



GRIFFITH JOURNAL OF

LAW & HUMAN DIGNITY

# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

---

*Editor-in-Chief*

Charlotte Mitchell

*Executive Editors*

Hana Katouli

Thao Nguyen

Laurynn Williams

*Editors*

Luella Boyd

Kirsten Gunhold

Annabelle Lewis

Jennifer Pasic

Harper Plant

Alexander Reeves

Louise Sullivan

*Consulting Executive Editor*

Kate Mitchell

Kayleigh Ng Cheng Hin

*Consulting Executive Editor*

Dr Allan Ardill

---

Volume 11 Issue 1  
2023

Published in August 2023, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

## CONTENTS

---

CATHERINE WALKER-MUNRO & DR BRENDAN WALKER-MUNRO	<i>COUNTERING TERROR: TERRORISM LAWS, DOMESTIC VIOLENCE &amp; THE AUSTRALIAN CONTEXT</i>	1
LISE BARRY & RACHEL PARSONS	<i>STRIKING THE BALANCE: APPLYING A HUMAN RIGHTS APPROACH TO CONSENT FOR PEOPLE WITH DEMENTIA IN RESIDENTIAL AGED CARE</i>	39
MICHAEL HEAD	<i>DEFENDING THE RIGHT TO PROTEST</i>	70
BRIANNA DARWIN	<i>THE CANADIAN RESIDENTIAL SCHOOL SYSTEM: AN INTERNATIONAL LAW FAILURE</i>	92

# THE CANADIAN RESIDENTIAL SCHOOL SYSTEM: AN INTERNATIONAL LAW FAILURE

BRIANNA DARWIN\*

*The government of Canada set out to completely rid the country of any traces of Indigenous culture, language, and rights. By implementing the Indian Act, it became illegal for an Indigenous child to attend any school other than a Residential School. Further, it deemed truancy a crime to which their parents would be punished by a fine or imprisonment while their children were kidnapped and placed in a Residential School. These schools were in operation in Canada from approximately 1880 to 1996. They wreaked havoc on Indigenous lives and culture, specifically for Indigenous children. This article opens up this chapter of history, and questions Canada's acts through the prism of the international framework of state responsibility. It puts forth the claim that the churches that ran the schools ought to be deemed as organs of Canada. At the backdrop of this critique is a conversation with other scholars who captured the structural indeterminacies in international law that facilitate maintaining a blind eye toward injustices afflicted against Indigenous people.*

---

\* Brianna Darwin: Graduate. Bachelor of Law from the University of Kent.

## CONTENTS

I INTRODUCTION .....	93
II CASE STUDY.....	94
<i>A Brief Context - The Residential School System</i> .....	94
<i>B State Responsibility</i> .....	95
<i>C Attributable to the State</i> .....	96
<i>D An Organ of Canada – Is Responsibility Attributable?</i> .....	97
<i>E Article 7 – Excess of Authority or Contravention of Instruction</i> .....	99
III DISCUSSION .....	100
<i>A The Domestication of the Indigenous Question</i> .....	100
<i>B Transitional Justice</i> .....	103
<i>C An International Law Issue</i> .....	104
IV CONCLUSION.....	104

## I INTRODUCTION

*'Kill the Indian in him, and save the man.'* – Richard Henry Pratt.<sup>1</sup>

The above quote illustrates how Indigenous peoples were once viewed and treated globally. Richard Henry Pratt was an American military officer who fathered the movement of assimilation of Indigenous populations in America by creating the first 'Indian boarding school' of many to come.<sup>2</sup> The quote was later used with a slight reword by Canadian Prime Minister, Stephen Harper, in his official statement of apology to former students of the Residential Schools.<sup>3</sup> Harper detailed that it was now a common

---

<sup>1</sup> Richard Henry Pratt, Brigadier General, 'The Advantages of Mingling Indians with Whites' (Speech, National Conference of Charities and Correction at the Nineteenth Annual Session Denver, Colorado, 23-29 June 1892) <[https://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources\\_1892-PrattSpeech.pdf](https://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources_1892-PrattSpeech.pdf)>.

<sup>2</sup> David Wallace Adams 'Foreword' in Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904*, (Yale University Press, 1964) xi.

