

International Bar Association



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IBA Interns' Newsletter

JUNE 2022



IBA Interns' Newsletter

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Child of All, Citizen of None – How international commercial surrogacy (ICS) violates children’s rights to a nationality

Human reproduction, formerly a matter that could be poignantly summarized in a story of “the birds and the bees”, has in recent years become an increasingly complex endeavour. It is one medical procedure, in particular, which seems to exponentially gain popularity and fundamentally transform the dynamics of human reproduction: procreation via surrogacy¹. The most prevalent form of surrogacy is international commercial surrogacy (ICS), whereby intended parents commission “their” respective surrogate outside of their own home country² and monetarily compensate her for her “services” of carrying and delivering a baby for them³. The practice of ICS has been held to raise various concerns regarding its implications for the human rights of the parties involved in such agreements. One particular critique of ICS concerns its impact on the right to nationality of the babies born via ICS. It is reproached that the practical unfolding of ICS agreements not only severely inhibits but actually prevents these children’s ability to enjoy and vindicate this fundamental human right and the rights that follow from it⁴. Given the ever-increasing dissemination and consequential relevance of this form of procreation, such grave assessments warrant their illumination.

The right to a nationality is explicitly recognized by international human rights law in one of its most fundamental legal instruments, namely the Universal Declaration of Human Rights (UDHR). In this sense, Article 15 UDHR establishes unequivocally that it is impermissible for someone to be arbitrarily deprived of or be prevented from changing their existing nationality. Beyond this, however, this article enshrines every person’s right to “receive” a nationality in the first place by acknowledging the universal right to a nationality. The leaving of a person in a situation where they are stateless would thus

directly contravene international human rights law. The International Covenant on Civil and Political Rights (ICCPR) acknowledges the special importance of the right to nationality when it comes to children. Accordingly, Article 24(3) ICCPR explicitly recognized children’s fundamental right to acquire a nationality. Given that this is the only reference made to the right to nationality in the entire ICCPR, this provision can be seen as an emphasis on this right’s particular importance for children. The ICCPR’s concern with the prevention of statelessness of children is supported by the United Nations Convention on Statelessness, as the latter too seems to embody a particular concern with the potential statelessness of children. In this sense, this convention does not limit itself to imposing upon states the duty to safeguard against the occurrence of statelessness in general but explicitly, and separately mentions states’ obligation to prevent statelessness at the point of an individual’s birth.

International human rights law’s special preoccupation with the nationality of children comes as no surprise. American judge Chief Justice Lord Warren once hauntingly defined citizenship as humans’ basic right as it constitutes no less than “the right to have rights”⁵. This interpretation of this right has since been endorsed by high figures in the international legal order, including Secretary-General António Guterres⁶. Nationality is thus accepted as being the very pre-requisite to people’s access to and enjoyment of all other human rights. Considering children’s especially vulnerable position in society, the sort of marginalization they may face due to statelessness is particularly dangerous to their well-being and the quality of their lives. Accordingly, stateless children are often left in a social, legal, and political no-mans-land in which they are often unable to access even basic rights and public services such as health care and education.



International commercial surrogacy has shown itself to be an unfortunate promoter of child statelessness. This is partly due to the legal discrepancies of the home countries of these agreements' surrogates and the consequential places of birth of the surrogated children, vis-à-vis the countries of the intended parents, where the children are meant to be brought after their birth. In this sense, child statelessness is risked where neither the surrogate's nor the intended parents' home country is ready to grant the surrogated child citizenship. Such refusal arises due to manifold reasons, including that intended parents in ICS agreements strongly tend to come from countries which have absolutely prohibited surrogacy and thus refuse to recognize relationships stemming from one⁷. Apart from the legal conflicts that almost inherently arise in ICS, another factor which renders this practice a facilitator for child statelessness is the abandonment of surrogated children by their intended parents in ICS. The physical and jurisdictional distance between intended parents and their surrogate child in ICS renders it considerably easier for the former to abandon the latter at their will, shall they no longer want the child because it was, e.g., born with disabilities or because their own relationship broke down⁸. With no one ready to claim parenthood over them, surrogate children are left in a situation where their citizenship cannot be properly assessed and/or granted, leaving them at the margin of society and the operation of human rights law.

Given the heightened and ever-increasing significance of ICS in modern society, the grave human rights concerns this practice gives rise to with regards to children, those most vulnerable and in need of the protection human rights are meant to guarantee them, the international community shall come together to tackle this cross-border issue jointly and expeditiously.

Notes

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- 7 Sanoj Rajan, "International surrogacy arrangements and statelessness" *Institute on Statelessness and Inclusion* (2017) <<http://children.worldstateless.org/3/safeguarding-against-childhood-statelessness/international-surrogacy-arrangements-and-statelessness.html>>
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Bedoya Lima v Colombia: Its importance in the Inter-American human rights system landscape regarding women¹ journalists and freedom of speech and press

A 2020 report by Mary Lawlor, the UN Special Rapporteur on the situation of human rights defenders (HRDs), highlighted that roughly 40 per cent of the killings against this particular group took place in Latin America, with Colombia being the most affected.² Meanwhile, in the same year UNESCO reported that most journalist killings took place in countries where there is

no conflict, but to media professionals covering subjects like corruption and human rights violations.³ Women are particularly vulnerable to human rights violations as members of the press, suffering online and offline attacks that put their safety at risk. UNESCO points out that they are more targeted than their male counterparts, and face threats based on sexuality, appearance, ethnicity or cultural background.⁴ The case

Marina Garcez



Bedoya Lima v Colombia is a clear example of discrimination and violence towards a woman journalist in the context of the internal conflict of her home country, resulting in human rights violations.

