Introduction

[Genocide] became one of the most powerful [words] in any language . . . it reshaped the moral landscape of the world – arguably, more so than any other single linguistic innovation in history. In doing so, it also reshaped our consciousness and, to some extent, it reshaped our culture as well.

David Luban[1]

This book takes seriously the issue of North American Indigenous genocides.[2] Focusing on the earliest stages of British colonization, we draw on the established legal definition of genocide – presented initially in the United Nations Genocide Convention – to determine whether the term genocide might appropriately be ascribed to historical events which marked the onset of settler colonialism. Our reflections will be confined to two cases that unfolded on Indigenous lands within what would later be known as Canada and the United States. The first relates the experiences of the Beothuk Nation from 1500–1830 on the island that became Newfoundland; the second follows the Powhatan *Tsenacommacah* from 1607 to 1677 in their struggle with British colonists over the tidewater and piedmont regions of what was called the Virginia Colony. We then assess and critique that account of genocide, suggesting how it might evolve beyond its current limitations, and determining what its general implications might be for the forcible transfer of Indigenous children to residential and boarding schools in Canada and the United States. We conclude by briefly considering the merits of some recent socio-historical contributions to genocide studies that promise to enhance our understanding of genocide in significant ways.

The colonization of the North American continent and its Indigenous[3] Peoples, first by settlers from European nation-states and then by those of their successor

[1] David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 Chi. J. Int'l L. 303, 307 (2006).

[2] We have limited ourselves to the United States and Canada, since their denial of genocide in North America has been notably persistent and pronounced.

[3] In this book, we use the term Indigenous in most cases. Exceptions to this are largely a function of context, for example, when a source uses a different term or when a more specific term is preferable or required, such as Australian Aboriginal or American Indian. In the Canadian context we tend to avoid

nation-states – Canada and the United States, unfolded as a series of brutal and highly diverse episodes over the entirety of North America, each of which must be examined individually and carefully before a charge of genocide can be sustained in a specific case. If it seems unlikely that genocide occurred in all of these cases without exception, it seems even more unlikely that it failed to take place in any of them, given all we know about the violent nature of the events that transpired during colonization and their impact on the First Peoples of this continent, as well as those that have marred the history of human habitation on this planet.

Since its introduction into the world's legal and moral lexicon during World War II, a diverse array of scholars have proposed a multitude of differing definitions of genocide, rendering the difficult task of determining the extent of historical genocides only more problematic by miring it in unresolved definitional debates. Only one definition has achieved a significant consensus, that set out in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the UNGC or the Genocide Convention)[4] which was adopted by the United Nations General Assembly in 1948 and entered into force in 1951. Since then the legal concept of genocide has undergone development primarily as the result of its application in recent international criminal law to contemporary cases – including genocide prosecutions by international criminal tribunals and state-to-state actions in the International Court of Justice. In the discussion that follows, we refer to this understanding of genocide – as presented in the UNGC and subsequently developed in international legal fora – as the *Conventional account*. We draw upon it to demonstrate that, contrary to what remains the 'received' (if increasingly challenged) view, the history of settler colonialism in North America includes episodes of genocide and that this can be established using what is commonly regarded as one of the most conservative understandings of genocide – which we refer to as the *restrictive interpretation of the Conventional account*. That account, as we will see, effectively undermines the repeated and persistent denials by many scholars that genocide took place during the colonization of North America, both because it is widely accepted internationally and because, however problematic it remains, its legal development has helped shape it into an unexpectedly potent tool to make this case. Nevertheless, we share the prevailing conviction that the Conventional account of genocide, especially in its restrictive version, is lacking in various respects, and argue against its adequacy. We support an *expansive interpretation* in its stead and advocate for the continued development of systemic, socio-historical accounts of genocide.

the term 'Canadian Aboriginal' in favor of First Nations, Métis, or Inuit. Indian is used in the Canadian context only in connection with the Indian Act. 'American Indian' is sometimes shortened to 'Indian,' although we avoid the term 'Native American' (primarily because it tends to conflate nationhood with ethnicity). Alaska Native and Native Hawaiian are used when appropriate.

