

The Disappeared: Indigenous Peoples and the international crime of enforced disappearance

First published in [Slaw.ca](#), 20 March 2023.

By [Catherine Morris](#) and [Rebekah Smith](#)

Disproportionate violence against Indigenous persons in Canada includes uncounted disappearances of Indigenous children, women, and men. Canada's decades of failure to prevent and halt disappearances forms part of a long litany of grave international human rights [violations](#) against Indigenous Peoples. Continued reports of officially [hushed-up](#) violence lead to increasingly clarion allegations of genocide.

An unknown number of children remain unaccounted for after going [missing](#) from Canada's notorious "Indian Residential Schools." Hundreds – possibly [thousands](#) – of Indigenous women, girls, two-spirit, and others with diverse gender identities ([2SLGBTQQIA](#)) have [disappeared](#) without adequate investigation. Police have forcibly taken Indigenous persons on "[starlight tours](#)," failing to document arrests and abandoning detainees in remote locations, sometimes without sufficient clothing, food, or water.

Canada's pattern of failure to ensure effective and timely remedies for disappearances of Indigenous persons may amount to acquiescence in international crimes of enforced disappearance. Canada's international law obligations require urgent steps to end official inaction and complicity. Concrete action would include accession to and implementation of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

"Enforced disappearance" at international law: How it applies to Canada

Enforced or involuntary disappearance (EID, or "enforced disappearance") is an international crime at customary international law binding on all States, including Canada. Enforced disappearance also violates treaty rights, including multiple rights guaranteed by the *International Covenant on Civil and Political Rights* ([ICCPR](#)), to which Canada acceded in 1976.

When such grave violations are widespread or amount to systematic attacks against a civilian population, situations may become [crimes against humanity](#).

In 1992, the United Nations General Assembly (UNGA) codified international law on enforced disappearance, adopting by consensus the [Declaration on the Protection of all Persons from Enforced Disappearance](#). There are also two relevant treaties, the [Inter-American Convention on the Forced Disappearance of Persons](#), adopted in 1994 by the Organization of American States (OAS), and the *International Convention for the Protection of All Persons from Enforced Disappearance* ([ICPPED](#)), adopted by the UNGA in 2006. Canada has not signed or ratified these Conventions.

Since 2017, Canada has been [urged](#) to become a State Party to the [ICPPED](#). That year, Canadian federal, provincial, and territorial ministers "agreed to [pursue discussions](#) on the possibility of Canada becoming a party" to the [ICPPED](#). In 2018, Canada reaffirmed this intention during its third Universal Periodic Review (UPR) by the UN Human Rights Council. So far there is no timeline for completion of necessary consultations among federal, provincial, territorial, and municipal officials. Also vital are consultations with Indigenous Peoples. Canada will undoubtedly be prodded to accelerate its consultations at its [fourth UPR](#) in November 2023.

Elements of the international crime of enforced disappearance

The UN Working Group on Enforced or Involuntary Disappearances (WGEID) summarizes [three cumulative elements](#) of IED:

1. Involuntary deprivation of liberty through arrest, detention, or abduction;
2. “[Perpetrated](#) by State actors or by private individuals or organized groups... acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”; and
3. Refusal of authorities to acknowledge the deprivation of liberty or failure to give information about the fate or whereabouts of the disappeared person.

These elements of enforced disappearance arguably apply in three situations involving Indigenous persons in Canada: Children who disappeared from Canada’s Indian Residential Schools (IRS), missing Indigenous women and girls, and persons temporarily subjected to enforced disappearance by police.

The victim is placed outside all protection of the law

Enforced disappearance entails placement of disappeared persons [outside all protection of the law](#), depriving them of all other rights, often even the right to life.

The crime continues as long as the disappeared person is missing

Failure of authorities to reveal – or adequately investigate – the location of a detained person constitutes a [continuous](#) enforced disappearance until the fate or whereabouts of the person – or their remains – have been ascertained. An enforced disappearance may be longstanding or temporary.

In the context of children still missing from United States ([US](#)) Indian Boarding Schools operating from the 1800s to the 1960s, the WGEID notes the State duty to provide information about the fate and whereabouts of the disappeared. In the context of short-term disappearances, the WGEID emphasizes that “accurate information on the detention of any person deprived of his or her liberty and the place of detention should be made available [promptly](#) to family members.” In the case of disappearances perpetrated by non-State actors, governments are required to exercise due diligence by ensuring timely, effective investigations into the fate and whereabouts of every missing person.