The rights of women journalists under international law

Journalism is part of one of democracy's core rights – the freedom of expression, which does not mean it is absolute, but that it should be safeguarded according to International Human Rights Law.⁵ It is protected at a global level by Article 19 at both the Universal Declaration of Human Rights (UDHR)⁶ and the International Covenant on Civil and Political Rights (ICCPR)⁷, and at a regional level on Article 13 of the American Convention on Human Rights.⁸ However, when it comes to women, there are also additional treaties and covenants that protect the right to equality and non-discrimination, for example, including the context of freedom of expression.

The ICCPR enforces the aforementioned rights in its Article 2, the Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Article 6 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention on Belém do Pará).⁹ The safety of women journalists is part of the Beijing Declaration and Platform for Action¹⁰ by protecting them against gender-based stereotyping and including them in the decision-making process. And while not all journalists are HRDs, those who fall under this category for the work they report on are also contemplated by the Declaration on Human Rights Defenders¹¹ by protecting them from violence, threats and general intimidation.

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, has also shown concern over the particular vulnerability of women journalists. They are subjected to 'physical and psychological violence and threats, including death and rape threats'¹² and many times these threats materialise into real-life physical assault, rape and/or murder. Other mechanisms, such as the UN Human Rights Council (HRC)¹³ have also recognised the specific risks women journalists are faced with in their day-to-day professional lives. Furthermore, states not only should protect them from violence, but also prevent it from happening.¹⁴

The Inter-American context of violence against women journalists

Women suffer a different type of violence compared to their male colleagues, due to gender roles and stereotypes. On a global scale, UNESCO reported that at least 38 women journalists were killed between 2012 and 2016, adding up to seven per cent.¹⁵ Yet, a year later the percentage rose to 19 per cent, according to the Committee to Protect Journalists (CPJ).¹⁶ In Latin America, it is no different since there are structural patterns in place that allow for the cycle of victimisation to be repeated over and over again. For instance, there are several Latin American leaders that are known as 'Press freedom predators',¹⁷ according to a list published by Reporters Without Borders (RSF).¹⁸ Among them are Daniel Ortega (Nicaragua), Nicolás Maduro (Venezuela), Miguel Díaz-Canel (Cuba) and Jair Bolsonaro (Brazil). However, the oppression against media professionals is not limited to the countries mentioned on the list, also including Colombia and Mexico, for example.

In fact, most of the killings of women journalists took place in Colombia and Mexico.¹⁹ However, murder is not the only time of sexual and gender-based violence employed to intimidate, threaten and silence media professionals. Plenty of women suffer sexual harassment online and offline, not to mention other types of threats in social media, especially Twitter – one of the major mediums for digital gender violence.²⁰ According to a study,²¹ what motivates these attacks are the women's political ideas and, secondly, their professional work. As a result, the journalists have their right to freedom of expression mitigated due to fear of being harassed or other forms of personal attacks, including doxxing and hacking. Some governments are even being investigated for using spyware like Pegasus to spy on journalists and HRDs.²²

The facts surrounding the Bedoya Lima case

Jineth Bedoya Lima²³ worked as an investigative journalist at one of the major newspapers in her home country of Colombia, *El Espectador*,²⁴ during a particularly violent period of the internal conflict taking place there. While covering the role of paramilitary forces during a face-off against other criminals at El Modelo prison on 25 May 2000, Ms Bedoya Lima was kidnapped. During the hours she was under captivity, she was assaulted and raped by her kidnappers, who were also verbally abusive, telling her that she was responsible for the



violence she was suffering due to her work as a journalist. After the various forms of assault took place, Ms Bedoya Lima was abandoned on the side of a highway without her mobile phone and was so injured she could not move for hours. On a national level, there was no proper accountability for the perpetrators of the human rights violations, nor to the Colombian state.

The case before the Inter-American Court of Human Rights (IACtHR)

On 3 June 2011, the Inter-American Commission on Human Rights (IACHR) received a petition from the Foundation for the Freedom of Press (FLIP) in the name of Ms Bedoya and her mother and in 2013 the Center for Justice and International Law (CEJIL) joined the victims' representation. In July 2014, the IACHR approved the Admissibility Report for the case and in December 2018, the Merit Report was published, in which the Commission offered several recommendations to the state. In January 2019, Colombia was notified and, at its request, the deadline for compliance was extended for three months. In September 2019, the Commission submitted the report to the Court's jurisdiction.²⁵

The Court issued the judgment for this case on 26 August 2021. The Colombian state was found responsible for the violation of several human rights protected under International Human Rights Law. According to the IACtHR, Colombia violated articles from the American Convention, the Belém do Pará Convention and the Inter-American Convention to Prevent and Punish Torture.²⁶ In its arguments, the IACtHR points out the 'particular risk in which women journalists face'²⁷ and that 'by adopting protective measures for journalists, the States should apply a strong distinctive focus that allows for gender considerations'²⁸. Therefore Ms Bedoya's case, the Court argues, should have been analysed under an intersectional lens, due to her vulnerability as both a woman and a journalist.²⁹

Because she had been receiving credible and verifiable threats³⁰ for almost a year prior to the kidnapping, the Colombian state was well aware of the danger her life and personal integrity were under.³¹ Besides, the Court understood that the attempts of intimidation that she received were a result of the ongoing violence against journalists, exposing women 'to particular risks and vulnerabilities within armed conflict, in which the risk of sexual violence stands out'.³² In addition to the violation of human rights involving Ms Bedoya's personal integrity and

life, her rights to judicial guarantees, equality before the Law and judicial protection were also violated.