4 Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951, U.S. ratification Nov. 11, 1988).

A good portion of our initial discussion is focused primarily 1) on establishing that genocide – as set out in the Genocide Convention and subsequently developed in international criminal law proceedings – indeed took place during the colonization of North America, and 2) on developing a methodology that establishes this by applying it to two case studies – that of the Beothuk and the Powhatan *Tsenacommacah*. These historical cases cover eight instances of genocide, and should be adequate to demonstrate the methodology. Given the lengthy history – and ongoing nature – of North American colonization, there is an excess of potential cases where the methodology may be applied and further refined. While any blanket denial of North American genocide of Indigenous Peoples would be refuted by a single case, to definitively undermine the preemptory dismissal of its occurrence which has been so common for so long, it seems probable that more – if not many – cases will need to be established. That is an ambitious task, requiring close historical analyses, convincing legal argumentation and far more space than can be devoted to it here.

We do not propose to undertake such a massive project in this book. Rather, we develop and apply a methodology to several cases that might, in turn, be extended to others. Throughout this portion of our discussion we adopt the restrictive interpretation of the Conventional account of genocide, using it to determine whether the term genocide appropriately applies to historical events that happened in the early stages of settler colonization in North America. We do this by illustrating the kind of evidence and argumentation that might be employed to support a finding of genocide either by a prosecutor in the course of issuing a warrant for arrest, or by a court relying on the higher standard that is required for actually confirming an indictment. By establishing that, at least in the cases considered here, the elements of the crime of genocide have been met, we hope to challenge North American genocide denial. Others, who have found themselves similarly dismayed by the pervasive, cavalier manner with which the prospect of domestic genocides has been dismissed, or by the failure of the majority of textbooks introducing students to Indigenous North American history even to raise the issue, may wish to conduct their own analyses of other cases. Eventually perhaps, the collective weight of such studies will be enough to so problematize facile domestic genocide denial that such denial will no longer have the currency it now enjoys.

With this destination in mind, we begin, in Chapter 1, by canvassing and critiquing a number of the grounds on which genocides of Indigenous Peoples in North America have been denied and dismissed. Chapter 2 defends the validity of retrospectively applying the Conventional account of genocide to historical cases antecedent to the UNGC, even as it acknowledges the legal constraints which necessarily attend retrospective analyses of this type. In Chapter 3, we engage some of the key concepts that settler colonial studies contributes to this project, in particular the suggestion that settler colonialism is characterized by an eliminatory dynamic. We argue that when settler colonialism is under pressure, as it often is for various reasons, it turns episodically to acts of genocide. However, since genocide is

but one form such an eliminatory dynamic might take, we do not argue that settler colonialism is invariably or unremittingly genocidal. Sustaining such a claim would require, among other things, the examination of a far greater number of cases than we address here.

Settler colonialism's eliminatory dynamic is a product of its unrelenting commitment to land and resource acquisition and the attendant conviction that the colonized, Indigenous population – regarded as inferior in multiple respects – presents a primary obstacle to such acquisition. It is, moreover, crucial to understanding the endurance and resilience of settler colonialism as a social formation which has survived, adapting itself to changing circumstances, regimes, and forms of power, while it generates new strategies for eliminating Indigenous Peoples and for securing their lands and resources, whether tangible or intangible.[5] The understanding of genocide that emerges within settler colonial theory is often described as "structural genocide," though we prefer the term "systemic genocide." It differs from the Conventional, legal account of genocide in some significant ways. We concur with the view that genocide is both a legal concept and a socio-historical concept, and that both of these are needed to adequately address genocide, especially in settler colonial contexts.[6] At the same time, we acknowledge that history and the law are very different projects with very different ends. While historical inquiry must not be restricted to legal rules of evidence,[7] neither should the legal account of genocide be jettisoned. Neither account is adequate on its own, and both capture aspects of the phenomenon of genocide that are vital to preventing it, as well as to understanding how it functions historically and in the present. These issues are examined at some length in Chapters 7 and 8, where we assess the development, as well as the limitations and stand-alone adequacy, of the Conventional legal account of genocide.

