drawn upon by the BTH Report to argue this intent — the 1937 Conference, assorted writings by Neville, Cook, Spencer, Bleakley and various other public officials and commentators — simply have no legal effect.28

The underlying problem is that the pursuit of an argument backed by the authority of law, in this case the application of the UNGC to the question of the removal of Indigenous children, demands an individualised and detailed (i.e, substantiated with evidence), case by case, analysis, rather than the broad-brush account provided by the BTH Report. Since genocidal aims were not stated in the legislation, the ‘crime’ of genocide could only be committed, as Hal Wootten has pointed out, by individuals who appeared to be being judged without any opportunity to defend themselves against the charges (1998:6). In referring to the fact that there were a variety of ways in which children were removed,29 Wootten distinguishes between two different types of purposes in analysing the history of the stolen generations; first, an understanding of the destructive effects of removal practices:
If a small child is forced to grow up cut off from family and community, in an emotionally barren environment in which its racial background is despised, told that its parents are dead or uninterested in it, and treated as having no destiny except as unskilled or domestic labour for the superior white race, its childhood will be misery and it will be at risk of lasting psychic disturbance. This will be true whether the child is removed for genocidal motives, because its fair skin in a blacks camp is an embarrassment to white society, because it is considered neglected, or because it lives far from a hospital or school (1998:6).

For this purpose, to which, Wootten suggests, the HREOC Inquiry should have confined itself, the reasons for removal are only peripherally relevant.

For the second purpose, however, that of the attribution of criminal responsibility, the finding of an intent to destroy Aboriginals as a group, the reasons for removal are highly relevant, and Wootten feels that "the failure to investigate individual circumstances makes problematic any finding that the removals were all carried out with intent to destroy a group, as such" (1998:7). Wootten regards its ‘finding’ of genocide a ‘quite unnecessary legal ruling’ which has generated ‘pointless controversy’:

The enormity of what was done speaks for itself through the lips of those to whom it was done, and the lips of self-righteous administrators of the past whose ideas would today be seen as genocidal. (1998:6)

Interestingly, we still circle back to the concept of ‘genocide’ which, despite its ineffectiveness in the legal arena, seems to retain conceptual force in addressing this aspect of the history of relations between Indigenous and non-Indigenous Australians.

The question I would like to turn to, then, is whether it is possible or useful to make distinctions between different conceptions of genocide, perhaps between gradations of genocide (Churchill 1986), approaching an understanding which can do justice both to the concepts limited application in law, and to its continuing attraction to Indigenous peoples as a means of capturing an essential dimension of their experience of settler-colonialism. In order to engage with this issue, it is useful to turn the analysis of purpose and intent to the UNGC itself, since this has tended to operate as the reference point for much of the discussion of genocide in relation to Indigenous peoples. What was its underlying purpose? What ‘mischief’ was it designed to correct, and what was the precise role played by the clause concerning the forcible removal of children from one group to another? Is the UNGC a reliable guide for a useful understanding of genocide, or do the attempted mobilisations of the UNGC actually constitute a critique of it, as well as an argument for a new and different approach to the whole question of genocide within modern state-formation?

THE UN CONVENTION, THE ‘FORCIBLE TRANSFER OF CHILDREN’ CLAUSE AND CULTURAL GENOCIDE

The roots of Lemkin’s conception of genocide lay not in Auschwitz, but in earlier examples of mass killings, such as the Armenian genocide, as well as in an analysis of ‘the rule imposed upon the occupied countries of Europe by the Axis powers’, supported by a variety of domestic ‘puppet’ régimes and states. It was addressed in large part to ‘the Anglo-Saxon reader, who, with his innate respect for human rights and human personality, may be inclined to believe that the Axis régime could not possibly be as cruel and ruthless as has been hitherto described’ (1944:ix). A core concern for Lemkin was thus not simply ‘obvious’ examples of killing, but the whole colonizing régime of the Axis powers in the occupied countries, a very particular kind of legal order based on a variety of ‘techniques of occupation’ constituting ‘a gigantic scheme to change, in favour of Germany, the balance of
biological forces between it and the captive nations for many years to come,’ aiming ‘to destroy or cripple the subjugated peoples in their development’ so that Germany would be placed in a position of ‘numerical, physical and economic superiority’ regardless of the military outcome of armed conflict. He referred to this ‘new technique of occupation aimed at winning the peace even though the war itself is lost’ (1944:81), as ‘genocide’, a ‘practice of extermination of nations and ethnic groups’ that is ‘effected through a synchronized attack on different aspects of life of the captive peoples’, in the realms of politics, society, culture, economics, biology, physical existence (starvation and killing), religion, and morality (1944:xi–xii).

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. 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. (1944:79)

It is clear, then, that Lemkin was prompted to speak of genocide by his observations of a multi-faceted political rationality and a multi-dimensional set of legal and administrative forms and practices, of which outright killing was one, but not the only part, and he was keen to point out the heterogeneity of ways in which the destruction of human groups could take place (see also Miller 1995).

This analysis was the starting point, then, for the United Nations’ attempts to develop an instrument of international law which might help prevent such conduct on the part of governing authorities in the future. At Lemkin’s urging, and with the strong support of the US delegation (Lemkin 1947:149), the United Nations passed a resolution on 11 Dec 1946 that a convention aimed at the prevention of genocide should be drafted for discussion at the UN, and after some to-ing and fro-ing, in April 1947 the Secretary-General requested the Human Rights Division, together with three external experts, to draw up a draft convention.30 This first Secretariat’s draft, issued on 26 June 1947, contained the seeds of most of the debates, disagreements and divergences which have characterized varying approaches to genocide ever since.

First, the Secretariat’s draft insisted that the literal definition of genocide as ‘the deliberate destruction of a human group’ ‘must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc’.31 The two difficulties attending too broad a definition included that of simple logic, the acts identified had to be understandable as genocide ‘by any normal process of reasoning’. In addition, governments ‘might become suspicious and tend to abstain’ if ‘the notion of genocide were excessively wide’, and the convention would be weighed down by too many reservations. The overall argument was that a convention on genocide should be seen as only one ‘chapter’ of international law, alongside ‘The law of war, the law of nationality, the protection of minorities, the general rights and obligations of States, the protection of human rights’, and that the distinctions between these different arenas of international law had meaning and should not be ignored.32

Second, the draft explicitly excluded ‘the policy of compulsory assimilation of a national element’ from its definition, even if such acts ‘may result in the total or partial
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destruction of a group of human beings’.33 A policy of forced assimilation ‘does not as a rule constitute genocide’.34 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’.35

None the less, thirdly, the draft did retain Lemkin’s three-fold typology of physical, biological and cultural genocide, albeit under protest from de Vabres and Pella, who felt that the idea of cultural genocide ‘represented an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities (which was based on other conceptions) under the cover of the term genocide’.36 In the face of this opposition, Lemkin maintained that ‘a racial, national, or religious group cannot continue to exist unless it preserves its spirit and moral unity’ and added that if actions identifiable as cultural genocide were criminal acts under municipal law, we should not have difficulty including them within a definition of an international crime of genocide.37 Lemkin insisted that his conception of cultural genocide constituted something more than ‘forcible assimilation’, it was ‘a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings’. The boundary between the two remained unclear.38

Fourth, the committee included the act of the forcible transfer of children within its definition of cultural genocide:

[Quote]

Lemkin, Pella and de Vabres ‘agreed that this point should be covered by the Convention on Genocide’ but we are also told, tellingly, that ‘their agreement did not go further than that’ (p.27).