According to the judgment, four individuals were criminally indicted for the crimes committed against Ms Bedoya on 25 May 2000.³³ Three men were sentenced for the kidnapping, assault and rape of the journalist,³⁴ but the only procedure that went through the Special Jurisdiction for Peace was the one against paramilitary member A.L. However, in the judgment of *Bedoya Lima v Colombia*, the Court stated that it had no information about the developments of the procedure.³⁵ Therefore, this is a case of women being disproportionately affected by conflict and therefore becoming more susceptible to sexual and gender-based violence during its duration. In the case of Ms Bedoya, the Colombian justice system failed her and perpetuated the impunity of those who committed atrocious human rights violations against her for being a woman journalist.

The Esperanza Protocol: a hope for the future?

One of the main issues regarding the protection of HRDs is the lack of ownership regarding the responsibility to prevent harm and protect rights. Through an initiative led by CEJIL, the Esperanza Protocol³⁶ seeks to change that and be used as a benchmark for cases involving the situation of HRDs. Its guidelines are based on International Human Rights Law and have the goal to aid states in responding adequately to any possible threats towards HRDs. Furthermore, it has the objective to help in achieving accountability in cases like *Bedoya Lima v Colombia*, where a woman journalist suffered human rights violations for completing the tasks related to her work and fulfilling fundamental rights like freedom of press and speech.

The Esperanza Protocol is named after the word 'hope' (*esperanza*) in Spanish, but also includes a nod to the city of La Esperanza, in Honduras, where human rights defender Berta Cáceres was murdered in March 2016.³⁷ However, the Protocol is to be used as a complementary tool to the already existing framework of human rights treaties that contemplate the investigation of violations of rights against HRDs. Still, it can be an important device to guide government and judicial officials in the investigation, prosecution and compliance of decisions regarding accountability.

Conclusion

The threats and attacks towards HRDs have been a concern in the Latin American context for quite a while. Jineth Bedoya's judgment consists of a landmark decision because it recognises the additional layer of vulnerability in which women journalists find themselves. The Colombian state failed in protecting her and failed in holding those who violated her physical integrity and right to freedom of speech accountable. The precedent this decision sets should prevent Colombia and other states from repeating this scenario, but the numbers of threats, attacks and killings of HRDs and, particularly, journalists, remains high.

Therefore, initiatives like the Esperanza Protocol appear like a beacon of hope. By using the guidelines, governments and other parties will be shown what path to follow and what the best tools in International Human Rights Law are. The document even includes a section on sexual and gender-based violence, which is necessary to address not only violations towards women but also LGBTQIA+ persons, who are in a hypervulnerable spot. Thus, *Bedoya Lima v Colombia* should not be forgotten among the vast Inter-American jurisprudence, but used as the first stone in the construction of a foundation to protect the freedom of press and speech of women all over the Americas.

Notes

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- 28 Ibid.
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- 30 Ibid, para. 93.
- 31 Ibid, para. 92.
- 32 Ibid, para. 94.
- 33 Ibid, para. 69-77.
- 34 Ibid, para. 70-76.
- 35 Ibid, para. 77.
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‘Έχε γεια καημένε κόσμε, έχε γεια γλυκιά ζωή – Farewell poor world, farewell sweet life’



In 1803, trapped in the mountains of Zalongo, the women of Souli and their children danced in a circle singing what would become an anthem of Greek resistance against Ottoman rule. They jumped – one after the other – to their death to escape what would have been certain capture by the Ottomans.²

Little did they know that the systematic killing of Asia Minor’s and the Pontus’ Christian Greek population more than a hundred years later between 1916 and 1922³ would give their song an ominous, foreboding quality. This timeframe is widely known for another atrocity committed in the region: the genocide perpetrated against the Armenian population.

This article is dedicated to this much lesser known and recognised campaign against another Christian minority – the Greeks – as well as their human rights situation in the second half of the 20th century. Before embarking on a brief journey into the thickets of this area’s troubled history, I would like to acknowledge that besides the Armenian and Greek people, other Christian minorities, such as Assyrian and Aramaean Christians were subjected to similar attacks.⁴

The systematic killing of the Greeks was executed by different leaders and in two phases: the government of the Ottoman Empire spearheaded by the Three Pashas (Mehmed Talaat, Ahmed Cemal and Ismail Enver) between 1916 and 1918 and the government of the Grand National Assembly led by Mustafa Kemal Atatürk between 1919 and 1922.⁵

Under the centralist wing of the Young Turks movement, the notion of ‘turkification’ was endorsed.⁶ Thus, the Three Pashas pursued an ideology of a homogenous Turkish state, with one language, one religion and one culture.⁷ This dogma underscores that the politics of turkification were ultimately aimed at Christians more generally,

regardless of them being Armenians, Assyrians or Greeks.⁸

Additionally, the Christian minorities were perceived as accomplices of the foreign superpowers.⁹ This view was reinforced after Ottoman Greek soldiers preferred to desert the Ottoman armed forces and fight for their opponents in the Balkan wars from 1912 to 1913. The notion of the Ottoman Greeks being traitors served as an important pretext for the ensuing massacres, forced internal displacement, rape, expropriation and the destruction of Eastern Orthodox cultural and historical monuments.¹⁰