Chapter 4 prepares the way for our case analyses by developing a genocide primer for settler colonialism, drawing from the Convention and the results of its application in recent international criminal law, as well as in genocide prosecutions by international criminal tribunals and state-to-state actions in the International Court of Justice. The legal materials set out in this chapter are then applied to historical cases in which we bring the question of genocide home by focusing on events that transpired during the onset of sustained settler colonialism in North America. The first case, addressed in Chapter 5, concerns the Beothuk Nation, whose homeland is now called Newfoundland and whose extinction is generally held to have been complete by the mid-nineteenth century. Chapter 6 looks further south, to some of

[5] On this last topic, *see* Laurelyn Whitt, Science, Colonialism and Indigenous Peoples: The Cultural Politics of Law and Knowledge (2009).

[6] Norbert Finzsch takes such a position in *If It Looks Like a Duck, If It Walks Like a Duck, If It Quacks Like a Duck*, 10 J. Genocide Res. 119 (2008), although our account of this differs from his.

[7] *See* Tony Barta, *With Intent to Destroy: on Colonial Intentions and Genocide Denial*, 10 J. Genocide Res. 111 (2008).

the tributary Nations of the Algonquin-speaking Powhatan *Tsenacommacah*, as well as certain surrounding Nations, who occupied the tidal and piedmont lands on the east coast that the British Empire referred to first as the Jamestown, and then the Virginia, Colony. These include most particularly the Paspahegh, a Powhatan tributary nation that appears to have been entirely exterminated by settler colonists, and the Siouan-speaking, very nearly extirpated, Occaneechee Nation – the gatekeeper of trade between Virginia's colonists and the Indigenous inhabitants of the continent's interior. We assess the record of settler colonial interaction with these Indigenous Nations, arguing that in the cases we address settler colonial actors harbored genocidal intent, and we use them to establish that there is a strong prima facie case for the occurrence of genocides in this region.

The methodology we develop in Chapter 4 to demonstrate that genocide, as the term is understood in the modern context, was a critical, recurrent, and episodic part of settler colonial interaction with Indigenous Peoples during the periods reviewed, is in large part based on the actual use of the Conventional definition of genocide, as interpreted within international fora by jurists and scholars over the past few decades. Legal concepts and definitions which are first advanced in statutes and conventions are later interpreted and applied, as they have been in recent genocide prosecutions by international criminal tribunals and in state-to-state actions in the International Court of Justice. In this process, such concepts and definitions are refined and revised, in a manner not dissimilar to that in which scientific concepts are refined and revised as a result of their application to the empirical world by scientists engaged in theory pursuit.

One of the insights of legal realism[8] concerns the indefinite nature and malleability of legal language. Critical legal theorists not only agree with this, but also believe it undergirds the notion that political perspectives infuse all areas and levels of the law, from law-making to adjudication. This implies that legal concepts can, do, and even should undergo evolution. Genocide, as evidenced by both the UNGC and customary international law, is evolving as modern international and domestic courts grapple with both the core and more incidental concepts surrounding genocide. We believe that this evolution should be influenced not only by contemporary cases but by exploring the kind of historical incidents presented in Chapters 5 and 6. There is much to be learned about the inadequacies of the Conventional account of genocide by understanding how the concept has been applied and interpreted within recent genocide prosecutions, as well as how it would be applied to cases such as those considered here were they to be prosecuted today.

