

# Convicting the Clergy: Seeking Justice for Residential School Victims Through Crimes Against Humanity Prosecutions

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## ABSTRACT

Over the past year, the Canadian Government acknowledged the existence of thousands of unmarked graves at locations of former Residential Schools across the country. An estimated 150,000 children were forcefully taken from their families and relocated to one of 139 Government-run and Church-affiliated Schools operating between 1883 and 1996. Although the Government failed to keep adequate records, thousands of children died and countless others were severely beaten, confined, and sexually abused while at these Schools and in the years following. No individual has been charged or convicted with organizing, facilitating, or assisting with the murder, torture, persecution, or other inhumane acts or omissions committed at Residential Schools, and fewer than 50 individuals have ever been convicted for the sexual violence that was perpetrated. This article demonstrates that the Residential School system was a widespread and systematic attack against civilian Indigenous peoples and involved conduct properly characterizable as crimes against humanity. Through an analysis of case law and international agreements, this article argues that numerous, feasible routes exist to prosecute those responsible for the international crimes committed. It identifies three

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distinct avenues for prosecuting individuals who participated in these international crimes: prosecutions of crimes forming part of customary international law in domestic Canadian courts; the establishment of a hybrid tribunal; and the exercise of universal jurisdiction by another state.

**Keywords:** Residential Schools; Crimes Against Humanity; International Law; Indigenous; Canada

## I. INTRODUCTION

“I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.”

– Duncan Campbell Scott, *Deputy Minister of Indian Affairs*, discussing his proposed amendments to the *Indian Act* (1920).

Over the past year, the Canadian Government acknowledged the existence of thousands of unmarked graves at locations of former Residential Schools across the country.<sup>1</sup> These graves, most holding the remains of children forcefully taken from their families and communities, highlight the gravity of crimes committed at these Government-sponsored, Church-run Schools. With countless locations still to be searched, the magnitude of these crimes and the deficient investigations over many decades emphasize Canada’s failure to identify, apprehend, and prosecute those responsible.

Under the nation-founding 1867 *British North America Act*, and the introduction of the *Indian Act* in 1876, the Canadian Government was required to provide Indigenous children with an education, which it facilitated through the creation of Residential Schools.<sup>2</sup> These Schools were predominately funded and operated by the Canadian Government and Roman Catholic, Anglican, Methodist, Presbyterian, and United

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<sup>1</sup> See Ka’nehs:io Deer, “Why it’s Difficult to put A Number on how Many Children Died at Residential Schools,” (29 September 2017), online: *CBC News* <[www.cbc.ca/news/indigenous/residential-school-children-deaths-numbers-1.6182456](http://www.cbc.ca/news/indigenous/residential-school-children-deaths-numbers-1.6182456)> [perma.cc/77NR-74DW].

<sup>2</sup> See Union of Ontario Indians, *An Overview of the Indian Residential School System* (2013) at 3, online (pdf): <[www.anishinabek.ca/wp-content/uploads/2016/07/An-Overview-of-the-IRS-System-Booklet.pdf](http://www.anishinabek.ca/wp-content/uploads/2016/07/An-Overview-of-the-IRS-System-Booklet.pdf)> [perma.cc/99DE-DMBD].

Churches.<sup>3</sup> The Indian Residential School System sought to assimilate Indigenous students into the broader Canadian society—an “assimilation” that is more aptly described as an attempt to “kill the Indian in the child.”<sup>4</sup> An estimated 150,000 children were forcefully taken from their families and relocated to one of 139 Government-affiliated Residential Schools<sup>5</sup> operating between 1883 and 1996.<sup>6</sup> These children were further separated from their siblings and segregated by gender in often distant locations.<sup>7</sup> In many cases, the children were forbidden from speaking their first language, practicing their culture, and stripped of their traditional clothing, appearance, and identity.<sup>8</sup> The Government failed to keep adequate records of the thousands of children who died and countless others who were severely beaten, confined, and sexually abused.<sup>9</sup> Many Residential School survivors suffer ongoing trauma, resulting in familial breakdown, post-traumatic stress, mental illness, violence, and intergenerational trauma.<sup>10</sup>

Indigenous peoples’ protests were instrumental in pushing for policy change to Residential Schools.<sup>11</sup> In 1969, the Residential School system was taken over by the Department of Indian Affairs, thereby ending the religious affiliation.<sup>12</sup> These schools were then phased out, with former students demanding the Canadian Government acknowledge its role in the

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<sup>3</sup> *Ibid.*

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

<sup>5</sup> Over 1,300 Residential Schools existed throughout Canada, 139 of which were funded and operated in whole by the Federal Government or in part by the Federal Government and a religious order. See Tanya Talaga, “It’s Time to Bring our Children Home from the Residential Schools” (1 June 2021), online: *The Globe and Mail* <[www.theglobeandmail.com/canada/article-survivors-of-residential-schools-share-their-stories-call-on-the/](http://www.theglobeandmail.com/canada/article-survivors-of-residential-schools-share-their-stories-call-on-the/)> [perma.cc/9BXS-CZ8L].

<sup>6</sup> *Ibid.*

<sup>7</sup> See Union of Ontario Indians, *supra* note 2, at 5.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Nishnawbe Aski Nation, “Healing the Generations: Abuses Suffered in Res Schools” (2002), online (pdf): <[schools.nan.on.ca/upload/documents/section-4/abuses-suffered-in-residential-school.pdf](http://schools.nan.on.ca/upload/documents/section-4/abuses-suffered-in-residential-school.pdf)>.

<sup>10</sup> See Truth and Reconciliation Commission of Canada, “Calls to Action” at para 19 (2015), online (pdf): <[www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls\\_to\\_action\\_english2.pdf](http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf)> [perma.cc/UZD9-HTDN].

<sup>11</sup> See The Canadian Encyclopedia, “Residential Schools in Canada” (10 October 2012) online: <[www.thecanadianencyclopedia.ca/en/article/residential-schools](http://www.thecanadianencyclopedia.ca/en/article/residential-schools)> [perma.cc/2UHY-YZXJ].

<sup>12</sup> *Ibid.*

crimes committed and provide compensation.<sup>13</sup> In 2006, over 120 years after the opening of the first Residential School, and more than a decade since former students began demanding government action,<sup>14</sup> the Federal Government established a \$1.9 billion compensation package for survivors under the *Indian Residential Schools Settlement Agreement* (“*Settlement Agreement*”).<sup>15</sup> One of the elements of the *Settlement Agreement* was the establishment of the Truth and Reconciliation Commission (“TRC”) to create a historical record of the Residential School system and facilitate reconciliation between former students, their families, communities, and all Canadians.<sup>16</sup> While this *Settlement Agreement* begins the much-needed process of addressing the plight of victims, nothing has been done to prosecute those guilty of perpetrating these monumental crimes. No individual has been charged or convicted with organizing, facilitating, or assisting with the murder, torture, persecution, or other inhumane acts or omissions committed at Residential Schools,<sup>17</sup> and fewer than 50 individuals have ever been convicted for the widespread sexual violence

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

<sup>14</sup> It is important to note that governmental action only occurred following numerous successful lawsuits by individual survivors, agreements-in-principle between Churches and the Federal Government to share compensation, and the certification of a class-action lawsuit in Ontario. Thus, the threat of massive liability was a major motivator for a federal settlement agreement. See CBC News, “A timeline of residential schools, the Truth and Reconciliation Commission” (25 March 2014) *CBC News*, online: <[www.cbc.ca/news/canada/a-timeline-of-residential-schools-the-truth-and-reconciliation-commission-1.724434](http://www.cbc.ca/news/canada/a-timeline-of-residential-schools-the-truth-and-reconciliation-commission-1.724434)> [perma.cc/4MFC-7VZ6].

<sup>15</sup> The Canadian Encyclopedia, “Indian Residential Schools Settlement Agreement” at para 5 (July 11, 2013), online: <[www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement](http://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement)>.

<sup>16</sup> As part of this process, the Canadian Government provided over 5 million relevant records. Govn’t of Canada, “Truth and Reconciliation Commission of Canada” (June 11, 2016), online: <[Error! Hyperlink reference not valid.www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525](http://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525)> at para 5; Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part 1, Origins to 1939: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1* (Montreal: McGill-Queen’s University Press, 2015) at VIII.

<sup>17</sup> In June 2022, the RCMP charged a retired priest, Father Arthur Masse, with indecent assault of a ten-year-old student for offenses that occurred between 1968 and 1970 at the former Fort Alexander Residential School Residential School in Winnipeg, Manitoba. Sam Thompson, “Manitoba RCMP Charge Retired Priest, 92, with Indecent Assault in Historical Residential School Case” (17 June 2022) *Global News*, online: <[globalnews.ca/news/8928243/manitoba-rcmp-arrest-residential-school-friday/](http://globalnews.ca/news/8928243/manitoba-rcmp-arrest-residential-school-friday/)> [perma.cc/2ZL8-5JDT].

that was perpetrated.<sup>18</sup> Canada's failure to prosecute those responsible for crimes committed at Residential Schools underscores its poor record of prosecuting anyone accused of international crimes.<sup>19</sup> Although it must be acknowledged that survivors invariably desire a range of outcomes, including reparation, and some may not favor prosecutions, it is nonetheless important to consider whether a feasible route to prosecution exists for Indigenous communities that may desire criminal accountability.

This article demonstrates that Residential School system conduct is properly characterizable as crimes against humanity ("CAH"),<sup>20</sup> and discusses feasible routes to prosecuting those responsible for such crimes. By framing the School system as a widespread and systematic attack committed against civilian Indigenous peoples in Canada, this article develops a hypothetical case study for the potential criminal responsibility of an individual involved in abuses committed at Residential Schools, referred to as "Clergy Member X." There are numerous culpable actors responsible for these crimes, including organizational actors such as the Canadian Federal Government and participating religious institutions that formulated policies intended to target and attack Indigeneity. However, this article focuses on feasible routes to obtain individual convictions under Canada's *Crimes Against Humanity and War Crimes Act* which can, in turn, provide the necessary impetus to establish culpability at the highest level. Clergy Member X represents each individual who had knowledge of the attack and either directly facilitated the attack or intended their conduct to be part of the attack, including teachers, clergy members, and school staff. Through an analysis of case law and international agreements, this article argues that numerous routes exist to prosecute international crimes committed at Residential Schools. It identifies three distinct avenues for prosecuting individuals who participated in these international crimes:

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<sup>18</sup> See Tristin Hopper, "Why so many sexual predators at Indian Residential Schools escaped punishment" (10 June 2021) *National Post*, online: <nationalpost.com/news/canada/why-so-many-sexual-predators-at-indian-residential-schools-escaped-punishment> [perma.cc/M79U-K5RK].

<sup>19</sup> See Amnesty International, "No safe haven: New report highlights Canada's failure to prosecute individuals accused of war crimes and crimes against humanity" (8 September 2020) *Amnesty International*, online: <www.amnesty.ca/news/no-safe-haven-new-report-highlights-canadas-failure-to-prosecute-individuals-accused-of-war-crimes-and-crimes-against-humanity/> [perma.cc/XY2B-WRRU].

<sup>20</sup> See 17 July 1998, UN Doc A/CONF 183/9, 37 LLM 999 [*Rome Statute*]; *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 4.

prosecutions of crimes forming part of customary international law in domestic Canadian courts; the establishment of a hybrid tribunal; and the exercise of universal jurisdiction by another state.

## II. HISTORY OF RESIDENTIAL SCHOOLS IN CANADA

### A. Policy, Creation & Closure

For over a century, the goal of Canada's settler-colonial society has been to eliminate Indigenous systems of governance, disregard Indigenous rights, terminate Treaties, and assimilate Indigenous peoples into the predominant "Canadian" society.<sup>21</sup> This process, often referred to as a form of "cultural genocide," disempowered Indigenous peoples, seized land, and destroyed many cultural institutions central to Indigenous communities.<sup>22</sup> Perhaps most significantly, the disruption of family units prevented the transmission of cultural values and identity from one generation to the next.<sup>23</sup> Residential Schools were a key element in attaining these goals and eroding Indigenous peoples' foundational existence as a distinct legal, social, cultural, religious, and racial entity in Canada.<sup>24</sup> This transformative process must be viewed as a culmination of all interdependent genocidal practices perpetrated by Canada. This includes the appropriation of Indigenous land, mass removal of Indigenous children from their families into the child welfare system (known as the Sixties Scoop), the creation of Reserves and Residential Schools, forced sterilization, negligible investigations into Missing and Murdered Indigenous Women and Girls, and ongoing overrepresentation of Indigenous peoples in the criminal justice system. Residential Schools cannot be viewed as an independent event, but rather as a tactic to sever cultural ties integral to Canada's longstanding efforts to destroy Indigeneity.

The early origins of Canada's Residential Schools trace back to the implementation of the mission system in the 1600s.<sup>25</sup> European settlers brought with them the belief that their civilization represented the pinnacle

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<sup>21</sup> See Truth and Reconciliation Commission of Canada, *supra* note 16, at 3.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 244.