The two essential instabilities in the Secretariat’s draft were the inclusion of ‘cultural’ genocide, against the resistance of Pella and de Vabres, and the inclusion of the ‘forcible transfer of children’ clause within cultural genocide. Both of these points became points of contention in later debates, both within the UN and beyond. The Secretariat’s draft was commented on by member states, then sent to an Ad Hoc Committee of the Economic and Social Council to re-draft the Convention; in this second draft, the tripartite division into physical, biological and cultural genocide was again retained, but the ‘forcible transfer of children’ clause was omitted. This was then the draft submitted to the 6th, Legal Committee of the General Assembly for discussion on 27 August 1948, with cultural genocide included, but ‘forcible transfer of children’ excluded. Among the themes of the subsequent discussions in the 6th Committee was the reversal of both these points.

A number of member states had decided to work towards the exclusion of Article III on cultural genocide, but first they wanted to achieve the reintroduction of the ‘forcible transfer of children’ clause. This was done by re-framing the idea of ‘forcible transfer of children’ as not being about cultural genocide at all, contrary to Lemkin’s original construction,39 but as being an example of physical genocide. The Greek delegate, Mr Vallindas, who moved that the clause be added as a fifth clause to Article II on physical and biological genocide, pointed out that both the French and US delegations, in opposing the idea of cultural genocide, had made a clear exception for ‘the special case of the forced transfer of children,’ which they saw as ‘an act far more serious and indeed more barbarous than the other acts enumerated in the first draft convention under the heading of cultural genocide,’ and they had included it in their own drafts of a convention. It has ‘not only cultural, but also physical and biological effects since it imposed on young persons conditions of life likely to cause them serious harm or even death’ (UN General Assembly 1948–1949:186).40 ‘There
could be no doubt,’ declared Vallinda, ‘that a forced transfer of children, committed with the intention of destroying a human group as a whole, or at least in part, constituted genocide’. It could be ‘as effective a means of destroying a human group as that of imposing measures intended to prevent births, or inflicting conditions of life likely to cause death’ (pp.186–7). In supporting the amendment, the US delegate, John Maktos, asked the Committee rhetorically ‘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’ (p. 187; again on p.189).

There is no need, then, to regard the eventual inclusion of the ‘forcible transfer’ clause as ‘enigmatic’ (Schabas 2000:175) just because it had started its life as part of the cultural genocide provisions and the UN ultimately excluded the cultural genocide Article. It is also incorrect to say that ‘one aspect of “cultural” genocide, forcible transfer of children, is included in [the] list,’ even though ‘cultural genocide generally is not prohibited by the convention’ (Starkman 1984:5). The delegate from Uruguay, Mr Manini y Rios, emphasized that ‘there was no reason why such acts of physical genocide should be associated with cultural genocide’, and Vallindas reiterated that the amendment ‘was not connected with cultural genocide, but with the destruction of a group — with physical genocide’ (UN General Assembly 1948–1949: 189).41 The Russian delegate, Mr Morozov, because he wanted to retain the whole cultural genocide Article, could see that case being weakened by the ‘forced transfer of children’ clause being airlifted out, and resisted the distinction being made between it and the other cultural genocide provisions, by complaining that ‘no one had been able to quote any historical case of the destruction of a group through the transfer of children’ (UN General Assembly 1948–1949:190).42 But, to no avail, the French/US/Greek position won out, the amendment was adopted 20/13, with 13 abstentions.

The next battle surrounded the push to remove cultural genocide from the convention. Johannes Morsink (1999) has pointed out that the UN divided essentially into three blocs: the communist and Arab delegations in favour of retaining a cultural genocide article, the North and South American delegations opposing it, and the Western European delegations wavering between the two positions.

The first bloc, in favour of retention,43 were all countries which either had experienced the worst of the National Socialist’s ‘population’ policies, being to Germany’s East, or had other reasons to be responsive to the protection of cultural diversity against social and political forces aimed at cultural homogeneity — at this particular time, at least, even if they were later to take up different attitudes. One major argument was that there was an intimate relationship between the destruction of culture, especially when linked to biological arguments about racial inferiority or degeneracy, and physical or biological annihilation. The Pakistani delegate, Mr Bahadur Khan, argued that cultural genocide could not be divorced from physical and biological genocide, since the two crimes were complementary in so far as they had the same motive and the same object, namely, the destruction of a national, racial or religious group as such, either by exterminating its members or by destroying its special characteristics. (UN General Assembly 1948–1949:193).44

While Khan appreciated that ‘new countries’ needed to assimilate immigrants ‘in order to create a powerful national unit,’ the genocide convention should still be used to prevent those forms of assimilation which were ‘nothing but a euphemism concealing measures of coercion designed to eliminate certain forms of culture’ (UN General Assembly 1948–1948:194).45

The Venezuelan delegate, Mr Pérez Perozo, made a valiant attempt to ‘ride on the back’ of the earlier inclusion of the ‘forced transfer of children’ clause, arguing that the 6th
Committee's recognition of that kind of action as genocide meant that it 'implicitly recognized that a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm' (UN General Assembly 1948–1949:195). If 'forced transfer of children' was recognised, 'less spectacular crimes should not be overlooked and the concept of genocide should extend to the inclusion of acts less terrible in themselves but resulting in "great losses to humanity in the form of cultural and other contributions"', for which it was indebted to the destroyed human group' (UN General Assembly 1948–1949:195).

