**MEMORANDUM**

To: Professor Van Schaack

From: Stanford Law School Human Rights and International Justice Policy Lab: Mackenzie Austin, Schuyler Atkins, Kevan Christensen & Molly Norburg

Date: January 2021

Re: A Theoretical Exercise: Can Either Compulsory Sterilization or the Forced Transfer of Children *Alone* Satisfy the *Actus Reus* Element of the Crime of Genocide?

**Background**

This Fall, a partner organization asked the Stanford Law School Human Rights and International Justice Policy Lab to investigate the theoretical question of whether either compulsory sterilization or forced transfers of children, acts which the Chinese government has reportedly conducted against the Uyghur population in Xinjiang, can satisfy the *actus reus* requirement of the crime of genocide in the absence of mass killings or other violence. Realities of the Chinese Communist Party’s alleged actions against the Uyghurs underscore the importance of this question and the need to open the blind eye that international justice mechanisms have long turned towards biological acts of genocide.

**Outcome**

After investigating this issue, we have found strong evidence that both compulsory sterilization and the forced transfer of children can independently qualify as acts of genocide when committed with the requisite *mens rea*. Such acts do not need to be accompanied by mass killings or other genocidal actions to be considered genocide themselves. To reach this conclusion, our clinic examined and prepared memos on each of the following topics: known facts about the situation in Xinjiang and treatment of Uyghurs, the factual and legislative history of the term “genocide” and the Genocide Convention, relevant international jurisprudence, and work by leading genocide scholar William Schabas. The details of these memos are laid out below and memoranda discussing each topic in depth are attached to this cover letter. Please note that we have limited our inquiry and so only our memo on academic work addresses the *mens rea* component of genocide, as that requirement is constant for all of the enumerated acts of genocide in Article II of the Convention.

1. **Factual Background on the Uyghurs’ Situation:** This memo identifies the publicly available information on potential acts of biological genocide being committed against the Uyghurs in Xinjiang. There is a focus on Adrian Zenz’s work and the credibility of his reporting. Discussion of the facts motivating this project is largely limited to this memo because our clinic has conducted this research as a theoretical question.
2. **History of the Genocide Convention:** This memo asserts that both Raphael Lemkin, who first conceptualized the concept of genocide and coined the term, and the drafters of the Genocide Convention understood biological genocide, enumerated in part (d) and (e) of Article II, as unique acts that individually could constitute genocide.
3. **International Jurisprudence:** This memo argues that the available jurisprudence on this topic, while sparse, supports the treatment of biological genocide as sufficient to satisfy the *actus reus* requirement of the prohibition against genocide. It surveys relevant case studies from international criminal law, the ICJ, and domestic settings.
4. **Academic Work:** This memo evaluates the work of William Schabas, a prominent genocide scholar who is known for a “conservative” approach to interpreting the crime’s definition. It shows that his narrow interpretation of the Genocide Convention also considers biological acts such as compulsory sterilization and the forced transfer of children as sufficient to constitute individual acts of genocide.

We have appreciated the opportunity to work on this important project and are excited to share our findings with you. Please let us know if there are any questions.

**MEMORANDUM ON THE FACTUAL BACKGROUND ON THE UYGHURS’ SITUATION**

The facts on the ground for Uyghurs are notoriously difficult to find. A German anthropologist, Dr. Adrian Zenz, has dedicated time to parsing through government documents to build a picture of what is happening to the Uyghurs. The practices Dr. Zenz has uncovered include the punishment of birth control violations, increased IUD implementation, and increased budget for sterilization procedures.

Starting in 2017, the Xianjiang government began to more harshly punish those who violated the policy limiting births to two (for those living in urban centers) or three (for rural residents) children. The punishments included steep fines and, in some counties, violators who could not pay were subject to “vocation skills education and training,” which Zenz describes as a euphemism for internment.[[1]](#footnote-1) It is important to note that according to the leaked government documents known as the Karakax list[[2]](#footnote-2), the most-cited reason for internment was the violation of birth control regulations.

Family planning documents also indicated the need for long-term birth control, in the form of intrauterine devices (IUDs). Zenz describes at least one prefecture that mandated the implementation of IUDs for *all* women who “met IUD placement conditions and are without contraindications.”[[3]](#footnote-3) Furthermore, the placement of IUDs has increased drastically in Xinjiang since 2015. In 2014, a little over two percent of the overall number of IUD placements were fitted in Xinjiang. In 2018, eighty percent of the overall number of IUD placements were fitted in Xinjiang.[[4]](#footnote-4)

The proof for sterilization in Xinjiang is less readily available from notices or other public documents. Zenz reports anecdotal evidence from a woman who was held in the “re-education” camps, who said that she and other female detainees were sterilized or given medication to stop their periods.[[5]](#footnote-5) Zenz also points to local family planning campaigns, notably in Guma (Pishan) County and Hotan City. Zenz describes family planning documents from 2019 calling for thousands of female sterilizations.[[6]](#footnote-6)

Dr. Zenz’s work has been criticized, mostly by Chinese media, as inaccurate and biased. Dr. Zenz admits to a religious motivation behind his research – he describes feeling “called to the work.”[[7]](#footnote-7) To his credit, Dr. Zenz has been interviewed, cited, and published by reputable American news sources like the New York Times, the Wall Street Journal, and NPR.[[8]](#footnote-8) He is oft-cited as an expert on China, especially in regard to what is happening in Xinjiang.

# **­MEMORANDUM ON THE HISTORY OF THE GENOCIDE CONVENTION**

This memorandum uses the history of the term “genocide” and the Genocide Convention to­ argue that genocide may be committed without mass killings through measures intended to prevent births or the forcible transfer of children to another group. The focus is solely on the theoretical question of whether either compulsory sterilization or forced transfers of children, acts which the Chinese government isreportedly committing against the Uyghur population in Xinjiang, can satisfy the *actus reus* requirement of the crime of genocide in the absence of other violence under the text of the Genocide Convention. This memorandum does not address *mens* *rea*, since that requirement is common across the different options for *actus reus*. Part I of this memorandum introduces evidence that Raphael Lemkin, who coined the term “genocide” and played a major role in shaping its definition under international law, strongly believed that prevention of births and the forcible transfer of children could qualify as genocide. Next, this memorandum uses documentation of the Genocide Convention’s drafting to show that the drafters regarded each subsection in Article II as an individual act of genocide. Part II offers proof that Article II subpart (d), measures imposed to prevent births, alone can satisfy the *actus reus* for genocide. Part III establishes that the drafters also intended Article II subpart (e), the forced transfer of children, to be an individual act of genocide. Overall, the historical evidence is conclusive: the definition of genocide was designed to include the prevention of births and the forced transfer of children, even when acts of either type are committed in the absence of mass killings or other forms of genocide.

# **Lemkin’s View: A Broad Definition of Genocide That Includes Forced Sterilization and the Transfer of Children**

The term “genocide” was originally coined by Raphael Lemkin, who subsequently exerted a major influence on the term’s incorporation into international law, including through the Convention on the Prevention and Punishment of the Crime of Genocide.[[9]](#footnote-9) His views on the term’s meaning can therefore inform the proper interpretation of the word in modern contexts. Lemkin’s writings strongly suggest that he would consider both compulsory sterilizations and the forced transfer of Uyghur children by the Chinese government to fall squarely within the definition of genocide, even if such acts are not accompanied by mass killings or other forms of physical harm. Lemkin took a notably broad view of the definition of genocide as he worked to coin, define, and popularize the term. In his writings, he specifically discussed compulsory sterilizations, transfers of children, and other efforts to reduce birthrates as acts of genocide.

