May, 2013

Agenda Item 6 - Study on the links between indigenous rights, truth commissions and other truth-seeking mechanisms on the American continent (UN DOC. E/C.19/2013/13)

Canada's Truth and Reconciliation Commission NOT the model for global adherence

Indigenous Peoples' experience with Canada's Truth and Reconciliation Commission demonstrates why the Declaration on the Rights of Indigenous Peoples so urgently requires that a mechanism be set in place which provides Indigenous Peoples as such with access to juridical recourse in relation to disputes with states, similar to the manner in which states (but presently only states) are able to seek recourse against other states through the International Court of Justice.

For several generations, Canada sought to assimilate Indigenous children into the culture of the Canadian settler population by means of its Indian Residential Schools (IRS). By forcibly seizing their children from the Indigenous Peoples and handing them over to non-indigenous institutions for their education, thereby depriving indigenous children of their traditional languages, cultures, histories and spirituality, and enforcing upon them an alien industrial Christian worldview, Canada sought to erase all traces of the indigenous holders of inherent and pre-existent sovereignty and rights, and thereby to gain access to territories, resources and jurisdiction which it was unwilling or unable to achieve by any other manner.

This policy was enacted to such ill effect and was so blatantly contrary to the Genocide Convention, which defined as genocide "those acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such," and, most specifically germane to Canada's case, (e) "Forcibly transferring children of the group to another group," that the IRS was eventually abandoned in the 1980s,

over three decades after the Genocide Convention. Canada's first apology for some of the impacts of IRS came in 1997, nearly another decade later, and a second more specific apology was issued in 2008. In the same year the Indian Residential Schools Survivors Settlement Agreement (IRSSSA) was operationalized. It established a Truth and Reconciliation Commission (TRC) to document the testimonies of survivors.

The IRSSSA and TRC as launched by the Canadian government, however, was a process which sought to extinguish Indigenous Nations' right to reparations without acknowledging the full dimension of the crimes (genocide, crimes against humanity, forced assimilation) committed against them. Instead it offered individual claimants compensation for personal injuries and abuse, establishing a ceiling limit for payments, and requiring a written "opt-out" procedure for those who spurned such paltry acknowledgements of the vastness of the damages visited not only upon themselves but upon their nations. Many who accepted the compensation payments were not informed of their legal rights by the state-funded counsel which uniformly advised them to do so.

The TRC only addressed the personal injuries of individuals (including de-culturization, sexual abuse and even sterilization, mental and emotional humiliation, and torture). It ignored the larger issue of Canada' s attempted genocide of Indigenous nations through policies of child seizure and forced assimilation, which effectively attacked and sought to destroy the very existential bases of these nations themselves: the inter-generational transmission of their unique histories, cultures, languages, and traditional and spiritual beliefs.

Most human rights experts agree that Truth and Reconciliation is not an appropriate remedy for people who have been the victims of genocide with respect to their genocidal perpetrators. Just as it would have been unthinkable to ask the Jews to enter into a Truth and Reconciliation process with their Nazi genocidaires, similarly a TRC falls far short of the mark in addressing the genocidal actions perpetrated against indigenous peoples by Canada. Where in the case of the Jews, the Nuremberg Tribunal was established to address that genocidal crime, and as a result of it, Reparations are still being paid to Jews today both individually and to Israel as presumed parens patriae, similarly this precedent should be applied in the case of Canada, making redress due not just by compensation to individuals but by reparations to the Indigenous Nations themselves, who more directly than in the case of the German Jews and the new state of Israel, are the parens patriae to whom such are owed.

Canada did not pay "reparations" -- as the Permanent Forum has termed

the payments under the Indian Residential Schools Survivors' Settlement Agreement -- to the Indigenous Peoples for the crimes against their nations exacted in the Indian Residential Schools. Canada paid compensation to individuals. That is, they paid compensation only to those individuals who were still alive in 2005 – not to the orphans, widows, parents and extended families of those who died either in the schools or because of the trauma experienced in the schools which directly caused their later deaths in substance abuse related accidents, suicide and murder.

Nor has Canada ceased its ongoing policy of forced assimilation, pursued next through the widespread and continuing removal of children from their families and communities and their placement with non-native families; through the present day BC Treaty Process seeking to extinguish Indigenous land and sovereignty rights; the Aboriginal Horizontal Framework which aims to municipalize Indigenous rights; and even more recently through legislation now being swiftly pushed through Parliament by the Harper government to the same effect: the denial of the right of self-determination of Indigenous Peoples.

Indigenous Peoples have cases against Canada which should be resolved in an international setting. But who can hear the case of complaints by Indigenous Peoples against states? Seeking such a hearing, IHRAAM submitted a petition to the Inter-American Commission on Human Rights (IACHR), seeking its ruling on an individual Líl'wat mother's right not to have her children seized by Canada when the Líl' wat have no treaty with Canada, and therefore Canada has no jurisdiction over them. IHRAAM argued that because it was impossible to raise in Canadian courts the jurisdictional issue of whether Canada had lawful jurisdiction over Líl'wat families and children, and the right to make the policy, laws and enforcement resulting therefrom, Ms. Edmonds could not get a fair trial in Canadian courts. Not only could the jurisdiction issue not be raised due to the legal principle of Nemo Potest Esse Simul Actor et Judex, but also the inability to do so had been empirically proved over a history of actual attempts to raise it.The IACHR has supported this Petition by asking Canada to respond four times to the initial Petition and subsequent IHRAAM Observations on Canada's responses, and Canada has complied. However Canada has since failed to make a fifth response to the most recent IHRAAM Observation, as requested by the IACHR. Canada has been claiming that the IACHR cannot hear the case. At this point in time IHRAAM has not heard further from the IACHR; the case has neither been admitted by the IACHR nor denied admission. While the IACHR has elected to send a representative to visit Canada, this does not remove from the table this pressing question which we must reiterate: who can hear complaints by Indigenous Peoples against states?

Indigenous Peoples have the right to self-determination. This right is guaranteed to Peoples by Article 1 of the International Covenant on Civil and Political Rights. The Indigenous are Peoples. Article 1 does not restrict this right only to some - it does not say: All Peoples except Indigenous Peoples have a right of self-determination. The efforts of state governments to impose this exemption clearly violate one of the most basic principles of international law: that of non-discrimination.

But the Human Rights Committee, mandated under the International Covenant on Civil and Political Rights to address grievances submitted "by individuals" via its Optional Protocol, is now widely understood to have effectively washed its hands of grievances related to Article 1 of the ICCPR. Further, it is not possible to raise this issue under the Genocide Convention as there is no monitoring body for same, and TO DATE indigenous nations cannot approach the International Court of Justice, the mechanism which addresses state vs. state disputes, though the Genocide Convention states in Article 9 that "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." Must indigenous peoples await the unlikely event that perpetrator states will themselves bring the issue to the ICJ, since Indigenous Peoples presently have no access? Should the ICJ be pressed to broaden its mandate to include them?

Alternatively, IHRAAM proposes that a fast-tracked process be undertaken to create a binding Convention to implement the DRIP within five (5) years, one which must be created in full partnership with indigenous experts. The resultant Convention on the Rights of Indigenous Peoples should mandate the existence of a Committee set up to monitor State Parties' compliance. An Optional Protocol attached thereto should provide for the Committee (CCRIP) to receive Complaints against States by Indigenous Peoples and Individuals.