The member states most strongly opposed to the cultural genocide article were those composed of a large proportion of immigrants, and/or settler-colonies with a minority or majority indigenous population: the USA and Canada, most of the Latin American states, Australia, New Zealand, South Africa. The US and French delegations had made their opposition clear from the start, but now it was a range of other member states which took the lead in the discussion. Mr Amado (Brazil) suggested that 'given the historical evolution of civilizations, sometimes through differentiation, sometimes through the amalgamation of local cultures, a State might be justified in its endeavour to achieve by legal means a certain degree of homogeneity and culture within its boundaries' (UN General Assembly 1948–1949:197). The South African delegate (Mr Egeland) referred to 'the danger latent in the provisions of Article III where primitive or backward groups were concerned,' using the example of absurdity of protecting 'such customs as cannibalism' (UN General Assembly 1948–1949:202).

Mr Reid (New Zealand) pointed out that the United Nations itself, in the Trusteeship Council, was busy attempting to 'advance' indigenous peoples beyond their tribal forms of social organization, so that the Council was in fact 'opposed to the maintenance of a distinctive cultural trait of the local population', producing the embarrassing situation of the UN's own organs being subject to its Genocide Convention (UN General Assembly 1948–1949:201). Mr Petren (Sweden), wondered whether the conversion of the indigenous Lapps to Christianity would not then constitute cultural genocide, and Mr Abdoh (Iran) complained that 'it would have to be decided whether all cultures, even the most barbarous, deserved protection, and whether the assimilation resulting from the civilizing action of a State also constituted genocide' (UN General Assembly 1948–1949:201). Both the Belgian (Mr Kaeckenbeek) and French (Mr Chaumont) delegates saw such an article as unjustified intervention in 'the domestic affairs of states' (UN General Assembly 1948–1949:204). It was clear that Lemkin's conception of the cultural dimensions of genocide actually overlapped significantly with a type of pursuit of cultural homogeneity characterizing 'the civilizing mission' that had become a normalised aspect of modern state-formation and nation-building, particularly in relation to immigrants and to indigenous populations attached to pre-industrial forms of social cohesion and interaction.

These arguments converged with others concerning the imprecision or vagueness of the idea of cultural genocide, the 'correct' understanding of what constitutes genocide (surely it has to involve killing), and the appropriateness of this particular instrument in dealing with whatever might be problematic about the cultural dimensions of genocide. Mr de Beus of the Netherlands was one among many delegates who complained of the 'vagueness' of the concept of cultural genocide, and the US delegation insisted that the convention 'should be confined to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject', and they also identified the realm of human rights, rather than international criminal law, as the appropriate arena for dealing with problems of this sort. Mr Chaumont (France) agreed (UN General Assembly 1948–1949:8), as did Mr Sundaram (India) (UN General Assembly 1948–1949:15) and Sir Hartley Shawcross (UK) (UN General Assembly 1948–1949:17). As Mr Manini y Rios (Uruguay), one of the vigorous supporters of the construction of forced transfer of children as being quite distinct from cultural genocide, put it, 'the convention should restrict itself to the crime of physical geno-
cide... those parts dealing with cultural and political genocide should be dealt with in the field of human rights' (UN General Assembly 1948–1949:16). The removal of Article III dealing with cultural genocide was supported by 25 votes to 16, with 4 abstentions.56

There were two aspects of the genocide question, then, which remained essentially disputed, even if a dominant position on both did ultimately emerge: how and where we should place the boundaries, first, between ‘biology’ and ‘culture’ and, second, between legitimate and illegitimate organized violence. The passage of the ‘forcible transfer of children’ clause shows that the distinctions between ‘biology’ and ‘culture’ were by no means clear. The practice of child removal was originally understood by Lemkin as part of the cultural dimension of genocide, and this is how it first entered the convention, but it was subsequently re-defined as ‘really’ an element of physical or biological genocide, and it was on this basis that agreement was secured on its place in the convention. However, this construction of child removal as biological and as having little to do with forcible assimilation and the pursuit of cultural homogeneity remained disputed, with the Venezuelan delegate using the inclusion of the clause as a ‘lever’ for the argument in favour of cultural genocide, re-framing it again in cultural rather than biological or racial terms.57

Similarly the arguments surrounding cultural genocide indicate a varying sensitivity to the cultural dimensions of genocide and a disputed understanding of what it means to ‘destroy’ a human group: whether it is necessary to physically kill them, or whether they can be ‘killed’ in more subtle and apparently civilized 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 unleash their dogs on the Indians as on ferocious beasts; they pillage the New World like a town taken by assault, without discrimination and without pity; but one cannot destroy everything, fury has a limit: the remnant of the Indian populations escaping the massacres in the end mixes with those who have defeated it and adopts their religion and mores.

The conduct of the Americans of the United States towards the natives, on the contrary, breathes the purest love of forms and legality. Provided that the Indians stay in the savage state, the Americans do not mix at all in their affairs and treat them as independent peoples; they do not permit themselves to occupy their lands without having duly acquired them by means of a contract; and if by chance an Indian nation can no longer live on its territory, they take it like a brother by the hand and lead it to die outside the country of its fathers. (2000:325)

This distinction between different modes of destruction remained the one splitting the debates in the UN, and continues to divide our understanding of genocide between a ‘narrow’ and a ‘broad’ view to this day. On the one side were the arguments that genocide should be narrowly conceived, restricted to the approach adopted by the Spanish in South America, and on the other were the proposals that we should understand genocide more broadly, and recognize what is problematic about the techniques adopted by the Americans in North America, what remains violent and destructive about the apparently civilized management of the process of settler-colonization within the rule of law.

Lying underneath this division is a related one concerning the character of legitimate force and violence within processes of state-formation, particularly in a settler-colonial context in relation to Indigenous populations, as well as the relationship between nation-building and cultural homogeneity or diversity. The arguments against the workability of the inclusion of attempts to address cultural genocide within the same convention dealing with killing and mass murder were not trivial, and there is force to the point that it might make more sense to engage with this kind of question in the sphere of human rights. Perhaps we would have all ended up voting against the inclusion of Article III. None the less, along the
way a very interesting bedfellow has been acquired, namely the proposition that states really have the right to do more or less as they please regarding cultural and behavioural uniformity as long as they do not actually murder anyone. As Patrick Thornberry has put it:

The Nazi experience impelled States to support the criminalization of genocide and give some promise of protection to groups as such, but this criminalization has its limits. These limits, characteristically, are reached when the law might be seen to function as a barrier to nation-building, to the ‘civilizing mission’ of States. (1991:14)

Indeed, Leo Kuper has his doubts about the restriction on murder, saying that the modern state has ‘as an integral part of its sovereignty, the right to commit genocide...against peoples under its rule’ and that ‘the United Nations for all practical purposes defends this right’ (1981:171). There was also a strong argument being put, both in these particular debates on the Convention, but also on the issues of ‘minority’ (as opposed to ‘individual’) rights and throughout the UN in this period (Tennant 1994), that particular eggs simply had to be broken in making the omelette of modern progress, and that it is acceptable, desirable and entirely consistent with the lofty ideals of humanitarian liberalism, to construct some ways of life as not constituting ‘culture’ at all, but merely misery, poverty, backwardness, savagery, illiteracy, ill health, inequality, oppression, and social disorganization. It is, of course, about precisely this world view that Indigenous peoples have expressed most dismay.