<sup>3</sup> Stephen Harper, Former Prime Minister of Canada, 'Statement of Apology to Former Students of Indian Residential Schools' (Speech, Government of Canada Ottawa, June 11, 2008) <<https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>>.

belief that Aboriginal cultures were once held to be inferior when he stated that the purpose of the Residential School system was to 'kill the Indian in the child'.<sup>4</sup> Although perhaps a case of misconstrued words throughout time, the intention behind them remains the same – to remove all traces of Indigenous culture and to indoctrinate white Euro-centric ideals into the minds of the Indigenous youth.

This paper will examine the international legal system's failure to hold Canada responsible for the legislative implementation of the Residential School System ('RSS') and critique the structural issues that might have led to these inadequacies.

This paper will commence with a case study, establishing the responsibility of Canada as a state for the international wrongdoings of the churches who ran the RSS. Subsequently, it will delve into an academic discussion focusing on the domestication of the Indigenous issue and transitional justice. Finally, the paper will contemplate the extent to which the Indigenous question falls within the purview of international law.<sup>5</sup>

## II CASE STUDY

### *A Brief Context - The Residential School System*

In operation from approximately 1880 to 1996, the RSS was put in place with the objective to 'educate' Indigenous children: imbue them with Euro-Canadian and Christian ways of life, and assimilate them into a white society.<sup>6</sup> Attendance was not only made mandatory via the *Indian Act 1876*<sup>7</sup> but it was made illegal for an Indigenous child to attend any other school.<sup>8</sup> The RSS was severely underfunded, which resulted in poor education that was mainly focused on religious teaching and practical skills like cleaning,

---

<sup>4</sup> Ibid.

<sup>5</sup> It is with heartfelt acknowledgment that I recognise that similar consequences of colonialism are seen across the globe, including in Australia, the US, Africa, and beyond. However, as an Indigenous Canadian, I chose to focus this piece specifically on the Indigenous issues within Canada as I have personal experience with the generational trauma that ensued from these Residential Schools.

<sup>6</sup> Erin Hanson et al, 'The Residential School System' *Indigenous Foundations, First Nations and Indigenous Studies UBC* (Website, September 2020) <[http://indigenousfoundations.arts.ubc.ca/the\\_residential\\_school\\_system/](http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/)>.

<sup>7</sup> CRC 1927, c 98

<sup>8</sup> *Indian Act 1876*, CRC 1927, c 98, s 3, 3(4) ('*Indian Act 1876*').

sewing, and farming.<sup>9</sup> The reality at these so-called schools was far from the image that was projected to the rest of the world by the government and the church.

The events that took place in the RSS were horrific. Stories depict the entailing physical and psychological abuses along with harsh punishments for speaking Indigenous languages (such as receiving needles through their tongue)<sup>10</sup> or otherwise acknowledging their Indigenous heritage.<sup>11</sup> In very recent years, there have been shocking discoveries made at a few of the RSS sites. The most significant discovery was made near Regina, Saskatchewan, where a total of 751 unmarked child graves were uncovered.<sup>12</sup> This discovery, together with others made at RSS sites across Canada, brings the total of unmarked child graves filled with remains to 1,323.<sup>13</sup> These findings reflect the searches of only a handful of the hundreds of RSS sites. While there were approximately 150,000 children to pass through the RSS, there were only around 80,000 survivors accounted for in 2012.<sup>14</sup>

### *B State Responsibility*

The very basic idea of ‘responsibility’ comes from the concept of response to a wrong. In the legal context, this would entail responding to an unlawful act or a breach of obligation. For there to be a responsibility for a state to respond to a breach, there must be an obligation to prevent or not partake in the acts that led to the breach. It was not until 2001 that the International Law Commission codified these ideas of state responsibility in the form of draft articles.<sup>15</sup> Article 1 of the *Responsibility of States for Internationally Wrongful Acts*<sup>16</sup> (‘RSIWA’) very clearly states that ‘every internationally wrongful act of a

---

<sup>9</sup> Ibid.

<sup>10</sup> David B. MacDonald & Graham Hudson ‘The Genocide Question and Indian Residential Schools in Canada’ (2012) 45(2) *Canadian Journal of Political Science* 427, 432. See also Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Indians of North America, 2006); Assembly of First Nations, *Breaking the silence: an interpretive study of residential school impact and healing as illustrated by the stories of First Nation individuals* (Assembly of First Nations, 1994).