Lemkin’s broad view of genocide can be seen in his early writings on the topic, where he outlined “techniques” of genocide falling into eight different categories: political, social, cultural, religious, moral, economic, biological, and physical.[[10]](#footnote-10) Lemkin did note that the “most direct and drastic of the techniques of genocide is simply murder.”[[11]](#footnote-11) However, he included this physical technique of genocide as just one in a long list of techniques, all of which he clearly believed constitute genocide.

Lemkin’s writings emphasize his view that genocide can occur in many different forms, and mass killings are only one particularly heinous aspect of the crime. He explained, “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 the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”[[12]](#footnote-12) At the same time, Lemkin made it clear that he did not believe multiple different techniques or types of atrocities had to occur together for an incident to count as genocide. Rather, he argued for a definition of genocide that would include “every action infringing on the life, liberty, health, corporal integrity, economic existence and the honor” of members of a group and “every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another.”[[13]](#footnote-13) Under Lemkin’s view, the key to whether an act qualifies as genocide is whether it was committed as part of a plan to destroy a protected group. Lemkin’s suggestion that *every* action or policy with that goal should be included in the definition of genocide suggests he believed someone could be guilty of genocide after committing just one type of act within the definition.

In describing the biological techniques of genocide, Lemkin explained that they involve the perpetrators pursuing a “policy of depopulation.”[[14]](#footnote-14) He used examples from Nazi Germany’s occupation of parts of Europe to illustrate how such genocidal acts proceed in practice. He explained that German occupiers used “every means to decrease the birth rate among ‘racial inferiors.’”[[15]](#footnote-15) The genocidal methods included preventing marriages between members of the group, separating males and females and sending some of them to labor campus, and keeping parents undernourished to reduce the survival rates of children.[[16]](#footnote-16) Meanwhile, the Nazi occupiers provided special incentives and subsidies to encourage Germans and other favored groups in occupied areas to have more children.[[17]](#footnote-17) Based largely off of his study of Nazi atrocities, Lemkin played a major role in pushing for the use of the term “genocide” during the Nuremberg trials, even though genocide *per se* was not within the subject matter jurisdiction of the Nuremberg Charter.[[18]](#footnote-18) In the process, he urged the Nuremberg judges to include compulsory sterilizations, forced abortions, and the abduction of children within their working definition of “genocide.”[[19]](#footnote-19)

Lemkin’s view that compulsory sterilizations, the compulsory transfer of children, and other biological techniques should constitute genocide is further shown in excerpts from his journal writings documenting negotiations in Paris in 1948 during the drafting of the Genocide Convention. He wrote that the historical existence of a group is “achieved through reproduction within the group,” which can be diminished through multiple actions that, in his estimation, needed to be addressed in the definition of genocide.[[20]](#footnote-20) Lemkin noted that the delegates to the Genocide Convention negotiations “remembered the problem of sterilizations and castrations, but not all of them were aware that in many past cases of genocide measures were undertaken to prevent births within the group through prohibition or mass restriction of marriage.”[[21]](#footnote-21) He further wrote that the forcible transfer of children was of concern to several delegations and that in particular the Greek delegation, reflecting the national experience of having tens of thousands of children transferred during the prior civil war, “formally proposed to include in the definition of genocide the practice of taking away children.”[[22]](#footnote-22) Lemkin himself reflected that “this type of genocidal practice appeared to be one of the cruelest” and, apparently satisfied that the delegates had agreed to include it as a crime under the Convention, wrote, “[t]hus a tragic experience of deep human significance was added to the definition of genocide.”[[23]](#footnote-23)

Lemkin further illustrated his views in his descriptions of the types of people who are involved in committing acts of genocide. He explained that those aiming to eliminate a group “may use certain specially trained persons to carry out genocide,” providing the example of “[s]cientists and pseudoscientists [who] have been used to devise quicker and cheaper methods of extermination and to carry out mass sterilization programs.”[[24]](#footnote-24) Lemkin’s description implies that he would view a scientist or doctor who helps to administer a mass sterilization program to be equally involved in genocidal acts as one who assists in mass extermination. In another example, Lemkin wrote, “There are three main types of groups which commit genocide: 1) Vested interest groups including governments, 2) Soldiers and others especially trained in mass sterilization, violence, or extermination methods who stand in the service of the vested interest groups, 3) Mobs.”[[25]](#footnote-25) Here again, Lemkin included mass sterilization right alongside extermination methods in discussing acts of genocide, suggesting he believed compulsory sterilization to be as much a part of the definition of genocide as mass killings.

Not only are Lemkin’s views apparent in his own words, but they are also evident in the words of others whom he influenced and with whom he worked. For example, Lemkin discussed in his journal his work with Judge Riad of Egypt, who had become a big supporter of Lemkin and one of the principal supporters of the Genocide Convention in the Arab world.[[26]](#footnote-26) Lemkin approvingly quoted a speech that Judge Riad gave arguing that the term “genocide” has special meaning beyond just “extermination”: “Extermination would limit the concept in scope of action. . . . A group can be destroyed as a group even when the members are not all destroyed, but when the cultural identity is replaced by another one. This is the case when children are taken by force to another cultural group.”[[27]](#footnote-27) This expansive view of genocide reflects Lemkin’s own broad definition of the term.

After the Genocide Convention finally entered into force, Lemkin gave a speech in celebration that concisely summarized his views: “[G]enocide is no longer a word, a promise, a hope . . . It is already a law which can be enforced. In practical terms, this law means no more extermination, no more mass killings, no more concentration camps, no more sterilizations, no more breaking up of families.”[[28]](#footnote-28) Yet again, Lemkin made clear in this speech that for him, compulsory sterilizations and efforts to forcibly separate children from their families were as much a part of the definition of genocide as mass killings.

# **The Drafters of the Genocide Convention Intended the Imposition of Measures Preventing Births to be an Act of Genocide.**

The Genocide Convention’s drafters intended that measures preventing births *alone* could satisfy the *actus reus* for the crime of genocide, if committed with the necessary *mens rea*. The *travaux préparatoires*, a collection of the preparatory work leading up to the promulgation of the Genocide Convention, show this intention. This Part presents comments and deliberations documented in the *travaux préparatoires* demonstrating that the Convention’s drafters viewed the prevention of births as a unique method of genocide. This section will discuss, in chronological order, support to include the prevention of births as an act of genocide in the Secretariat’s Draft, comments issued by UN members and NGOs on the Secretariat’s Draft, the Ad Hoc Committee’s deliberations, and the Sixth Committee’s final draft.

From the first stage of drafting, the prevention of births in a group was intended to qualify as an act of genocide. After the General Assembly passed a resolution introduced by India, Cuba, and Panama, recognizing the crime of genocide under international law, the Secretariat was appointed to prepare a preliminary draft.[[29]](#footnote-29) This initial draft included a section on “Acts Qualified as Genocide” which provided that:

In this convention, the word “genocide” is understood to mean criminal acts against any one of the groups of human beings aforesaid, with the purpose of destroying them in whole or in part, or of preventing their preservation or development. Such acts consist in . . . Restricting births by: (a) sterilization of individuals and/or compulsory abortion; (b) segregation of the sexes; (c) obstacles to marriage.[[30]](#footnote-30)

Comments from the Secretariat explained that the restricting births subsection was meant to capture what Professor Lemkin referred to as biological genocide, the extinction of a group by systematic restrictions on births through physical, legal, or social means.[[31]](#footnote-31) The commentary provided compulsory residence of the sexes in remote places or the systematic allocation of work to men and women in different localities as examples of acts restricting births that could qualify as genocide.[[32]](#footnote-32)

Comments made on this draft by the General Assembly also support recognizing the imposition of measures to prevent births as a method of genocide.[[33]](#footnote-33) First, a number of comments indicate that the General Assembly members understood that acts restricting births themselves could qualify as genocide, including the United States.[[34]](#footnote-34) For instance, the United States proposed edits to clarify that *any* of the enumerated acts could be genocide by suggesting the section read “Genocide means any of the following criminal acts directed against a racial, national, religious, or political group of human beings, for the purpose of totally or partially destroying such group or of preventing its preservation or development” and changing “Such acts consist of:” to “any of the following criminal acts.”[[35]](#footnote-35)

Comments from Norway and Siam (now Thailand) also recognized that acts restricting births could qualify as genocide. Siam suggested the last subsection read “obstacles to marriage including racial prohibition” to clarify that prohibiting women in a racial group from marrying other members could lead to the group’s destruction.[[36]](#footnote-36) This comment shows that the delegates from Siam believed the destruction of a group could occur solely through acts preventing births without other violence directed at the group. The Norwegian representative commented that there needed to be international jurisdiction over persons acting in an official capacity for a state because only states can commit some acts of genocide.[[37]](#footnote-37) To illustrate this argument, Norway pointed out that only a state would be able to commit genocide by restricting births through obstacles to marriage.[[38]](#footnote-38) This comment takes for granted that restrictions of births alone can qualify as genocide. Comments from the United States, Siam, and Norway delegations on the Secretariat’s Draft signal that these members viewed the prevention of births as an act of genocide.