STATE FORMATION AND INDIGENOUS PEOPLES — BETWEEN GENOCIDE AND ETHNOCIDE

In addition to the polarisation between narrow and broad conceptions of genocide, one of the significant features of the Australian debates around Aboriginal child removal is the stand-off between those who argue that it should be seen in terms of ‘welfare’ on the one hand, or ‘cultural genocide’ — requiring an official apology and other forms of reparation — on the other. The Commonwealth Government’s response to the Bringing them Home report (Commonwealth of Australia 2000), for example, concentrated on contesting what proportion of the Aboriginal population was in fact removed from their families, complaining about the semantic accuracy of the word ‘generation’, protesting that Aboriginal children were treated no more appallingly than white children and, above all, insisting that the underlying intent, and often the actual effect of child removal policies was always the ‘welfare’ and ‘interests’ of Aboriginal people. The categories ‘welfare’ and ‘genocide’ are generally treated as mutually exclusive, so that one can only argue for one by completely denying the validity of the other. This is largely why the opposing sides on the question of official apology find it so difficult to understand each other: although the Australian Prime Minister, John Howard, agreed to express his Governments ‘regret’, he did so with enormous reluctance and in response to enormous political pressure, and his underlying position is more accurately represented as ‘why should the pursuit of welfare be apologised for?’

One of the problems with attempting to pursue this debate within the context of a welfare/genocide distinction is, as we have seen, that the different sides have divergent understandings of ‘genocide’ (narrow vs broad), so that these two categories overlap rather than oppose each other, and in fact there is nothing to prevent the pursuit of ‘welfare’ to simultaneously be comprehensible as ‘genocidal’. Another is that there is certainly little correspondence between our current understandings of the distinction between welfare and genocide and the ones which were operative at the time of the relevant legislation being passed and the relevant policies being formulated and translated into administrative practice.

Looking back at the political forces which produced the laws, policies and practices of child removal around the turn of the century, they aligned themselves along different lines
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from the current welfare/genocide distinction. If the broader understanding of 'genocide' effectively operates as a synonym for 'colonization', it may be useful to recall that state formation is also a process of social and cultural formation which should not be equated with 'government', so that we might need to distinguish between genocidal actions and policies on the one hand, and a genocidal structuring of social relations on the other. One of the reasons it is even possible to debate whether particular organised interventions (by Church as well as state agencies) were 'genocidal' or pursuing Aboriginal 'welfare' is that we are observing an assembly of interactions between government action (via legislation, interventions, and support of Church agency interventions) and extra-governmental social, demographic and economic processes with their own logic and dynamic. Tony Barta has pointed out, for example, that it is true to say that Australian governments have consistently spoken not of eliminating the Aboriginal people, but of saving them, from an essentially genocidal society, a mode of structuring social relations and ordering the disposition of land which could have no effect other than destroy Aboriginal social life (1985:159).

The Aboriginals Ordinance (NT) 1911, on which the 1918 Ordinance was based, had been drafted in large part by Atlee Hunt (1864–1935), secretary and permanent head of the Department of External Affairs (1901–1915), and the anthropologist and public servant W. Baldwin Spencer. Spencer's views were much respected by Hunt (Mulvaney & Calaby 1985:277), and he was relied upon by the government to rebuild its Aboriginal legislation and policy (Mulvaney & Calaby 1985:278). The very broad powers granted to the Chief Protector and constituting the capacity for 'genocidal' intervention were those which Spencer had sought to render what was, from an administrator's point a view, a very unruly state of relations between Indigenous and non-Indigenous people in the Northern Territory more amenable to governance and regulation. The problem facing Spencer, as Mulvaney and Calaby point out, was

how to reconcile paternalism with indigenous initiative, or compulsion in humanitarian interests with civil liberties ... how to implement government decisions relating to the black majority, when the white minority effectively controls administration and regards both the laws and the native population with contempt ... (1985:264–5)

His solution fell very much on the side of paternalism, giving the Chief Protector enormous powers over the Aboriginal population, powers which could be deputed to any other official designated a Protector, which included all police officers, and from a contemporary perspective constitutes an extraordinary governmental intrusion into the everyday lives of a particular section of the population.

However, although Mulvaney and Calaby agree that 'there was an element of racial arrogance, which enabled him to ignore the emotional, personal problems, resulting from his rational legal solutions' (1985:286), they also argue that this needs to be placed within the particular ideological and material context from which this racial arrogance emerged. They point out that the racist overtones of Spencer's writings and policy developments 'should be compared with the naked and aggressive racism of tropical Australian contemporaries, rather than with the United Nations Charter' (1985:289). Equally important was the fact that the arguments against such government paternalism, supposedly in support of the civil liberties of the Aboriginal population, came from precisely those individuals and groups hoping to most ruthlessly exploit Aboriginal labour and to retain unlimited sexual access to Aboriginal girls and women (Mulvaney & Calaby 1985:289).

The reasoning of the Commonwealth Member of Parliament who spoke up most frequently 'on behalf of' Aboriginal interests, Dr Charles Carty Salmon (1860–1917),60 also tells us a little more about the liberal political rationality underlying this concern better to govern Indigenous affairs. Salmon insisted that 'The aboriginals of Australia have, in the
past been shamefully treated’, and that this ‘is one of the greatest blots on the history of the States’. He felt, the House of Representatives was told,

a personal responsibility towards those people who were the original owners of the soil. We have dispossessed them, taking from them their birthright; and although there are those who believe that Australia was pre-ordained as a home of the white race, I feel sure that the extinction of the aboriginals in the fashion that prevails was not pre-ordained.

However, Salmon was also an active supporter of the White Australia policy, and clearly supported Spencer’s ‘stern paternalism’ in order to improve the governance of the racial composition of the Northern Territory. The particular problem there, in Salmon’s view, was that part-Aboriginal children were being born of Asian rather than European fathers.

