FINDING RETROACTIVE LIABILITY FOR THE STERILIZATION OF INDIGENOUS WOMEN UNDER INTERNATIONAL LAW

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Throughout the late twentieth century, Indigenous women in the United States and Canada have been disproportionately impacted by the legalization of forced sterilization. In both countries, thousands of Indigenous women were forced to undergo sterilization without their full knowledge or true consent. The failure of states to take sufficient legislative action to prohibit these practices and protect Indigenous women has a continuing impact into the present day. As recently as 2015, two Indigenous women living in the Canadian province of Saskatchewan came forward to a regional newspaper saying they had been coerced into consenting to sterilization procedures in 2010 and 2012. Though such practices and policies are no longer in widespread effect in the United States and Canada, their existence has left a lasting impact on Indigenous women and their communities.

This Comment evaluates options for retroactive liability for perpetrators of the forced and coercive sterilization of Indigenous women in the United States and Canada. It applies a larger international context to the issue, by considering the protections international law provides to Indigenous communities and the possible avenues of redress for human rights violations that continue to affect these Indigenous communities. This Comment also examines the possibility of reparations for Indigenous women who underwent forced or coercive sterilization procedures and for their communities. While some avenues of liability are more difficult to pursue than others, the long-lasting impact of these coercive procedures demands a response from the international legal community to redress those harms.

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TABLE OF CONTENTS

I. INTRODUCTION

The legalization of forced sterilization[1] in many states around the world has left a lasting impact on vulnerable communities. Indigenous women[2] have been disproportionately affected—in the United States, for example, it is estimated that more than one in four Indigenous women of child-bearing age during the 1970s were subjected to forced or coercive sterilization.[3] Similarly, during the same period in Canada, Indigenous people accounted for almost 25% of the total sterilizations

1. This Comment interchangeably uses the adjectives "forced," "involuntary," and "coerced/coercive" to describe the sterilization experiences of Indigenous women. While the terms have slightly different definitions and connotations, I use all three to encompass the variety of lived experiences of Indigenous women and to reflect the language that is used throughout the cited authorities.

2. This Comment uses the term "women" to reflect the language used in much of the cited authority, including relevant international declarations and conventions. Here, the term refers to any child-bearing individual who has been the victim of forced and coercive sterilization practices.

3. *See* Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q., 400, 400 (2000) (providing that at least 25% of Native American women, between the ages of fifteen and forty-four during the 1970s, were allegedly sterilized, coerced into obtaining signatures on sterilization consent forms, and subject to similar procedural faults).

performed,[4] despite their only making up around 2-3% of the population.[5] The United States and Canada provide a comparative perspective on forced and coercive sterilization practices imposed on Indigenous populations under the guise of population control. Analyzing the policies of these two states can elucidate how international and domestic laws are applied to forced sterilization practices on a global scale.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes both the traditional practices and historical sufferings of Indigenous peoples around the world and establishes a set of minimum standards for their human rights and well-being.[6] The United States and Canada both initially voted against UNDRIP when it was first adopted by the U.N. General Assembly in 2007, despite each state having significant Indigenous populations.[7] Although the United States and Canada eventually reversed their positions on UNDRIP,[8] long-standing legislation in these states legalized—and even incentivized—sterilization.[9] These practices resulted in thousands of Indigenous women undergoing operations without their full knowledge or true consent.[10] Such policies allowing sterilization are no longer in widespread effect in the United States or Canada; however, the involuntary sterilization of Indigenous women still occurs in some areas of the world.[11] In addition to the need to prevent current and future sterilizations, the long-

4. Karen Stote, *Sterilization of Indigenous Women in Canada,* CANADIAN ENCYC. (Apr. 17, 2019), https://www.thecanadianencyclopedia.ca/en/article/sterilization-of-indigenous-women-in-canada.