Impunity and State acquiescence

Habitual failure of authorities to ensure timely and effective investigations of disappearances results in an expectation by perpetrators – and potential perpetrators – that they can get away with their crimes. A systemic climate of impunity may be [imputed as State acquiescence](#) in crimes of enforced disappearance.

Children disappeared from Indian Residential Schools

In May 2021, Tk’emlúps te Secwépemc First Nation in British Columbia announced the potential presence of [215 unmarked graves](#) on the grounds of the former Kamloops IRS, operated from 1890 to 1969 by the Canadian government and the Roman Catholic church.

The First Nation had organized a ground-penetrating radar survey at an apple orchard near the school after IRS survivors told of being awakened at night to dig graves there when they were [as young as six years old](#). A “juvenile tooth and rib bone” had also been found in the area. In 2015, Canada’s Truth and

Reconciliation Commission ([TRC](#)) had reported the probable existence of unmarked gravesites at former residential schools across the country.

The [TRC](#) described the IRS system as part of Canada’s “cultural genocide” against Indigenous Peoples. From [1883](#), authorities forcibly took Indigenous children from their families and communities and placed them in the schools to compel their assimilation into Euro-Canadian society. An estimated 150,000 children, ages 4 to 16, passed through the schools until the last IRS closed in 1996. Until 1969, IRS institutions were operated by Roman Catholic, Anglican, Methodist, Presbyterian, Baptist, and United churches.

Many children never returned home. Attempts by families to learn what happened to their missing children were fruitless due to lack of cooperation by churches and government agencies that ran the schools. University of Windsor research emphasizes that, “[t]he most basic of questions about missing children — Who died? Why did they die? Where are they buried? — have [never been addressed](#) or comprehensively documented by the Canadian government.”

The TRC’s 2015 [Calls to Action](#) demanded that governments and churches cooperate in “researching, locating, documenting and commemorating residential school cemeteries and other burial sites,” including revelation of records, such as maps of cemeteries and attendance records. Nearly eight years later, even after First Nations have discovered probable gravesites on their own, neither governments nor churches, save for the [United Church](#), have been fully forthcoming with their records.

While the announcement of unmarked graves in Kamloops deeply shocked Canadians, the revelation confirmed for Indigenous Peoples the “[heavy truth](#)” of what they had been saying for years. The announcement triggered survivors’ traumatic memories of physical, sexual, and emotional [brutalities](#) inflicted on them by IRS staff. The discovery prompted [nine UN experts](#) to call on Canada and the Holy See (Vatican) to conduct “full-fledged investigations” into the deaths.

Since the 2021 findings at Kamloops, First Nations have found thousands of other potential [unmarked](#) graves across Canada. While some First Nations have planned excavations, none have yet been conducted. Each First Nation has its own laws or protocols for honouring burial sites. Some IRS survivors feel that exhumation would help the process of laying child IRS victims to rest in dignity. Others prefer that the graves remain undisturbed.

In June 2022, the federal government appointed former TRC Commissioner, Kimberly Murray, of the Kahnésatake Mohawk Nation, as [Independent Special Interlocutor](#) for Missing Children and Unmarked Graves and Burial Sites. She is tasked to work with Indigenous Peoples to make recommendations to strengthen federal laws and practices to protect and preserve unmarked burial sites.

Kimberly Murray’s November 2022 progress report called for more [transparency and information](#) on how to gain timely access to IRS records. Some communities waited months before access was granted. For others, access was limited to a small subset of records deemed “relevant” by the archive.

All elements of the international crime of enforced disappearance may be present in the situation of children still missing from the IRS system: Children were forcibly detained in IRS institutions. Government officials were directly responsible for IRS policies and oversight of the schools. The disappearances of many of the children are continuing, and government efforts to cooperate with First Nations to investigate and reveal missing children’s fate and whereabouts have been at best dilatory.

Canadian authorities are obligated at international law to ensure prompt, thorough, and impartial investigations into all potentially unlawful deaths (including disappearances) in accordance with UN standards (the [Minnesota Protocol](#)). It does not matter how long ago the deaths or disappearances occurred. These international standards require that investigations be conducted with full respect for victims' relatives, who have the right to [know the truth](#) about what happened to their disappeared loved ones.