<sup>11</sup> Hanson (n 6).

<sup>12</sup> Ian Profiri ‘Hundreds of Bodies Discovered at Former Canada Residential School for Indigenous Children’, *Jurist* (online, 25 June 2021) <<https://www.jurist.org/news/2021/06/hundreds-of-bodies-discovered-at-former-canada-residential-school-for-indigenous-children/>>.

<sup>13</sup> Ibid.

<sup>14</sup> MacDonald and Hudson (n 10) 431.

<sup>15</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, as contained in *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/55/10 (2000) (‘Draft Articles’).

<sup>16</sup> UN Doc A/RES/56/83 (‘RSIWA’).

State entails the international responsibility of that State.<sup>17</sup> Further, Article 2 of *RSIWA* articulates that an internationally wrongful act might consist of an act or omission that is both attributable to the state and a general breach of international obligation.<sup>18</sup> Therefore, States are to be responsible for their own internationally wrongful acts along with internationally wrongful acts that can be attributed to them.

### *C Attributable to the State*

For attribution, Article 4(1) of the *RSIWA* draft articles declares that:

*(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*

The State acts only through its agents and therefore any conduct by a State organ will be considered an act of the State to which it operates under.<sup>19</sup> The organ and the State are two distinct and separate identities, yet they hold the same liability. Therefore, the State can be held liable for any conduct of the organ, even when the organ exceeds or contravenes the State's authority.<sup>20</sup>

To be an organ of a State, an entity will have that 'status in accordance with the internal law of the State'.<sup>21</sup> However, even if the status of the organ does not flow from internal law it is possible to equate an organ's actions with the State, but only if the entity acted in 'complete dependence' on the State.<sup>22</sup> What is required is that the organisation or group received its authority from the State including acting under instructions or under the direction or control of the state in carrying out the conduct.<sup>23</sup> This requires

---

<sup>17</sup> *RSIWA* (n 16) art 1; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 77-80.

<sup>18</sup> *RSIWA* (n 16) art 2; Crawford (n 17) 81-5.

<sup>19</sup> *RSIWA* (n 16) art 4; Crawford (n 17) 95-6.

<sup>20</sup> *Draft Articles* (n 15) art 4 'Commentary'; James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 156.

<sup>21</sup> *RSIWA* (n 16) art 4(2).

<sup>22</sup> The 'effective control' test was affirmed in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 388 ('*Bosnian Case*').

<sup>23</sup> Two levels of control have been identified, 'strict control' and 'effective control' *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986]



demonstrating direct interference over the activities or operations giving rise to the internationally wrongful act including financial assistance, military assistance, intelligence sharing, selection, support and supervision of the leadership.<sup>24</sup> Proving that an entity is a State organ requires an exceptional degree of State control.<sup>25</sup>

*D An Organ of Canada – Is Responsibility Attributable?*

While the Government of Canada began funding the RSS around 1867 (at the time of confederation) the first Indigenous boarding school can be traced back to 1620.<sup>26</sup> The boarding schools in operation pre-confederation were largely funded by the churches alone. Once confederation occurred, the Canadian government saw the utility in funding these school with hopes of ‘taming the savages’ and bending Indigenous will to conform with Euro-centric ideals and ways of life.<sup>27</sup> Prior to the resurrection of the federally funded RSS, the government of Canada requested that Nicholas Davin study and report back on the ‘Indian Boarding Schools’ that were appearing throughout the United States of America.<sup>28</sup> His report was hopeful for success in taking away the Indigenous children’s ‘simple Indian mythology’ by methods of ‘aggressive civilisation’.<sup>29</sup> The report further insisted that the RSS be run by the Christian churches.<sup>30</sup>

In breaking down the requirements for an entity to be considered an organ of the State, one would start with the question of funding. The RSS was funded by the government of Canada.<sup>31</sup> In Davin’s report, there were thorough details on exactly how much the RSS

---

ICJ Rep 14, 62 [109], 64 [115] (*Nicaragua Case*); *Bosnian Case* (n 22) 392; *RSIWA* (n 16) art 7; Crawford (n 20) 106-9.