I am sorry to notice...the admixture of races that is going on. We have been accustomed to look upon the half-caste as being partly a European product, but a reference to the reports will show that it is with the Eastern aliens that the admixture is taking place. Chinese and Japanese have been using the native women against their will, and against the will of their natural protectors...I do not know what the Minister of External Affairs has done in order to deal with this matter, but I hope he will use the enormous powers with which he is invested to issue Ordinances for the Northern Territory, and also for Papua, which will properly protect the chastity of the native women. The admixture of European with aboriginal blood is bad enough, but the admixture of the blood of Chinese, Japanese, and Malays of low caste with the blood of the aboriginal race is too awful to contemplate. If we are to have a piebald Australia, let it be by the admixture of European blood with the blood of another race, not by the mixture of alien blood with the blood of the aboriginal race, which would be more degrading and lowering to our status as a nation.

Salmon’s declared sensitivity to his position as a colonizer did not prevent him from continuing to see Aboriginal people, unlike the more war-like Papuans and Maoris, as ‘more degraded’, as ‘lower in the scale of intelligence’, as ‘more susceptible to evil influences and most likely to be imposed upon’, and thus in need of ‘immediate and sympathetic attention’, such as precisely the ‘stern paternalism’ embodied by ss 6 and 16 of the Aboriginals Ordinance.

It is clear, then, that what the broader approach might wish to identify as the genocidal element in the child removal policies lay less in an unambiguous ‘intent to destroy’ a human group, than in the presumption that there was not much to destroy. Aboriginal culture and its way of life, especially once it had encountered European civilization, was presented by Paul Hasluck and 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’ (1953:9; see also Read 1983:20). Aboriginality was constructed simply as a ‘primitive social order’ composed of ‘ritual murders, infanticide, ceremonial wife exchange, polygamy’ (1956:2), so that for Hasluck and most white Australians, the permanent elimination of Aboriginally from the fabric of Australian social life was self-evidently synonymous with civilization and progress itself, a crucial element of the truth that ‘the blessings of civilization are worth having’. ‘We recognise now,’ said Hasluck, ‘that the noble savage can benefit from measures taken to improve his health and his nutrition, to teach him better cultivation, and to lead him in civilised ways of life ... We know that the idea of progress, once so easily derided, has the germ of truth in it’ (1953:17).
The concern was rather with some ‘thing’ which was not meant to have a legitimate existence, namely racial and cultural hybridity, the combination of Aboriginal with European and Asian culture/blood/skin, so that there were no ethical problems raised by the construction of the destruction of that hybridity as being consistent with promoting the welfare of Aboriginal people. Clastres prefers the concept ‘ethnocide’ to ‘cultural genocide’, and he emphasizes that ‘ethnocide, from the perspective of its agents, does not recognize itself as a destructive enterprise: on the contrary, it is a duty, demanded by the humanism inscribed at the heart of Western culture’ (1988:53). 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 the narrow conception of genocide, and for the destructive dimensions of nation-building to take place ‘tranquilly; legally, philanthropically, without spilling blood, without violating a single one of the great principles of morality in the eyes of the world’ (de Tocqueville 2000:325).

Clastres has also identified the general place that ethnocide ‘as the more or less authoritarian suppression of socio-cultural difference’, or what Tully (1995) calls liberalism’s ‘empire of uniformity’, occupies within the egalitarianism of the modern states construction of its relationship with its individual citizens. Christopher Lasch had similar comments on this characteristic of egalitarianism as it operated in the early twentieth century development of citizenship:

The rise of egalitarianism in western Europe and the United States seems to have been associated with a heightened awareness of deviancy and of social differences of all kinds, and with a growing uneasiness in the face of those differences — a certain intolerance even, which expressed itself in a determination to compel or persuade all members of society to conform to a single standard of citizenship. On the one hand, egalitarian theory and practice insisted on the right of all men (and logically of all women as well) to citizenship and to full membership in the community; on the other hand, they insisted that all citizens live by the same rules of character and conduct. (1973:17)

This means that a particular kind of organised violence — whether we call it cultural genocide or ethnocide — central to the assimilatory project of the modern state, is also integral to nation-building and state formation, so that ‘every State organisation is ethnocidal, ethnocide is the States normal mode of existence’ (Clastres 1988:56).

Lemkin’s analysis of genocide in the European context engages with the experience of Jewish peoples prior to as well as including the Holocaust, and this is important for the ways in which the Australian experience of colonialism is to be compared with the European experience. Many usages of the concept of ‘genocide’ have revolved around whether there are parallels between the Australian practices of colonization and the annihilation of Jewish, Gypsy and otherwise ‘marginal’ peoples in the Holocaust. However, it is more meaningful in a broader sense to compare the assimilation of the Aboriginal people in Australia, not with the Holocaust, but with the processes, structures and political rationalities of assimilation of ‘outsiders’ and ‘strangers’ in the modern state generally, both in the centuries prior to the Holocaust and continuing after it. It has become a truism in Holocaust studies that the event can only be understood in its context, as the result of a long history and the outcome of long-term processes — this idea can also underlie an understanding of the attraction of the concept of cultural genocide in addressing the comparison of settler-colonial (Australian) and metropolitan (European) versions of assimilation and the flattening-out of cultural diversity.

These considerations also add weight to the rejection of a distinction between eugenicist forms of assimilation based on race — possibly leading to ‘real’ genocide — and forms based on culture — leading not to genocide, but perhaps to violations of human rights, with
the subsequent arguments then being about whether collective rights should be recognized alongside individual rights. The distinction has been problematic from the start, because culturally-based discourses of colonization preceded those organized around racial distinctions, rather than the other way around. As Robert Williams puts it in his analysis of medieval discourses of conquest and colonization, in medieval Christian jurisprudence the central focus was on ‘the deficient cultures and religious customs of normatively divergent races of people, rather than with their racially distinctive biological features’.

When the Christian European legal tradition justifying cultural racism against normatively divergent peoples finally encountered the indigenous tribal cultures of the New World, Christian Europeans had already accepted the rights and responsibilities belonging to a superior race to exercise its lawful privileges of power and aggression over such inferiorly-regarded human beings. (1989:60; also 1990:149–50)

The difference between the narrow and broad conceptions of genocide, or as Clastres puts it, between genocide and ethnocide, is not that one is based on race and the other on culture, because we find a reliance on both race and culture in each.65 It is more that the former is pessimistic, in the sense that all that can be done with the (racial and/or cultural) Other is to destroy them physically, whereas the latter is optimistic, in the sense that it is seen as possible to lead barbarians and savages to civilization (Clastres 1988:53), that it is indeed possible to ‘kill the Indian and save the man’.

CONCLUSION — CIVILIZING STATE FORMATION?