<sup>25</sup> See Erin Hanson, "The Indian Act" (2009) First Nations & Indigenous Studies, The University of British Columbia, online: <[indigenousfoundations.arts.ubc.ca/the\\_indian\\_act/](http://indigenousfoundations.arts.ubc.ca/the_indian_act/)> [perma.cc/6KPE-EUAU].

of human achievement and Indigenous peoples were “savages” in need of guidance.<sup>26</sup> Education, as a federal responsibility, became a primary means to this end and fostered the belief that schools were institutions for “civilizing” Indigenous peoples.<sup>27</sup> It was not until the conclusion of the War of 1812 that the establishment of Residential Schools became a government priority. Following the War, Indigenous peoples were no longer valued in the fur trade or as strategic military partners and transitioned from being broadly perceived as allies to burdens on the emerging nation.<sup>28</sup> By 1830, the “Indian problem” moved from military to civilian jurisdiction, and Indigenous people came to be predominantly viewed as barriers in the way of a flourishing new nation.<sup>29</sup> As a result, the priority shifted to targeting and destroying strong, sovereign Indigenous nations.<sup>30</sup> Prime Minister John A. Macdonald commissioned a study of “aggressive civilization” tactics and Residential Schools (referred to as Industrial Schools in the United States),<sup>31</sup> finding that “if anything is to be done with the Indian, we must catch him very young. The children must be kept constantly within the circle of civilized conditions.”<sup>32</sup> Recommendations from this study included the segregation and isolation of Indigenous children from any and every influence of their cultural traditions.<sup>33</sup> Public funding was provided to establish a school system in Canada similar to that in the United States.<sup>34</sup>

In 1831, the first Church-run Residential School opened in what is now Brantford, Ontario.<sup>35</sup> By this time, the Government<sup>36</sup> had adopted a comprehensive and official policy for funding Residential Schools across

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<sup>26</sup> See Truth & Reconciliation Commission of Canada, *supra* note 16, at 18.

<sup>27</sup> *Ibid* at 83.

<sup>28</sup> See University of Alberta, Faculty of Native Studies, *Indigenous Canada: Looking Forward/Looking Back* (Toronto: Lorimer, 2022) at 7.

<sup>29</sup> *Ibid*.

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

<sup>31</sup> Industrial schools were more similar to manual labor camps than educational institutions and had aggressive assimilation tactics. See *ibid*.

<sup>32</sup> Nicholas Flood Davin, who was commissioned by Prime Minister John A. Macdonald wrote in his 1879 Report on *Industrial Schools for Indians and Half-Breeds*. See *Ibid*.

<sup>33</sup> See University of Alberta, *supra* note 28.

<sup>34</sup> See Hanson, *supra* note 25.

<sup>35</sup> See Canadian Encyclopedia, *supra* note 11.

<sup>36</sup> In 1831, Canada was a British Territory known by settlers as “Upper Canada” and “Lower Canada.” Thus, prior to the confederacy of Canada in 1867, official governmental policy could not yet be referred to as “Federal Government” policy.

Canada with the explicit intent of separating Indigenous children from their culture and assimilating them into Canada's mainstream society.<sup>37</sup> Although another apparent goal of these Schools was to "educate" children, the policy is more appropriately viewed as an institution formed to break the link to Indigenous identity.<sup>38</sup> Following confederation, the Federal Government of Canada entered into a formal legal agreement with the Roman Catholic, Anglican, United, Methodist, and Presbyterian Churches to administer Residential Schools in 1892.<sup>39</sup> Under this agreement, the Church educated the children while the Government covered the costs.

In 1920, the *Indian Act*<sup>40</sup> enforced compulsory attendance at Indian Residential Schools for Treaty-status children between the ages of seven and 15.<sup>41</sup> Parents refusing to send their children were prosecuted under the Truancy Provisions of the *Indian Act*, with punishments including fines and imprisonment.<sup>42</sup> Deputy Minister of Indian Affairs, Duncan Campbell Scott, explained the goals of this policy in 1920 when he told a parliamentary committee that "our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic."<sup>43</sup> These goals were reiterated in the Federal Government's 1969 Statement of the *Government of Canada on Indian Policy*, which sought to end Indian status and terminate Treaties the Federal Government had negotiated with Indigenous peoples.<sup>44</sup> The Canadian Government pursued this policy of cultural genocide as a way of divesting itself of legal and

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> See University of Alberta, *supra* note 28, at 9.

<sup>40</sup> The *Indian Act* was developed through separate pieces of colonial legislation regarding Indigenous peoples, such as the *Gradual Civilization Act* of 1857 and the *Gradual Enfranchisement Act* of 1869. In 1876, the *Indian Act*, a Canadian federal statute that governs matters pertaining to Indian status, Bands, and Indian Reserves, was passed. The *Indian Act* is a part of a long history of assimilation policies intended to terminate the cultural, social, economic, and political distinctiveness of Indigenous peoples by absorbing them into mainstream Canadian life and values. Although the *Indian Act* has undergone numerous amendments, today it largely retains its original form. See Hanson, *supra* note 25.

<sup>41</sup> See University of Alberta, *supra* note 28, at 10.

<sup>42</sup> See University of Alberta, *supra* note 28, at 10.

<sup>43</sup> *Ibid* at 7.

<sup>44</sup> Truth and Reconciliation Commission of Canada, *supra* note 16, at 4.

financial obligations to Indigenous peoples and gain control over their land and resources.<sup>45</sup>

The Government's partnership with the Churches remained in place until 1969 when the Department of Indian Affairs took over the system, thereby ending the religious affiliation.<sup>46</sup> By the 1980s, most Residential Schools had closed following protests by Indigenous children and parents regarding the Schools' harsh conditions, abuse, and pedagogical shortcomings.<sup>47</sup> Although the phasing out of these Schools met with resistance from the Catholic Church, which maintained that segregated education was needed for Indigenous children, the last Residential Schools closed in 1996.<sup>48</sup>

## **B. Diseases, Experiments & Abuse**

The institutionalized structure of Residential Schools contributed to high incidences of disease, illness, and death. From the 1860s until the mid-1990s, infectious diseases including tuberculosis, the measles, and influenza were rampant.<sup>49</sup> Although neither the Canadian Government nor the Church compiled adequate records, it is estimated that tuberculosis accounted for almost 50 percent of fatalities during this time.<sup>50</sup> Deaths were significantly under-reported, and of those recorded, 40 percent listed no cause of death whatsoever.<sup>51</sup> The chronic and intentional underfunding of these Schools resulted in significantly higher death rates for those suffering from these common diseases—a fact well known to both the Federal Government and Church.<sup>52</sup> In 1907, Dr. Peter Henderson Bryce from the Department of Indian Affairs identified the high prevalence of tuberculosis, stating that it was “almost as if the prime conditions for the

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> See Canadian Encyclopedia, *supra* note 11.

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

<sup>49</sup> See University of Alberta, *supra* note 28, at 11.

<sup>50</sup> *Truth and Reconciliation Commission of Canada, Canada's Residential Schools: Missing Children and Unmarked Burials, Volume 4 at 138 (Montreal: McGill-Queen's University Press, 2015).*

<sup>51</sup> *Ibid.*

<sup>52</sup> See University of Alberta, *supra* note 28, at 11-12.

outbreak of epidemics had been deliberately created.”<sup>53</sup> Dr. Bryce’s horrific discoveries<sup>54</sup>—including the fact that death rates increased the longer schools were open—made national headlines.<sup>55</sup>

Prominent social and health determinants common in Residential Schools, including malnutrition, overcrowding, poor ventilation, and unsanitary conditions contributed to astronomically high instances of diseases.<sup>56</sup> Tuberculosis rates in general Indigenous populations throughout the 1930s and 40s were some of the highest ever recorded in human population with 700 deaths per 100,000.<sup>57</sup> However, rates in Residential Schools were dramatically higher, with approximately 8,000 deaths per 100,000.<sup>58</sup> Dr. Bryce reported that at least 24 percent of children died at these Schools and anywhere from 47 to 75 percent died after returning home.<sup>59</sup> Dr. Bryce recorded these observations and made recommendations to improve school buildings and children’s diets, but the Federal Government ignored his advice, arguing that changes were too costly, and going so far as preventing him from conducting any further research or presenting his findings at academic conferences.<sup>60</sup> In fact, Deputy Minister Scott readily acknowledged that Indigenous children lost their natural resistance to illness at these Schools and died at much higher rates than in their communities.<sup>61</sup> However, Scott did not view this as justification to change School policy, instead citing the effectiveness of the current policy in promoting the “final solution of our Indian problem.”<sup>62</sup>

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<sup>53</sup> See Jeremy Appel, “Researchers say that TB at Residential Schools was no Accident” (18 July 2021) *CTV News*, online: <[www.ctvnews.ca/canada/researchers-say-that-tb-at-residential-schools-was-no-accident-1.5513755](http://www.ctvnews.ca/canada/researchers-say-that-tb-at-residential-schools-was-no-accident-1.5513755)> [perma.cc/SFL3-BR4Y].

<sup>54</sup> Both Dr. Bryce’s 1907 report that was distributed to the Members of Parliament and to the Church, “Report on the Indian Schools of Manitoba and the Northwest Territories,” as well as his self-published 1922 book “The Story of a National Crime: An Appeal for Justice to the Indians of Canada” provide clear evidence of the Government’s role in creating, and maintaining, conditions that led to a large number of student deaths.

<sup>55</sup> See University of Alberta, *supra* note 28, at 11-12.

<sup>56</sup> See Appel, *supra* note 53.

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

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

<sup>59</sup> See Hanson, *supra* note 25.

<sup>60</sup> *Ibid.*

<sup>61</sup> See Kevin D Annett, *Hidden from History: The Canadian Holocaust – The Untold Story of the Genocide of Aboriginal Peoples by Church and State in Canada* (Vancouver: The Truth Commission into Genocide in Canada, 2001) at 6.

<sup>62</sup> *Ibid* at 37-38.

Dr. Bryce was not the only individual who was met with silence after voicing concerns to the Government—numerous other inspectors and officials expressed alarm at the horrifying death rates and were systemically ignored.<sup>63</sup>

Diseases were just one of the many causes of death at Residential Schools, with nutritional experiments and starvation tactics also common. Following the medical atrocities performed in the name of scientific experimentation by a cadre of Nazi doctors during World War II, the *Nuremberg Code of Medical Ethics* was developed in 1947, setting forth standards that medical doctors must follow when conducting experiments.<sup>64</sup> However, between 1942 and 1952, an unprecedented number of highly unethical nutrition experiments were conducted at Residential Schools in clear violation of the *Nuremberg Code*.<sup>65</sup> The experiments were performed by the Department of Indian Affairs under the direction of two physicians: Dr. Percy Moore, the Indian Affairs Branch Superintendent of Medical Services, and Dr. Frederick Tisdall, a former president of the Canadian Pediatric Society.<sup>66</sup> These experiments were conducted without parental knowledge or consent and continued even as numerous children died.<sup>67</sup> Many such experiments involved denying malnourished children adequate nutrition, with some given mixtures of flour, thiamine, riboflavin, niacin, and bone meal.<sup>68</sup> This caused children to become anemic and resulted in death or altered development.<sup>69</sup> Moreover, these children were often denied available, but severely lacking, dental care so that researchers could observe the development of dental cavities and gingivitis in malnourished children.<sup>70</sup>

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<sup>63</sup> See Hanson, *supra* note 34.

<sup>64</sup> See Noni Macdonald, Richard Stanwick & Andrew Lynk, “Canada’s shameful history of nutrition research on residential school children: The need for strong medical ethics in Aboriginal health research” (2014) 19:2 *Paediatrics & Child Health* at para 1.

<sup>65</sup> See Ian Mosby, “Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942-1952” (2013) 46:91 *Social History* at 146-148; see Macdonald et al, *supra* note 64, at para 2.

<sup>66</sup> See Macdonald et al, *supra* note 64, at para 2.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at para 3.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

Prior to the first nutritional experiments conducted by the Nutrition Services Division during the mid-to-late 1940s, reports from Indigenous children, their parents, and even Indian Affairs employees indicated that students were underfed and, in many cases, severely malnourished.<sup>71</sup> The Federal Government knowingly chose not to provide Schools with sufficient funding to ensure that kitchens were properly equipped, personnel was adequately trained, and that quality food was purchased—a decision that left thousands of children in a weakened state and vulnerable to disease.<sup>72</sup> Hunger was constant, with children receiving an insufficient caloric intake leading to the development of diabetes and thyroid, neurologic, psychological, and immune system dysfunction, as well as long term effects, including a greater risk of stillbirths, pre-term birth, neonatal death, complications with labor, and decreased offspring birth weight.<sup>73</sup> In a 1945 Red Cross study of nutrition in Residential Schools, conditions were reported as “simply appalling,” with the noted presence of maggots and mold on rotten food served to children.<sup>74</sup> In fact, during the course of this study, 45 flies were found on a single slice of bread that was to be served.<sup>75</sup> Constant hunger and unsanitary, even inedible food that children were forced to eat often dominates the memories of Residential School survivors.<sup>76</sup> These conditions contributed to the appalling death rates of children either during their residency or upon their discharge from the Schools.<sup>77</sup>

Physical, emotional, and psychological abuse was another experience common among attendees of Residential Schools. Survivors’ narratives often cite sexual assault, beatings, poisonings, electric shock, and freezing, in addition to starvation and medical experimentation.<sup>78</sup> The presence of

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<sup>71</sup> See Mosby, *supra* note 65, at 149.

<sup>72</sup> See Ian Mosby & Tracey Galloway, “‘Hunger was never absent’: How residential school diets shaped current patterns of diabetes among Indigenous peoples in Canada” (2017) 189:32 *Canadian Medical Assoc J*, at para 4.

<sup>73</sup> *Ibid* at para 8.

<sup>74</sup> See Cindy Blackstock (@Cblackst), “Today’s #reconciling history A 1945 Red Cross study of nutrition in residential schools found ‘simply appalling’ conditions reporting ‘45 flies were found on one slice of bread.’ The state of malnutrition prompted Dr. Tisdale (founder of Pablum) to conduct experiments on the kids” (26 September 2021 at 7:48), online: *Twitter* <[twitter.com/cblackst/status/1442108930088448001?s=10](https://twitter.com/cblackst/status/1442108930088448001?s=10)>.