<sup>24</sup> *Bosnian Case* (n 22) [241], [388], [394]; *Nicaragua Case* (n 23) [112]. See also Kristen E Boon ‘Are Control Tests Fit for the Future? Slippage Problem in Attribution Doctrines’ (2014) 15(2) *Melbourne Journal of International Law* 330, 347-50.

<sup>25</sup> *Ibid* 393.

<sup>26</sup> Robert Carney ‘Aboriginal Residential Schools Before Confederation: The Early Experience’ (1995) 61 *Historical Studies* 13, 13.

<sup>27</sup> Denise Ferreira da Silva, ‘Voicing ‘Resistance’: Race and Nation in the Global Space’ in Yitzhak Sternberg and Eliezer Ben-Rafael (eds), *Identity, Culture and Globalisation: The Annals of the International Institute of Sociology* (Brill, 2001) 427-42; Ikechi Mgbeoji, ‘The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security’ (2006) 27(5) *Third World Quarterly* 855.

<sup>28</sup> Nicholas Flood Davin ‘Report on Industrial Schools for Indians and Half-Breeds’ (Public Archives of Canada, 1879) < <https://www.canadiana.ca/view/oocihm.03651/29> >.

<sup>29</sup> *Ibid* 1, 14.

<sup>30</sup> *Ibid* 2.

<sup>31</sup> Rachel L. Burrage, et al. ‘Beyond Trauma: Decolonizing Understandings of Loss and Healing in the Indian Residential School system of Canada’ (2022) 78(1) *Journal of Social Issues* 27, 31.

would cost the government,<sup>32</sup> along with how much money the RSS could make the government by way of raising cattle and farming vegetables.<sup>33</sup> However, as mentioned above, financial support alone is insufficient to deem the church an organ of Canada.

What would be considered next is whether the church was completely dependent on or under the control of Canada at the time the atrocities were committed. Article 2 of RISWA explains that the conduct of an organ shall constitute the conduct of the State if it is exercising legislative functions of the State.<sup>34</sup> Further, the conduct of an organ is to be considered the conduct of the State if it is exercising governmental authority without the presence of official authorities.<sup>35</sup> The churches were acting under the authority of the *Indian Act 1876* which was amended in 1927 to make it mandatory for every Indigenous child to attend the RSS and further deemed truancy a crime should an Indigenous child fail to attend such a school within three days' notice of being told to attend.<sup>36</sup> Truancy was to result in the parent being charged a fine or liable to imprisonment along with the child being arrested without warrant and remanded to the school by a 'Truancy Officer'.<sup>37</sup> These children were legally forced under the care and authority of the church by the government's legislation. It would be valid to say that the churches were organs of Canada as they were acting under legislative authority and fully funded by the government. The churches would not have had the facilities to board the children, nor would they have had the mass numbers of children under their care if it were not for the government providing them with instruction, support, and authority. Therefore, it is likely that the churches would be found to be completely dependent on and under the control of the Canadian government. Of course, there is nothing in the *Indian Act 1876* that explicitly permits abuse, so the next step would be to consider whether the churches, as they could be established as organs, acted in a manner that exceeded or contravened instruction.<sup>38</sup>

---

<sup>32</sup> Davin (n 28) 4.

<sup>33</sup> Davin (n 28) 2, 3.

<sup>34</sup> RISWA (n 16) art 2.

<sup>35</sup> RISWA (n 16) art 9.

<sup>36</sup> *Indian Act 1876* (n 8) s 3.

<sup>37</sup> *Ibid* s 3(4).

<sup>38</sup> RISWA (n 16) art 7.

*E Article 7 – Excess of Authority or Contravention of Instruction*

Under Article 7 of the *RSIWA*, it is stated that any conduct of an organ shall be considered conduct of the state, even if authority is exceeded or instruction is contravened.<sup>39</sup> A detailed report from the Truth and Reconciliation Commission of Canada on the RSS was released in 2015 after discussions with more than 6,000 survivors of and witnesses to the RSS.<sup>40</sup> It discusses a myriad of tragic and horrific punishments ranging from physical, mental, and sexual abuse (including rape)<sup>41</sup> to forcing children who had been sick to eat their own vomit,<sup>42</sup> all encapsulated by institutionalised child neglect.<sup>43</sup> The abused children began to abuse each other, as abuse was all that they knew.<sup>44</sup> There was no safe place for the children within the RSS, no one they could look to for protection. One might think, as children are often told, that if they are hurt they can tell an adult who will attempt to remedy the situation. However, what were these neglected children to do when it was, in fact, the adults who were hurting them?