One of the central concerns of this paper has been to show the inherent instability of the concept of ‘genocide’, but also of all the concepts which surround, underlie and oppose it, such as ‘welfare’, ‘race’ and ‘culture’, and the heterogeneity in the ways in which they can be assembled in relation to each other. The question of the forced transfer of children, for example, straddled biology/race and culture, and was capable of being moved to either side of the divide between them, depending on the political purposes being addressed. This means that the utilization of any of these concepts according to their current meaning in relation to the past — to 1911, when the Aboriginals Ordinance (NT) was introduced, or to 1948, when the UNGC appeared — has to take place in different ways for differing purposes.

Robert Gordon (1996) has suggested that there are three different types of stories that can be told to deal with historical injustice, to account for what ‘went wrong’ and to cognitively reframe history so as to return to normative legitimacy. The first is based on what he calls a ‘narrow-agency’ approach, which looks only for individual perpetrators and specific victims, more or less along the lines of criminal law’s punitive sanctions or the compensations of tort and equity. The second, ‘broad-agency’ approach recognizes both collective victims and collective perpetrators, and they aim more at forms of corrective or compensatory justice addressing these aggregate wrongs (1996:36). Both of these approaches are contained in what I have called the ‘narrow’ conception of genocide, and constitute the focus of the UNGC’s concerns. The strategies adopted within either understanding of injustice may or may not involve punishment or compensation, an apology, an official recognition of past wrongs, or ceremony of remembrance.

It is Gordon’s third approach which corresponds roughly to what I have called the ‘broad’ conception of genocide, namely a structural approach which aims to identify explanations of the occurrence of historical injustice at the level of institutions and structures rather than individuals, and the remedies sought focus on those institutions rather than on particular individuals (1996:38). Within this orientation to the logic of organized violence built into state formation, the concern with ‘cultural genocide’ constitutes an attempt to grasp the ways in which particular institutional and structural arrangements of social, eco-
nomic and political relations end up having particular violent effects on the colonized. The term ‘genocide’ is then applied not simply to the actions of individuals guided by more or less good faith, but to a whole system of beliefs, practices and administrative structures, to the over-confident presumption that it is actually possible for state and church to re-fashion both individuals and social and cultural groups to particular ends.

To the extent that the UNGC emerges from the first two approaches, and an essentially narrow conception of genocide, the BTH Report’s reliance on it to address the question of genocide in the history of Australian settler-colonialism was probably a misjudgment. The United Nations which produced the UNGC was, at that time, no real friend of Indigenous peoples, and the New Zealand delegate pointed out during the debates on the convention how central concepts of assimilation and integration — if need be, forced — were to the UN’s own understanding of the place of Indigenous peoples within processes of progress and social improvement (above; see also Tennant 1994:26–7). The BTH Report turned to the ‘forced transfer of children’ clause in the Convention as an ally in its engagement with a central dimension (child removal) of the experience of settler-colonialism, but the problem is that this was not the way in which the UN itself approached that clause and the acts it was intended to deal with, and it is a construction of the UNGC which is actually alien to its overall intent, particularly its concern to exclude the question of ‘cultural’ genocide. In this sense, then, it is clear that ‘genocide’ has only restricted range of application of law.

However, if we agree that cultural genocide should, for particular purposes — especially that of identifying legally cognizable responsibility — be distinguished from physical genocide, and that this distinction is a central feature of the UNGC, this has still done nothing to deal with the question of what continuity there nevertheless remains, what they continue to have in common with each other, what general ‘spirit’ they share, and what might be done in response to that continuity (Gaita 1997:45). The Australian discussions of the ‘forced transfer of children’ clause in the Convention is precisely a telling illustration of how problematic the opposition of biology to culture remains, and how problematic and unsatisfactory the distinction between ‘destruction as killing’ and destruction as cultural ‘euthanasia’ (Merivale 1967:511) actually is.

The recognition that genocide has limited legal application also does not change the fact that there remain significant problems of legitimacy surrounding colonization 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 colonizer? We should be uneasy, then, about agreeing with the idea that any proportion of this heat, of the resistance to the moral and political questions raised by the stolen generations debate is attributable to ‘anger at that charge being leveled promiscuously against individuals who perhaps were less informed or less imaginative than they might have been, but who in many cases acted in good faith’ (Clendinnen 2001:7). It may be more plausible to see the public resistance to the mobilisation of the idea of genocide as being primarily a reaction to the suggestion that white Australians’ self-image might be tarnished, that our ‘civilization’ has a dark side to it, and that European Australians are indeed colonizers. Albert Memmi, in his book The Colonizer and the Colonized, has pointed out that the problem with being a colonizer is that one’s identity is essentially that of a usurper, and that colonizers are constantly concerned with trying to legitimate their usurpation — of land, of space, of power, and of bodies.

In other words, to possess victory completely he 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 (Memmi 1965:52).
The history of the stolen generations is a particularly close and proximate manifestation of the destructive and violent dimensions of the European presence in Australia, and the resistance to a recognition of its problematic nature is perhaps a result of its being a little 'too close for comfort'. Massacres are almost 'easier' for colonizing populations to deal with, because they can still be relatively easily placed in the past, and liberal non-Aboriginals can see themselves as 'better' than those blood-thirsty settlers. But this is more difficult to achieve in relation to the removal of Aboriginal children, partly because the practices took place closer in time, but also because they were more central to ideologies we currently continue to hold to, such as welfare, civilization, and assimilation/integration.

It is important to take account here of the different forms which can be taken by liberal political rationality institutions and practices, depending on how the relationships between individuals, intermediate collectivities (culture, civil society) and the state are conceived. If they are understood in ways which seek simply to detach individuals from communal ties and reconstruct them as abstract universalized and infinitely interchangeable 'citizen-isolates' in relation to the state and the nation (Rowse 1998:127), they generate the kinds of institutions and practices which the human beings being acted upon, especially Indigenous people under settler-colonialism, are highly likely to experience as essentially genocidal, no matter how well-intentioned the architects of those institutions and practices might be.

Liberal models of individual rights can never really detach themselves from an accompanying conception of 'society as a whole' to which individuals are to be 'assimilated'. Indeed, the rhetoric of liberal democracy tends to draw attention away from the models of society and community which are in fact being drawn upon, making their problematic effects that much harder to perceive, let alone respond to. On the other hand, when combined with an organic, mono-cultural, and unitary conception of citizenship and community, individualistic liberalism has a strongly normalising edge to it which can, in situations where the boundaries between the 'normal' and the 'pathological' communities are drawn strongly enough (as with racial divisions), have effects very similar to more authoritarian regimes based on quite different political philosophies.

