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THE LAW OF GENOCIDE AND INDIGENOUS PEOPLES

Book Review: Laurelyn Whitt and Alan W. Clarke, *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law* (Cambridge U. Press, 2019).

In the mid-20th century, state governments—enabled by the United States federal government—removed 25 to 35 percent of American Indian* children from their families and placed them with new families. Roughly 80 percent of the time, this meant placing Indian children with complete strangers. The removals of Indian children were a continuation of forced removals of children by the federal government—and church missions authorized and funded by the United States—in the letter half of the 19th century and early part of the 20th century to Indian boarding schools. Was this genocide?

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* A word about nomenclature. The National Lawyers Guild's stated preference is to use the term "indigenous." However, the author of this review (who is a prominent indigenous scholar and a member of the Grand Traverse Band of Ottawa and Chippewa Indians uses the word "Indian" to refer to the original inhabitants of North America. We are aware that this may seem controversial to some. However, on many U.S. reservations, tribal members proudly refer to themselves as "Indian" as have many of the leaders of the American Indian Movement. Indeed, the premier newspaper across Indian country is *Indian Country Today*. Moreover, as explained in note 3 of *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law*, the most usual alternative term in the U.S., "Native American" presents its own difficulty:

> "In this book, we use the term Indigenous in most cases. Exceptions to this are largely a function of context, as 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 the term 'Canadian Aboriginal' in favor of First Nations, Metis, 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 Hawiian are used where appropriate."

In the 1950s, the United States terminated its political relationship with hundreds of American Indian nations, often liquidating the tribes' assets with little compensation to the tribes or their citizens. A few tribes consented to termination, but most did not. In the 1970s, the United States began restoring some—but not all—of those tribes. Was this genocide?

In the latter half of the 19th century into the early decades of the 20th century, the United States implemented a land allotment scheme that divested American Indian nations of more than two-thirds of their lands. A few tribes consented to allotment, but most did not. Was this genocide?

In the 20th century, the United States confiscated numerous Indian reservations — and compensated the tribes—for large hydrologic projects that flooded large swaths of those reservations, primarily the best land near the rivers available to Indian people. The tribes took the compensation. Was this genocide?

In the 21st century, it is now established and understood that federal Indian policy undermines tribal governance powers to enforce criminal laws against non-Indians. When coupled with federal and state governments' failures to adequately police Indian country, this has contributed to a horrific rise in physical and sexual assaults against Indian women and children in Indian country, an epidemic of human trafficking of Indian women and children, and thousands of missing and murdered Indian women. Is this genocide?

Professors Laurelyn Whitt and Alan W. Clarke set forth a stirring legal analysis of why each of these circumstances likely constitutes genocide. Whitt and Clarke choose the extermination of the Beothuk Nation over three centuries and the extermination of the Powhatan Confederacy in the 17th century to make a pair of easy cases that what happened to these Indian nations was genocide. (Whitt and Clark at 100-161). They prepare an excellent case, almost like a long-form criminal complaint, identifying the individuals and nations responsible and detailing the horrific histories of these nations. Great Britain acknowledged in writing in 1837 that the indigenous people once found in Newfoundland had been exterminated. (Whitt and Clark at 116). The Powhatan Confederacy was "disappeared." (Whitt and Clark at 160).

The cases are easy to make, in part, because the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948 in the wake of the horrors of World War II, defines "genocide" very broadly. Article 2 of the Convention states:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Surely, the intentional extermination of entire Indian nations by warfare fits subpart (a) of this definition, *killing members of the group with an intent to destroy in whole a national group*. Massacres like Wounded Knee and Sand Creek also probably fit this definition, given that the American military *killed members of those groups* — Lakota bands and Cheyenne and Arapaho bands, respectively — *with an intent to destroy in part*. Of course, those acts occurred before there was an established definition of "genocide." But settler colonial states like the United States defended those actions as mere acts of war, which under international law are legitimate. As Whitt and Clarke establish, those states now deny that those actions were genocidal. (Whitt and Clarke at 8-25). These states might apologize, as the United States has generally in relation to Indian nations and more specifically on matters such as the Native Hawaiian conquest, but they will not admit responsibility for genocide. In fact, if pressed, as former Canadian Prime Minister Stephen Harper was, they might deny any wrongdoing whatsoever. (Whitt and Clarke at 11).

Consider the termination era of federal Indian policy in the United States. In 1953, a mere five years after the genocide convention, the United States Congress adopted House Concurrent Resolution 108. That resolution used the language of freedom and emancipation to accomplish what its opponents would call "termination." In the resolution, Congress called for the end of the status of Indian people as "wards" of the United States, and identified five Indian nations to be granted immediate "freedom." How this worked in reality was apparent with the first tribe terminated, the Menominee Tribe of Wisconsin. The United States Department of the Interior confiscated the main asset of the tribe, a timber products company (perhaps the first profitable sustainable forestry company in the world), then sold it off at pennies on the dollar of the fair market value, took an administrative fee off the top, and distributed what remained in small, per capita payments to the former members of the terminated tribe. The tribe itself would no longer receive services like health care, public safety, or housing from federal agencies. Despite the pretty language of the House resolution, this was intentional. The Menominee Tribe was targeted for termination *because* of their successes, with their business competitors reaching out to the Wisconsin Congressional delegation to suggest this tribe as a termination test case.