With thousands of first-hand stories regarding the rampant abuses within the RSS, it is impossible to deny that the churches were acting in excess of authority and in contravention of instruction, contrary to Article 7 of the *RSIWA*. Similar to the law of vicarious liability, where an employee must have been acting in the course of their employment, the churches were committing internationally wrongful acts in the course of implementing the legislative authority of the government (i.e., in the course of their employment at the RSS).

In acting beyond the power of the legislation that provided for the RSS, the churches exceeded authority by deliberately enforcing harsh punishments on the children and, further, did not follow instruction by allowing a toxic environment rampant with abuse to form within the RSS. The state should be held accountable for its organ's actions as per the *RSIWA* and customary international law for the harm committed.

---

<sup>39</sup> *Ibid.*

<sup>40</sup> Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (2015), 6 <[https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive\\_Summary\\_English\\_Web.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf)>.

<sup>41</sup> *Ibid* 107.

<sup>42</sup> *Ibid* 89.

<sup>43</sup> *Ibid* 4.

<sup>44</sup> *Ibid* 109.

## III DISCUSSION

*A The Domestication of the Indigenous Question*

The question of who is Indigenous has long been a debate worldwide. The question was brought back to the forefront post-colonisation, and often debated within the United Nations (UN) and beyond so that it could become obvious exactly whose issues were to be dealt with.<sup>45</sup> The query seems to have been answered by Cobo, Special Rapporteur for the UN in his *Study of the Problem of Discrimination Against Indigenous Populations*.<sup>46</sup> Cobo detailed that Indigenous peoples are those who have historical continuity with their pre-colonial societies that have developed on their territories and consider themselves to be distinct from others in the current post-colonial society.<sup>47</sup> Further, that they are non-dominant in society and aim to preserve their ancestral lands along with their cultural identity through their own cultural practices, social institutions, and legal traditions.<sup>48</sup>

This big question of who is Indigenous could easily be construed as a distraction from the real issues that need to be addressed, like that of loss of ancestral lands, language, and culture. However, as Martínez stated, the question relating to Indigenous peoples was domesticated.<sup>49</sup> What this means is that jurisdiction to rule on and deal with any issues relating to the treatment of Indigenous peoples was removed from the hands of international law and placed in those of domestic law, which is objected to by many Indigenous parties to the treaties in question.<sup>50</sup> This could possibly be because the trust to address issues faced by the Indigenous populations adequately is to be placed with those who are the cause of those same issues.

Indeed, there was hope when the Economic and Social Council established the Permanent Forum on Indigenous Issues in 2000, but that hope was diminished when the *United*

---

<sup>45</sup> Anna Meijknecht 'The Re(Emergence) of Indigenous Peoples as Actors in International Law' (2002) 10(4) *Tilburg Foreign Law Review* 315, 316.

<sup>46</sup> José R. Martínez Cobo, *Report of the Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1983/21 (5 August 1983).

<sup>47</sup> *Ibid* 379.

<sup>48</sup> *Ibid* 379.

<sup>49</sup> Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999), [192].

<sup>50</sup> *Ibid* 117.

*Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') was released in 2007.<sup>51</sup> What *UNDRIP* did was formally domesticate Indigenous issues and ultimately absolve the UN and the international community of all liability for the relevant issues relating to Indigenous peoples and communities worldwide.

As treaties were negotiated from Nation to Nation, it is important to note that in Canada, Indigenous peoples are treated like that of a special interest group as opposed to a Nation. This is treated as a justification for the UN's actions in washing its hands free of the Indigenous question. While not morally right, this justification acts to *legally* absolve the UN of its duty to rectify any wrong done to Indigenous peoples, cultures, and lands. Arguably, this predominately places the blame for the UN's lack of interference on Canada, for its refusal to view Indigenous peoples as a Nation.

Under Article 8 of *UNDRIP*, paragraph 2 says that:

*States shall provide effective mechanisms for prevention of, and redress for: ... (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...*

These statements effectively remove liability from the international sphere and places the burden on the state to rectify the wrongdoings.