[8] Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988); James Boyd White, *Law as Rhetoric, Rhetoric as Law*, 52 U. CHI. L. REV. 684 (1985); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (discussing the development of rhetoric and language behind specific legal terms); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (providing an example of the powerless being silenced in political decisions).

Thus, while we constrain ourselves to the dominant, restrictive interpretation of the Genocide Convention in the first six chapters, this interpretation is directly challenged in Chapter 7. There we support an expansive interpretation of the Conventional account of genocide, which we believe is more accurate than the restrictive interpretation which has dominated genocide scholarship. We contend that this expansive interpretation may be of value in determining whether the cultural destruction inflicted upon Indigenous Nations as the result of the imposition of residential/boarding schools constituted genocide. This part of the argument seeks, then, to clarify what we maintain is already implicit in the Conventional account, properly understood – namely, that the forcible transfer of children involved in such schools carries with it a mens rea (criminal intent) element that implies cultural destruction. The second part of this argument calls for the continuation of an evolutive process in genocide law which will gradually secure an enhanced role for the cultural protection of human groups.

There are numerous examples from legal history of legal concepts undergoing such evolution, refinement and revision. The Due Process Clause of the 14th Amendment (which itself stems from the earlier 5th Amendment, and from yet earlier concepts going back to the Magna Carta) underwent massive evolution in the twentieth century.[9] Designed in part in 1868 to protect the newly freed slaves, the concept of due process rapidly expanded to prevent invidious discrimination against other racial groups, and its sweep broadened as it began to incorporate various elements of the Bill of Rights. The concept of *habeas corpus* underwent analogous transformations.[10] Beginning as an obscure writ to move people from one court to another, it evolved into a defense against absolutism in the seventeenth century, then ultimately became the writ of liberty that (at least in the United States) defends against unconstitutional incarceration. Genocide is a far more recent concept, and that is all the more reason for critical legal scholars to advocate for the direction in which it ought to evolve.

In their critique of legal formalism, critical legal theorists have drawn upon similar observations about the evolution that legal concepts and definitions undergo, and we are in strong agreement. The definition of genocide set out in the Convention started to be refined and revised as soon as it began to be used in recent genocide prosecutions. We continue that process by continuing its application to – and so its revision and refinement by – historical cases of settler colonization where similar human rights violations occurred.

We believe it is important not only to draw attention to this process, but also to argue that it leads to a rather different understanding of genocide than that initially set out in the Genocide Convention. This is not a purely "philosophical" point. Among other things, such a revision promises to be of value in future prosecutions

[9] Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution*, 7 SCHOLAR 151 (2005).
[10] Alan W. Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375 (1998).

where the issue of cultural genocide is in play, as well as in analogous historical human rights violations, such as the devastation of residential schools so searingly documented by Canada's Truth and Reconciliation Commission. Our analysis leads us to conclude that the forcible removal of children by way of boarding and residential schools can constitute a form of genocide prohibited by the UNGC.

Whether such a revision comes about as the result of a modification of the Convention (which seems not only unlikely but arguably ill-advised), or via a soft law approach involving a slow evolutionary change in customary international law, remains to be seen. But we do believe the revision is already underway, and we hope to nudge it along in this book. Even so, we conclude in Chapter 8, such legal accounts of genocide are, and are likely to remain, inadequate on their own. They need to work in tandem with recent accounts of systemic genocide that genocide scholars have been developing if we are to fully grasp how genocide functions, and has functioned, as a social and historical formation in human societies, and so position ourselves to intervene more effectively to prevent it, especially in its early, gestational stages. We draw particular attention to socio-historical accounts currently being developed which identify globalization and climate change as dual causes of the kind of collective violence and mass destruction that gives rise to genocides. Their immediacy, and their crucial implications for genocide prevention, underscore our contention that to suppose we must choose between a Conventional and a systemic account of genocide is to embrace a false dichotomy. Different constraints may well have shaped them, but neither is adequate on its own. We need them both.