One of the earliest applications of the concept of 'cultural genocide' in the Australian context was in 1959, in a memo by a Department of External Affairs officer, Phillip Peters, on Hasluck's address to the Anthropology section at the 1959 ANZAAS congress (Hasluck 1959). Peters observed that Hasluck's statement suggested 'that cultural genocide is a prerequisite of full assimilation of the Aborigines into the non-Aboriginal community', making 'no reference to the wishes of the Aborigines as regards their future' and failing to 'envisage any alternative which might allow Aborigines to preserve some of their customs and culture'. The 1960s thus began a confrontation between Hasluck's liberalism and an ethnocultural orientation which conceived assimilationist monoculturalism, given its construction of 'welfare' as concerned to transcend/eliminate cultural difference, as inherently 'despotic' (Valverde 1996), to the point of at least verging on the political, if not legal, conception of 'genocide'.

An important manifestation of this confrontation was the on-going tension between Hasluck and his main competitor as the leading 'theorist' of assimilation, A.P. Elkin, Professor of Anthropology at the University of Sydney between 1934 and 1951. 'Assimilation, however,' wrote Elkin in the 1950s, 'does not mean, or necessarily involve, the extinction of the Aboriginal race, that is, swallowing it by social processes and intermarriage', nor that 'to be citizens, Aborigines must give up all their kinship customs and their beliefs and rites, or that local groups must no longer think of themselves as closely knit communities'. Elkin felt that 'although scattered in groups across Australia, and increasing in numbers, the Aborigines will have their own sense and experience of solidarity, of possessing a common history, — in short, of being a people'. 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. Rather than simply being an error in judgement, a mistake for which Australians today should or should not apologise, the policies and practices surrounding the ‘stolen generations’ reveal more fundamental characteristics of ‘civilized’ liberalism. If human beings are conceived as ‘disembodied, defamilialized, and degendered’ (O’Neill 1995:3), this prevents a comprehension of individuals as socially located, inter-generational, inter-subjective beings, their essentially communal identities ‘stretched’ over time both backwards and forwards (van Krieken 1997). A mono-cultural and organicist conception of ‘society’, also allows only for assimilation to a single, individualised and de-communalised ‘way of life’. It is only to the extent that both these aspects of liberal political rationality are addressed, and a form of liberalism is nourished which instead conceives individuals as integral parts of collectivities, with their communal identity an essential rather than expendable element of their relationship to the state, that we can hope that similar histories might not re-emerge, and that people might cease experiencing themselves as the objects of one or other form of organized violence, regardless of whether it is appropriate to call it ‘genocide’.70

NOTES
1. An excellent analysis of Lemkin’s campaign for the UN Genocide Convention can be found in Power 2002:31–60.
5. As O’Loughlin J said of the policy regarding part-Aboriginal children in the Northern Territory in the 1950s, ‘On the one hand, it can be emphasised that removal was only to be effected ‘in the interests of the children’ and after ‘a painstaking attempt’ had been made to explain to the mother the advantages that her child would enjoy; but, on the other hand,…the policy was silent on the subject of the mother’s consent. A careful reading of the terms of the policy shows that, in the final analysis, a child could be removed against the express wishes of its mother’ (Cubillo & Anor v Commonwealth (No 2) (2000) 103 FCR 1 at 88).
8. For example, Bob Collins said to the Senate Legal & Constitutional References Committees Inquiry into the implementation of the BTH Report’s recommendations: ‘It is a fact that, particularly after the Second World War, many of the cases that were involved in children being forcibly separated from their parents were done for what would now be seen to be legitimate welfare reasons. There is no question about that. But having acknowledged that, it is just outrageous to try to pretend that the genesis of this policy was not the deliberate extermination of Aboriginal people from Australia, because it was. If anybody doubts that, it is all contained in the official transcripts of what was probably one of the more appalling conferences that has taken place in Canberra, our national capital. That was that 1937 conference where it was made explicitly clear. In fact, if you look at the transcript of the conference, there is not a single mention of the welfare of the kids. That never even rated a mention. It was all to deal with the ‘half-caste problem’ and what needed to be done to eliminate that problem. And, as Neville said, after five or six generations there would be no trace left of any Aboriginal people in Australia. In the face of all that, how people could disagree — prominent among them the Minister for Aboriginal and Torres Strait Islander Affairs — with the application of the word ‘genocide’ to that process, I do not know’ (Senate Legal & Constitutional References Committee 2000, 490 [11 August 2000]).
9. The former is additionally limited by the ‘golden rule’, and the latter is also known as the ‘mischief rule’.
10. Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 126, 161–2 (Higgins J); Higgins v ODea (1962) WAR 140.
13. Avel Pty Ltd v Attorney-General for NSW (1987) 11 NSWLR 126 at 127. This despite the fact that Kirby P is also one of the most enthusiastic supporters of the ‘purposive approach’ (Cook et al. 1996:171). See also Kirby (1988).
14. For example, Tickner v Bropho (1993) 40 FCR 183.
15. Secretary of Dept of Health v Harvey (1990) 21 ALD 393 (Meagher JA).
22. *Potter v Minahan* (1908) 7 CLR 277, 304.
24. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers Case*) (1920) 28 CLR 129, 130.
27. In relation to a different plea, but equally relevantly, Justice Toohey commented on the plaintiff’s reference to ‘official reports and correspondence which, they say, evidence the very purpose of the Ordinance as the removal of half-caste children to prevent them from assimilating the ‘habits, customs and superstitions of the full-blooded Aboriginals’. Assuming that the material in question is admissible in the construction of the Ordinance, it cannot be relied upon in the proceedings as they are now before the Court. The possibility of sustaining the claim by reference to extrinsic material does not warrant giving a qualified answer to so much of Question 1 [constitutionality of the Ordinances restriction of movement] as is relevant to this head of the plaintiffs claim’. (*Kruger*, 86-7).
28. ‘Virtually all lasting separations where parents did not have free choice are lumped together as “forcible separations”, whether they were for the purpose of ensuring that children would grow up physically or culturally cut off from an Aboriginal community, to remove them from an environment where their safety or health was considered in jeopardy, to secure them a secondary education, or to take them into custody under the processes of the criminal justice system’ (*Wootten* 1998:6-7).
29. The drafting committee consisted of two members of the UN Division of Human Rights: Prof Humphrey (Director), Prof Giraud (Chief of Research Section), Mr Kliava from the Secretariats Legal Dept, and the three external experts invited by S-G: Professor Donnedieu de Vabres (Prof of Law, Paris), Professor Vespasion V. Pella (Romanian Law Professor, Chair of International Penal Law Association) and Professor Lemkin.
30. *van Krieken*
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Saudi Arabia, Ethiopia, Syria — China, Pakistan, the Philippines — Mexico, Ecuador.