Support for recognizing the prevention of births as a form of genocide continued during the next phase of the drafting process: the Ad Hoc Committee’s consideration of the Secretariat's Draft and General Assembly’s comments.[[39]](#footnote-39) To begin deliberations, the Union of Soviet Socialist Republics (USSR) submitted a document containing basic principles of a convention on genocide showing it understood actions restricting births to provide satisfactory *actus reus* for the crime of genocide.[[40]](#footnote-40) This document noted that the convention should include “the restriction of births by sterilization or compulsory abortion” as an instance of genocide,[[41]](#footnote-41) indicating that the USSR’s delegation understood acts restricting births to constitute genocide.

The Ad Hoc Committee’s debate on the definition of genocide also revealed the drafters’ belief that restricting births could qualify as an act of genocide. On April 16, 1948, the committee considered a proposed definition, “In this Convention genocide means intentional destruction, in whole or in part, of racial, national or religious groups as such.”[[42]](#footnote-42) The Venezuelan and French delegations argued against this definition because strict interpretations of that text could exclude biological genocide when the entire group is not destroyed.[[43]](#footnote-43) Ultimately, the committee rejected this text.[[44]](#footnote-44) These comments demonstrate the intention to treat restrictions on births as a unique act of genocide by ensuring the definition of genocide was consistent with this treatment.

Delegations continued to advocate for recognizing restricting births as genocide when the Ad Hoc Committee began to discuss acts that qualify as genocide. As the United States representative, the Chairman suggested adopting “[s]ubjecting members of a group to such physical conditions or measures as will cause their death or prevent the procreation of the group” as the second act qualifying as genocide.[[45]](#footnote-45) This suggestion prompted the delegation from Venezuela to note that the proposed texts so far did not cover all possible acts that could constitute genocide and thus could lead to under-inclusive legal interpretations.[[46]](#footnote-46) France’s representative suggested three categories should be covered: the murder of a group’s members, acts against the corporal integrity of the members of a group, and the condition of life inflicted on group members.[[47]](#footnote-47) In his view, the third category included measures restricting birth but he worried that separately enumerating those methods would lead to restrictive interpretations.[[48]](#footnote-48) The group quickly adopted “Any act directed against the corporal integrity of members of the group.” as the second enumerated act of genocide.[[49]](#footnote-49)

Still, drafters continued to advocate for a specific provision on biological genocide. Poland’s delegate again injected the issue into the conversation by remarking “ . . . that it was possible to destroy a group without destroying its members . . . such as [through] the prolonged segregation of sexes.”[[50]](#footnote-50) Lebanon’s representative echoed that no provision condemned measures aimed at restricting births within the group and proposed adding an item on this point.[[51]](#footnote-51) The Committee voted to accept a separate item on biological forms of genocide and then adopted the text “Any act or measure calculated to prevent births within the group.”[[52]](#footnote-52) This language was modified to “imposing measures preventing births within the group” during a subsequent meeting.[[53]](#footnote-53) These repeated pushes to separately acknowledge biological genocide and the ultimate adoption of an individual provision on the issue show a clear intention that acts restricting births provide a sufficient and independent *actus reus* for the crime of genocide.

Drafters on the General Assembly’s Sixth (Legal) Committee, which produced the final Convention, continued to embrace measures preventing births as a satisfactory *actus reus* for genocide while reviewing the Ad Hoc Committee’s draft. Only one amendment was proposed to alter this provision, indicating strong support for recognizing measures to prevent births as an act of genocide.[[54]](#footnote-54) The amendment, proposed by the USSR’s delegation, would change the subsection “to the prevention of births by means of sterilization and enforced abortion.”[[55]](#footnote-55) Iran’s representative preferred the Ad Hoc Committee’s text because it was general and comprehensive.[[56]](#footnote-56) In his view, naming the means, as the USSR delegate’s amendment did, was superfluous.[[57]](#footnote-57)The Committee rejected the amendment by thirty votes to five, with seven abstentions.[[58]](#footnote-58) Instead, the Committee adopted the Ad Hoc Committee’s text by thirty votes to none, with three abstentions,[[59]](#footnote-59) again indicating strong support for recognizing the prevention of births as an act of genocide.

The Sixth Committee submitted its final text without discussing item 4 of Article II again, and the General Assembly adopted the Genocide Convention.[[60]](#footnote-60) The *travaux préparatoires* document the drafters’ intention that measures preventing births within a group alone constitute an act of genocide. The drafters’ consistent efforts to include a provision on measures to prevent births are present in supportive comments on the Secretariat’s inclusion of biological genocide, persistent remarks of members of the Ad Hoc Committee advocating for a separate paragraph on the issue, and the Sixth Committee’s rejection of a restrictive amendment.

# **The Drafters of the Genocide Convention Intended for the Forced Transfer of Children to Satisfy *Actus Reus* for Genocide.**

The *travaux préparatoires* also document the drafters’ intent that the forced transfer of children from one group to another could satisfy *actus reus* for the crime of genocide. This Part will argue that there was consistent support for including the forcible transfer of children as an act of genocide.

Support to recognize the forced transfer of children as an act of genocide also existed from the start. The Secretariat’s draft section on “Acts Qualified as Genocide” included the “forced transfer of children to another human group” as one method of cultural genocide.[[61]](#footnote-61) Despite this initial association, members immediately differentiated between the forcible transfer of children and cultural genocide in their comments on the Secretariat’s draft. The United States, for instance, commented that it was opposed to the inclusion of paragraph 3 of Article I—which codified means of cultural genocide—except for the “forced transfer of children to another group.”[[62]](#footnote-62) The United States argued that only the forced transfer of children, as opposed to the prohibition of the use of language or the destruction of books, was barbarous enough for inclusion given that the “new international crime of genocide is one of extreme gravity.”[[63]](#footnote-63) This comment is representative of the view that cultural genocide—the destruction of a group’s spiritual, national, and cultural identity despite their continued physical existence—should be addressed separately because it did not amount to the same kind of atrocity as the Holocaust, which inspired the campaign for the Genocide Convention.