The persecution, killing and deportation of the Greek population continued under the national movement of Atatürk following the same creed of national purity and culminated in the Great Fire of Smyrna in September 1922.¹¹ A driving factor behind the killings during that time was revenge for the military successes of the Greek army during the Greco-Turkish war (between 1919 and 1922).¹² Equally, the Greek army perpetrated killings and other crimes against Turkish civilians, especially during their retreat in the summer of 1922.¹³

In 1923, a peace treaty, known as the Lausanne Treaty, was signed that provided for a compulsory exchange of populations. About 1.25 million Greeks left Turkey for Greece, and about half a million Turks left Greece for Turkey¹⁴ – both losing the homes they had, at times, inhabited for hundreds of years.

Despite the extent of the campaigns against the Greeks (depending on the estimation of between 770,000 and one million Greek victims¹⁵) these events – commonly known as ‘the Great Catastrophe’ (η Μεγάλη Καταστροφή)¹⁶ in Greece – have received comparatively little attention.

In 2007, the International Association of Genocide Scholars passed a resolution calling the persecution of the Greeks a genocide.¹⁷ Sweden’s Riksdag¹⁸ and Armenia,¹⁹ among

others, recognised the killings of the Pontic Greeks as a genocide, with the United States' Congress speaking of a campaign of genocide.²⁰ In 2015, then-Federal President of Germany, Joachim Gauck, spoke of planned and calculated criminal acts against Pontian Greeks.²¹ In contrast, 33 countries recognised the genocide committed against the Armenians. A reason for this may be the Greco-Turkish Treaty of Friendship of June 1930 that settled reparation claims in return for peace in the region. 'This effectively silenced any further debate on the responsibility for those crimes. During the subsequent Second World War and Nazi Germany's occupation of Greece, the country was faced yet again with a fight for its very survival that left no room for a movement of recognition of the crimes committed against the Greek population in Turkey.'²²

The systematic disregard for human rights of the Greek population in Turkey was highlighted, once more, in 1955 and 1964 – each time triggering a mass exodus. In 1955, sweeping and violent anti-Greek riots occurred in Istanbul, allegedly in response to a Greek bombing attack on the Turkish consulate in Thessaloniki, which was later found out to have been ordered by then-Turkish President Adnan Menderes.²³

In 1964, with increased tensions in Cyprus, over 10,000 Greeks were expelled²⁴ on the grounds that they were a threat to 'internal and external' security of the state.²⁵ The Helsinki Watch Report of 1992 speaks of serious violations of – inter alia – freedom of expression, religious freedom, and denial of ethnic identity.²⁶ This led to a Greek interviewee stating that 'the Greek community [in Istanbul] is dying, and it is not a natural death'.²⁷

Sadly, the modern world sees tensions rising again between the two nations with regular and deliberate Turkish incursions of Greek airspace, focusing on the islands of Kalymnos, Rhodes and Samos,²⁸ as just one example.

In 1922, a young 13-year-old boy left Asia Minor on a boat while a little girl fled her village close to Izmir (back then Smyrna) on a cattle-drawn cart for an unknown future in Northern Greece. This is how the stories of my grandparents, and countless other people, began and one of the few morsels of their past recounted to the following generations. A loud silence is what tells the rest of their plight. In remembrance, the song of the women of Souli is still sung worldwide by the scattered Greek communities.

Notes

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Jennifer
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Canada's cultural genocide through the use of residential schools

Canada's treatment of its Indigenous peoples is an abhorrent part of its colonial past with effects that persist to the present day.¹ In 2015, the Truth and Reconciliation Commission of Canada (the "TRC") released its final report, the purpose of which was to document the plight of Indigenous peoples in Canada and make recommendations for the government moving forward. This widely read Commission described Canada's treatment of the Indigenous population as a "cultural genocide".² The purpose of this article is to dissect what is meant by cultural genocide and bring awareness to the treatment of Indigenous peoples in Canada which is so often missing from international human rights discourse.³

What is cultural genocide?

In international law, when genocide is discussed, it is most often referring to physical genocide; that is, an attempt to destroy a group by physically killing its members. While historically the definition of genocide was much broader, the deliberations surrounding the Genocide Convention narrowed the interpretation significantly as a more holistic approach would leave democratic societies vulnerable to criticism regarding their treatment of minorities and Indigenous peoples.⁴ The TRC described the difference between physical and cultural genocide as follows: "physical genocide is the mass killing of the members of a targeted group, and biological genocide is the destruction of the group's reproductive capacity. Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group."⁵

While the Genocide Convention is limited to physical and biological genocide, Article II (e), which names the forcible transfer of children from one group to another as a method of genocide, is considered by some to be a remaining reference to cultural genocide.⁶ Canada's residential school

system directly contravened this part of the convention by forcibly removing Indigenous children from their homes and sending them to schools operated by Christian churches.⁷ It is safe to assume that this was a problem Canada was well aware of when the Genocide Convention was being deliberated; Canada was strongly opposed to the inclusion of cultural genocide in the Genocide Convention during the drafting deliberations and only signed the convention once Article III (the cultural genocide article) was eliminated, and other delegations expressed the viewpoint that Article II (e) would be interpreted narrowly in physical terms.⁸