46. Ibid.
49. Ibid.
48. Ibid.
45. Ibid.

67. Elkin Papers, University of Sydney, Series 17, Box 19, Item 109.

66. NAA A 1838 557/1; Peters was also unimpressed with Hasluck's response to criticism: 'Mr Hasluck attacks Mr
Hasluck

53. Similar arguments were mobilised against the protection of minority rights, or the extension of the concept of
cultural genocide, it was unhappy with the wording of Article III and would have preferred an amended version
to be put to the vote (pp.196–7).

55. UN Doc E/3/SR. 175–225 (1948) at 7. (Summary Records of Meetings 175–225, UN ESCOR, 3rd Year, 7th
Session, Supp No. 6). [in Morsink 1999 at 1024]

51. Ibid.
50. Ibid.
49. Ibid.
48. Ibid.
46. Ibid.
45. Ibid.
44. 3rd Session, 6th Committee, 83rd Meeting, 25 October 1948.

52. 3rd Session, 6th Committee, 63rd Meeting, 30 September 1948, 83rd Meeting, 25 October 1948.

53. Similar arguments were mobilised against the protection of minority rights, or the extension of the concept of
human rights to collectivities and groups as well as individuals, for related reasons associated with state-for-
mation (Morsink 1999; Thornberry 1991:122).

54. As the jurist Pieter Drost argued a little later, ‘Genocide is collective homicide and not official vandalism or
violation of civic liberties. It is directed at the life of man and not against his material or mental goods. The
protection of culture belongs primarily to the province of human rights and, perhaps to a lesser degree also to
the department of minority rights. It is foreign to the field of criminal law. In a convention on group murder it
is completely out of place’ (1959:11).

55. For deletion: South Africa, UK, USA, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominici-
ian Republic, France, Greece, India, Iran, Liberia, Luxembourg, Netherlands, New Zealand, Norway, Panama,
Peru, Siam, Sweden, Turkey. Against: USSR, BSSR, UkSSR, Yugoslavia, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, Philippines, Poland, Saudi Arabia, Syria; Abstaining: Venezuela, Afghanistan, Argentina, Cuba.

56. This means that the BTH Report’s usage of the Venezuelan delegate’s comments (p. 271) is a little mislead-
ing, in that it gives the impression that they reflect the UN’s overall position on the child transfer question.
But the ultimately successful arguments for the inclusion of the child transfer clause were those based pre-
cisely on its exclusion from the concerns about assimilationist policies and practices, or ‘cultural genocide’,
and its redefinition as an essentially biological or physical intervention. We need to recognize the Venezue-
lan delegate’s speech, then, as an (unsuccessful) attempt to re-assert a ‘cultural’ understanding of child trans-
fer so as to gather support for the idea of cultural genocide more broadly, rather than as based on a shared
understanding that ‘forced transfer of children’ should be approached as an act of cultural genocide.

58. Related arguments can be found in Levene (1999).

59. On the broader public’s approach to questions of apology and reparation, see Augustinos, Tuffin & Rapley

60. Salmon was born in 1861, educated at Scotch College, Melbourne University, and Edinburgh Medical
School. He joined the Australian Natives Association in 1894, its Board of Directors in 1895, and became
President in 1898. Salmon was a member of the Legislative Assembly between 1893 and 1901, and became
Minister for Education. Between 1901 and 1913 he was a member of the House of Representatives in the
Federal Parliament, and he was Speaker of the House during 1909–10.

62. Id. p.5463.
63. Id. p.5462. Later AO Neville was to come to a different view, telling the 1937 Commonwealth Conference
that '[t]he Asiatic cross, however, is not a bad one. We find that half-caste Asiatics do very well indeed; in
fact, very often they beat the white cross' (Commonwealth of Australia 1937:11).


65. Cecil Cook, for example, spoke of ‘colour of the mind’ and wrote, ‘where the coloured individual is “white"
in all but colour very little conflict is likely to take place’ (in McGregor 1997:162). Cook’s notion of ‘breed-
ing out the colour’ was thus aimed more at the perception of people of Aboriginal descent among Euro-
peans, which would not accept non-whites, than at what he regarded as the real difference between Aboriginals
and Europeans, which he constructed in sociological terms.

66. NAA A1838 557/1; Peters was also unimpressed with Hasluck’s response to criticism: ‘Mr Hasluck attacks
those who, unaware of the complexities of the problems facing Aborigines, are bold enough to criticise Gov-
tment policy. The implication seems to be that Govt policy, like the laws of the Medes and Persians, is
unalterable and profoundly wise. It may be difficult to argue this point to overseas critics’. Hasluck was fond
of attributing any criticism of the management of Aboriginal affairs to a Communist plot (Hasluck 1988:97).
I am grateful to Susan Taffe (1995) for drawing my attention to this memo, and also for providing me with
her copy of it, since I was unable to locate it personally in National Archives.

67. Elkin Papers, University of Sydney, Series 17, Box 19, Item 109.
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68. Elkin Papers, University of Sydney, Series 17, Box 143, Item 111.
69. Elkin Papers, University of Sydney, Series 17, Box 19, Item 109. See also the discussions in Thomas (1994), Rowse (1998) and McGregor (1999). Russell McGregor observes, then, that ‘Elkin seems to have sincerely believed that his proposals, by recognising the viability of some degree of indigenous identity and cultural continuity, offered Aborigines a more secure and satisfying route to citizenship than did the official insistence on their becoming black replicas of white Australians’ (1996:124).
70. For a discussion of these issues in relation to the USA, see Julie Scales-Trent’s (2001) comparison of American and Nazi race laws.

CASEx

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (the Engineers’ Case) (1920) 28 CLR 126.
Avel Pty Ltd v Attorney-General for NSW (1987) 11 NSWLR 126.
Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372.
Crafter v Kelly [1941] SASR 237.
Heydon’s Case (1584) 3 Co Rep 7a.
Kiaa v West (1985) 159 CLR 550.
Metal Manufacturers Pty Ltd v Lewis (1988) 13 NSWLR 315.
Potter v Minahan (1908) 7 CLR 277.
Secretary of Dept of Health v Harvey (1990) 21 ALD 393.
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1.
Ex parte Walsh & Johnson; In re Yates (1925) 37 CLR 36.

REFERENCES

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HAEBICH, A. 1988. For Their Own Good: Aborigines and Government in the Southwest of Western Australia, 1900–1940. Perth: University of Western Australia Press.