Third party organizations also supported recognizing the forced transfer of children as an act of genocide. The World Jewish Congress submitted a comment on the Draft Convention encouraging the rapid adoption and recommended that it “outlaw the systematic practice of forcibly separating children from their parents and bringing them up in a culture different from that of their parents.”[[64]](#footnote-64)

As the drafting process continued into the committee phase, delegations persisted in advocating for enumerating the forced transfer of children as an act of genocide. Although disagreements led the Sixth Committee to decide against including an express reference to, or prohibition of, cultural genocide, the forced transfer of children was included as an act of genocide because it could result in the physical destruction of a group, similar to the other enumerated acts.[[65]](#footnote-65) During the Sixth Committee’s deliberations, the Greek representative proposed enumerating the “forced transfer of children” as an act of genocide in Article II and offered a justification that sufficiently separated the issue from cultural genocide.[[66]](#footnote-66) Greece’s representative argued:

There could be no doubt that a forced transfer of children, committed with the intention of destroying a human group in whole, or at least in part, constituted genocide. The forced transfer of children 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.[[67]](#footnote-67)

In response, the USSR’s delegate argued this amendment was unjustified because there was no historical record of a forced transfer of children amounting to genocide and because harm to children of the group was already covered by the Convention.[[68]](#footnote-68) From this perspective, the transfer of children was not viewed as a realistic means to destroy a group and thus indistinguishable from cultural genocide.[[69]](#footnote-69)

Despite this criticism, Greece’s justification was widely embraced. Uruguay’s representative argued that “[t]he Greek amendment dealt with clearly defined cases of genocide in which the destruction of human groups could occur” and reasoned that forcibly transferring children had the same potential to destroy a group as measures preventing births.[[70]](#footnote-70) The United States reiterated this point, asking “the Committee 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” and again remarked that “in the eyes of a mother, there was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth.[[71]](#footnote-71) After discussion clarified that the scope of the Greek amendment would extend only to forcible transfers of children which were intended to bring about the physical destruction of a group, the Committee adopted the amendment.[[72]](#footnote-72) The adoption of this provision and these comments reveal the drafters’ understanding that the forcible transfer of children can destroy a group, and thus can constitute *actus reus* for the crime of genocide.

# **Conclusion: Historical Evidence Strongly Demonstrates the Inclusion of Forced Sterilization and Transfers of Children as Acts of Genocide**

The Genocide Convention’s history illustrates that either measures imposed to prevent births or forced transfers of children from one group to another can satisfy the *actus reus* requirementfor genocide, even without mass killings or other violence targeted at the group. In coining the term “genocide” and campaigning for its inclusion in international law, Raphael Lemkin clearly intended for the definition to include both forced sterilizations and forced transfers of children. Decisions and deliberations made during the Convention’s drafting, as documented by the *travaux* *préparatoires*, also strongly indicate members understood­—and agreed—that these acts could qualify as genocide.

# **­MEMORANDUM ON JURISPURDENCE**

***I. International Criminal Law***

International criminal caselaw interpreting Articles 2(d) and 2(e) remains incredibly sparse. While the Genocide Convention provides no inherent hierarchy between physical and biological acts of destruction,[[73]](#footnote-73) the former has clearly dominated prosecutions and jurisprudence. Neither the ICC, ICJ, or any *ad hoc* criminal tribunal has ever sought or examined a charge of genocide exclusively on the basis of Article 2(d) or 2(e). However, when genocide charges have arisen in the context of sexual violence or broader claims of destruction aimed at a protected group, courts have expressed a willingness to apply these provisions in support of a finding of genocide.

While in-depth explorations of the two clauses have been evasive, the International Criminal Tribunal for Rwanda (ICTR) did offer a lodestar of what constitutes genocide under Article 2(d) and 2(e) in *Akayesu*.[[74]](#footnote-74) The pathbreaking case, in which a municipal leader was accused of overseeing a horrific campaign of violence against Tutsi community members, represented the first conviction for genocide under the 1948 Convention.[[75]](#footnote-75) More critically for our purposes, the case also grappled with the legal characterization of sexual violence and the contours of the definition’s constitutive acts. The ICTR first enumerated several acts that would overtly qualify under 2(d): “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”[[76]](#footnote-76) The Tribunal then endorsed an even more inclusive reading by asserting that genocidal preventive measures can be mental, as well as physical.[[77]](#footnote-77) This stretches the definition of Article 2(d) to reach acts like rape that induce psychological trauma and deter the victim from procreating in the future, separate and apart from the serious bodily or mental harm incurred, which would be actionable under Article 2(b). The Court then applied this capacious logic to the forcible transfer of children, writing that “the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”[[78]](#footnote-78)

The ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY) have also confronted the ways in which gender dynamics might interact with “measures intended to prevent births” to erode the cohesion or survival of a protected group. In *Akayesu*, the ICTR acknowledged that “in patriarchal societies,[[79]](#footnote-79) where membership of a group is determined by the identity of the father,” impregnation via rape can constitute a measure intended to prevent birth.[[80]](#footnote-80) In *Krstić*, the ICTY found that the execution of 7,000 Muslim men in Srebrenica constituted genocide.[[81]](#footnote-81) While the Trial Chamber did not base its conviction on Article 2(d), it did address the “catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society.”[[82]](#footnote-82) In affirming the conviction, the Appeals Chamber doubled down on the nexus between these gendered acts of killing and the erosion of reproductive capability: “physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.”[[83]](#footnote-83) Thus, these cornerstone decisions read the constitutive acts of genocide generously in order to acknowledge that perpetrators can stunt the reproductive capacities of a population in a variety of ways.

In sum, mechanisms assessing individual criminal liability for genocide have never comprehensively interpreted, or even emphasized, the role of Articles 2(d) and 2(e). The limited jurisprudence has instead leveraged the provisions as a backdoor for incorporating certain psychological or sexual acts of destruction into the concept of genocide. This paucity of precedent on more literal manifestations of Articles 2(d) or 2(e) should not be read, however, to undermine potential prosecution of genocide. After all, where the stringent requirements for genocide are met, “the law must not shy away from referring to the crime committed by its proper name.”[[84]](#footnote-84)

***II. The ICJ & State Responsibility***

The existing jurisprudence from the International Court of Justice (ICJ) sheds little additional light on Articles 2(d) or 2(e). Under Article IX of the Genocide Convention, the ICJ acts as the primary judicial mechanism for adjudicating charges of state responsibility for genocide.[[85]](#footnote-85) This responsibility has arisen only twice, and neither situation has centered on biological forms of genocide: first, in *Bosnia v Serbia*, and recently in the still-developing case of *The Gambia v Myanmar*.

In the former case, Bosnia alleged that Serbia had violated its obligations under the Genocide Convention by orchestrating, or at least condoning, the Srebrenica massacre (litigated in *Krstić*).[[86]](#footnote-86) The Court’s principal discussion revolved around - and has grown significant for - parsing the distinctions between direct responsibility or complicity and simple failure to prevent or cooperate.[[87]](#footnote-87) In undertaking this reasoning, however, the opinion did succinctly confront allegations of Article 2(d) and 2(e) infractions. The applicants had argued for 2(d) liability on the basis of forced separation of the sexes, physical and psychological trauma from sexual violence as an impediment to future procreation, and societal rejection of rape victims.[[88]](#footnote-88) The applicants also argued 2(e) liability on the basis of forced pregnancy as a demographic control mechanism.[[89]](#footnote-89) The Court rejected all of these assertions due to insufficient evidence, bypassing the opportunity to offer a substantive treatment of the provisions.[[90]](#footnote-90)

Only one judge in *Bosnia v. Serbia* chose to address these claims more thoroughly. In a lengthy separate opinion, Judge ad hoc[[91]](#footnote-91) Kreća, selected by Bosnia-Herzegovina, articulated his views on the parameters of “destruction” as it pertains to Articles 2(d) and 2(e), before casting doubt on the holding in *Krstić*. He adopted the dichotomy between physical and biological acts, caveating that forcible transfer of children does not align perfectly with either category, but instead manifests both physical and biological effects, “since it imposes on young persons conditions of life likely to cause them serious harm, or even death.”[[92]](#footnote-92) Judge Kreća also conceptualized measures intended to prevent births as “annihilating [a] group’s national biological power.” He distinguished these two modalities of destruction from killing on the basis of actual results: forcible transfer of children imposes “a causal connection, in which the [destructive] effect is deferred,” whereas measures intended to prevent births do not require proof of a result - “they represent, themselves, the result.”[[93]](#footnote-93) Consequently, he argued that, to counterbalance the lack of direct causation, “acts of genocide short of actual destruction, must be evaluated strictly.”[[94]](#footnote-94) In applying this viewpoint to the situation in Srebrenica, Judge Kreća critiqued *Krstić*’s analysis of procreative implications and its imputation of genocidal intent, arguing that the Court’s holding was tantamount to a finding of social destruction, which “seems highly doubtful for a legal point of view.”[[95]](#footnote-95) In other words, Kreća’s opinion advocates for a narrower reading of Article 2(d) when the conduct in question (such as the extermination of all men in a community) does not carry immediately genocidal consequences, but instead serves as a more attenuated, proximate cause of the group’s destruction (by hampering the community’s women from reproducing).