Canada's Cultural Genocide

Schooling is one of the primary ways cultural genocides have been carried out because separating children from their parents, whether physically or by values alone, can bring about cultural erasure of a group in a relatively short amount of time.⁹ As the final report of the TRC states, "The establishment and operation of residential schools were a central element of this (cultural genocide) ..."¹⁰ Canada's residential schools were a method of assimilation meant to prevent the transmission of Indigenous values and identities from one generation to the next.¹¹

At the schools, Indigenous children were not allowed to speak their native language. They were given uniforms. Some were assigned numbers and or given anglicised names.¹² The conditions in the schools were often poor, and disease was rampant. Children were subjected to physical and sexual abuse in addition to the emotional trauma that they were experiencing.¹³

In addition, the schools were widely considered to be educational failures; because schools were underfunded, the labour of the students were used to keep them running. Both the government and the Church had little regard for the academic abilities of Indigenous children, and idle time was considered contrary to the assimilationist

policy.¹⁴ Students spent at least a few hours each day completing repetitive tasks that were not meant for educational purposes but rather meant to support the school such as food preparation, cleaning, and general maintenance.¹⁵

At their peak, there were about 140 schools across the country. The Canadian government has estimated that at least 150,000 Indigenous children have passed through the schools.¹⁶ Due to poor conditions, dangerous working conditions, and prevalent physical and sexual abuse, many children did not return home. There were no records kept for much of the period that the schools were in operation and because of this, the number of children who died in these schools are unknown.¹⁷ However, recent developments have shed some light on this.

A Broader Definition

In early 2021, a mass grave containing the bodies of over 200 children was found on the site of a former residential school in British Columbia using ground-penetrating radar.¹⁸ This devastating discovery prompted other Indigenous communities to conduct their own searches at former residential school sites across the country. To date, graves of more than 1,000 children have been found.¹⁹ No evacuation has yet begun to confirm, nor has every former school site been examined—the real number could be much higher. Regardless of the exact number, the bodies of approximately 1,000 children are physical evidence of genocide. These discoveries are indisputable evidence that Canada contravened Articles II (a), (b), and (c) of the Genocide Convention, which are killing members of a group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, respectively.²⁰ While one could argue that Article II (c) does not apply as the poor conditions in the schools were a result of underfunding rather than a deliberate attempt to bring about the children's destruction through disease, the bodies of the children are evidence that Canada's 'cultural genocide' was more than only cultural.

Conclusion

Some scholars have speculated about why the TRC used the term "cultural genocide" rather

than "genocide" in describing the effects of the residential school system and theorize that the commission wished to avoid legal debate about whether the Genocide Convention applies so as not to take away from the message of reconciliation.²¹ However, regardless of the potential legal effects of using "cultural genocide" versus "physical genocide", terminology has a very important role: that of naming and shaming. Canada is still often seen as a peaceful, human rights pioneer; as a result, its treatment of its Indigenous peoples often goes unscrutinised. This is one reason why the usage of the term cultural genocide was a victory; one can only hope that the discoveries of the graves brings more attention to the physical consequences of the residential schools as well.

Notes

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- 15 *Ibid*, at page 78.
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- 17 Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada", 2015, page 90.
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American exceptionalism cuts both ways

Jacob Marshall
Shapiro



On 24 May 2022, an 18-year-old in Uvalde, Texas walked into an elementary school and murdered 19 children and two teachers, marking America's deadliest school shooting in a decade.¹ The children were aged seven to ten years old, and while investigations remain preliminary, Texas officials have concluded that the perpetrator legally purchased two rifles immediately after turning 18.² The atrocity follows a string of mass shootings in America over the past two months. A week before the Texas shooting, a white supremacist murdered ten people in a Buffalo supermarket.³ The same week, a US citizen originally from China opened fire in a Taiwanese church in California, murdering one and wounding five in what the police have described as 'a politically motivated hate incident'.⁴ In mid-April, a man opened fire on a Brooklyn subway, shooting ten but thankfully killing none.⁵ As the White House orders all flags to be flown at half-mast once again,⁶ all Americans must reckon with the fact that American exceptionalism cuts both ways.

Proponents of American exceptionalism believe that America – by virtue of its unique history, commitment to democratic values and liberalism, and reverence for the protection of civil liberties guaranteed by a robust constitution – is 'both destined and entitled to play a distinct and positive role on the world stage'.⁷ And America is indeed exceptional in this realm. At a time when autocrats abroad threaten the liberal

international order, the world needs a strong America, and America has answered the call. Since the Ukraine crisis began, the US has reprised its role as an 'arsenal of democracy',⁸ most recently exemplified by Congress' overwhelming approval of a \$40 billion aid package to Ukraine, bringing 'U.S. spending on the war to more than \$100 million per day'.⁹ As NATO becomes increasingly essential to the security of Europe, even prompting Finland and Sweden to abandon their non-alignment policies and apply for membership,¹⁰ the United States maintains its staunch commitment to the transatlantic alliance. With over 100,000 American troops stationed in Europe,¹¹ the US spent \$811 Billion on NATO in 2021, accounting for 69 per cent of the alliance's defense expenditure, and emphasising America's commitment to peace and security abroad.¹²

But while America may play an exceptional role on the world stage, the shooting in Texas reminds us that the US remains exceptional for more draconian reasons back home. Despite the prevalence of school shootings, the US has not implemented swift and substantial reform. Neither political party should bear the full brunt of the blame, for if a solution were simple, there would be one by now.