<sup>75</sup> *Ibid*; see Mosby, *supra* note 61, at 159.

<sup>76</sup> See Blackstock, *supra* note 75; see Mosby, *supra* note 65, at 146.

<sup>77</sup> Mosby, *supra* note 65, at 149.

<sup>78</sup> See University of Alberta, *supra* note 28, at 12.

an electric chair as a punishment tool is verified in at least one School,<sup>79</sup> although many individuals report use of this device to be widespread.<sup>80</sup> Survivors also recall being beaten, strapped, and shackled to their beds as punishment, while others remember having needles shoved in their tongues for speaking their native languages.<sup>81</sup>

Sexual abuse was also rampant at Residential Schools, with over 38,000 claims submitted to an Independent Assessment Process conducted by the TRC as part of the *Settlement Agreement*—and yet less than 50 individuals were ever convicted of these crimes.<sup>82</sup> Since School staff members were poorly trained, limited in numbers, and unscreened, sexual predators had the opportunity to establish undetected, unpunished, and long-lasting regimes of abuse against these already-vulnerable children.<sup>83</sup> Residential School dorm supervisor, Arthur Plint, was sentenced in 1995 for more than two decades of horrific sexual abuses against children.<sup>84</sup> Another former Residential School employee, Douglas Haddock, was sentenced to 23 months for abusing children over a six-year period starting in the late 1940s.<sup>85</sup> Richard Donald Olan, a Residential School teacher, was convicted of five counts of “gross indecency” against children, including a practice of “signing out” children from the school to abuse them at his home over weekends.<sup>86</sup> In 1998, eight former students of St. George’s Indian Residential School sued a priest, the Government, and the Anglican Church of Canada, with both the Anglican Church and the Government admitting fault and agreeing to a settlement.<sup>87</sup>

While these cases are included to reflect the gravity of sexual abuse perpetrated at Residential Schools by staff members, it must be acknowledged that these reported cases are the exception; thousands of sex crimes committed at Schools were not reported, taken seriously, or resulted

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<sup>79</sup> St. Anne’s Catholic Residential School, open from 1904 until 1973, had an electric chair in its basement until its closure. See *ibid.*

<sup>80</sup> See *Ibid.*

<sup>81</sup> Hanson, *supra* note 34.

<sup>82</sup> See Independent Assessment Process Oversight Committee, *Final Report* (2021) at 8, online (pdf): <[www.residentialschoolsettlement.ca/IAP\\_Final\\_Report\\_English.pdf](http://www.residentialschoolsettlement.ca/IAP_Final_Report_English.pdf)> [perma.cc/2SUZ-JWP6]; Hopper, *supra* note 18.

<sup>83</sup> See Truth and Reconciliation Commission of Canada, *supra* note 16, at 141-43.

<sup>84</sup> See Hopper, *supra* note 18.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> See Hanson, *supra* note 34.

in any formal punishment or acknowledgment. 5,315 people—both students<sup>88</sup> and staff—are believed to have committed sexual abuse at Residential Schools in Canada, highlighting the deficiency of this paltry number of convictions.<sup>89</sup> Moreover, the Royal Commission on Aboriginal Peoples concluded that Church and Government officials were fully aware of the abuses and tragedies taking place at Schools across the country.<sup>90</sup> These horrific acts perpetrated against Indigenous peoples, in conjunction with the thousands of graves recently acknowledged, clearly reflect systematic, extreme abuse and oppression of a targeted population. What remains is the difficult process of linking these crimes to the School staff members who facilitated and were directly responsible for these crimes.

### III. THE GENOCIDE DEBATE

In 2019, Prime Minister Justin Trudeau acknowledged that the murders and disappearances of Indigenous women and girls across Canada in recent decades amounted to an act of genocide.<sup>91</sup> Trudeau stopped short of similarly categorizing Residential Schools as an act of genocide,<sup>92</sup> stating simply that the system was part of a larger colonial policy designed to erase language and culture. Significantly, Trudeau’s comments present an accurate description of “cultural genocide,” which refers to the systematic

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<sup>88</sup> Although student perpetrators are cited here, it may not be appropriate to prosecute victim-perpetrators. Part of the toxicity of the Residential School system was that it normalized abuse and resulted in many students who were personally abused abusing other students. For that reason, there is a distinction between crimes committed by students and by those in positions of authority. While this article acknowledges that some crimes were committed by students, it does not argue that they should be included in those targeted for prosecution.

<sup>89</sup> Hanson, *supra* note 34.

<sup>90</sup> *Ibid.*

<sup>91</sup> See Catharine Tunney, “Trudeau says deaths and disappearance of Indigenous women and girls amount to ‘genocide’” (4 June 2019), online: *CBC News* <[www.cbc.ca/news/politics/trudeau-mmiwg-genocide-1.5161681](http://www.cbc.ca/news/politics/trudeau-mmiwg-genocide-1.5161681)> [perma.cc/4BRS-JA63].

<sup>92</sup> It is important to note that NDP leader, Jagmeet Singh, has recognized Residential Schools as a crime of genocide and has pledged to appoint a special prosecutor to investigate Residential Schools. See Anja Karadeglija, “NDP leader visits Cowessess First Nation, pledges to appoint special prosecutor on residential schools” (21 August 2021), online: *National Post* <[nationalpost.com/news/politics/election-2021/ndp-leader-visits-cowessess-first-nation-pledges-to-appoint-special-prosecutor-on-residential-schools](http://nationalpost.com/news/politics/election-2021/ndp-leader-visits-cowessess-first-nation-pledges-to-appoint-special-prosecutor-on-residential-schools)> [perma.cc/9QJA-RR5U].

destruction of traditions, values, language, and other elements that make one group of people distinct from another.<sup>93</sup> Cultural genocide is not a recognized form of genocide under Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (“*Genocide Convention*”) and is thus not a prosecutable international crime.<sup>94</sup> The only recognized forms of genocide under international criminal law are any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.<sup>95</sup> This definition has been widely adopted at both national and international levels, including in the 1998 *Rome Statute of the International Criminal Court* (“*Rome Statute*”).<sup>96</sup>

Prosecuting Residential School abuses under the genocide framework is problematic for numerous reasons. Firstly, although Canada was a signatory to the *Genocide Convention* in 1949 and ratified the Convention in 1952, the International Criminal Court (“ICC”) only has temporal jurisdiction for crimes committed on or after July 1, 2002.<sup>97</sup> The ICC lacks jurisdiction to prosecute those responsible for Residential School crimes occurring prior to this date. Secondly, Canada excluded the fifth prong of the *Genocide Convention*—forceful transfer of children from one group to another—when it incorporated genocide into its *Criminal Code* in 1970.<sup>98</sup> This is troublesome when considering Canada’s status as a dualist state, meaning that treaties must be implemented into Canadian law to hold

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<sup>93</sup> See Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective*, (Oxford: Oxford University Press, 2016) at 1-2.

<sup>94</sup> See *ibid.*

<sup>95</sup> See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

<sup>96</sup> *Rome Statute*, *supra* note 20, at Art 5.

<sup>97</sup> See Kathleen Martens, “Canada can’t be prosecuted for residential school crimes, says former UN-tribunal lawyer” (18 June 2021), online: *APTN News*: <[www.aptnnews.ca/national-news/canada-cant-be-prosecuted-for-residential-school-crimes-says-former-un-tribunal-lawyer/](http://www.aptnnews.ca/national-news/canada-cant-be-prosecuted-for-residential-school-crimes-says-former-un-tribunal-lawyer/)> [perma.cc/6KER-J8GJ].

<sup>98</sup> *Ibid.*

force.<sup>99</sup> It is also relevant to consider exactly why Canada excluded the fifth prong, which was included in the *Genocide Convention* to prosecute Nazis for removing Polish children from their families and moving them to German families and schools to be “Germanized.”<sup>100</sup> The rationalization for the prong’s exclusion is that mass transfers of children to another group were “unknown” in Canada at the time of the *Convention*’s incorporation in 1970<sup>101</sup>—a questionable claim when acknowledging the prevalence of Residential Schools. Perhaps, rather, this is evidence of Canada’s knowledge that the events happening at the time, including forceful transfers of children to Residential Schools, would fit the definition of genocide if the prong was adopted. By excluding this prong, Canada could avoid international culpability and continue its attack on Indigeneity for decades to come.

It can be argued that the elements of the *Genocide Convention* represent customary international law<sup>102</sup> and, thus, the entire convention, including the fifth prong, are applicable to Canada, regardless of Canada implementing legislation language. This is particularly relevant if the elements of the genocide framework are considered *jus cogens*—a norm recognized by the international community of states in which no derogation is permitted from general international law unless it is modified by a subsequent norm of general international law having the same character.<sup>103</sup> *Jus cogens* provide universal jurisdiction over crimes, regardless of where or by whom they were committed, and carry with them a duty to prosecute and punish.<sup>104</sup> There is a strong argument that the *Genocide Convention* holds the status as a norm of *jus cogens* as it has been ratified by

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<sup>99</sup> See Department of Justice Canada, “Legal Dualism – A New Look into the Complexity of Canada’s Legal Framework” (1 September 2021), online: *Government of Canada* <[www.justice.gc.ca/eng/csj-sjc/franc/dual/index.html](http://www.justice.gc.ca/eng/csj-sjc/franc/dual/index.html)> [perma.cc/L3V8-BVPC]

<sup>100</sup> See Martens, *supra* note 97.

<sup>101</sup> See *ibid.*

<sup>102</sup> Customary international law refers to international obligations arising from established international practices. States recognize that treaties and customary international law are sources of international law and, as such, are *binding*.

<sup>103</sup> Jan Wouters & Sten Verhoeven, “The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide” (2005) 5 Intl Crim L Rev at 401.

<sup>104</sup> See Anees Ahmed & Merryn Quayle, “Can genocide, crimes against humanity and war crimes be pardoned or amnestied?” (2009) 79 Amicus Curiae 15 at 20.

134 countries.<sup>105</sup> Furthermore, the recent inclusion of genocide in the Statutes of the International Criminal Tribunal for Rwanda (“ICTR”) and the former Yugoslavia (“ICTY”) reflect the international community’s determination to eradicate genocide.<sup>106</sup> This belief is reaffirmed by the International Court of Justice in its Advisory Opinion concerning the *Genocide Convention* in which it emphasized the binding character of the prohibition of genocide, even on States that have not subscribed.<sup>107</sup> Although a strong argument exists for genocide to be considered a *jus cogens*, this is only one small step in the quest to obtain convictions—Canada’s exclusion of the fifth prong in conjunction with the date of the ICC’s jurisdiction pose significant hurdles in the way of prosecution under the *Genocide Convention*.

Another issue with the genocide framework is the difficulty in proving intent. Although the Canadian Government has shown a clear intent to destroy Indigeneity in terms of cultural genocide, it would be far more difficult to meet the high burden of proof that the accused—whether that be the Government, Church, or Clergy Member X—had specific intent to physically or biologically destroy the targeted group. For prosecution to occur, this high legal standard must be met, and intent clearly shown. This article does not intend to argue that intent was not present; however, if the goal is prosecution, then proving the intent standard, along with the jurisdictional and legislative issues, make the genocide framework more difficult to meet than pursuing CAH convictions. Moreover, genocide and CAH hold equal significance in the eyes of the law—a more lenient charge is not substituted here, merely a more feasible one. Lastly, Trudeau’s reluctance to recognize Residential Schools as a genocidal act reflects the federal government’s continued denial of this crime—prompting a debate that continues throughout the international community. Comparatively, there is a clearer case for Residential Schools meeting the legal standard of a CAH as they reflect a highly organized and systematic attack against the Indigenous population in Canada. With this strategy, it is still possible to recognize that genocide occurred—a fundamental truth that must be accepted for reconciliation—while acknowledging that it is not the most viable framework for obtaining convictions that would legally confirm that

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<sup>105</sup> *Ibid* at 18.

<sup>106</sup> *Ibid* at 17.

<sup>107</sup> See *ibid*.

atrocious crimes were committed against Indigenous victims through Canada's establishment and operation of Residential Schools.

This article recommends using the CAH framework to prosecute those responsible for Residential Schools as its flexible nature can address the unique harms caused by different perpetrators. As the above reflects, murder, torture, sexual violence, persecution, and other inhumane acts were committed at Residential Schools and could provide the appropriate mechanisms for pursuing criminal accountability under the CAH framework. The CAH framework offers the potential of a two-pronged conviction: punishing both the individual responsible for the specific crime, and the Canadian Government and Churches which instituted and enforced the policy. The policy creating these Schools meet the CAH criteria of a highly organized and systematic attack against the Indigenous population, and the specific underlying crimes can be tailored by the prosecutorial system to meet the experiences of the individual victims and perpetrators. In a general sense, other inhumane acts<sup>108</sup> will likely encompass a large percentage of the crimes committed due to the nature of these Schools—the entire system was inhumane and thus, most people in the system had knowledge of how their specific acts furthered the inhumanity. Nonetheless, the crime of murder must be included to account for individuals who died; torture, sexual violence, and persecution must be included to account for those who suffered; and other inhumane acts must be included to account for the inhumane conditions experienced by both survivors and victims.

## IV. RESIDENTIAL SCHOOLS AS A CRIME AGAINST HUMANITY

### A. Avenues of Accountability

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<sup>108</sup> At the time some Residential School crimes were committed, the “other inhumane acts” category encompassed more acts that have since been distinguished as stand-alone crimes. For example, the *London Agreement* in 1945 defined CAH as “murder, extermination, enslavement, deportation, and other inhumane acts.” Thus, current CAH stand-alone crimes such as torture and sexual violence may have been defined as “other inhumane acts” at the time of commission but have since been explicitly enumerated. See Norman JW Goda, “Crimes Against Humanity and the Development of International Law” (15 September 2021), online: *The National WWII Museum* <[www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law](http://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law)> [perma.cc/YU4A-7T39].