Government acquiescence in disappearances of Indigenous women and girls

Indigenous women make up approximately five percent of women in Canada, but they account for a scandalous 24 percent of women homicide victims. From 2015 to 2020, 13 percent of Indigenous women homicide victims were [missing](#) at the time of their death.

Amnesty International's 2004 [Stolen Sisters](#) report documented decades of official neglect and failure to investigate violence against Indigenous women and girls, including disappearances.

Many Indigenous women and girls remain missing. The exact number is unknown, because many disappearances have been unreported or misreported. Police have often [labelled](#) missing Indigenous women and girls as "just an Indian, out partying, on a drunk, or a runaway." Such discriminatory assumptions contribute to underreporting and miscounting of Indigenous persons' disappearances.

While most disappearances are believed to have been perpetrated by civilians rather than police, Canadian officials have demonstrated widespread, systematic, and persistent failure to properly investigate. The resulting systemic impunity is suggestive of State acquiescence in the international crime of enforced disappearance.

For years, Indigenous women's groups and human rights groups [sought](#) a national inquiry about Canada's missing and murdered Indigenous women and girls. In 2013, the UN Committee on Elimination of Discrimination Against Women (CEDAW) conducted an [inquiry](#) into allegations of systematic violations of rights of Indigenous women and girls in Canada. In March 2015 the CEDAW concluded that Canada had committed "a grave violation" of the rights of Indigenous women "by failing to promptly and thoroughly investigate the high levels of violence they suffer, including disappearances and murders." The CEDAW recommended a National Inquiry and a National Action Plan.

In December 2015, the federal government launched the [National Inquiry](#) into Missing and Murdered Indigenous Women and Girls (MMIWG). In June 2019, the National Inquiry's final report, [Reclaiming Power and Place](#), analyzed testimonies and submissions of thousands of persons. The Commissioners concluded that race-based violence against Indigenous Peoples amounted to "genocide... empowered by colonial structures evidenced notably by the *Indian Act*, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations." The report [mentioned](#) but did not elaborate on the international crime of enforced disappearances.

The National Inquiry issued 231 [Calls for Justice](#), including appeals for missing persons legislation and standardized police practices across Canada to ensure thorough investigation and regular audits of all cases of missing and murdered Indigenous people. A separate report of Métis women augmented the National Inquiry's findings with 62 Calls for Change ([Miskotahâ](#)) to address Métis needs.

The release of the National Inquiry report prompted the [UN High Commissioner for Human Rights](#) to call on Canada to investigate the genocide allegations. The Secretary General of the Organization of American States (OAS) wrote to Prime Minister Trudeau, offering to create an Interdisciplinary Group of Independent Experts (GIEI Canada) to “clarify these allegations and achieve justice.” No OAS GIEI has been formed.

Two years later, in June 2021, the Canadian government issued a National Action Plan ([NAP](#)) to “support transformational changes in laws, policies, and systems across Canada in justice, health and wellness, human security, culture, and Indigenous human rights that include inherent, Treaty, and Constitutional rights.” In May 2022, several organizations, including the National Family and Survivors Circle, released a [progress report](#) on implementation of the NAP. The report expressed concern about lack of coordination and information-sharing among governments and Indigenous organizations. Also cited was inadequacy of promised funding, and a lack of government mechanisms to account for reporting on the progress of investigations.

Canada’s deadly “starlight tours”

Neil Stonechild was a 17-year-old boy from the Saulteaux First Nation in Saskatchewan. Saskatoon police officers apprehended him just after midnight on 25 November 1990. His mother called the police on 26 November to ask if he was in custody, but police said he was not.

On 29 November 1990, Neil was found [frozen](#) to death in a field wearing only jeans, a light jacket, and one shoe. The two arresting police officers denied having any contact with Neil on the night he went missing.

Nearly a decade later, on 28 January 2000, another young man, Darrel Night, was arrested by the Saskatoon Police Service, taken outside the city, and left to walk back to Saskatoon in freezing weather wearing only a jean-jacket. Darrel Night survived and filed a complaint against the police officers who apprehended him. In February 2000, the bodies of three other young Indigenous men were found in an industrial area of Saskatoon.