One could argue that Article 8 *UNDRIP* reflects international law's attempt at using its voice to remedy the injuries caused by the RSS, however, there is apparent safeguard in place to protect the states. Article 46, paragraphs 1 and 2 state that:

*1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.*

*2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall*

---

<sup>51</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007).

*be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.*

Article 46(2) justifies limiting the rights that are set out in *UNDRIP* under the guise of territorial integrity and political unity. With a slight twist of words, any state could justify limiting certain rights provided by *UNDRIP* by invoking Article 46.

*UNDRIP* ultimately bestows responsibility upon the States to ensure the negative impacts of colonisation and the RSS are reconciled, ridding international law of any burden to do the same, while simultaneously providing an excuse for States to not take action. It is unclear whether adopting *UNDRIP* is positive for the rights of Indigenous peoples. Although, we have yet to have any sort of real-life examples as Canada has continued to assert that *UNDRIP* is inconsistent with Canadian law and, therefore, continues to refuse to formally adopt it.

In 1996 at the Inter-sessional Working Group on the UN Draft Declaration on the Rights of Indigenous Peoples in Geneva, Steven Newcombe founder of the Indigenous Law Institute asked what sort of practical significance *UNDRIP* would have for Indigenous Nations and Peoples.<sup>52</sup> Newcomb was told that, 'to the extent that words have meaning, and to the extent that meanings configure reality, the Declaration has importance.'<sup>53</sup> When attempting to rationalise and understand this statement, it was said that those who work within the domain of international law and human rights are 'masters of linguistic subtlety and nuance,' who understand that a minor change in wording could potentially reconstruct reality.<sup>54</sup>

In taking advantage of this knowledge and linguistic power, it has become clear that States are attempting to ensure that *UNDRIP* provides no disruption to the State's domination over Indigenous peoples, as the domination has been proven to be rather beneficial to the states both politically and economically.<sup>55</sup> Thus, it is clear that the

---

<sup>52</sup> Steven T Newcomb 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2014) 20(3) *Griffith Law Review* 578, 584.

<sup>53</sup> *Ibid* 585.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* 586.

motivations behind states being in favour of domesticating the Indigenous question are purely political and economic.

### *B Transitional Justice*

As horrendous as the RSS was and still is, it is only a tiny portion of the harm done to Indigenous peoples in Canada. Transitional justice offers opportunities to re-establish the responsibility of states toward their Indigenous populations, however 'whether they will have transformational capacity, will depend in part on the political context in which they take place'.<sup>56</sup> For instance, in 2006, the Conservative government proposed the idea of extending human rights to Indigenous populations in a manner that, in turn, limited state obligation and threatened the collective rights of self-determination of Indigenous peoples.<sup>57</sup>

Although the Truth and Reconciliation Commission (TRC) has done a great job at making the voices of survivors of and witnesses to the RSS heard, its aim, as stated in its Mandate, is to 'put the events of the past behind us so that we can work towards a stronger and healthier future'.<sup>58</sup> It appears as though the government's intention with transitional justice is to put an end to their liability for wrongs committed in the past through apologies and mild forms of compensation for survivors of the RSS rather than to commence the beginning of amends and actual reparations.

The TRC's publications, along with the government's official apology for the RSS hold a surprising lack of reference to the deeper issues of colonisation while focusing solely on coming to an end of scrutiny faced for the past. It has been argued that decolonisation should be at the forefront of transitional justice for the Indigenous peoples of Canada, which ought to include decolonisation of the mind and of the structural transformation.<sup>59</sup> The former involves challenging colonial assumptions, privileged ignorance and taking ownership of colonial history.<sup>60</sup> The latter, 'calling for a transformation of the social,

---

<sup>56</sup> Courtney Jung 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society' (Research Brief No 295, Aboriginal Policy Research Consortium International, October 2009) 2.

<sup>57</sup> *Ibid* 1.

<sup>58</sup> *Ibid* 13.

<sup>59</sup> Augustine S. J. Park 'Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools' (2015) 16 *Human Rights Review* 273, 277.