CAH require a widespread or systematic attack directed against any civilian population or identifiable group pursuant to or in furtherance of a state or organizational policy to commit such attack.<sup>109</sup> This crime involves either large-scale violence in relation to the number of victims, its extension over a widespread geographic area, or a methodical/systematic type of violence.<sup>110</sup> Random, accidental, or isolated acts of violence are excluded from this definition. Furthermore, the plan or policy need not be explicitly stipulated or formally adopted and can be inferred from the totality of the circumstances.<sup>111</sup> CAH can occur during times of war or peace, making them unique from war crimes as they are not isolated acts committed by individual soldiers, but are instead committed in furtherance of state policy. Under both customary international law and the ICC Statute, a CAH requires that an “underlying crime” be committed in the context of what is known as the “chapeau element.” The chapeau element requires that a CAH include not only a widespread or systematic attack, but that the perpetrator have knowledge of the attack (the *mens rea* requirement) and their actions constitute “part of” the attack, or that they intend their conduct to be part of the attack.<sup>112</sup> At trial, the chapeau element must be established as a circumstantial element in addition to the *mens rea* and *actus reus* requirements.<sup>113</sup>

### *1. Customary International Law*

The first prosecution of a CAH occurred during the Nuremberg Trials in which Nazi war criminals, including doctors, high-ranking officials, army officers, and SS officers employed at concentration camps, were tried before the International Military Tribunal.<sup>114</sup> *The London Agreement & Charter*

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<sup>109</sup> See e.g. *Rome Statute*, *supra* note 20, at Art 7.

<sup>110</sup> See *ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> See Robert Dubler SC & Matthew Kalyk, “Crimes against Humanity under Customary International Law and the ICC: *The Chapeau Elements*” in *Crimes against Humanity in the 21st Century*, (Leiden, The Netherlands: Brill Nijoff, 2018) at 638.

<sup>113</sup> *Prosecutor v Kayishema & Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999) at para 126 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR (pdf): <[ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MS45055R0000620218.PDF](http://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MS45055R0000620218.PDF)> [perma.cc/HNR5-KQUK].

<sup>114</sup> Emily Rajakovich, “London Agreement & Charter, August 8, 1945” (1 September 2015), online: *Robert H. Jackson Centre* <[www.roberthjackson.org/article/london-agreement-charter-august-8-1945/](http://www.roberthjackson.org/article/london-agreement-charter-august-8-1945/)>.

("London Agreement") was the basis for these Trials, defining which crimes defendants could be charged with—namely, crimes against peace, war crimes, and CAH.<sup>115</sup> The *London Agreement* was originally signed by the United States, England, France, and the Soviet Union, with 19 nations later accepting the *Agreement* provisions.<sup>116</sup> Moreover, the *London Agreement* explicitly stated that the Tribunal shall have powers to try and punish those who committed CAH, regardless of whether the acts were in violation of the domestic law existing in the country where they were perpetrated.<sup>117</sup> Unlike genocide and war crimes, CAH has yet to be codified in a dedicated treaty of international law; however, the prohibition of CAH is considered a *jus cogens* of international law from which no derogation is permitted by any State.<sup>118</sup> In 1998, the *Rome Statute* establishing the International Criminal Court came into force, setting forth legal standards for the administration of international justice.<sup>119</sup> Canada was the fourteenth country to sign the *Rome Statute*.<sup>120</sup> In 2000, Canada enacted the *Crimes Against Humanity and War Crimes Act* ("the Act"), becoming the first country in the world to adopt comprehensive legislation implementing the *Rome Statute*.<sup>121</sup> A month later, Canada ratified the *Rome Statute*.<sup>122</sup> Despite this recent timeframe for Canada's formal adoption of CAH legislation, it can be argued that customary international law existed for decades prior.

Customary international law can be used to prosecute those responsible for Residential Schools and bypass the existing temporal limitations. Some of these limitations include the ICC's temporal jurisdiction extending only to crimes committed on or after July 1, 2002, and the Federal Government's inability to advocate for individual criminal

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<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

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

<sup>118</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, "Crimes Against Humanity" (nd), online: *United Nations* <[www.un.org/en/genocideprevention/crimes-against-humanity.shtml](http://www.un.org/en/genocideprevention/crimes-against-humanity.shtml)> [perma.cc/9ABB-RJ3T].

<sup>119</sup> See *ibid.*

<sup>120</sup> See "Canada and the Rome Statute," online: *Parliamentarians for Global Action* <[www.pgaction.org/ilhr/rome-statute/canada.html](http://www.pgaction.org/ilhr/rome-statute/canada.html)> [perma.cc/W4Y2-9V7U].

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

prosecutions.<sup>123</sup> There is also confusion surrounding who is able to commence proceedings against the accused—some believe that the consent of Canada’s Deputy Attorney General is necessary for charges to be initiated under the Act, while the Attorney General has argued that this office lacks the necessary jurisdiction to order an investigation.<sup>124</sup> There are also arguments that Canada lacks the ability to retroactively punish those accused of CAH that occurred before the enactment of the Act in 2000.<sup>125</sup> Nonetheless, as the next sections explore, customary international law allows for CAH committed as of at least 1975 to be prosecuted, and Canadian jurisprudence has reiterated that belief. The ICC’s involvement is also not necessary if Canada were to create a hybrid tribunal. Despite these temporal debates, a feasible route exists to side-step the limitations and obtain prosecutions.

The Extraordinary Chambers of the Courts of Cambodia (“ECCC”) was established in 2006 to prosecute those responsible for the war crimes, CAH, and genocide committed by the Khmer Rouge regime between April 1975 and December 1979. Thus, the ECCC was an *ad hoc* Cambodian Court with international participation from the United Nations, applying both domestic and international law.<sup>126</sup> During these trials, the ECCC found that murder, extermination, enslavement, deportation, imprisonment, and the residual category of “other inhumane acts” were recognized as CAH under customary international law as of 1975 or earlier.<sup>127</sup> The ECCC also found that CAH need not be committed in connection to armed conflict as of at least 1975, dropping the so-called

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<sup>123</sup> See Rachel Gilmore, “What can Canada do to prosecute residential school crimes? Here’s what we know” (29 July 2021), online: *Global News* <[globalnews.ca/news/8067396/residential-school-abuse-perpetrators-charges-survivors/](http://globalnews.ca/news/8067396/residential-school-abuse-perpetrators-charges-survivors/)> [perma.cc/RCH5-NM2]?view-mode=server-side&type=image].

<sup>124</sup> See Gilmore, *supra* note 123; Nick Boisvert, “Why criminal charges for deaths at residential schools would be unprecedented - and enormously complex” (27 July 2021), online: *CBC News* <[www.cbc.ca/news/politics/residential-school-criminal-charges-1.6081337](http://www.cbc.ca/news/politics/residential-school-criminal-charges-1.6081337)> [perma.cc/VVK9-L6JC].

<sup>125</sup> See *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513 [*Finta*]; *Munyaneza v R*, 2014 QCCA 906 [*Munyaneza*].

<sup>126</sup> See *Prosecutor v Nuon Chea and Khieu Samphan*, 002/01, Judgment (7 August 2014) (Extraordinary Chambers in the Courts of Cambodia), online (pdf): ECCC <[www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_E NG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_E NG.pdf)> [perma.cc/4GJ4-5WYL].

<sup>127</sup> *Ibid* at para 410-458.

“armed conflict nexus” required by the International Military Tribunal (“IMT”).<sup>128</sup> The principle of legality requires prosecution based upon clear provisions of international law at the time the crime was committed.<sup>129</sup> This principle involves the derivation of specificity and certainty, requiring that definitions of crimes be sufficiently clear and precise.<sup>130</sup> International jurisprudence and researchers assert that this principle is not violated if the requirements of foreseeability and accessibility are satisfied. Customary law is not excluded from application if it meets these standards and has been relied upon in numerous criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.<sup>131</sup>

Canada’s *Crimes Against Humanity and War Crimes Act* recognizes the existence of customary international law directly in its definition. This definition states that conduct may constitute a CAH according to “customary international law or conventional international law” or by virtue of it being criminal according to general principles of law recognized by the community of nations, regardless of whether it constitutes a contravention of law in force at the time of commission.<sup>132</sup> The *Act* makes special reference to Article 7 of the *Rome Statute*, which defines CAH at the ICC, as reflecting customary law as of July 17, 1998, but notes that this does not limit or prejudice the application of any other existing rules of international law.<sup>133</sup> Due to the customary nature of CAH, it can be argued that prosecution for Residential School crimes was both foreseeable and accessible as of at least 1975, if not earlier, despite Canada’s *Act* not coming into force until 2000.<sup>134</sup>

It is important to note that the *Act* treats crimes committed within Canada differently from those committed outside of Canada.<sup>135</sup> For CAH committed outside of Canada, the *Act* states that such offenses were part of customary international law or was criminal according to the general

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<sup>128</sup> *Ibid* at para 177.

<sup>129</sup> Yudan Tan, “The Identification of Customary Rules in International Criminal Law” (2018) 34:2 *Utrecht J Intl & European L* 92 at 94.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid* at 95.

<sup>132</sup> *Crimes Against Humanity and War Crimes Act*, supra note 20, s 55.

<sup>133</sup> *Ibid*.

<sup>134</sup> See supra note 126, at para 410-458.

<sup>135</sup> Although the *Act* fails to explicitly state that its application to crimes committed within Canada is prospective only, it is presumed prospective absent explicit language to the contrary.

principles of law recognized by the community of nations before the coming into force of either; (1) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945, or, (2) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.<sup>136</sup> For CAH committed within Canada, the Act only opines that the *Rome Statute's* CAH provisions reflected customary law as of 1998, and is silent as to the temporal applicability of the Act for conduct occurring in Canada.<sup>137</sup> The net result is that the Act appears to only apply to alleged CAH or war crimes committed in Canada from 2000 onwards, while extending the temporally applicability of the Act indefinitely backward in time, so long as the relevant crime existed generally under international law at the time of its commission.

This selective retroactivity is problematic for numerous reasons: firstly, if the Act can be rendered retroactively applicable to crimes outside Canada, there is no cogent reason to think of it as more problematic to do so within Canada. If we accept that these offences existed independently within international law dating back to at least Nuremberg, then the question of whether Canadian courts can prosecute is strictly jurisdictional and not a matter of *ex post facto* criminalization. Secondly, it is troublesome that the Canadian Government would see it as unproblematic to exercise a form of universal jurisdiction in a backwards looking fashion for crimes committed outside the country, while exercising domestic jurisdiction only forward looking for crimes committed within the country. Similar to the exclusion of the fifth prong of the *Genocide Convention*, the Canadian Government's selective retroactivity solely for crimes committed outside the country appears to hint that it was aware of its potential role in CAH committed at Residential Schools and beyond. By restricting the Act's jurisdiction over crimes committed within Canada, the Government perceivably intended to limit its criminal responsibility and exempt Canadian actors from prosecution under the Act.

Canada can amend its Act so that it applies retroactively to crimes committed within Canada. This would be permissible under the Canadian *Charter of Rights and Freedoms* ("Charter") and in line with the norms of

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<sup>136</sup> *Crimes Against Humanity and War Crimes Act*, *supra* note 20, s 55.

<sup>137</sup> *Ibid.*

international criminal law.<sup>138</sup> The *Charter* explicitly permits the retroactive application of criminal laws if the relevant conduct was criminalized by international law at the time of its commission.<sup>139</sup> Thus, it would not offend the *Charter* to amend the *Act* so that CAH committed in Canada prior to 2000 could be prosecuted in a Canadian court. The limitation on the retroactive application to crimes committed in Canada is an intentional jurisdictional gap that can be altered to expand jurisdiction to include these crimes. There are no legal arguments to prevent the *Act* from being amended; rather, it appears, as stated above, that the Canadian Government wanted to restrict its liability by making the *Act* prospective only in its application to crimes committed within the country. Although some may argue that amending the *Act* is unnecessary as crimes committed within Canada prior to 2000 can simply be prosecuted under domestic criminal law, this overlooks that some Residential School conduct would not have amounted to a crime under domestic criminal law at the time of commission. For example, some “inhumane acts” would not constitute a crime according to Canadian domestic law but would constitute a CAH under international law. Since Canada’s domestic criminal law cannot be utilized to sufficiently prosecute the range of crimes committed at Residential Schools, the *Act* must be amended to provide an avenue for accountability.

## ***2. Crimes Against Humanity and War Crimes Act***

The first prosecution of a CAH occurred during the Nuremberg Trials in which Nazi war criminals, including doctors, high-ranking officials, army officers, and SS officers employed at concentration camps, were tried before the International Military Tribunal.<sup>140</sup> *The London Agreement & Charter* (“*London Agreement*”) was the basis for these Trials, defining which crimes defendants could be charged with—namely, crimes against peace, war crimes, and CAH.<sup>141</sup> The *London Agreement* was originally signed by the United States, England, France, and the Soviet Union, with 19 nations

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<sup>138</sup> *Canadian Charter of Rights and Freedoms*, s 11(g), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

<sup>139</sup> *Ibid.*

<sup>140</sup> Emily Rajakovich, “London Agreement & Charter, August 8, 1945” (1 September 2015), online: *Robert H. Jackson Centre* <[www.roberthjackson.org/article/london-agreement-charter-august-8-1945/](http://www.roberthjackson.org/article/london-agreement-charter-august-8-1945/)>.