Darrel Night’s story was a significant factor in the Saskatchewan government’s creation of the 2003 Commission of Inquiry ([Wright Inquiry](#)) into the death of Neil Stonechild, after the families of Neil and the other young Indigenous men found frozen to death around Saskatoon filed complaints.

The Wright Inquiry’s October 2004 report determined that the police investigation into Neil Stonechild’s death was “superficial and totally inadequate” despite suspicious circumstances, including injuries and marks likely caused by handcuffs. The two police officers who apprehended Neil Stonechild were [charged with unlawful confinement](#) and served eight-month prison terms.

However, no Saskatoon police officer has ever been tried for the deaths of any of the Indigenous people taken into police custody, then abandoned to die. It took nearly two decades, until January 2023, for Saskatchewan to implement the Wright Inquiry’s recommendation to establish a civilian police [oversight body](#).

Canada lacks a stand-alone criminal offence of enforced disappearance. This means that other insufficiently serious charges may be the only ones available in the absence of proof beyond reasonable doubt of murder or abduction.

It is feared that starlight tours may be more widespread throughout Canada. For example, in August 2019, an Ontario Provincial Police (OPP) sergeant apprehended Jeremiah Skunk, of the Mishkeegogamang First Nation, in the town of Armstrong. The sergeant abandoned Mr. Skunk far away from Armstrong, telling him he would be charged with trespassing if he returned.

Mr. Skunk [walked](#) 10 hours to the nearest community on a hot day. He had little food or water, which forced him to drink water from a roadside ditch. The OPP sergeant was not held accountable. After seeking an OPP investigation for three years, the Chief of the Gull Bay First Nation made the incident public, and in late 2022, the OPP launched a new investigation. The police sergeant has been suspended pending the outcome.

While the term “enforced disappearance” has not been used in the Wright Inquiry or news reports about starlight tours, the elements of enforced disappearance are arguably present: Arrest, failure to acknowledge and disclose the arrestee’s whereabouts, and lack of timely investigation into the fate and whereabouts of the victims. The alleged enforced disappearances continued until the victims’ fate and whereabouts were revealed through the discovery of a body in the case of Neil Stonechild or when victims turned up alive as in the cases of Darrel Night and Jeremiah Skunk.

Canada is obligated to prevent, investigate, and remedy enforced disappearances

Canadian officials’ persistent failure to prevent, investigate, and ensure timely remedies for disappearances is clear. While Parliament’s passage of 2021 [legislation](#) to implement the UN *Declaration of the Rights of Indigenous Peoples* ([UNDRIP](#)) indicated intention to end discrimination against Indigenous Peoples, Canadian officials demonstrate a continuing pattern of denial, disregard, and delay when it comes to investigating and remedying violations of rights of Indigenous Peoples and individuals.

Indigenous Peoples have advocated for themselves since colonization began. It took decades of strenuous advocacy to obtain official inquiries into disappeared IRS children, missing Indigenous women and girls, and starlight tours. The government’s pace of implementing recommendations of those official inquiries has been glacial. The delays foster impunity for those who commit or acquiesce in crimes against Indigenous persons.

Systemic impunity for enforced disappearances is a major part of Canada’s historic pattern of discrimination against Indigenous Peoples. The persistence of impunity undergirds increasingly compelling allegations of genocide. Failure to halt widespread, systematic violations against Indigenous Peoples, including enforced disappearances, also gives credence to [allegations](#) of crimes against humanity.

Sluggish deliberations on accession to the international treaty on enforced disappearances renders Canada [open to accusations](#) of hypocrisy when Canadian officials call on other countries to respect human rights or to [ratify](#) the ICPPED. Canada needs to expedite its necessary federal-provincial-territorial – and Indigenous Peoples – consultations towards accession to the ICPPED. Also needed is revision of the Criminal Code to ensure that enforced disappearance is a stand-alone offence that complies with the ICPPED.

Canadian governments also need to ensure that police and other officials implement the Minnesota Protocol for investigation of serious crimes – without discrimination – including each and every potentially unlawful death or disappearance.

These steps by Canada will combat impunity for grave crimes against Indigenous persons and will help build more just relationships between Canadian governments and Indigenous Peoples.