The case against Myanmar remains in its nascent stages, but may surface some pertinent jurisprudence, especially on forcible transfer under Article 2(e). Beginning in 2017, Myanmar’s military escalated long-held policies of persecution against the Rohingya minority into outright “clearance operations,” surfacing credible claims of crimes against humanity and genocide.[[96]](#footnote-96) These charges have galvanized investigations at the ICC and a contentious state responsibility case before the ICJ, brought by The Gambia in November of 2019.[[97]](#footnote-97) In January of 2020, the Court issued a provisional measures order, mandating that Myanmar cease any genocidal actions, affirm the rights of the Rohingya as a protected group, safeguard potential evidence of violations, and report back to the ICJ on measures taken in compliance with its order.[[98]](#footnote-98) The order did not include specific analysis of either 2(d) or 2(e), but did ascertain “a real and imminent risk of irreparable prejudice to the rights” of the Rohingya.[[99]](#footnote-99)

***III. Domestic Case Studies***

In the absence of authoritative statements from international courts, we should also consider relevant domestic proceedings. National patterns of compulsory sterilization and transfer of children have emerged with particular salience in the context of harms perpetuated against indigenous populations. Instead of attempting a holistic analysis of all applicable case studies, we will leverage two situations that appear to be emblematic of governmental responses: the Stolen Generation in Australia and the residential school program in Canada.[[100]](#footnote-100) In both instances, even where the factual basis exists for claims under Articles 2(d) or 2(e), courts and government actors have rarely scrutinized these incidences through the lens of the Genocide Convention. Instead, judicial responses tend to avoid substantive discussion by dismissing lawsuits or making findings on narrower legal questions, whereas truth commissions are more likely to leverage the framework of human rights law or the unsanctioned language of “cultural genocide.”

The response to allegations of forced sterilization in Canada demonstrates how the international community commonly frames coercive measures under Article 2(d) as a human rights abuse, instead of genocide. A class action lawsuit, proceeding in Saskatchewan, is aiming to attribute liability to the Canadian government for a longstanding practice of sterilizing indigenous women.[[101]](#footnote-101) While a multitude of regional and international human rights mechanisms, from the Inter-American Commission on Human Rights to the UN Committee Against Torture, have analyzed this practice and attributed blame to the Canadian government, we could not identify any concrete allegations of genocide or analysis under the Genocide Convention.[[102]](#footnote-102) That said, the Standing Senate Committee on Human Rights is conducting an ongoing investigation into the allegations, so some theoretical potential for reframing these issues remains.[[103]](#footnote-103)

National responses to forcible transfers of indigenous children, meanwhile, have hemmed closer to a genocide analysis, but without opening avenues to criminal liability. Both the Canadian[[104]](#footnote-104) and the Australian[[105]](#footnote-105) governments have published comprehensive reports on state policies of forcible removal in the 20th century. While each report invokes the terminology of genocide, neither provide the grounds for future prosecution. For example, as the culmination of a decades-long reconciliation process, the Canadian government attempted to study and confront the legacy of its residential school program. The program, which forcibly isolated hundreds of thousands of indigenous children in Christian boarding schools far from their families and culture, resulted in innumerable abuses and thousands of deaths. A Truth and Reconciliation Commission, convened from 2008 – 2015, concluded that these separations were an integral “part of a coherent policy to eliminate Aboriginal people as distinct peoples.”[[106]](#footnote-106) In discussing inadequate access to justice and the difficulty of bringing civil claims, the report even suggested that “the forced assimilation of children through removal from their families and communities […] can be deemed an act of genocide under Article 2(e) of the UN’s Convention on Genocide.”[[107]](#footnote-107) In spite of this explicit reference, the Commission refrained from analyzing Canadian atrocities through the lens of the Convention. Instead, it deemed these actions to amount to “cultural genocide,” defined as the “destruction of those structures and practices that allow the group to continue as a group.”[[108]](#footnote-108) This designation, of course, is not incorporated into the Convention and consequently exposes no legal vulnerabilities.[[109]](#footnote-109) Progress should be noted, however, in the subsequent publication of a national report on violence against indigenous women. This Inquiry explicitly charged that the government’s complicity in failing to prevent homicides was tantamount to genocide, albeit not on the direct basis of Article 2(d) or 2(e).[[110]](#footnote-110)

When such analyses migrate to judicial settings, courts display even greater reluctance to fully examine the applicability of the Genocide Convention.[[111]](#footnote-111) In *Nulyarimma v. Thompson*, the Federal Court of Australia dismissed two appeals by members of the Aboriginal community.[[112]](#footnote-112) The plaintiffs had alleged that certain governmental authorities were perpetrating genocide via contemporary proposals to reform native title policy.[[113]](#footnote-113) In raising these allegations, appellant Nulyarimma testified on being forcibly separated from her mother as a child and subsequently prohibited from her cultural practices. Because the core legal dispute did not implicate these facts, only one justice addressed this component of the case: Justice Merkel, writing in dissent.[[114]](#footnote-114) In dicta, Justice Merkel acknowledged the endemic policies undergirding Nulyarimma’s trauma, stating that “over several decades, children of mixed ancestry were systematically removed from their families and brought up in a European way of life.”[[115]](#footnote-115) However, despite arguing that this conduct met the *actus reus* definition of Article 2(e), Justice Merkel stonewalled any further analysis by invoking the *mens rea* element. Claims of genocide on this basis would falter, Justice Merkel claimed, due to a scarcity of special intent, which he identified as “the essence of the international crime of genocide.”[[116]](#footnote-116)

Helpful analogs may also exist in litigation around the “stolen babies” programs that permeated Argentina[[117]](#footnote-117) and Spain[[118]](#footnote-118) in the 20th century. These episodes have also been framed predominantly in a human rights context and have thus far given rise mostly to civil and domestic criminal

# **­MEMORANDUM ON THE WORK OF WILLIAM SCHABAS**

Preeminent genocide theorist and scholar William Schabas interprets the Genocide Convention narrowly, which has animated his controversial opinions as to whether certain atrocities qualify as “genocide.”[[119]](#footnote-119) In his book *Genocide in International Law: The Crime of Crimes*, Schabas delves through the legislative history of the Genocide Convention’s provisions. Like most scholars, he identifies three definitional components of genocide: (1) eligible group, (2) *actus reus* and (3) *mens rea*. However, he argues that both the text and legislative intent of the Convention counsel a sparing use of the term “genocide” in order to prevent its dilution.[[120]](#footnote-120)

In order to qualify as an act of genocide, Schabas argues that the act must be directed at one of the eligible groups listed in Article II: “national, ethnical, racial or religious.” Schabas notes that many of these categories overlap with one another. For example, the negotiators of the Convention long debated whether to include both “racial” and “ethnical” groups in the definition of genocide. Ultimately, they concluded that “ethnical” group would be broader than the “racial” definition, encompassing groups that share “a common language or culture.”[[121]](#footnote-121)