<sup>141</sup> *Ibid.*

later accepting the *Agreement* provisions.<sup>142</sup> Moreover, the *London Agreement* explicitly stated that the Tribunal shall have powers to try and punish those who committed CAH, regardless of whether the acts were in violation of the domestic law existing in the country where they were perpetrated.<sup>143</sup> Unlike genocide and war crimes, CAH has yet to be codified in a dedicated treaty of international law; however, the prohibition of CAH is considered a *jus cogens* of international law from which no derogation is permitted by any State.<sup>144</sup> In 1998, the *Rome Statute* establishing the International Criminal Court came into force, setting forth legal standards for the administration of international justice.<sup>145</sup> Canada was the fourteenth country to sign the *Rome Statute*.<sup>146</sup> In 2000, Canada enacted the *Crimes Against Humanity and War Crimes Act* (“the Act”), becoming the first country in the world to adopt comprehensive legislation implementing the *Rome Statute*.<sup>147</sup> A month later, Canada ratified the *Rome Statute*.<sup>148</sup> Despite this recent timeframe for Canada’s formal adoption of CAH legislation, it can be argued that customary international law existed for decades prior.

Customary international law can be used to prosecute those responsible for Residential Schools and bypass the existing temporal limitations. Some of these limitations include the ICC’s temporal jurisdiction extending only to crimes committed on or after July 1, 2002, and the Federal Government’s inability to advocate for individual criminal prosecutions.<sup>149</sup> There is also confusion surrounding who is able to commence proceedings against the accused—some believe that the consent of Canada’s Deputy Attorney General is necessary for charges to be initiated under the *Act*, while the Attorney General has argued that this

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, “Crimes Against Humanity” (nd), online: *United Nations* <[www.un.org/en/genocideprevention/crimes-against-humanity.shtml](http://www.un.org/en/genocideprevention/crimes-against-humanity.shtml)> [perma.cc/9ABB-RJ3T].

<sup>145</sup> See *ibid.*

<sup>146</sup> See “Canada and the Rome Statute,” online: *Parliamentarians for Global Action* <[www.pgaction.org/ilhr/rome-statute/canada.html](http://www.pgaction.org/ilhr/rome-statute/canada.html)> [perma.cc/W4Y2-9V7U].

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> See Rachel Gilmore, “What can Canada do to prosecute residential school crimes? Here’s what we know” (29 July 2021), online: *Global News* <[globalnews.ca/news/8067396/residential-school-abuse-perpetrators-charges-survivors/](http://globalnews.ca/news/8067396/residential-school-abuse-perpetrators-charges-survivors/)> [perma.cc/RCH5-NM2]?view-mode=server-side&type=image].

office lacks the necessary jurisdiction to order an investigation.<sup>150</sup> There are also arguments that Canada lacks the ability to retroactively punish those accused of CAH that occurred before the enactment of the Act in 2000.<sup>151</sup> Nonetheless, as the next sections explore, customary international law allows for CAH committed as of at least 1975 to be prosecuted, and Canadian jurisprudence has reiterated that belief. The ICC's involvement is also not necessary if Canada were to create a hybrid tribunal. Despite these temporal debates, a feasible route exists to side-step the limitations and obtain prosecutions.

The Extraordinary Chambers of the Courts of Cambodia ("ECCC") was established in 2006 to prosecute those responsible for the war crimes, CAH, and genocide committed by the Khmer Rouge regime between April 1975 and December 1979. Thus, the ECCC was an *ad hoc* Cambodian Court with international participation from the United Nations, applying both domestic and international law.<sup>152</sup> During these trials, the ECCC found that murder, extermination, enslavement, deportation, imprisonment, and the residual category of "other inhumane acts" were recognized as CAH under customary international law as of 1975 or earlier.<sup>153</sup> The ECCC also found that CAH need not be committed in connection to armed conflict as of at least 1975, dropping the so-called "armed conflict nexus" required by the International Military Tribunal ("IMT").<sup>154</sup> The principle of legality requires prosecution based upon clear provisions of international law at the time the crime was committed.<sup>155</sup> This principle involves the derivation of specificity and certainty, requiring that

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<sup>150</sup> See Gilmore, *supra* note 123; Nick Boisvert, "Why criminal charges for deaths at residential schools would be unprecedented – and enormously complex" (27 July 2021), online: CBC News <[www.cbc.ca/news/politics/residential-school-criminal-charges-1.6081337](http://www.cbc.ca/news/politics/residential-school-criminal-charges-1.6081337)> [perma.cc/VVK9-L6JC].

<sup>151</sup> See *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513 [Finta]; *Munyaneza v R*, 2014 QCCA 906 [Munyaneza].

<sup>152</sup> See *Prosecutor v Nuon Chea and Khieu Samphan*, 002/01, Judgment (7 August 2014) (Extraordinary Chambers in the Courts of Cambodia), online (pdf): ECCC <[www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf)> [perma.cc/4GJ4-5WYL].

<sup>153</sup> *Ibid* at para 410-458.

<sup>154</sup> *Ibid* at para 177.

<sup>155</sup> Yudan Tan, "The Identification of Customary Rules in International Criminal Law" (2018) 34:2 *Utrecht J Intl & European L* 92 at 94.

definitions of crimes be sufficiently clear and precise.<sup>156</sup> International jurisprudence and researchers assert that this principle is not violated if the requirements of foreseeability and accessibility are satisfied. Customary law is not excluded from application if it meets these standards and has been relied upon in numerous criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.<sup>157</sup>

Canada's *Crimes Against Humanity and War Crimes Act* recognizes the existence of customary international law directly in its definition. This definition states that conduct may constitute a CAH according to "customary international law or conventional international law" or by virtue of it being criminal according to general principles of law recognized by the community of nations, regardless of whether it constitutes a contravention of law in force at the time of commission.<sup>158</sup> The Act makes special reference to Article 7 of the *Rome Statute*, which defines CAH at the ICC, as reflecting customary law as of July 17, 1998, but notes that this does not limit or prejudice the application of any other existing rules of international law.<sup>159</sup> Due to the customary nature of CAH, it can be argued that prosecution for Residential School crimes was both foreseeable and accessible as of at least 1975, if not earlier, despite Canada's Act not coming into force until 2000.<sup>160</sup>

It is important to note that the Act treats crimes committed within Canada differently from those committed outside of Canada.<sup>161</sup> For CAH committed outside of Canada, the Act states that such offenses were part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either; (1) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945, or, (2) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.<sup>162</sup> For CAH committed within Canada, the Act only opines that the *Rome Statute's* CAH

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<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid* at 95.

<sup>158</sup> *Crimes Against Humanity and War Crimes Act*, *supra* note 20, s 55.

<sup>159</sup> *Ibid.*

<sup>160</sup> See *supra* note 126, at para 410-458.

<sup>161</sup> Although the Act fails to explicitly state that its application to crimes committed within Canada is prospective only, it is presumed prospective absent explicit language to the contrary.

<sup>162</sup> *Crimes Against Humanity and War Crimes Act*, *supra* note 20, s 55.

provisions reflected customary law as of 1998, and is silent as to the temporal applicability of the Act for conduct occurring in Canada.<sup>163</sup> The net result is that the Act appears to only apply to alleged CAH or war crimes committed in Canada from 2000 onwards, while extending the temporally applicability of the Act indefinitely backward in time, so long as the relevant crime existed generally under international law at the time of its commission.

This selective retroactivity is problematic for numerous reasons: firstly, if the Act can be rendered retroactively applicable to crimes outside Canada, there is no cogent reason to think of it as more problematic to do so within Canada. If we accept that these offences existed independently within international law dating back to at least Nuremberg, then the question of whether Canadian courts can prosecute is strictly jurisdictional and not a matter of *ex post facto* criminalization. Secondly, it is troublesome that the Canadian Government would see it as unproblematic to exercise a form of universal jurisdiction in a backwards looking fashion for crimes committed outside the country, while exercising domestic jurisdiction only forward looking for crimes committed within the country. Similar to the exclusion of the fifth prong of the *Genocide Convention*, the Canadian Government's selective retroactivity solely for crimes committed outside the country appears to hint that it was aware of its potential role in CAH committed at Residential Schools and beyond. By restricting the Act's jurisdiction over crimes committed within Canada, the Government perceivably intended to limit its criminal responsibility and exempt Canadian actors from prosecution under the Act.

Canada can amend its Act so that it applies retroactively to crimes committed within Canada. This would be permissible under the Canadian *Charter of Rights and Freedoms* ("Charter") and in line with the norms of international criminal law.<sup>164</sup> The *Charter* explicitly permits the retroactive application of criminal laws if the relevant conduct was criminalized by international law at the time of its commission.<sup>165</sup> Thus, it would not offend the *Charter* to amend the Act so that CAH committed in Canada prior to 2000 could be prosecuted in a Canadian court. The limitation on the retroactive application to crimes committed in Canada is an intentional

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Canadian Charter of Rights and Freedoms*, s 11(g), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

<sup>165</sup> *Ibid.*

jurisdictional gap that can be altered to expand jurisdiction to include these crimes. There are no legal arguments to prevent the Act from being amended; rather, it appears, as stated above, that the Canadian Government wanted to restrict its liability by making the Act prospective only in its application to crimes committed within the country. Although some may argue that amending the Act is unnecessary as crimes committed within Canada prior to 2000 can simply be prosecuted under domestic criminal law, this overlooks that some Residential School conduct would not have amounted to a crime under domestic criminal law at the time of commission. For example, some “inhumane acts” would not constitute a crime according to Canadian domestic law but would constitute a CAH under international law. Since Canada’s domestic criminal law cannot be utilized to sufficiently prosecute the range of crimes committed at Residential Schools, the Act must be amended to provide an avenue for accountability.

## V. CULPABILITY OF CLERGY MEMBER X

### A. Commission of Crimes Against Humanity

Clergy Member X is meant to refer to an example of an individual who had knowledge of the attack committed against Indigenous peoples through the operation of Residential Schools, and either directly facilitated the attack or intended their conduct to be part of the attack—including teachers, clergy members, and school staff.<sup>166</sup> In order to obtain a conviction of Clergy Member X, several elements must be proven for liability to be established. A CAH conviction requires a widespread or systematic attack directed against any civilian population. “Widespread” can be defined as acts conducted on a large scale that result in a significant number of victims or the extension of these acts over a broad geographical area.<sup>167</sup> “Systematic” refers to a methodical type of violence that can be

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<sup>166</sup> Clergy Member X can also represent actors who did not directly carry out the harms but were more closely connected than individuals like Government officials. For example, actors holding the position of School principal or district superintendent may not have directly committed the crimes, but nonetheless directly facilitated them, and would require one or more modes of liability to be established by the prosecutor to connect them to the crimes.

<sup>167</sup> See Carsten Stahn, *A Critical Introduction to International Criminal Law*, (Cambridge: Cambridge University Press, 2018) at 57.

demonstrated through the existence of a plan, state or organizational policy, or through patterns of conduct.<sup>168</sup> The plan or policy need not be explicitly stipulated or formally adopted and can instead be inferred from the totality of the circumstances.<sup>169</sup> CAH are often related to a social system of oppression and domination, and the systematic element can be derived from the existence of behavior furthering such a system.<sup>170</sup> Thus, the policy may not explicitly intend to commit CAH; rather, it can simply pursue goals that could reasonably lead to CAH being committed.<sup>171</sup>

An “attack against any civilian population” means a course of conduct involving the commission of CAH against a civilian population pursuant to or in furtherance of state or organizational policy to commit such an attack.<sup>172</sup> This is a contextual element requiring large-scale violence in relation to the widespread or systematic requirements. Moreover, the attack need not be “violent” in a narrow sense as jurisprudence has held that the term encompasses any mistreatment of the civilian population so long as mistreatment satisfies the widespread or systematic requirement.<sup>173</sup> To meet these requirements, an ordinary crime under domestic law becomes an international crime when the collective action of an organization causing harm to the civilian population reaches the threshold of widespread or systematic violence.<sup>174</sup>

The Canadian Federal Government formulated an attack against the Indigenous civilian population that was both widespread and systematic. Not only did Residential Schools exist across the country, but attendance was compulsory for Treaty-status children between the ages of seven and 15. Moreover, 150,000 children were forced to attend these schools. Thus, the attack was widespread as it targeted all Treaty-status Indigenous children in Canada. The attack was also systematic due to its highly organized nature, basis on common policy governing these schools, implication of high-level authorities, and the involvement of substantial

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 95.

<sup>170</sup> See Stahn, *supra* note 167, at 57.

<sup>171</sup> *Ibid.* at 55.

<sup>172</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 172.

<sup>173</sup> *Prosecutor v Milomir Stakić*, IT-97-24-T, Judgement (31 July 2003) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online (pdf): ICTY <[www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf](http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf)> [perma.cc/2SRQ-RRZP].

<sup>174</sup> Stahn, *supra* note 167, at 52.

public and private resources.<sup>175</sup> Residential Schools actively promoted the governmental mandate under the *Indian Act* to assimilate Indigenous children and eliminate Indigeneity. The Federal Government was deeply involved in the creation, facilitation, and enforcement of Residential Schools which reflects a highly organized plan and patterned conduct to dismantle Indigenous culture and further settler-colonial domination. Although the Federal Government's explicit intent was not to commit CAH, it was nonetheless pursuing an attack that could reasonably lead to CAH—especially considering the lack of School funding and oversight, and the widespread knowledge of abuses, diseases, and deaths.

