The background of the slide features a close-up, blurred view of a wooden structure, possibly a staircase or a large piece of furniture, with warm brown tones. A solid orange horizontal bar is positioned at the top of the page, and another is at the bottom, framing the central white content area.

INTERNATIONAL HUMAN RIGHTS AND LEGAL CONSIDERATIONS IN RELATION TO TERMINOLOGY AND THE DISCOVERY OF UNDOCUMENTED BURIALS AT THE KAMLOOPS INDIAN RESIDENTIAL SCHOOL

DISCUSSION ON TERMINOLOGY

June 9, 2021

Mass Grave or Unmarked Burial?

Many former residential school sites in Canada include a cemetery and it has been suggested that a majority may include an unmarked burial site. At this time there is not sufficient information to confirm how many marked or unmarked burial sites exist, however, investigations are ongoing. The Truth and Reconciliation Commission of Canada (TRC) Final Report, Volume 4 was dedicated to the [Unmarked Burials and Missing Children](#) of the residential school system. The term “unmarked burial” emerged during the TRC process to describe the physical sites of former residential schools and where Survivors or communities indicated burial sites. It was noted that often there was no formal designation of those sites as cemeteries.

Following the May 27, 2021 news release from Tk'emlúps te Secwépmeč on the discovery of unmarked and undocumented burials at the site of the Kamloops Indian Residential School (KIRS), the preliminary reports indicated use of the term “unmarked burial.” After the Tk'emlúps te Secwépmeč May 31, 2021 [press release](#), news agencies have updated their usage of the term “mass graves” and instead have used “unmarked burials” consistently.

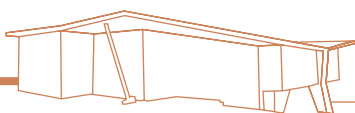
The discovery of unmarked or undocumented burials (as records are incomplete or unavailable in the KIRS situation) proximate to an Indian residential school calls for reflection on what the appropriate legal and policy framework should be for assessing the site, and referring to it in public discussion.

Of note are a number of international humanitarian and human rights considerations relevant to the context of Indigenous Peoples. The residential school policies were part of state-sanctioned colonialism. Law and policy governing residential schools mandated the forced removal of children under the objective of “education.” Generations of Survivors have testified that this system of forced removal to attend the denominational schools resulted in massive human rights violations. Canada’s policies authorized the forced removal of children without the consent of individuals, families and Indigenous communities. Guardianship over the lives of the children were passed to the various religious entities running the schools on behalf of Canada.

At the international level, experts and organizations have been working for many years on some standardized language and protocols to address missing persons, and in particular the context of an undocumented burial site or “mass grave.” This work is relevant to the situation in Canada with the discovery of a burial site proximate to a residential school in Kamloops.

The [International Commission on Missing Persons](#) has assisted this work and supported the publication of a Protocol on the matter, entitled the *Bournemouth Protocol on Mass Grave Protection*.¹ The Protocol was published in 2020

1 Klinkner, M. and Smith, E., (2020) *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University. <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>; see also: International Commission on Missing Persons: Legal Frameworks and Rights. <https://www.icmp.int/the-missing/legal-frameworks-and-rights/>



and is the product of extensive dialogue with global experts, those who have processed mass graves in a variety of contexts, and international bodies responsible to address state accountability for human rights violations. The foundation for the work on the mass grave protocol is recognition that it is the obligation of the State to investigate and account for instances of mass graves, especially where the location suggests a connection with human rights violations. The obligation under these protocols is with the State in which the grave is found, guided by protocols, and a number of working definitions and standards, which are offered to promote accountability, investigation and reporting on these matters.

In the Protocol, the definition of **mass grave** is defined as:

“A site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonised, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warranting an investigation as to their lawfulness.”

Missing person is defined as

“Persons missing as a result of conflict, human rights abuses and/or organised violence.”

Victim is defined as

“Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in the state or as a result of acts which constitute gross violations of international human rights law or serious violations of international humanitarian law.”

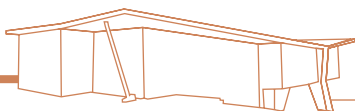
While the preference of certain First Nations might be to refer to unmarked burials of their cherished relations, as the lens shifts to the framework for analysis and consideration of next steps, the international standards and protocols should inform terminology and dialogue. In this respect, the emerging international human rights and legal norm is to classify such sites as “mass graves”

Cultural Genocide, Genocide, or Ethnocide?

In addition to various terminology to refer to the site of the mass grave, there are a variety of terms in use in relation to the concept of the crime of genocide, and recently the Prime Minister of Canada has used the phrase genocide in relation to the impact of colonial policies on Indigenous Peoples.²

The term “cultural genocide” was used in the reports of the Truth and Reconciliation Commission, to frame the

² Here’s the 1st steps Canada plans to take in light of the MMIWG inquiry.” (June 3, 2021). Global News. <https://globalnews.ca/news/7918083/mmiwg-federal-commitment-action-plan/>



nature of the destruction caused by residential schools as a cultural loss and not the extermination or intentional eradication of Indigenous Peoples.