Article II of the Convention lists the five *actus rei* of genocide. Schabas indicates that some of the *actus rei* serve as umbrella categories that cover many acts that would each individually qualify as genocide. For example, the fourth act covers forced sterilization, castration and rape as methods to “prevent births within a group.”[[122]](#footnote-122) Despite his narrow reading of the *actus rei*, Schabas confirms that any *one* of the five acts is sufficient to find genocide.[[123]](#footnote-123)

Drawing from the ICC’s Rome Statute, Schabas indicates that the *mens rea* for genocide has two components. First, the Genocide Convention requires knowledge of a national plan or policy of genocide. He notes that it would be “hard to conceive of a case of genocide that was not conducted as a widespread and systematic policy or practice.”[[124]](#footnote-124) Second, the Genocide Convention requires intent to destroy the target group. Schabas argues that there are three aspects of genocidal intent: “the offender must intend to destroy the group, the offender must intend that the group be destroyed in whole or in part, and the offender must intend to destroy a group that is defined by nationality, race, ethnicity or religion.”[[125]](#footnote-125) Furthermore, prosecuting a defendant for some of the acts of genocide in the Convention requires proof of an additional intent. For example, the *mens rea* for the fourth enumerated genocidal act also requires intent to prevent births within the group.[[126]](#footnote-126)

Schabas’ narrow interpretation has informed his controversial takes on atrocities in Darfur, Myanmar and Cambodia, which other scholars overwhelmingly agree constitute acts of genocide. Schabas has primarily denied claims of genocide for either a failure to satisfy the eligible group requirement or on the theory that the perpetrators were engaging in ethnic cleansing as opposed to genocide.[[127]](#footnote-127) However, even under the narrowest interpretation of genocide, the Chinese government’s persecution of the Uyghur minority fits squarely within the Convention’s definition.

First, the Uyghur minority is an ethnic group defined by its common language and culture. Unlike the political adversaries that the Khmer Rouge targeted,[[128]](#footnote-128) the Uyghur population shares a common language and culture which is sufficient to constitute an ethnic minority group under the Genocide Convention. Second, the *actus reus* is satisfied under Schabas’ framework. The Chinese government is engaged in a national policy to forcibly sterilize the Uyghur population, which falls under the fourth enumerated act in the Convention. In a recent report, a Uyghur woman reported that she “was offered ‘free’ surgical sterilization and was threatened with internment if she refused.”[[129]](#footnote-129) Finally, the Chinese government is likely acting with the requisite intent to destroy. Adrian Zenz’s report reveals that there is a nationwide policy to control Uyghur population growth that would otherwise “weaken[] national identity and identification with the Chinese Nation-Race.”[[130]](#footnote-130) Therefore, any Chinese government official with knowledge of the national policy and the intent to eliminate the group through reproductive means would have the *mens rea* for a finding of genocide.

Taking all of these factors together, one might argue that the Chinese government’s policy toward its Uyghur people does not constitute genocide because the campaign only “aims to sterilize rural minority women with three or more children.”[[131]](#footnote-131) One could argue that allowing a certain number of Uyghur children per family cuts against the inference that the Chinese government has the intent to *destroy* the ethnical group. However, the recent Zenz report reveals a drastic decline in Uyghur population size and growth that is unparalleled when compared to the Han population and other ethnic groups in China.[[132]](#footnote-132) In fact, there are sufficient data to suggest that the population control regime instituted by the “CCP authorities in Xinjiang aims to suppress minority population growth while boosting the Han population through increased births and in-migration,” indicating a concerted effort to reduce the Uyghur population.[[133]](#footnote-133)

Furthermore, the data demonstrate that the Chinese government’s effort to “prevent births” is directed exclusively at the Uyghur minority. Zenz shows that “population growth rates in a Uyghur region where Han constitute the majority were nearly 8 times higher than in the surrounding rural Uyghur regions (in 2018).”[[134]](#footnote-134) Although these data could be further developed, even early reports indicate an ongoing effort to suppress Uyghur population growth. If the current trend continues, this campaign could eventually lead to the elimination of the Uyghur population. Given these factors, the Chinese campaign against the Uyghur population likely satisfies the Convention’s definition vis-à-vis the prevention of births, even under Schabas’ narrow conception of genocide.