### *1. Mens Rea, Actus Reus & the Chapeau Element*

For Clergy Member X to be prosecuted, both *mens rea* and *actus reus* must be established, in addition to the chapeau element linking their conduct to the Federal Government's attack. The *mens rea* element requires that the prosecution prove the actor's knowledge of, but not necessarily responsibility for, the overarching attack.<sup>176</sup> It is the chapeau element that elevates these offenses to the status of crimes against humanity.<sup>177</sup> To satisfy the *mens rea* and chapeau elements, the actor must be aware of the attack that makes their conduct a CAH. For example, Clergy Member X must have directly facilitated the attack, had knowledge of the attack, or intended their conduct to be part of the attack. However, Clergy Member X need not have specific knowledge of the attack or policy details, and their motive for participating is irrelevant.<sup>178</sup> It does not matter whether the actor committed the crime(s) for purely personal reasons as their position at the School was anchored in the broader attack.<sup>179</sup> Similarly, it is irrelevant whether the actor intended their acts to be directed against the targeted population or a specific victim.<sup>180</sup> Rather, the actor must simply be generally

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<sup>175</sup> See *ibid* at 57.

<sup>176</sup> *Ibid* at 93.

<sup>177</sup> Robert SC Dubler & Matthew Kalyk, "Crimes against Humanity under Customary International Law and the ICC," *supra* note 110, at 705.

<sup>178</sup> See Stahn, *supra* note 167, at 43.

<sup>179</sup> See *Prosecutor v Jadranko Prlić*, IT-04-74, Judgement (29 May 2013) (International Criminal Tribunal for the former Yugoslavia, Trial Chambers), online (pdf): ICTY <[www.icty.org/x/cases/prlic/tjug/en/130529\\_summary\\_en.pdf](http://www.icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf)> [perma.cc/5LA4-C6YY].

<sup>180</sup> See *Prosecutor v. Kunarac, Kovac and Vukovic*, 96-23-T and IT-96-23/1-T, Appeals Chamber Judgement (12 June 2002) (International Criminal Tribunal for the former

aware of the attack and a nexus must exist between their conduct and the overall attack. Moreover, as ICTY jurisprudence holds, knowingly running the risk that one's conduct may be part of the greater attack is sufficient to establish the knowledge requirement.<sup>181</sup> Thus, a sufficient showing that Clergy Member X had general knowledge of the attack and either intended their conduct to further or be a part of the attack, or knowingly ran the risk that their conduct could contribute to the attack, will establish the *mens rea* element.

In *Finta*, the Supreme Court of Canada held that, while the average citizen is not expected to know CAH or war crimes in detail, everyone has inherent knowledge that such actions are wrong and not tolerated.<sup>182</sup> The Court has reiterated that the mental element of CAH must involve an awareness of the facts or circumstances which would bring the acts within the definition of a CAH, but it is not necessary to establish that the actor knew that their actions were inhumane.<sup>183</sup> Rather, it is sufficient if the prosecutor establishes that a reasonable person would view the conduct as inhumane.<sup>184</sup> Furthermore, the Court has held that the *mens rea* requirement of a CAH is met if it can be established that the actor was willfully blind<sup>185</sup> to the facts or circumstances that would bring his or her actions within the provisions of the offence.<sup>186</sup> For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars transporting Jews to concentration camps, that is sufficient to convict him of CAH even though he did not know that his actions in loading people into those boxcars was inhumane.<sup>187</sup> Once knowledge is established, or the fact that the actor was reckless in regard to their conduct, the specific motive or intent is irrelevant.<sup>188</sup> Most importantly, the Court held that

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Yugoslavia, Trial), at para 103 online (pdf): [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf).

<sup>181</sup> *Ibid* at para 81.

<sup>182</sup> See *Finta*, supra note 125 at para 214-15.

<sup>183</sup> *Ibid* at para 95.

<sup>184</sup> *Ibid* at para 104, 162.

<sup>185</sup> The willfully blind standard was reiterated in the *R c. Munyanzeza* Superior Court decision, where the court held that the actor must either have knowledge that their acts were part of the widespread or systematic attack, or that they were willfully blind to that fact. See *R c. Munyanzeza*, 2009 QCCS 2201, at para 126.

<sup>186</sup> *Finta*, supra note 125, at para 95-98.

<sup>187</sup> *Ibid* at para 98.

<sup>188</sup> See *Ibid* at para 301; *Munyanzeza*, supra note 125, at para 159.

knowledge can be inferred from the circumstances, public knowledge of the attacks, the scope of violence, or the historical and political context.<sup>189</sup> In this regard, the Court has held that intention, knowledge, recklessness, or willful blindness can fulfil the *mens rea* requirement for a CAH conviction. Under this reasoning, it is possible to establish that Clergy Member X had knowledge or was willfully blind to the ways in which Residential Schools formed an attack against the Indigenous civilian population—especially when the appalling conditions of Residential Schools made national headlines and could reasonably be considered public knowledge.

In *Prosecutor v Van Anraat*, Van Anraat was convicted as an accessory to war crimes for supplying Saddam Hussein’s Iraqi regime between 1987 and 1988 with at least 1,160 tons of Thiodyglycol, a chemical used to make mustard gas.<sup>190</sup> Although this chemical has civilian applications, the Supreme Court of the Netherlands held that Van Anraat “knew” that the chemical would be used for the production of mustard gas.<sup>191</sup> Although Van Anraat did not personally commit the war crime or supply the weapons with which they were committed, he made a “conscious” and “substantial” contribution to the extensive and gross violations of international law under Saddam Hussein.<sup>192</sup> The Netherlands’ Court of Appeal affirmed the trial decision, holding that serious violations of the law of war had been committed, and reiterating that increased vigilance is required by people and companies to avoid prosecution and long-term prison sentences.<sup>193</sup> On July 20, 2010, the European Court of Human Rights unanimously rejected Van Anraat’s claims challenging the jurisdiction of the Netherland courts and the legal certainty of the criminal acts being prosecuted.<sup>194</sup> The European Court of Human Rights also found that, at the time Van Anraat supplied the Thiodyglycol, a norm of customary international law existed prohibiting the use of mustard gas either against an enemy in an international conflict or against civilian populations affected by an

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<sup>189</sup> *Munyaneza*, *supra* note 125 (citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 254 DLR (4th) 200) at para 159.

<sup>190</sup> *Prosecutor v. Frans van Anraat*, Netherlands Supreme Court, Judgment (in Dutch), (30 June 2009), LJN: BG4822, 07/10742, online: The Hague Justice Portal <[www.asser.nl/upload/documents/20121129T050720-Van%20Anraat%20Supreme%20Court%20Judgment\\_30-06-09\\_NL.pdf](http://www.asser.nl/upload/documents/20121129T050720-Van%20Anraat%20Supreme%20Court%20Judgment_30-06-09_NL.pdf)>.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

international conflict.<sup>195</sup> While this case focused on the commission of war crimes, the reasoning is equally applicable to CAH. This case highlights that, when knowledge can be established, individuals directly involved yet further removed from the CAH commission can be held criminally responsible for their involvement. This is especially relevant when considering that as early as 1907, when Dr. Bryce reported on his horrific discoveries, the Canadian Government and Church “knew” of the School conditions that their policy was creating and maintaining. Similarly, it can be argued that school staff who were implementing the governmental policy “knew” of the consequences—whether it be death, abuse, or disease—and were both consciously and substantially contributing to the commission of CAH.

It is important to note that the Supreme Court Chamber of the ECCC has interpreted the post-World War II jurisprudence and the Nazi *Medical Case* as including the notion of *dolus eventualis*, or a formulation of recklessness,<sup>196</sup> in the definition<sup>197</sup> of murder as a CAH.<sup>198</sup> The Chamber concluded that while the Nazi doctors had a complete disregard for life when conducting their brutal experiments, or even considered the death as an expected outcome, in some instances it was the objective to determine whether survival was possible in extreme conditions or while suffering from severe disease.<sup>199</sup> These experiments required endangering lives with the knowledge that death was a likely outcome. Therefore, while the *Medical Case* made no explicit reference to the *mens rea* standard applied, the Trial Chamber was satisfied that criminal responsibility can be attributed for intentional killing even if the perpetrator acted with less than direct

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<sup>195</sup> *Ibid.*

<sup>196</sup> Sometimes translated as advertent recklessness—a heightening form of recklessness almost rising to a level of willful blindness.

<sup>197</sup> It must be noted, however, that this finding has been controversial and other courts have found otherwise. See Robert SC Dubler & Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security* (Leiden, The Netherlands: Brill Nijhoff, 2018) at 752-53.

<sup>198</sup> *Prosecutor v Brđanin*, IT-99-36, Judgement (2004 September 1) (International Criminal Tribunal for the former Yugoslavia, Trial), online (pdf): ICTY <[www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf](http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf)> [perma.cc/5DJ6-YM5B] at para 395; *Prosecutor v Khieu Samphan*, 002 F54/4, Appeal Judgment (19 September 2007) (Extraordinary Chambers in the Courts of Cambodia) at para 54, online (pdf): ECCC/SC <[www.eccc.gov.kh/sites/default/files/documents/court/5Bdate-intz%5D/F53\\_4\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/court/5Bdate-intz%5D/F53_4_EN.PDF)>.

<sup>199</sup> *Ibid* at para 54, n 158.

intent.<sup>200</sup> The Chamber also concluded that this form of reckless killing existed as customary international law by at least<sup>201</sup> 1975.<sup>202</sup> Thus, because Residential School experiments were conducted with the knowledge that death was a likely result, these actions can meet the standard of a CAH even if the perpetrator acted without a direct intent to kill.

The *actus reus* element can be established by a showing of any CAH conduct; namely, murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission committed against the Indigenous civilian population. *Actus reus* is the specific factor giving the crime a requisite international dimension permitting extraterritorial prosecution and distinguishing it from an “ordinary crime” that the state is expected to prosecute, and raising the conduct to the level of an international crime.<sup>203</sup> Where the crime is especially widespread and directed against an entire population or an identifiable group within the population, foreign enforcement is particularly important because there is the likelihood that the state’s government is not willing to prosecute—and may even be the source of the crimes.<sup>204</sup> It is essential to establish *actus reus* not only as an evidentiary standard, but also to prove that the crimes committed are of international severity.

## ***2. Fitting the Framework: Murder, Torture, Sexual Violence, Persecution & Other Inhumane Acts***

There is no question that the Federal Government and Church institutions are culpable of CAH for formulating, or furthering, policy to attack and destroy Indigeneity. Not only did the Government create a plan in which it was foreseeable that crimes would be committed given the circumstances, it also made no attempt to discover or control criminal acts

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<sup>200</sup> *Ibid* at para 55.

<sup>201</sup> It is important to reiterate that the ECCC found that these legal principles were settled by at least 1975 and many scholars argue that relevant principles (e.g., dropping the war crimes nexus for CAH) happened significantly earlier. However, no authoritative judicial body has assessed the exact date that the nexus was dropped, so it is presumed to have occurred sometime between Nuremburg and 1975. See e.g. Robert Dubler SC & Matthew Kalyk, “Crimes against Humanity under Customary International Law and the ICC: *The Chapeau Elements*,” *supra* note 110 at 676-79.

<sup>202</sup> See *Prosecutor v Khieu Samphan*, *supra* note 198 at para 56.

<sup>203</sup> *Finta*, *supra* note 125, at para 287-88.

<sup>204</sup> *Ibid* at para 288.

committed, even after receiving information that indicated a need for investigation—starkly illustrated by Dr. Peter Henderson Bryce’s reports. For comparison, the Nuremberg Trials illustrate that the Government and high-ranking institutions/officials are not the only culpable actors in the commission of CAH and war crimes. At Nuremberg, in addition to Nazi party leaders and governors, army officers, medical professionals, industrialists, and SS officers employed at concentration camps were tried and convicted.<sup>205</sup> By holding individuals responsible for their direct facilitation of the attack, Nuremberg promoted the ideal that no one is immune from prosecution. Moreover, the ICTY prosecuted low level actors first not only because those individuals were the ones who physically perpetrated, or were intimately familiar with, the crimes, but also because it formed connections with and established evidence implicating higher-level actors. While it may seem that targeting Clergy Member X is inconsequential, the cumulative effect of this approach repeated with convictions of multiple Residential School staff can, cumulatively over time, provide a picture of culpability pertaining to higher-level individuals who were less physically attached to the actual crimes but were responsible for the formation of policy or superior orders. For these reasons, individuals such as Clergy Member X, who committed CAH through their own conduct, should be held responsible for their participation in the attack against Indigenous civilians.

Clergy Member X could be held liable for numerous crimes committed at Residential Schools. For those individuals who committed murder, or willful killing, the *mens rea* standard requires a showing that the accused had intent to kill or inflict serious bodily injury in reckless disregard of human life.<sup>206</sup> The *actus reus* for this offense is established when the death of the victim is a result of the actions or omissions of the actor.<sup>207</sup> The accused’s conduct must be a substantial cause of the victim’s death, and the victim must be a member of the civilian group being attacked.<sup>208</sup> Here, Clergy Member X could fulfil the requirements of a CAH conviction for

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<sup>205</sup> Rajakovich, *supra* note 114.

<sup>206</sup> See Human Rights Watch, *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, (2004) at 39-40, online (pdf): <[www.hrw.org/reports/2004/ij/digest.pdf](http://www.hrw.org/reports/2004/ij/digest.pdf)> [perma.cc/Z9VV-NZSG]. [“Genocide, War Crimes, and Crimes Against Humanity”].

<sup>207</sup> *Ibid* at 130.