According to the Truth and Reconciliation Commission of Canada (2015):

“**Cultural genocide** is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.”³

The term “genocide” was used in the papers and reporting by the National Inquiry into Missing and Murdered Indigenous Women and Girls. The position advanced was that the totality of colonial policies and practices of the Crown amounted to the effect of a genocide.

The Supplementary Report on a *Legal Analysis of Genocide* for the Inquiry on Missing and Murdered Indigenous Women and Girls states:

“...**genocide** has been empowered by colonial structures, evidenced notably by the *Indian Act*, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.”⁴

There is no international category of “cultural genocide” as it was considered during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide⁵, but not included in the final definition. Article 3 states:

Article III

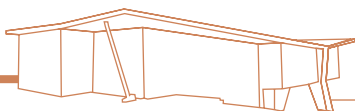
The following acts shall be punishable:

- a. Genocide;
- b. Conspiracy to commit genocide;
- c. Direct and public incitement to commit genocide;

3 Truth and Reconciliation Commission of Canada, (2015) *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal & Kingston: McGill Queens Press, pp. 1.

4 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Supplementary Report: A Legal Analysis of Genocide*, pp. 4 https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf .

5 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.



- d. Attempt to commit genocide;
- e. Complicity in genocide.

There have been considerations for the use of the term genocide as it applies to the UN Genocide Convention and its inclusion of Article 2 and “forcibly transferring children of the group to another group.” Article 2, parts a) to e) state:

Article II

In the present Convention, genocide 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:

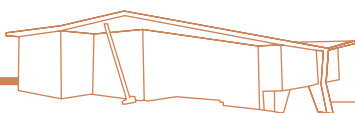
- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

The interplay between “genocide” and the term “ethnocide” is relevant to discussion of article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples*,⁶ and in particular in relation to policies that seek to intentionally disrupt the transmission of identity and culture through residential schools. Article 8 states:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

The context of the Declaration’s restatement of human rights protections and standards for Indigenous Peoples,

6 Pruijm, S. (2014). “Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples.” 35(2) *Adelaide Law Review* 269. <https://law.adelaide.edu.au/system/files/media/documents/2019-02/ch4-alr-35-2-pruijm.pdf>.



is valuable as Canada and British Columbia have committed to implement the Declaration as the framework for reconciliation. This was recommended by the TRC as the framework for reconciliation at all levels.

“Genocide,” “cultural genocide” and “ethnocide” each have specific legal meanings, require distinct processes or state responses, and involve a variety of international standards and mechanisms to be considered. Furthermore, these concepts are related to matters of reparation, redress and restoration for the harm caused.⁷

More dialogue and discussion is required, but care should be taken to assess these terms and consider how to frame and construct an appropriate approach to the residential schools missing children and mass grave work that must be undertaken.

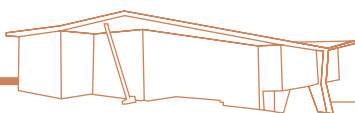
Dialogue and Discussion Required

The framework for the assessment of missing children and mass graves such as was recently confirmed in British Columbia, is a new area of assessment and consideration from a normative viewpoint. These key concepts will be discussed and considered by the First Nations impacted, and Tk'emlups te Secwépmeč has requested time to reflect and develop its approach to this situation, and how it will advance accountability and protection, while honouring the lives of those at the site.

These are fundamental questions and are not to be answered in haste at this point as people come together to support each other with the impact of this revelation, and consider next steps. While we are contending today with laws, policies and practices of the past, the impacts are with us afresh, and the extent to which these impacts were known for some time informs the context.

Dr. Peter Henderson Bryce, a former Chief Medical Officer for the federal government and advocate for the health of Indigenous children living in residential schools, spoke out as early as 1907 about the unacceptable conditions and risk of [deaths of children](#) in the schools. Dr Bryce stated that the churches and the federal government had the means to save many lives but failed to take adequate action in the face of known concerns. Further evidence from Dr. Bryce's inspections suggests that the numbers of student deaths over time were much higher when taking into account that many children died shortly after leaving the schools.

7 Logan, Tricia. (2018) “Questions of Privacy and Confidentiality after Atrocity: Collecting and Retaining Records of the Residential School System in Canada” 12(1) *Genocide Studies International*, pp. 100.



Final Thought

As we lack the full disclosure of church and state records regarding Indian residential schools, it is important to hold space for dialogue and reflection surrounding the terminology and framing of the situation. There is an urgent need to ensure that all records related to the Indian Residential School System and its operations by the church are made available, without exception, to appropriate entities to support the identification of missing children and to ensure that protocols can be followed for the investigation of a mass grave. The religious congregations that operated the Kamloops Indian Residential School must immediately make all records available and accessible to Tk'emlúps te Secwépmeč First Nation.

The Indian Residential School History and Dialogue Centre stands in support of Tk'emlúps te Secwépmeč First Nation, all Indigenous Peoples in BC and Survivors of residential schools and will assist in the areas of our expertise on records, archives and living testimony of Survivors to support a full and accessible record of the disturbing discovery.