1. Adrian Zenz, Sterilizations, IUDs and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang, pg. 11. (July 21, 2020). [↑](#footnote-ref-1)
2. Ivan Watson & Ben Wescott, Watched, judged, detained. CNN. https://www.cnn.com/interactive/2020/02/asia/xinjiang-china-karakax-document-intl-hnk/ [↑](#footnote-ref-2)
3. Zenz, Sterilizations, IUDs and Mandatory Birth Control, *supra* n. 1, p. 13. [↑](#footnote-ref-3)
4. *Id.* at 14. [↑](#footnote-ref-4)
5. *Id.* at 15. [↑](#footnote-ref-5)
6. *Id.* at 16. Specifically, Guma (Pishan) County planned for 8,064 sterilizations, and Hotan City called for 14,872. [↑](#footnote-ref-6)
7. Josh Chin, The German Data Diver who Exposed China’s Muslim Crackdown. Wall Street Journal. <https://www.wsj.com/articles/the-german-data-diver-who-exposed-chinas-muslim-crackdown-11558431005>. (May 21, 2019). [↑](#footnote-ref-7)
8. *See*  <https://www.npr.org/2020/07/04/887239225/china-suppression-of-uighur-minorities-meets-u-n-definition-of-genocide-report-s>, <https://www.wsj.com/articles/the-german-data-diver-who-exposed-chinas-muslim-crackdown-11558431005>, https://www.nytimes.com/2019/11/24/opinion/china-xinjiang-files.html. [↑](#footnote-ref-8)
9. Samantha Power, “A Problem From Hell”: America and the Age of Genocide 29–60 (2002). [↑](#footnote-ref-9)
10. Raphael Lemkin, *Genocide – A Modern Crime*, 9 Free World 39, 40-42 (1945), http://www.preventgenocide.org/lemkin/freeworld1945.htm. [↑](#footnote-ref-10)
11. *Id.* at 42. [↑](#footnote-ref-11)
12. Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress 79 (1944). [↑](#footnote-ref-12)
13. *Id.* at 93 (discussing his proposals for amendments to the definition of genocide in the Hague Regulations). [↑](#footnote-ref-13)
14. *Id.* at 86. [↑](#footnote-ref-14)
15. Lemkin, *Genocide – A Modern Crime, supra* note 1, at 41. [↑](#footnote-ref-15)
16. Lemkin, Axis Rule, *supra* note 3, at 86 (specifically discussing Nazi treatment of Poles in occupied Poland). [↑](#footnote-ref-16)
17. *Id.* at 86­–87, http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm. [↑](#footnote-ref-17)
18. *See* Hilary Earl, *Prosecuting Genocide Before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945 – 1949*, 15 J. Genocide Res. 317 (2013). [↑](#footnote-ref-18)
19. Irvin-Erickson, *supra* note 15, at 262 (quoting Correspondence from Raphael Lemkin to the Right Honorable David Maxwell Fyfe (Aug. 26, 1946) (on file with the Raphael Lemkin Collection, American Jewish Historical Society)). [↑](#footnote-ref-19)
20. Raphael Lemkin, Totally Unofficial: The Autobiography of Raphael Lemkin 167–68 (Donna-Lee Frieze, ed. 2013). [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* at 68. *See also* Lars Baerentzen, *“The Paidomazoma” and the Queen’s Camps*, *in* Studies in the History of the Greek Civil War 1945–1949 127, 127­–136 (Lars Baerentzen, John O. Iatrides & Ole Langwitz Smith, eds, 1987) (providing a historical discussion of Greek charges made in 1948 alleging the forced transfer of children by the military branch of the Communist Party of Greece during the Greek Civil War, and a United Nations Special Committee on the Balkans report that found some cases of forced removal had occurred). [↑](#footnote-ref-22)
23. *Id.* at 168-69. [↑](#footnote-ref-23)
24. Raphael Lemkin, Lemkin on Genocide 31 (Steven Leonard Jacobs, ed. 2012). [↑](#footnote-ref-24)
25. *Id.* at 36. [↑](#footnote-ref-25)
26. Lemkin, Totally Unofficial, *supra* note 9, at 130. [↑](#footnote-ref-26)
27. *Id.* at 131. [↑](#footnote-ref-27)
28. Douglas Irvin-Erickson, The Life and Works of Raphael Lemkin: A Political History of Genocide in Theory and Law (Oct. 2014) (unpublished Ph.D. dissertation, Rutgers University) (available at: https://rucore.libraries.rutgers.edu/rutgers-lib/45631/PDF/1/play/) (quoting Raphael Lemkin, Statement at Testimonial Luncheon of the New York Region of the American Jewish Congress (Jan. 18, 1951) (transcript available in the New York Public Library)). [↑](#footnote-ref-28)
29. G.A. Res. 96 (I), at 188 (Dec. 11, 1946), Economic and Social Council Res. 47(IV), at 1 (Mar. 28, 1947). [↑](#footnote-ref-29)
30. U.N. Secretariat, Draft Convention of the Crime of Genocide, at 5-6, U.N. Doc. E/447 (June 26, 1947). [↑](#footnote-ref-30)
31. *Id.* at 26. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. Economic and Social Council Res. 77(V), at 21-22 (Aug. 6, 1947). [↑](#footnote-ref-33)
34. U.N. Secretary-General, Draft Convention of the Crime of Genocide Communications Received by the Secretary-General, Communication Received from the United States of America, at 4-5, U.N. Doc. A/401/Add.2 (Sept. 27, 1947). [↑](#footnote-ref-34)
35. *Id.* The U.S. also suggested adding the modifier “compulsory” to “restrictions of births.” [↑](#footnote-ref-35)
36. Economic and Social Council, Prevention and Punishment of Genocide Comments of Governments on the Convention Prepared by the Secretariat, Communication Received from Siam, at 1, U.N. Doc. E/623/Add.4 (July 2, 1948). [↑](#footnote-ref-36)
37. Economic and Social Council, Prevention and Punishment of Genocide Comments of Governments on the Convention Prepared by the Secretariat, Communication Received from Norway, at 1, U.N. Doc. E/623/Add.2 (April 19, 1948). [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. Economic and Social Council Res. 117 (VI), U.N. Doc. E/734 at 119-20 (1948). [↑](#footnote-ref-39)
40. Ad Hoc Comm. on Genocide, Basic Principles of a Convention on Genocide, U.N. Doc. E/AC.25/7 (April 7, 1948). [↑](#footnote-ref-40)
41. *Id.* at 2. [↑](#footnote-ref-41)
42. Ad Hoc Comm. on Genocide Official Records, 11th mtg. at 1, U.N. Doc. E/AC.25/SR.11 (Apr. 21, 1948). [↑](#footnote-ref-42)
43. *Id.* at 2. [↑](#footnote-ref-43)
44. *Id.* at 3. [↑](#footnote-ref-44)
45. Ad Hoc Comm. on Genocide Official Records, 13th mtg. at 10, U.N. Doc. E/AC.25/SR.13 (Apr. 29, 1948). [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)
47. *Id.* at 11. [↑](#footnote-ref-47)
48. *Id.* [↑](#footnote-ref-48)
49. *Id.* at 12. [↑](#footnote-ref-49)
50. *Id.* at 13. [↑](#footnote-ref-50)
51. *Id.* at 14. [↑](#footnote-ref-51)
52. *Id.* [↑](#footnote-ref-52)
53. Ad Hoc Comm. on Genocide Official Records, 24th mtg. at 3-4, U.N. Doc. E/AC.25/SR.24 (Apr. 28, 1948). Commentary produced by the committee on this language provides “The formula refers to measures of any kind intended forcibly to prevent the births by which the group reproduces itself (the sterilization of individuals, forced abortions, separation of the sexes, barriers to marriage etc).” Ad Hoc Comm. on Genocide, Commentary on Articles Adopted by the Committee, at 4, U.N. Doc. E/AC.25/W.1 (Apr. 26, 1948). [↑](#footnote-ref-53)
54. U.N. GAOR, 3rd Sess., 82nd mtg. at 183, U.N. Doc. A/C.6/SR.82 (1948). [↑](#footnote-ref-54)
55. U.N. GAOR, 3rd Sess., Union of Soviet Socialist Republics: Amendments to Article II of the Draft Convention at 1, U.N. Doc. A/C.6/223 (Oct. 7, 1948). [↑](#footnote-ref-55)
56. U.N. GAOR, *supra* note 27, at 183-184. [↑](#footnote-ref-56)
57. *Id.* [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)
59. *Id.* [↑](#footnote-ref-59)
60. G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948). [↑](#footnote-ref-60)
61. U.N. Secretariat, *supra* note 4, at 5-6. [↑](#footnote-ref-61)
62. U.N. Secretary-General, *supra* note 8, at 4-6. [↑](#footnote-ref-62)
63. *Id.* [↑](#footnote-ref-63)
64. Economic and Social Council, Committee on Arrangements for Consultation with Non-Governmental Organizations, List of Communications Received from Non-Governmental Organizations Granted Category (b) or (c) Consultative Status, transmitted by letter dated 30 July 1947 from the World Jewish Congress, at 1, U.N. Doc. E/C.2/52 (Jan. 30, 1948). [↑](#footnote-ref-64)
65. U.N. GAOR, 3rd Sess., 83d mtg. at 206, U.N. Doc. A/C.6/SR.83 (1948) [↑](#footnote-ref-65)
66. U.N. GAOR, *supra* note 27, at 186-87. Syria also proposed a similar amendment, “imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment,” which was rejected at a prior meeting for being too broad and over-inclusive. *See* U.N. GAOR, 3rd Sess., 81nd mtg. at 176, U.N. Doc. A/C.6/SR.81 (1948). [↑](#footnote-ref-66)
67. U.N. GAOR, *supra* note 27, at 186-87. [↑](#footnote-ref-67)
68. *Id.*  [↑](#footnote-ref-68)
69. The delegations disagreed on whether the abduction of Christian children by the Ottoman empire or Jewish children during WWII by Germany provided an example of genocide occurring through the forced transfer of children because both groups were used for slave labor. As discussed in Part I, the Greek delegation advocated for this provision so strongly because of the tragedy in their nation’s history. Other delegations, like the USSR, argued these incidents lacked the requisite motivation, destruction of the group, to qualify as genocide. [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. *Id.* at 187, 189. [↑](#footnote-ref-71)