<sup>208</sup> *Ibid*.

committing intentional murder or conducting nutritional experiments, withholding food, failing to improve conditions knowingly spreading disease, or for any other conduct resulting in willful killing or serious bodily injury that resulted in the victim's death. Moreover, as the persuasive ECCC jurisprudence holds, reckless killing lacking a direct intent to cause death can be considered a CAH.<sup>209</sup>

Clergy Member X could also be held liable for torture as a CAH. The *mens rea* standard requires that the actor's act or omission be intentional and be committed with the intent of obtaining information, punishing, intimidating, coercing, or discriminating against the victim on any ground.<sup>210</sup> The *actus reus* for this offense is established when the actor inflicts, by act or omission, severe mental or physical pain and suffering.<sup>211</sup> Moreover, the victim must be in the actor's custody or control, and no specific purpose for committing the torture is needed (other than the broad nexus to the attack).<sup>212</sup> Many of the crimes committed at Residential Schools readily fulfil this framework, including physical abuse, nutritional experiments, or the use of electric chairs, as students were in the custody/control of Clergy Member X and Clergy Member X intended the act as a form of punishment, intimidation, or discrimination.

Clergy Member X could also be held liable for the countless instances of sexual violence<sup>213</sup> committed at Residential Schools. The *mens rea* for this offense requires that the actor intended to commit a sexual act to which

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<sup>209</sup> See *Prosecutor v Nuon Chea and Khieu Samphan*, 002 F36, Appeal Judgment (19 September 2007) (Extraordinary Chambers in the Courts of Cambodia) at para 396, 409, online (pdf): ECCC/SC <[www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36\\_EN\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36_EN_0.pdf)>.

<sup>210</sup> See "Genocide, War Crimes, and Crimes Against Humanity," *supra* note 206, at 42-43.

<sup>211</sup> Rome Statute, *supra* note 20.

<sup>212</sup> *Ibid.*

<sup>213</sup> The *Rome Statute* enumerates more sexual violence crimes than the ICTY and ICTR Statutes. Consequently, acts of sexual violence that are not specifically enumerated in the *Rome Statute*, or did not explicitly exist in customary international law at the time of their commission, may have to be charged under the residual category of "other inhumane acts." See Angela Banks "Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes" at 7 (2005) William & Mary Law School Scholarship Repository, Faculty Publications, online (pdf): <[scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs](http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs)> [perma.cc/W765-YMPZ].

the victim did not voluntarily consent.<sup>214</sup> Additionally, the act must have been committed by force, threat of force, or coercion that created a level of fear, duress, detention, psychological oppression or abuse of power against the victim, or in an environment that created a coercive environment.<sup>215</sup> The *actus reus* for this offense requires that the actor commit rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.<sup>216</sup> This offense is especially applicable when considering the widespread sexual abuse at Residential Schools, coupled with the inability for most, if not all, students to consent due to their age and the overall coercion existing throughout the School system.

Persecution is another crime in which Clergy Member X could be held liable. Persecution must be carried out in execution of or in connection with any other CAH act.<sup>217</sup> The *mens rea* for this offense requires that the actor deliberately committed any other CAH act with the intent to discriminate on political, racial, or religious grounds.<sup>218</sup> The *actus reus* requires that a fundamental right recognized under customary international or treaty law be denied or infringed upon.<sup>219</sup> With the exception of persecution, discriminatory intent is not required when committing any other CAH act.<sup>220</sup> With systemic racism underlying Residential School policy, any crime committed by Clergy Member X with the specific intent of targeting the victim because of their Indigenous identity can meet the requirements of persecution.

Lastly, there is a strong likelihood that Clergy Member X committed other inhumane acts when intentionally causing great suffering or serious injury to the victim's physical or mental health. In order to fulfil the *mens rea* requirement of this offense, it must be shown that the inhumane acts were committed deliberately against the victim.<sup>221</sup> The *actus reus* requires a showing of an act that is of similar gravity<sup>222</sup> to the enumerated crimes of

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<sup>214</sup> *Ibid* at 23.

<sup>215</sup> *Ibid* at 21.

<sup>216</sup> *Ibid* at 8, 21.

<sup>217</sup> *Ibid* at 25-26.

<sup>218</sup> *Ibid* at 26.

<sup>219</sup> *Ibid*.

<sup>220</sup> Stahn, *supra* note 167 at 41.

<sup>221</sup> Banks, *supra* note 213 at 27-28.

<sup>222</sup> For example, the ICTY found that forcing prisoners to perform oral sex on one another constituted other inhumane acts. Similarly, the ICTR found that the forced

murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution.<sup>223</sup> The ICTR defines this category as acts that constitute a serious attack on the human dignity of the targeted civilian community as a whole.<sup>224</sup> Moreover, the specific conduct underlying inhumane acts need not itself be expressly criminal.<sup>225</sup> Instead, this category requires a case-specific analysis to consider the nature of the act or omission, the context in which it occurred, and the impact on the victim.<sup>226</sup> For instance, it could be established that Clergy Member X committed numerous inhumane acts, such as feeding students moldy and inedible food. Additionally, depending on the acts committed and the time of commission, this residual category may encompass some forms of sexual violence and torture committed at Residential Schools.<sup>227</sup> Conditions at these schools could be compared to those at prisons, particularly in the former Yugoslavia. These conditions, such as food deprivation, were prosecuted as both war crimes and CAH at the ICTY.<sup>228</sup> Moreover, the argument that the authority who ran the prisons lacked the resources to properly care for the internees was rejected as a possible defense.<sup>229</sup> These

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undressing and marching of women in public was also an inhumane act. See *ibid* at 29.

<sup>223</sup> *Ibid* at 28.

<sup>224</sup> *Ibid* at 29.

<sup>225</sup> See Rome Statute, *supra* note 20.

<sup>226</sup> *Ibid*.

<sup>227</sup> For further explanation, see footnotes 107, 227.

<sup>228</sup> See e.g. *Prosecutor v Nikolić*, IT-94-2-1, Indictment (4 November 1994) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), at para 24, online (pdf): ICTY <[www.icty.org/x/cases/dragan\\_nikolic/ind/en/nik-ii941104e.pdf](http://www.icty.org/x/cases/dragan_nikolic/ind/en/nik-ii941104e.pdf)> (charging Nikolic with CAH under the “inhumane acts” category for failure to provide prisoners with adequate food); see Diana Kearney, “Food Deprivations as Crimes Against Humanity” (2013) 46:253 Intl L & Politics 253, 266.

<sup>229</sup> See e.g. *Prosecutor v Rutaganda*, ICTR-96-3, Judgement and Sentence Chamber (6 December 1999) at para 84 (International Criminal Tribunal for Rwanda, Trial Chamber), online (pdf): ICTR <[ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-03/MS17328R0000620659.PDF](http://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-03/MS17328R0000620659.PDF)> [<https://perma.cc/M4K4-HZEP>] (“It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.”); *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) at para 8 (International Criminal Tribunal for Rwanda, Trial Chamber), online (pdf): ICTR <[unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf](http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf)> [[perma.cc/3RSL-5539](https://perma.cc/3RSL-5539)] (holding that either an act or omission may constitute a crime against humanity).

findings are highly persuasive that conditions at Residential Schools constitute inhumane and indefensible acts.

## **B. Major Hurdles Hindering Prosecution**

Despite both Canadian jurisprudence and customary international law consistently holding that CAH committed as of at least 1975 are prosecutable, numerous hurdles exist in the way of prosecutions. Although this article argues otherwise, some scholars and governmental officials contend that jurisdiction does not exist under Canada's Act, or that international customary law is not applicable.<sup>230</sup> For example, the differing retroactive applicability of the Act to offenses committed within versus outside of Canada may pose an issue, although this is a legislative choice and not something mandated by fundamental principles of justice or legality. As stated above, the Canadian Government is more than capable of amending its Act to apply retroactively to crimes committed within Canada and provide Canadian courts with jurisdiction to prosecute. There are also conflicting opinions on how best to initiate charges, with legal counsel for the Native Women's Association of Canada arguing that, in order for the Act<sup>231</sup> to be applied, Canada's Attorney General must provide consent to proceed.<sup>232</sup> Conversely, the Attorney General has argued that this office lacks the necessary jurisdiction to order an investigation, despite the Act explicitly requiring the Attorney General's personal consent for investigations to commence.<sup>233</sup> These conflicting opinions signal confusion regarding the Act's application and jurisdiction that require clarification in order for charges to be laid. Additional funding to increase staff resources, education, and administration could help to address these issues and ensure that means exist for launching prosecutions.<sup>234</sup>

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<sup>230</sup> See e.g. Gilmore, *supra* note 123; Boisvert, *supra* note 124.

<sup>231</sup> Nonetheless, this Association agrees that the Act is one legal option that the Canadian Government could proceed under to obtain convictions. See Gilmore, *supra* note 123.

<sup>232</sup> See *ibid.*

<sup>233</sup> See Boisvert, *supra* note 124; *Crimes Against Humanity and War Crimes Act*, *supra* note 20 s 55.

<sup>234</sup> See Valerie Oosterveld, *Canada and the Development of International Criminal Law: What Role for the Future?* (2018), online (pdf): Centre for International Governance and Innovation <[www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.16web.pdf](http://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.16web.pdf)> [perma.cc/64FD-SUYG] at 8, 13.

The type of violence committed at Residential Schools also hinders prosecution. International criminal law tends to focus on instances of familiar and fast manifestations of CAH and war crimes. By narrowing the focus and perceived temporal boundaries of justice, social and legal definitions of harm, victims, and perpetrators reconceptualize how the ICC and treaty countries construe international crimes.<sup>235</sup> The heavy emphasis on highly visible international crimes demonstrates a general failure to recognize and prioritize structural or bureaucratic forms of violence that promote prolonged victimization.<sup>236</sup> In terms of Residential Schools, not only did government policy create a general acceptance of the Schools for many decades, but the Government also sufficiently concealed, or detracted from the crimes committed. In this regard, CAH committed at the Schools can be defined as “hidden” atrocities—not that Canada was unaware of the crimes committed, but because the social policy validated and successfully obscured the crimes from the mainstream discourses of atrocity and international crime.<sup>237</sup> The CAH perpetrated at Residential Schools, and the many victims stemming from these crimes, are “forgotten” in terms of international law because of the means used to commit the harms: enforcement of settler-colonial society, socio-economic oppression, and situations in which the victims are deprived of basic rights producing harms cumulatively over time.<sup>238</sup> Although the narrowing definition of CAH must be acknowledged as a prosecutorial hurdle, Canada’s Federal Government could heed the requests to broaden the definition of violence and international crimes by defining Residential School crimes for what they are: CAH.

Locating those responsible, including Clergy Member X, poses a challenge given the number of culpable individuals and the historic nature of the crimes. However, as part of the *Settlement Agreement*, the Federal Government previously contracted 17 private investigation firms and located 5,315 alleged abusers from Residential Schools.<sup>239</sup> Although these individuals were located for purposes of determining compensation for

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<sup>235</sup> See Randle DeFalco, “Time and Visibility of Slow Atrocity Violence” (2021) 21 Intl Crim L Rev 905, 907.

<sup>236</sup> *Ibid* at 912.

<sup>237</sup> *Ibid* at 910.

<sup>238</sup> See *Ibid* at 913.

<sup>239</sup> Martha Troian, “Indian residential schools: 5,300 alleged abusers located by Ottawa” (2 February 2016), online: *CBC News* <[www.cbc.ca/news/indigenous/residential-school-alleged-abusers-iap-1.3422770](http://www.cbc.ca/news/indigenous/residential-school-alleged-abusers-iap-1.3422770)> [perma.cc/MB6D-R783].

survivors rather than to lay criminal charges, this nonetheless demonstrates that the Government has kept record of the offenders and is capable of locating them.<sup>240</sup> Moreover, the fact that some individuals were charged for sex crimes committed at Residential Schools indicates that prosecutions—and convictions—are possible, even if the crimes occurred decades earlier. For example, Arthur Plint was sentenced in 1995 for the sexual abuse he committed at Residential Schools between 1947 and 1968.<sup>241</sup> Plint’s charges were initiated following an inquiry by the Nuu-chah-nulth Tribal Council on Vancouver Island that linked 130 survivors to three Residential Schools operating in the area.<sup>242</sup> The TRC has also systematically located numerous culpable individuals.<sup>243</sup> An investigation similar to the one conducted for the *Settlement Agreement* or by the TRC would act as a logical starting point for CAH prosecutions. Furthermore, the *Settlement Agreement* requires<sup>244</sup> the Canadian Government to research, locate, and contact individuals named as perpetrators of abuse during the Independent Assessment Process.<sup>245</sup> Successful convictions like that of Plint provide a glimmer of hope for future investigations, but it must also be recognized that, due to the length of time it took to lay charges against Plint, most of his victims had taken their own lives or died of alcohol abuse—highlighting

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<sup>240</sup> See *ibid.*

<sup>241</sup> Hopper, *supra* note 18.

<sup>242</sup> See *ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> This agreement also requires the release of certain documents pertaining to Residential Schools. However, Churches, the Federal Government, and Provincial Governments have consistently failed or refused to release such documents. For example, the Sisters of St. Ann, which staffed the Kamloops Residential School (where remains of 215 children were recently acknowledged), refuse to share certain documents relating to the internal working of the congregation, as well as the School’s “narrative.” Another congregation has refused to provide personnel files of the individuals staffed at numerous Residential Schools. Furthermore, the Federal Government has been in court since 2020 attempting to block the creation of statistical reports on Residential School abuse claims. In 2017, the Supreme Court of Canada ruled that thousands of files documenting abuse at Residential Schools should be destroyed. The Federal Government has claimed to have met all TRC requirements and argues that no further action is required on their part. See Angela Sterritt & Jennifer Wilson, “Catholic order that staffed Kamloops residential school refuses to share records families seek” (14 June 2021), online: *CBC News* <[www.cbc.ca/news/canada/british-columbia/catholic-order-staffed-kamloops-residential-school-refuses-share-records-1.6065322](http://www.cbc.ca/news/canada/british-columbia/catholic-order-staffed-kamloops-residential-school-refuses-share-records-1.6065322)> [perma.cc/9GKS-KHMW].