The right to 'keep and bear Arms' is enshrined in the Second Amendment¹³ of the Constitution. Even if there was widespread support for the complete abolition of gun ownership in the United States, such reform would require a subsequent constitutional

amendment nullifying the right to bear arms, a near-impossible task. Amending the Constitution requires the support of two thirds of both Houses of Congress, followed by ratification in three quarters of the states. The process is so arduous that it has only been accomplished 27 times since 1788, and while a firm constitution is great for preventing arbitrary encroachment on civil liberties, it makes any constitutional reform solution to the mass shooting crisis improbable.

In lieu of a constitutional solution, American decisionmakers have experimented with gun control policy at the state level for years. In the aftermath of the shooting at Marjory Stoneman Douglas High School in Florida, a bipartisan group of Floridian lawmakers under the leadership of a Republican governor passed a ‘bill that included provisions banning weapons sales to those younger than 21, imposing a three-day waiting period on most long-gun purchases, and creating a “red flag” law allowing authorities to confiscate weapons from people deemed to constitute a public threat.’¹⁴ Since its implementation in 2018, Florida’s ‘red flag’ law has kept ‘guns out of the hands of nearly 6,000 troubled Floridians’,¹⁵ serving as a great example for the rest of the country as to how bipartisan cooperation can generate effective legislation to combat the crisis. Notably, however, a similar law¹⁶ in New York did not stop the Buffalo shooter from legally obtaining a weapon, and even if Texas had a red flag law, it is unclear whether the Uvalde shooter would have been denied the purchase since he seemingly had no criminal record.¹⁷

While the individual states may continue to experiment with legislative solutions following Uvalde, substantial reform at the federal level is unlikely. In general, the country is split across party lines as to the root of the issue: should access to guns, or lack of mental health resources and inadequate school security be blamed? The truth is likely somewhere in the middle, but without bipartisan support for one solution, nothing is likely to change. Even though Democrats currently hold a majority in both the House and Senate, the existence of the filibuster effectively requires 60 Senators to pass any legislation, numbers Democrats do not have.¹⁸ While Democrats could attempt to exercise the so-called ‘nuclear option’ and change Senate rules to bypass the filibuster for gun legislation, this is unlikely to happen considering moderate Democrats’

ambivalence towards taking such drastic action.¹⁹

America has long sought to be a role model for the rest of the world. In 1630, well before the American Revolution, English lawyer and future Governor of the Massachusetts Bay colony John Winthrop famously declared his intent to form a ‘city upon a hill’ in the New World – an idyllic society for the rest of the world to see.²⁰ Presidents on both sides of the political aisle have since invoked this imagery in their speeches to the nation.²¹ How can America fulfil its perennial desire to shine as a positive beacon on the world stage in the wake of atrocities like Uvalde?

While solutions prove elusive, what is clear is that until something – anything – is done to address this crisis, America will remain exceptional for all the wrong reasons.

Notes

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'We did not know where they were taking us':¹ Forced Deportations of Civilians from Ukraine to Russia

Helen Brady



According to Ukraine's Human Rights Commissioner, Lyudmyla Denisova, over one million Ukrainians have been illegally deported to Russia by Russian forces since the outbreak of the war.² Several have described their experiences of being taken by Russian soldiers from bomb shelters in Mariupol to 'filtration camps' in Donbas and Luhansk for interrogation.³ After being photographed, fingerprinted, and ordered to hand over their mobile devices and passwords, they are then boarded onto buses, without being informed of their destination, and driven over the border without their identity documents or adequate food or money.⁴ Many are sent to camps thousands of miles away, in areas as far afield as Russia's Far East, Siberia, and the Arctic Circle.⁵ While many camps are heavily guarded, their residents can leave freely; however, given their lack of resources and the vast distances involved, returning to Ukraine is unfeasible for many.⁶ Russia, meanwhile, claims to be rescuing Ukrainian refugees. This article will seek to answer three questions: do the transfers of Ukrainian civilians into Russia by its soldiers qualify as

unlawful deportations under international law? Are there any justifications which Russia could claim in its defence? And does the treatment of Ukrainians in Russia violate international law?

(1) Do these population transfers breach international law?

The Fourth Geneva Convention prohibits, and classifies as a grave breach, the forcible deportation of civilians from an occupied territory by an occupying power, regardless of motive.⁷ The Rome Statute categorises such deportations as a crime against humanity and a war crime.⁸ One key element of deportation as a crime against humanity is the use of 'expulsion or other coercive acts'.⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY) has held in this regard that '[w]hat matters is that the victims had no genuine choice whether to remain or to leave'.¹⁰ In other words, they need not be threatened at gunpoint; rather, the court 'will take into account the prevailing situation and atmosphere' when assessing coercion.¹¹ Ukrainians trapped

without food, water, or electricity in bomb shelters in Mariupol have described it as ‘a choice without a choice’, living as they were in a ‘total informational vacuum’ and lacking the resources or energy to continue living under constant bombardment.¹² As Human Rights Watch’s Tatyana Lokshina has commented, ‘[t]hese people weren’t given any option to evacuate to a safer place in Ukraine... [T]heir only choice was essentially crossing into Russia or dying as shelling grew more intense’.¹³ There is a strong case, then, that Russia has breached international law by transporting Ukrainian civilians over the border in these circumstances.