72. *Id.* at 190. [↑](#footnote-ref-72)
73. “Physical genocide […] is generally regarded as the extermination of the group by killing its individual members, while biological genocide consists of measures intended to prevent births within the group, including forced sterilizations and separation of the sexes.” Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 Harv. Int'l L.J. 61, 75 (2009). [↑](#footnote-ref-73)
74. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Int'l Crim. Trib. for Rwanda Sept. 2, 1998). [↑](#footnote-ref-74)
75. *See* Jose E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. Int'l & Comp. L. 359, (1999). [↑](#footnote-ref-75)
76. *Akayesu* at ¶ 507. [↑](#footnote-ref-76)
77. *Id.* at ¶ 508. [↑](#footnote-ref-77)
78. *Id.* at ¶ 509. [↑](#footnote-ref-78)
79. The tribunal probably meant to invoke the term ‘patrilineal’ here. “Authors commonly misuse the term ‘patriarchal’ in place of patrilineal. Patrilineal refers to the line of heritage, which is of importance here, whereas patriarchal refers to a normative social order.” Jonathan M. H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 Mich. J. Race & L. 503, 513 n.58 (2002-2003). [↑](#footnote-ref-79)
80. *Id.* at ¶ 507. [↑](#footnote-ref-80)
81. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, ¶ 688 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001). [↑](#footnote-ref-81)
82. *Krstić* at ¶ 595. [↑](#footnote-ref-82)
83. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia April 19, 2004) [*Krstić* Appeals Judgment, hereafter]. [↑](#footnote-ref-83)
84. *Krstić* Appeals Judgment at ¶ 37. [↑](#footnote-ref-84)
85. The Chinese government ratified the Genocide Convention in 1983, but lodged a reservation indicating a refusal to be bound by Article IX. Consequently, the ICJ’s contentious jurisdiction is almost certainly unavailable as a mechanism for accountability in this context. However, states could request an advisory opinion as to whether violations of Articles 2(d) and 2(e) constitute breaches of the Convention. [↑](#footnote-ref-85)
86. *See generally* Serena Forlati, *The Legal Obligation to Prevent Genocide: Bosnia V Serbia and Beyond*, 31 Polish Y.B. Int'l L. 189 (2011). [↑](#footnote-ref-86)
87. *Id.* [↑](#footnote-ref-87)
88. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment, 2007 I.C.J. 91, ¶ 355- 359 (Feb. 26) [hereinafter Genocide Case], available at <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>. [↑](#footnote-ref-88)
89. *See* Genocide Case at ¶ 362-365. [↑](#footnote-ref-89)
90. *See* Genocide Case at ¶ 361, 367. [↑](#footnote-ref-90)
91. When cases arise at the ICJ, the *judge ad hoc* mechanism allows states parties that lack representation on the Court to appoint a judge with fully equal power for the duration of the litigation. [↑](#footnote-ref-91)
92. Genocide Case, Sep. Op. Kreća at ¶ 85, available at <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-11-EN.pdf>. [↑](#footnote-ref-92)
93. *Id.* at ¶ 88 [↑](#footnote-ref-93)
94. *Id.* at ¶ 89. [↑](#footnote-ref-94)
95. *Id.* at ¶ 140. [↑](#footnote-ref-95)
96. Hannah Beech, Saw Nang and Marlise Simons, *‘Kill All You See’: In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, New York Times (Sept. 8, 2020), available at <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>. [↑](#footnote-ref-96)
97. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of Provisional Measures, 2020 I.C.J. General List 178 (Jan. 23), available at <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>. [↑](#footnote-ref-97)
98. *Id.* [↑](#footnote-ref-98)
99. Id. at ¶ 75. [↑](#footnote-ref-99)
100. For a lucid overview of these programs and correlations to Article 2(e), *see* Ruth Amir, *Killing Them Softly: Forcible Transfers of Indigenous Children*, 9 Genocide Studies and Prevention 41 (2015), available at <https://scholarcommons.usf.edu/gsp/vol9/iss2/7>. [↑](#footnote-ref-100)
101. Avery Zingel, *Indigenous women come forward with accounts of forced sterilization, says lawyer*, CBC News, available at <https://www.cbc.ca/news/canada/north/forced-sterilization-lawsuit-could-expand-1.5102981>. [↑](#footnote-ref-101)
102. *Forced Sterilization of Indigenous Women in Canada*, International Justice Resource Center, available at <https://ijrcenter.org/forced-sterilization-of-indigenous-women-in-canada/>. [↑](#footnote-ref-102)
103. *Human rights committee to study the forced and coerced sterilization of persons in Canada*, Senate of Canada (March 27, 2019), available at <https://sencanada.ca/en/newsroom/ridr-human-rights-committee-study-forced-coerced-sterilization-persons-in-canada/>. [↑](#footnote-ref-103)
104. *Honouring the Truth, Reconciling for the Future,* Truth and Reconciliation Commission of Canada (2015), available at <http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf>. [↑](#footnote-ref-104)
105. *Bringing them home*, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), available at <https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>. [↑](#footnote-ref-105)
106. *Honouring the Truth, Reconciling for the Future* at 3. [↑](#footnote-ref-106)
107. *Id.* at 202. [↑](#footnote-ref-107)
108. *Id*. at 1. [↑](#footnote-ref-108)
109. For more on the nexus between cultural genocide and extermination of indigenous peoples, *see generally* Bonnie St. Charles, *You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings*, 21 Chi. J. Int'l L. 227 (2020). [↑](#footnote-ref-109)
110. The National Inquiry into Missing and Murdered Indigenous Women and Girls delivered its final report – a 1,200 page volume – to the Canadian government on June 3, 2019. The report includes a supplementary *Legal Analysis of Genocide* that the SLS team did not have the capacity to read and summarize. The comprehensive report is available at <https://www.mmiwg-ffada.ca/final-report/>. The supplementary report is available at <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf>. [↑](#footnote-ref-110)
111. *See* Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 Berkeley J. Int'l L. 387, 415 (2002). [↑](#footnote-ref-111)
112. *Nulyarimma v Thompson*, Austl. F.C.A. (1999) (Merkel J, dissenting), available at <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1999/1192.html>. [↑](#footnote-ref-112)
113. For an overview of the case, *see generally* Kristen Daglish, *The Crime of Genocide: Nulyarimma v. Thompson*, 50 Intl. and Comp. Law Quarterly 404, 404-411 (2001). [↑](#footnote-ref-113)
114. The case is best known for galvanizing the Australian Parliament to fully criminalize genocide, because the judgment turned on the nature of customary international law and the lack of domestic criminal codification of genocide. [↑](#footnote-ref-114)
115. *Nulyarimma* at ¶ 5. [↑](#footnote-ref-115)
116. *Id.* at ¶ 12. [↑](#footnote-ref-116)
117. *See* Francisco Goldman, *Children of the Dirty War*, The New Yorker (March 12, 2012), available at <https://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war>. [↑](#footnote-ref-117)
118. *See generally* Cristina Fernandez-Pacheco Estrada, *On The Prosecution of “Stolen Babies” Cases in Spain*, 31 Crim. L. Forum 415 (2020). [↑](#footnote-ref-118)
119. *See* Linnea D. Manashaw, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 California Western Int’l L.J. 303, 315 (2005); *See also* David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?*, 2 Notre Dame J. Int’l & Comp. L. 167 (2011). [↑](#footnote-ref-119)
120. William Schabas, Genocide in International Law: The Crime of Crimes 114 (2000) (“Diluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed.”). [↑](#footnote-ref-120)
121. *Id*. at 125-126. [↑](#footnote-ref-121)
122. *Id*. at 172-173. [↑](#footnote-ref-122)
123. *Id*. at 206. [↑](#footnote-ref-123)
124. *Id*. at 209. [↑](#footnote-ref-124)
125. *Id*. at 228. [↑](#footnote-ref-125)
126. *Id*. at 221. [↑](#footnote-ref-126)
127. Although “ethnic cleansing is … a warning sign of genocide to come,” Schabas argues that rendering an area ethnically homogenous through forced migration is not an enumerated act under the Genocide Convention and therefore does not fulfill the actus reus for genocide. *Id*. at 175. [↑](#footnote-ref-127)
128. William Schabas, War Crimes and Human Rights 766 (2008). [↑](#footnote-ref-128)
129. Adrian Zenz, Sterilizations, IUDs and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang 15 (2020). [↑](#footnote-ref-129)
130. *Id*. at 7. [↑](#footnote-ref-130)
131. *Id*. at 2. [↑](#footnote-ref-131)
132. *Id*. at 8. [↑](#footnote-ref-132)
133. *Id*. at 20. [↑](#footnote-ref-133)
134. *Id*. at 3. [↑](#footnote-ref-134)