<sup>245</sup> Gilmore, *supra* note 123.

another significant hurdle in prosecutions.<sup>246</sup> Irrespective, the disclosure of perpetrator names is a crucial starting point for accountability efforts.

Successful examples of investigations exist in the realm of international criminal law providing a framework for Canada to follow. For example, the ICTR created a taskforce to locate, apprehend, and prosecute individuals responsible for the Rwanda Genocide. The International Residual Mechanism for Criminal Tribunals (“IRMCT”), established by the United Nations Security Council in 2010, was responsible for locating and arresting indicted individuals still at large.<sup>247</sup> This taskforce resulted in 93 indictments, 75 trials, and 61 convictions—all occurring more than 20 years after the Genocide was committed.<sup>248</sup> Although these numbers do not reflect the successful prosecution of every culpable individual involved, it sends a clear message that international crimes must be confronted in a court of law. The way forward to obtain convictions may not be clear, but the mandate surely is: Canada must initiate investigations and hold those responsible for the CAH committed.

The Federal Government’s failure to locate those responsible for Residential School crimes should come as no surprise to those familiar with Canada’s deficient record of prosecuting others accused of CAH and war crimes. Not only does Canada often wash its hands of responsibility concerning alleged war criminals by failing to prosecute or deport those suspected, but it also rarely utilizes its own Act that enshrines universal jurisdiction over international crimes.<sup>249</sup> In fact, since its passage in 2000, the Act has only been used twice to prosecute two individuals linked to the Rwandan Genocide.<sup>250</sup> Moreover, the Act has not been utilized in over a decade.<sup>251</sup> The utter failure to employ the Act with jurisdiction to prosecute CAH committed on Canadian soil before 2000, and the rare use of it concerning crimes committed elsewhere, reflects that Canada grossly underfunds and underuses its available resources to prosecute.<sup>252</sup> If Canada’s failures are framed in terms of settler-colonial society, the

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<sup>246</sup> See Hopper, *supra* note 18.

<sup>247</sup> “ICTR” (nd), online: *International Justice Resource Centre* <[ijrcenter.org/international-criminal-law/ictr/](http://ijrcenter.org/international-criminal-law/ict/)> [perma.cc/6Q5D-VQFB].

<sup>248</sup> See *ibid.*

<sup>249</sup> Amnesty International, *supra* note 19.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

Government's hesitation to adequately investigate Residential School crimes becomes even clearer; time and time again, Canada refuses to go beyond the bare minimum<sup>253</sup> to achieve reconciliation as outlined in the TRC Report and *Settlement Agreement*. If Canada seeks to legitimize itself as an international criminal law ally, it must amend its *Act* to confer Canadian courts with retroactive temporal jurisdiction over conduct occurring both outside and within Canada's borders and prosecute individuals accused of masterminding and carrying out CAH without distinction.

## VI. OBTAINING JURISDICTION TO PROSECUTE

### A. Creating a Hybrid Tribunal

Feasible routes exist if Canada's Federal Government truly desires justice in a court of law for Residential School crimes. Although there are evidentiary burdens existing and some culpable actors will inevitably escape punishment, for decades the Government has avoided taking action despite the existence of sufficient evidence to begin meaningful investigations. The Government has the capability to approach Indigenous communities and form a partnership to define wants and needs of the aggrieved, and to establish a tribunal tasked with locating, apprehending, and prosecuting those responsible. Nothing prevents the establishment of such a tribunal—the CAH committed are recognized under international customary law at the time of commission regardless of whether Canada explicitly enumerated them in its *Criminal Code*, and the crimes are thus prosecutable. Canada, through its support of tribunals including the ICTY, ICTR, and ECCC, reflects the belief that crimes of international gravity must be confronted, including those that happened decades ago. However, this understanding must extend to crimes committed on Canadian soil—even when the Canadian Government was complicit in the commission.

The Supreme Court of Canada held in *Finta* that customary international law forms part of Canada's domestic law and that an actor's charges are not retroactive so long as the underlying conduct was criminal according to Canadian law existing during the crime's commission. The only lingering issue is that of jurisdiction. Unlimited temporal jurisdiction for CAH, restricted only by the armed conflict nexus elimination, appears to have existed under customary international law as of 1975 or earlier, and

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<sup>253</sup> For further explanation, see footnote 249.

likely significantly earlier. Since the ICC has only temporal jurisdiction for crimes committed on or after July 1, 2002, Canada must derive temporal jurisdiction to prosecute the CAH committed before this date. The ECCC, for example, was a hybrid tribunal using both domestic and international law, and derived temporal jurisdiction through the creation of such a tribunal.<sup>254</sup> Canada could approach the United Nations Security Council to create a similar ad-hoc, hybrid tribunal like the ECCC to exercise temporal jurisdiction over those responsible for the CAH committed in Canada against Indigenous civilians. An agreement with the UN would detail the international community's role with the tribunal. Although a hybrid tribunal would be a joint creation of the Canadian Government and UN, it would be independent of them—that is, the tribunal exists as a Canadian court with international participation that applies international standards. Moreover, due to the Canadian Government's involvement in the CAH perpetrated, and the international nature of the crimes, a hybrid tribunal will assist in meeting the international standards of justice and lessen the likelihood of bias. This would also provide an opportunity for the inclusion of sovereign Indigenous nations within Canada, as well as Indigenous judges and lawyers. For example, Indigenous judges from Indigenous courts across the country could be called on to serve.

This tribunal would be tasked with prosecuting the international crimes committed in Canada against Indigenous populations since the elimination of the armed conflict nexus requirement. A benefit of creating a hybrid tribunal is that the trial would be held in Canada using Canadian staff and judges with assistance from foreign personnel. This structure allows for the creation of a tribunal in partnership with Indigenous sovereign nations to ensure a mutually equitable approach while also allowing for the involvement of Indigenous judges. A hybrid tribunal would also allow the UN and Canada to define the organizational structure, as well as the criminal procedure in general terms, and set forth the tribunal's jurisdiction—for example, it could propose focusing on CAH committed after WWII and 1996, with the Court empowered to assess when the armed conflict nexus was dropped and having that moment serve as the starting point for the assessments of CAH. This tribunal would act as a role model for court operations existing in Canada. Customary international law and the Act provide Canada with the ability to prosecute CAH and, through

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<sup>254</sup> *Prosecutor v Nuon Chea and Khieu Samphan*, *supra* note 126.

the creation of a hybrid tribunal established with the UN, temporal jurisdiction could exist over the individuals who committed the CAH. For these reasons, creating a hybrid tribunal is a logical starting point if Canada truly wishes to act and obtain prosecutions.

## B. Exercising Universal Jurisdiction

Universal jurisdiction is another route that could be pursued to obtain prosecutions. Universal jurisdiction refers to another state's ability to prosecute individuals charged with international crimes, including CAH, based on the principle that such crimes harm the international community.<sup>255</sup> The state may prosecute the actor accused of committing such crimes if they are currently in state territory, regardless of where the alleged crimes occurred or the nationality of the accused or victims, so long as personal jurisdiction can be obtained.<sup>256</sup> Generally, universal jurisdiction is invoked when other traditional bases of criminal jurisdiction are unavailable, or when the country where the crimes were committed is unable—or unwilling—to prosecute. Universal prosecution has been used to effectively advocate for prosecutions in numerous instances, including in trials against Nazis and their collaborators post-WWII.<sup>257</sup> Canada itself has codified this principle in its Act, and has brought two universal jurisdiction cases against individuals accused of involvement in the Rwandan Genocide, including *Munyaneza*.<sup>258</sup>

Universal jurisdiction can assist with securing prosecutions where Canada has failed to do so, be it through a lack of political will, ineffective investigations, decisions by the Crown to decline prosecutions, or failures of the Canadian Government to request extradition.<sup>259</sup> States where accused individuals currently reside may be reluctant to extradite citizens, but are more willing to pursue investigations and trials under their own system.<sup>260</sup> Aside from the genuine goal of obtaining justice, universal jurisdiction serves as a shaming mechanism against Canada and spurs

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<sup>255</sup> Mark Kersten, "Justice for Indigenous Peoples in Canada: All Options on the Table, including Universal Jurisdiction" (14 July 2021), online: *Justice in Conflict* <[justiceinconflict.org/2021/07/14/justice-for-indigenous-peoples-in-canada-all-options-on-the-table-including-universal-jurisdiction/](https://justiceinconflict.org/2021/07/14/justice-for-indigenous-peoples-in-canada-all-options-on-the-table-including-universal-jurisdiction/)> [perma.cc/RE7S-WC6T].

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

action at a domestic level. Canada perceives itself as a human rights champion—despite its poor record reflecting otherwise—and another state initiating an investigation or prosecuting an individual for their role in CAH, while Canada sits idly by would be damning to this reputation on both a national and international level.<sup>261</sup>

There are several limitations to universal jurisdiction to consider. The effectiveness of a foreign legal system, possibly within the context of another settler-colonial (or former colonial) society, may not produce the most meaningful justice, especially if key players are absent; in this case, Indigenous communities, judges, and many witnesses. There are also procedural matters that can act as additional hurdles. Since the foreign state will apply its domestic legislation that existed at the time of the alleged acts, certain crimes, such as CAH, may not have existed at the time in which the Residential School system operated.<sup>262</sup> Alternatively, the foreign state's legislation may have a varying definition of certain crimes, such as sexual violence, and incorporate elements different from what exists in Canada.<sup>263</sup> Although customary international law may nonetheless bind the foreign state in similar ways to which Canada is bound, certain criminal definitions may vary which could leave individuals with an incomplete sense of justice. Other limitations include the possibility of proceedings conducted in a foreign language, as well as the application of differing jurisprudence and rules of evidence.<sup>264</sup> Thus, it is important to assess the foreign state's criminal justice system to determine whether a meaningful outcome could be obtained. It also must be noted that many foreign state faces issues similar to Canada in locating and apprehending the accused—especially given the lack of Church and Government cooperation and continuing concealment of necessary records.<sup>265</sup> However, action cannot be taken without the consent of Indigenous communities to define the goals and objectives for justice. The differing views of justice existing across Indigenous communities must also be recognized and respected. There is no perfect approach to accountability for international crimes, but

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<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> See Kersten, *supra* note 255; Anya Zoledziowski, “Criminally Charge Canada and the Catholic Church For Residential Schools: Experts” (June 15 2021), online: *VICE* <[www.vice.com/en/article/wx5xww/criminally-charge-canada-and-the-catholic-church-for-residential-schools-experts](http://www.vice.com/en/article/wx5xww/criminally-charge-canada-and-the-catholic-church-for-residential-schools-experts)> [perma.cc/7YG7-JGSS].

numerous routes nonetheless exist for the Canadian Government to consider.

## VII. CONCLUSION

For well over a century, crimes against humanity were committed at Residential Schools. The School system reflected a widespread and systematic attack on the Indigenous civilian population with the clear intent to destroy their Indigeneity. The murder, torture, sexual violence, persecution, and other inhumane acts committed by school staff, as depicted in the example of Clergy Member X, constituted an unconscionable attack. The Canadian Government, along with the Church, created and operated Residential Schools with the intent to “destroy the Indian in the child,” and were responsible for the forced separation of over 150,000 children from their families and communities. Once at these schools, children experienced horrific abuse—abuse the Government either condoned or knowingly ignored. Clergy Member X had general knowledge of this attack and furthered it through their direct commission of crimes. Although this article focuses on prosecuting only Clergy Member X, this approach, cumulatively over time, establishes a pattern of tacit consent pertaining to higher-level decision-makers who were likely less physically present, but no less responsible for the actual crimes—namely Government and Church officials. It should not be denied that genocide has also been committed against Indigenous peoples but deploying the CAH framework offers the potential of a two-pronged conviction: punishing both the individual responsible for the specific crime and the Canadian Government and Church that instituted and enforced the policy.

Thousands of unmarked graves reflect the gravity of crimes committed. The difficult process of linking the perpetrators to the crimes is a formidable task, but it is not an impossible one. Customary international law, Canadian jurisprudence, and amending Canada’s *Crimes Against Humanity and War Crimes Act* would provide Canada with jurisdiction to prosecute culpable individuals for crimes committed as of 1975, if not earlier. Canada then has the power to approach the United Nations Security Council and propose the creation of a hybrid tribunal, like the ECCC, to locate, apprehend, and prosecute those responsible. Alternatively, another state could exercise universal jurisdiction over

culpable actors currently residing in their territory and prosecute them under their own criminal justice system. Canada prides itself as a human rights champion, but its poor record of prosecuting international crimes and its continued denial over the CAH committed at Residential Schools show otherwise. The way forward to obtain convictions may not be clear, however, the path towards reconciliation requires Canada to initiate investigations and hold those responsible for the CAH committed. Names and records of perpetrators exist and an investigation like the one conducted for the *Settlement Agreement* or by the Truth and Reconciliation Commission would act as a logical starting point for CAH prosecutions.

The Canadian Government's hands are not tied when it comes to prosecuting those responsible for the CAH committed at Residential Schools. Although hurdles exist, feasible options remain for the Government if it truly wishes to seek justice for victims and survivors. However, any pursuit of justice must be led by Indigenous communities, and Indigenous individuals not wishing to pursue criminal prosecutions must be respected in their decision. Nonetheless, it must be acknowledged that a route can exist for those who do want formal consequences in a criminal court of law. The Government must generate these options to procure meaningful reconciliation and foster purposeful conversations and partnerships. The CAH framework provides a strategy for Indigenous groups and interested parties to move the process forward, punish guilty individuals, and ultimately force the Canadian Government to assume responsibility for the profound harm created by Residential School policy. There is no perfect approach when seeking justice, but CAH prosecutions offer a viable option to move the process toward the next step in reconciliation.