<sup>60</sup> *Ibid*; See generally Paulette Regan, *Unsettling the settler within: Indian residential schools, truth telling, and reconciliation in Canada* (UBC Press, 2010).

political, cultural and economic injustices that often constitute the root causes of acute, extraordinary abuses'.<sup>61</sup>

### *C An International Law Issue*

In the fifteenth century European forces used the international law of colonialism to dominate and conquer Indigenous peoples, their lands, and their assets in what is now known as the 'Doctrine of Discovery'.<sup>62</sup> Further known as one of the first principles of international law, the Doctrine of Discovery allowed Christian European countries to claim rights over Indigenous territories not yet known to the Europeans.<sup>63</sup> Thus, it is essential to note that international law, as we know it today, consists of doctrines and principles that developed out of Europe and were influenced by European experience.<sup>64</sup>

Suppose the colonisation that provided for a world of abuse and cultural genocide for the Indigenous populations was allowed for and excused by international law, then why was international law so quick to rid itself of the question of reparations and amends to the Indigenous peoples for the wrongs it authorised? This appears to be a theme, sometimes known as the public/private divide in international law.<sup>65</sup> It seems to want to rid itself of complex or perhaps controversial issues so as not to upset the states it relies on to function and maintain its level of power and dominance.<sup>66</sup>

### IV CONCLUSION

The question appears to be whether the RSS should be an international law issue and, further, how it could or has already become an international law issue. Having established that the actions carried out within the RSS by the churches could and should be attributable to Canada, there is no question that there should be a level of state

---

<sup>61</sup> Ibid. See also Rosemary Nagy 'The scope and bounds of transitional justice and the Canadian truth and reconciliation commission' (2013) 7(1) *International Journal of Transitional Justice* 52, 52-73.

<sup>62</sup> Robert J. Miller 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5 *Indigenous Peoples' Journal of Law, Culture, and Resistance* 35, 35.

<sup>63</sup> Robert J. Miller 'The International Law of Colonialism: A Comparative Analysis' (2011) 15(4) *Lewis & Clark Law Review* 847, 848-9.

<sup>64</sup> Antony Anghie 'The Evolution of International Law: Colonial and Postcolonial Realities' (2007) 27(5) *Third World Quarterly* 739, 740.

<sup>65</sup> See generally Paulina García-Del Moral 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2013) 18(6-7) *Citizenship Studies* 661, 665-7.

<sup>66</sup> Ibid.



responsibility in the international sphere. However, blocking this from coming to fruition are general principles of international law, such as *UNDRIP*, which have fully domesticated the Indigenous question.

*UNDRIP* has been argued to be a consequence of 'states constructing and institutionalising in law and policy a framework of domination against Indigenous peoples'.<sup>67</sup> Meaning that international law has always been and continues to be used as a tool of domination. Further, *UNDRIP* has been criticised as addressing the broader human rights of Indigenous peoples rather than the rights that Indigenous peoples require to survive as distinct peoples.<sup>68</sup> There are already in place several sources that protect general human rights in the international and domestic forums.<sup>69</sup> What is needed are formal and potentially binding international protections for Indigenous populations that go beyond simple recognition of past wrongs and, further, explore what decolonisation would entail.

---

<sup>67</sup> Newcomb (n 52) 578.

<sup>68</sup> Irene Watson 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where to from Here?' (2014) 20(3) *Griffith Law Review* 507, 507.

<sup>69</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948); *Canadian Human Rights Act*, RSC 1985, c H-6; *Canada Act 1982 (UK)* c 11, sch B pt I.

## REFERENCE LIST

*A Articles/Books/Reports*

- Adams, David Wallace, 'Foreword to the Paperback Edition' in Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904*, (Yale University 1964)
- Anghie, Antony, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2007) 27(5) *Third World Quarterly* 739
- Boon, Kristen E, 'Are Control Tests Fit for the Future? Slippage Problem in Attribution Doctrines' (2014) 15(2) *Melbourne Journal of International Law* 330
- Burrage, Rachel L et al., , et al. 'Beyond Trauma: Decolonizing Understandings of Loss and Healing in the Indian Residential School system of Canada' (2022) 78(1) *Journal of Social Issues* 27
- Crawford, James, *State Responsibility: The General Part* (Cambridge University Press, 2013)
- Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002)
- Da Silva, Denise Ferreira 'Voicing 'Resistance': Race and Nation in the Global Space' in Yitzhak Sternberg and Eliezer Ben-Rafael (eds), *Identity, Culture and Globalisation: The Annals of the International Institute of Sociology* (Brill, 2001)
- Davin, Nicholas Flood, 'Report on Industrial Schools for Indians and Half-Breeds' (1879) <  
<https://www.canadiana.ca/view/oocihm.03651/29><https://www.canadiana.ca/view/oocihm.03651/29> >
- Hanson, Erin, et al., 'The Residential School System' *Indigenous Foundations, First Nations and Indigenous Studies UBC* (2020) <  
[http://indigenousfoundations.arts.ubc.ca/the\\_residential\\_school\\_system/](http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/)[http://indigenousfoundations.arts.ubc.ca/the\\_residential\\_school\\_system/](http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/) >
- Haig-Brown, Celia, *Resistance and Renewal: Surviving the Indian Residential School* (Indians of North America, 2006)