(2) Can Russia invoke legal justifications?

Russia might point to the two exceptions to the prohibition contained in the Fourth Geneva Convention for ‘evacuation’ of occupied territories where (1) the security of the population or (2) imperative military reasons demand it.¹⁴ However, such evacuations may not involve the displacement of civilians outside the bounds of the occupied territory unless this is impossible to avoid. Civilians evacuated outside the bounds of the occupied territory must be transferred back to their homes as soon as hostilities have ceased.¹⁵ Firstly, could Russia invoke security of the population to justify the displacements? Arguably, no. The ICTY has commented that the exception does not apply ‘where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity’.¹⁶ Russia, by illegally invading Ukraine and blocking aid corridors into Mariupol, is precipitating the very humanitarian crisis from which it claims to be evacuating civilians.

Secondly, as for imperative military reasons, the ICTY refused to apply that exception in the *Naletili & Martinović* case where the defendants had deliberately transferred civilians outside the occupied territory unnecessarily, had damaged the occupied territory to such an extent that it was impossible for civilians to return to their homes, and made no attempt to repatriate civilians after the cessation of hostilities.¹⁷ Russia has not demonstrated the necessity of taking civilians out of Ukraine and there are indications that it intends the displacement of many, especially those taken thousands of miles

into Russia’s interior, to be permanent. One Russian anti-war activist has reported that ‘the state treats them as a labour force, as objects’,¹⁸ while Denisova has stated that Ukrainians are purposefully distributed throughout poorer regions of Russia ‘to help boost the economy’.¹⁹ It also appears unlikely, therefore, that Russia could invoke imperative military reasons to establish a lawful evacuation.

(3) Does the treatment of displaced persons conform with international law?

Even if Russia’s displacement of civilians constituted a lawful evacuation, there would still remain the question of whether their treatment meets the standards set by international law. The Fourth Geneva Convention contains a ‘very strong recommendation’²⁰ that an occupying power provide proper accommodation to evacuees and ensure proper standards of hygiene, health, safety, and nutrition.²¹ They should also ensure that families are not separated.²² Where an evacuation is prolonged due to the military situation, as in Ukraine, and it becomes impossible to return evacuees to their homes within a comparatively short period, this strong recommendation becomes a duty upon the occupying power.²³ It is reported that displaced Ukrainians are given 10,000 rubles (\$129) and some food.²⁴ However, several have complained of the low quality of the food, with reports that some were hospitalised after consuming it.²⁵ Denisova has called upon the UN to investigate reports that 200,000 children are among those deported, stating that the ‘conditions of their stay and their health [are] currently unknown’.²⁶ This lack of information is concerning, and the indications which we do have point to a standard of living which, in the case of many deportees, falls below that which Russia is obliged to ensure.

Conclusion

Russia appears to be violating international law by deporting Ukrainian civilians. It likely cannot claim to be carrying out a lawful evacuation on grounds of security of the population or imperative military reasons. The treatment of Ukrainians in Russian camps may also breach its obligations. These are crimes with which Russia may be charged under accountability mechanisms in future,



as may Russian personnel who continue to authorise and carry out these deportations.

Notes

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State obligations to protect women – the European Court of Human Rights and domestic violence jurisprudence

Erin Gallagher



Until recent decades, domestic violence (DV) was considered a private matter, rather than part of human rights discourse.¹ Feminist scholars attribute this in part to the human rights movement focusing on violations occurring in the public sphere, rather than private, as well as a focus on preventing governments from interfering with rights, rather than imposing obligations to protect rights.² However, throughout the late 1980 to 1990s this began to change. The concept of state responsibility for actions of non-state actors was developing, and acknowledgements of state obligations to protect women from gender-based violence arose.³

The European Court of Human Rights (ECtHR) acknowledged state responsibility for the actions of individuals in *Osman v UK*,⁴ and explicitly recognised this in the context

of DV in *Opuz v Turkey*.⁵ The Court has now developed a body of jurisprudence relating to DV, and this article will discuss two recent rulings.

Kurt v Austria

*Kurt v Austria*⁶ in 2021 was a significant case as the Grand Chamber heard a case relating to DV for the first time and laid out general principles that should apply. The case was brought by an Austrian woman who had been abused by her ex-husband (E), as had her children, one of whom he murdered.

Over the course of some months, the applicant reported to the police that E had threatened her and her children's lives, and physically abused them. A barring order was issued, and later E was convicted of bodily harm and sentenced to three months'

imprisonment. In 2012, a further barring order and charges were brought. The following day, E shot and killed his son.

The applicant made a claim against the public prosecutor's office, specifically arguing that E should have been taken into pre-trial detention due to a real risk that he would cause harm. The claim was dismissed by the domestic courts. The applicant brought a claim under Article 2 (right to life) of the European Convention on Human Rights (ECHR), alleging that the authorities failed to protect her and her children.