5. Canadian census data after 1926 is not available to the general public. *Censuses*, LIBR. & ARCHIVES CAN., https://www.bac-lac.gc.ca/eng/census/Pages/census.aspx#h (Feb. 4, 2021). However, more recent data (from 1996 to present) is available to the public on government websites. *See* Frank Trovato & Laura Aylsworth, *Demography of Indigenous Peoples in Canada*, CANADIAN ENCYC., https://www.thecanadianencyclopedia.ca/en/article/aboriginal-people-demography (Mar. 4, 2015) (finding census data on Statistics Canada). This percentage is an estimate of the total number of Indigenous people in Canada at the time, based on demographic statistics from 1996 that are available to the public. *Id.* Indigenous people made up 2.8% of the total population in Canada in 1996. *Id.*

6. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 43 (Sept. 13, 2007) [hereinafter UNDRIP].

7. *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP'T OF ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Feb. 12, 2021).

8. *See id.* (providing historical overview of efforts to draft the resolution and challenges these efforts faced).

9. ANDREA SMITH, "*Better Dead Than Pregnant*," *in* CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 79, 82 (2005).

10. *See id.* (citing a 1974 report from Government Accounting Office that estimated that over 3,000 Indigenous women in United States were sterilized between 1973–1976, though actual number is likely much higher).

11. See *infra* Section II.B for a description of the class-action suit being brought against the Canadian government by Indigenous women who were victims of forced sterilization as recently as 2017. While this paper specifically focuses on the United States and Canada, other nations have also imposed forced and coercive sterilizations on their Indigenous populations in recent years, including Peru in the early 21st Century, Uzbekistan from 2000–2013, and China as recently as 2020. *See* Ñusta Carranza Ko, *Peru's Government Forcibly Sterilized Indigenous Women from*

lasting and damaging impact of such policies on Indigenous communities necessitates that the international legal community both recognizes and remedies these historical harms.

International law provides underutilized avenues for redress for Indigenous women who have suffered human rights violations related to forced and coercive sterilization practices. According to the 1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), forced sterilization is defined as policies designed to impose "measures intended to prevent births."[12] It is considered an act of genocide, which is an act intended to destroy a national, ethnical, racial, or religious group.[13] As a result, civil liability for states may be found in the International Court of Justice (ICJ),[14] and criminal liability may be found for the individuals involved in carrying out state-sponsored policies in violation of the Genocide Convention in the International Criminal Court (ICC).[15] Unfortunately, significant barriers to prosecution exist within both.[16] Civil remedies in the form of reparations may also be sought in accordance with international law.[17] International conventions addressing the human rights of Indigenous people also provide guidance for nations, such as the United States and Canada, to address the lingering impact of their sterilization practices.[18]

Part II of this Comment will provide context to the sterilization policies of the United States and Canada throughout the twentieth century, particularly during the period from 1970–1980. This discussion will include a discourse on the broader context of the eugenics movement, an examination of the relevant states' respective

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1996 to 2011, the Women Say. Why?, WASH. POST (Feb. 19, 2021, 11:26 AM), https://www.washingtonpost.com/politics/2021/02/19/perus-government-forcibly-sterilized-indigenous-women-1996-2001-why/ (documenting ongoing lawsuits in Peru relating to forced sterilizations that occurred under authoritarian government of former Peruvian president Albert Fujimoro); Natalia Antelava, *Policy Report - Forced Sterilization of Women in Uzbekistan*, OPEN SOC'Y FOUNDS. (Dec. 2013), https://www.opensocietyfoundations.org/uploads/9b3b427b-444b-4ba4-9a33-160a31932976/sterilization-uzbek-20131212.pdf (outlining an Uzbek national policy that targets all women of reproductive age who have delivered two or more children and disproportionately impacts nation's Romany population—who are not currently recognized as Indigenous—although their communities have distinct cultural practices and have experienced colonialism in a similar way to Indigenous communities); *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, ASSOC. PRESS (June 29, 2020), https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c (describing aggressive Chinese campaigns to force various types of birth control, including sterilization procedures, upon Uighur people, resulting in a more than 60% decrease in number of births in the mostly Uighur regions of Hotan and Kashgar).

12. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

13. *Id.*

14. Statute of the International Court of Justice, Oct. 24, 1945, 33 U.N.T.S. 933.

15. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90.

16. See *infra* Part III for a discussion of the many barriers that exist to prosecution of states and individuals in the ICJ and ICC, including the issue of intent and jurisdictional challenges.