The tribe and its citizens, of course, suffered horribly. The only legal right left to the Menominee people was the treaty—guaranteed right to hunt and fish. Without that right, tribal members could not eat. Naturally, the state of Wisconsin began to enforce its conservation laws against the Menominee people—undermining the treaty right.

Was the Menominee "termination" genocide? Arguably yes, but maybe not. Note that the actual instrument of termination, the Menominee Termination Act of 1954, disposed with the pretty language of freedom, but cut to the heart of the matter—termination. This statute was overtly designed to destroy the Menominee Tribe. But no Menominee people were killed or tortured, or their children forcibly removed (they were, of course, but not because of this law). Instead, the best argument that the termination act was genocide comes from subpart (c) of the definition of genocide: "Deliberately inflicting on the group conditions of life calculated to bring about [the nation's] physical destruction in whole or in part. . . ." The meanings of those words are themselves undefined by the genocide convention, presumably to be determined through the adversarial process of litigation and the methodology of the common law. It might not be an easy case to win. But as we all know, the United States would never allow such a proceeding to occur, and if it did occur, the United States would never have participated. So we'll never know. The Menominee Tribe's restoration began, not with Congress, but with the Supreme Court in 1968, which recognized that the tribe's treaty rights to hunt and fish remained. Congress did eventually restore the tribe in 1973, but the tribe still suffers the consequences of termination and is, arguably, *the* tribe in Wisconsin that struggles the most.

What's important is that the United States—fresh from fighting World War II, fresh from seeing the horrors of genocide in Europe, fresh from imposing its will and its justice on those nations and their leaders it had defeated in that war—is the same United States who righteously engaged in the termination of Indian tribes. After Menominee, Congress terminated dozens of small tribes in Oklahoma and elsewhere, and about a hundred more tribes in California. Some of those tribes were never restored. They were politically exterminated. Few of the restored tribes recovered completely. At the same time of termination, Congress undermined reservation governance—authorized by state governments on 70 percent of reservations—to assume control, pulling back federal services from those reservations. Crime rates in Indian country began to climb and continue to climb to this day. The Executive branch embarked on forced fee patent land sales, interfered with tribal political and religious activities, and impeded tribal attorney contracts. The U.S.leaders that perpetrated the termination policy would have been shocked to be told they were engaged in acts that bordered on genocide. This was the government that was finally enforcing Reconstruction era civil rights statutes by outlawing racial segregation.

Genocide as a legal matter is woefully incomplete without a political reckoning. The most well—known persons found guilty of genocide, the perpetrators of the European genocide during World War II, the perpetrators of the Bosnian genocide of the war in the former Yugoslavia, and the perpetrators of the Rwandan genocide, were held responsible by more powerful nations through international tribunals. A cynic might say the only persons likely to be charged with and convicted of genocide are those persons who are from a weak or defeated state.

Professors Whitt and Clarke rightly identify the most critical problem with the definition of "genocide," that the crime of genocide is inherently political.

But there is another question, at least in relation to the 574 American Indian nations who are federally recognized by the United States: the question of modern self-determination and the historic relationship between Indian nations and the United States. Like other national perpetrators of genocide, the United States has not acknowledged its actions as meeting the definition of genocide. But unlike other national perpetrators of genocide, the United States does acknowledge a duty of protection—what we normally call the trust responsibility—to Indian nations and individual Indians. This duty of protection is a matter of recognized international law where a superior sovereign agrees to be responsible for the exterior, or international, affairs of the inferior sovereign, while leaving the internal political matters of the weaker nation intact. What this means—if the United States is guilty of the crime of genocide against American Indians and Indian tribes—is that the victims of genocide place themselves, at least in part, in the protective hands of the genocidal perpetrator. What an odd circumstance!

Self-determination and the trust responsibility gives the United States political cover for its past and continuing actions (and omissions) that, arguably, meet the definition of genocide. The federal government can claim that these tribes are still here, not exterminated, and that we contract with them to provide basic governmental services and generally honor the duty of protection. Hence, the government can plausibly state that it has not been a perpetrator of genocide. Everything described in the opening paragraphs of this review that happened hsitorically and currently maymeet the definition of genocide, but the continuing self—governing status of modern Indian tribes complicates that conclusion. My only significant regret after reading *North American Genocides*, an otherwise important and well—researched book, is that Professors Whitt and Clarke do not engage this complication.