- Jung, Courtney, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society' (Research Brief No 295, Aboriginal Policy Research Consortium International, October 2009)
- MacDonald, David B. and & Graham Hudson, 'The Genocide Question and Indian Residential Schools in Canada' (2012) 45(2) *Canadian Journal of Political Science* 427
- Meijknecht, Anna, 'The Re(Emergence) of Indigenous Peoples as Actors in International Law' (2002) 10(4) *Tilburg Foreign Law Review* 315
- Miller, Robert J, 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5 *Indigenous Peoples' Journal of Law, Culture, and Resistance* 35
- Miller, Robert J, 'The International Law of Colonialism: A Comparative Analysis' (2011) 15(4) *Lewis & Clark Law Review* 847
- Moral, Paulina García-Del, 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2013) 18(6-7) *Citizenship Studies* 661
- Mgbeoji, Ikechi, 'The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security' (2006) 27(5) *Third World Quarterly* 855
- Nagy, Rosemary, 'The scope and bounds of transitional justice and the Canadian truth and reconciliation commission' (2013) 7(1) *International Journal of Transitional Justice* 52
- Newcomb, Steven T, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2014) 20(3) *Griffith Law Review* 578
- Park, Augustine S. J., 'Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools' (2015) 16 *Human Rights Review* 273
- Profiri, Ian, 'Hundreds of Bodies Discovered at Former Canada Residential School for Indigenous Children' *Jurist* (2021), <<https://www.jurist.org/news/2021/06/hundreds-of-bodies-discovered-at-former-canada-residential-school-for-indigenous-children/>><https://www.jurist.org/news/2021/06/hundreds-of-bodies-discovered-at-former-canada-residential-school-for-indigenous-children/>>

Regan, Paulette, *Unsettling the settler within: Indian residential schools, truth telling, and reconciliation in Canada* (UBC Press, 2010).

Watson, Irene, 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where to from Here?' (2014) 20(3) *Griffith Law Review* 507

#### B Cases

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 91, No 43

*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 70, No 14

#### C Legislation

*Canada Act 1982* (UK)

*Canadian Human Rights Act*, RSC 1985, c H-6

*Indian Act 1876*, RSC 1927, c 98

#### D Treaties

Assembly of First Nations, *Breaking the silence : an interpretive study of residential school impact and healing as illustrated by the stories of First Nation individuals* (Assembly of First Nations, 1994).

*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, as contained in *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/55/10 (2000)

*Responsibility of States for Internationally Wrongful Acts*, GA Res 62/61, UN Doc A/RES/62/61 (8 January 2008) <<https://www.refworld.org/docid/478f60c52.html> >

Cobo, José R. Martínez, *Report of the Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1983/21 (5 August 1983)

Martínez, Miguel Alfonso, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999)

*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948)

*E Other*

Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (2015), 6 < [https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive\\_Summary\\_English\\_Web.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf) >

Davin, Nicholas Flood, 'Report on Industrial Schools for Indians and Half-Breeds' (Public Archives of Canada, 1879) < <https://www.canadiana.ca/view/oocihm.03651/29> >

Harper, Stephen, Former Prime Minister of Canada, 'Statement of Apology to Former Students of Indian Residential Schools' (Statement delivered on behalf of the Government of Canada from Ottawa on June 11, 2008) < <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655> >

Pratt, Richard Henry and Brigadier General, 'The Advantages of Mingling Indians with Whites' (Speech delivered at the National Conference of Charities and Correction at the Nineteenth Annual Session Held in Denver, Colorado, June 23-29, 1892) < [https://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources\\_1892-PrattSpeech.pdf](https://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources_1892-PrattSpeech.pdf) >