In the ruling, the Grand Chamber expanded on the *Osman* test that states an obligation will arise if authorities know or ought to have known about a real and immediate risk to life from the criminal acts of a third party.⁷ The Court established that authorities must provide an immediate response to allegations of DV with special diligence. They also must establish if there is a real and immediate risk to life via a lethality risk assessment and consider the particular context of DV in assessing the risk to life. If there is a real and immediate risk to life, an obligation to take preventative measures is triggered. These measures must be adequate and proportionate to the level of risk assessed.⁸

Clarification on how the *Osman* test applied in cases concerning DV was welcomed,⁹ as there was uncertainty over how to assess 'immediate risk' in DV scenarios, which are ongoing and often escalate, meaning an immediate threat to life would likely come too late for state intervention.¹⁰ Explicit recognition that the context of DV cases must be considered is also highly valuable.

In this case, the Court ruled that based on the knowledge the authorities had, there was no immediate risk of further violence that could have been discerned, thus Article 2 was not violated. The seven dissenting judges, and critics of the judgment, disagreed, finding that the risk assessment carried out by the Austrian authorities had been inadequate.¹¹

Tkheldze v Georgia

In *Tkheldze v Georgia*¹², the ECtHR applied the principles laid out above. *Tkheldze* concerned the abuse and murder of the applicant's daughter (MT) by her daughter's ex-partner (LM).

Both MT and LM's parents reported LM to the police for abuse (including threats

to MT's life) on several occasions. Criminal investigations were not opened, and no restrictive measures were placed, with the exception of one formal warning. This lone warning failed to dissuade LM. MT continued to report his behaviour, with no action taken. The police incorrectly advised that no arrests could be made as no officers had witnessed violence.

After months of pleading with the police for help, LM fatally shot MT, committing suicide immediately after. An investigation was opened but quickly shut down due to LM's death. The applicant lodged multiple complaints with the authorities, which received no response.

Applying to the ECtHR, the applicant claimed that MT's Article 2 rights had been violated by the authorities failing to take preventative measures despite knowing of the risk, and failing to effectively investigate MT's death. Further, the applicant alleged that the conduct of the authorities could be attributed to gender-based discrimination, thus violating Article 14 (prohibition on non-discrimination).

Applying the principles laid out in *Kurt*, the Court considered whether the authorities were aware of an immediate danger, and displayed special diligence if so. The Court ruled that the authorities were aware and that the lack of action in response to the threat was 'unforgivable'.¹³ The Court held there had clearly been a violation of the substantive limb of Article 2 read in line with Article 14. With regards to the failure of the authorities to conduct an effective investigation, the Court noted that the state had a positive obligation to investigate the inaction of the authorities. Failure to do so meant there had been a violation of the procedural limb of Article 2, read in line with Article 14. The choice to examine the Article 2 violations in conjunction with Article 14 was important as the Court acknowledged that the authorities' failures were linked to discrimination.¹⁴

Conclusion

Assessing the right to life through the lens of discrimination against women in *Tkheldze* is a progressive step, which acknowledges that systemic misogyny in legal systems affects how authorities act. Admittedly, the actions of the Georgian authorities in *Tkheldze* were so far removed from what could be considered adequate that the Court had no difficulty in agreeing on their failure. The value of the



principles laid out in *Kurt* then remain to be seen, when a less clear-cut case emerges.

Notes

- 1 The Convention on the Elimination of Discrimination Against Women (1979) notably made no mention of violence against women; Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The ECtHR, Due Diligence, and International Legal Minimums of Protection' (2010) 8(2) *Northwestern Journal of International Human Rights* 190, p.192.
- 2 *Ibid*; Beate Rudolf & Andrea Eriksson, 'Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence' (2007) 5 *International Law Journal of Constitutional Law* 507, p.523.
- 3 The concept of state responsibility for non-state actors was first considered in *Velazquez Rodriguez v. Honduras* (1988) Inter-American Court of Human Rights, Series C No. 4, 172. For acknowledgement of gender-based violence and state responsibility see: UN Convention on the Elimination of Discrimination Against Women *General Recommendation* No. 19 (1989); Christine Chinkin, 'Sources' in *International Human Rights Law* edited by Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (2nd edn, Oxford University Press 2014) p.81.
- 4 *Osman v. United Kingdom* [1998] European Court of Human Rights, Application No. 3124.
- 5 *Opuz v. Turkey* [2009] European Court of Human Rights, Application No. 33401.
- 6 *Kurt v. Austria* [2021] European Court of Human Rights, Application No. 62903/15
- 7 *Osman* n viii, para 166.
- 8 *Kurt v. Austria*, paras. 164-168.
- 9 Ronagh McQuigg 'Tkheldze v. Georgia: Domestic Abuse and the European Court of Human Rights' (2022) *European Human Rights Law Review* 1, p.9.
- 10 Ronagh McQuigg, 'Kurt v Austria: domestic violence before the Grand Chamber of the European Court of Human Rights' (2021) 5 *European Human Rights Law Review* 550, p.553.
- 11 See: Lisa Maria Weinberger, 'Kurt v. Austria: A missed chance to tackle intersectional discrimination and gender-based stereotyping in domestic violence cases' (2021) *Strasbourg Observers*. Available at: <https://strasbourgobservers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases>
- 12 *Tkheldze v. Georgia* [2021] European Court of Human Rights, Application No. 33056/17.
- 13 *Ibid*, para 56.
- 14 European Human Rights Advocacy Centre, 'Tkheldze v. Georgia' (2021). Available at: https://ehrac.org.uk/en_gb/resources/tkheldze-v-georgia; McQuigg n viii, p.12.