17. G.A. Res. 217 (III), *Universal Declaration of Human Rights*, art. 8 (Dec. 10, 1948) [hereinafter UDHR].

18. UNDRIP, *supra* note 6.

state-sponsored health systems, and recount some of the long-term consequences such policies have had on Indigenous communities and families. Part III will then provide broader international context to these issues and supply information about major treaties and declarations that protect the human rights of Indigenous people, as well as those of women, around the world.

Part IV will examine the protections afforded to human rights and recourses available for victims of human rights violations under international law. It will also explore some of the barriers to the application of the Genocide Convention, including the elimination of the term "cultural genocide" from the document and the reluctance of states to fully adopt the Convention. Additionally, it will then discuss the various options and limitations for finding civil and criminal liability under international law under the Genocide Convention, based on its specific definition of genocide as well as the issues with proving intent. This part will also explore options for providing reparations to victims.

Finally, Part V of this Comment will conclude with reflections on where the international community should go from here. Remedies should begin with extensive apologies from state-sanctioned health services and national governments and should be paired with generous monetary reparations, paid both directly to the victims of forced and coercive sterilization practices and to broader Indigenous communities. Additional remedies should include guarantees of non-repetition of harmful practices and meaningful policy changes that respect and protect Indigenous communities' rights and identities.

II. HISTORICAL CONTEXT

Forced and coercive sterilization policies did not have one singular motivation and did not occur under the responsibility of one single agency or individual.[19] In both the United States and Canada, these practices persisted within a political and social landscape complicated by a combination of racist and sexist policies, influences from eugenic theories, inappropriately implemented population control measures, and the dependence of low-income women on federally provided healthcare services.[20]

A. United States

1. The Eugenics Movement of the Twentieth Century and the Rise of Sterilization Procedures

While the eugenics movement and associated philosophies gained prominence around the world throughout the early and mid-twentieth century, these ideas were uniquely influential in the United States.[21] Originally designed to "have a limited

19. D. Marie Ralstin-Lewis, *The Continuing Struggle Against Genocide: Indigenous Women's Reproductive Rights*, 20 WICAZO SA REV. 71, 72 (2005).

20. *Id.*

21. *See* Gregory W. Rutecki, *Forced Sterilization of Native Americans: Later Twentieth Century Physician Cooperation with National Eugenic Policies?*, 27 ETHICS & MED. 33, 35 (2011) (describing cruel enforcement of eugenic philosophy throughout America while world-at-large

social impact," concepts of eugenics eventually developed to the point where they were considered by some to be a "cure [to] all 'social ills, from poverty and promiscuity to overcrowded institutions.'"[22] Indiana was the first U.S. state to legally authorize compulsory eugenic sterilization in 1907.[23] Many states followed Indiana's lead, and by 1974 an estimated 70,000 men and women across the country were sterilized without their consent, though the actual number of victims may be as high as 150,000.[24] This estimate includes individuals labeled "mentally deficient,"[25] convicted criminals,[26] minority women,[27] and other marginalized groups.[28] Following authorization in Indiana, thirty other U.S. states eventually adopted some form of legal compulsory sterilization,[29] oftentimes prescribing sterilization as punishment for crimes.[30] When such practices were challenged in the seminal 1927 case *Buck v. Bell*, the U.S. Supreme Court upheld the sterilization laws, allowing for the involuntary sterilization of "feeble-minded" individuals at the hands of the state.[31]

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experienced dramatic deterioration of Hippocratic ethos).

22. Tiesha Rashon Peal, *The Continuing Sterilizations of Undesirables in America*, 6 RUTGERS RACE & L. REV. 225, 227 (2004) (quoting Mike Anton, *California Confronts Its Eugenic History,* CHI. TRIB., July 17, 2003, at 21).

23. *See* Charles P. Kendregan, *Sixty Years of Compulsory Eugenic Sterilization*, 43 CHI. KENT L. REV. 123, 124 (1966) (noting that while Indiana became first state to legally authorize compulsory eugenic sterilization in 1907, twenty-nine states followed, each creating their own legislation that allowed such sterilizations to occur).

24. *See* Terry Gross, *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR: FRESH AIR (Mar. 7, 2016, 1:22 PM), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations (interviewing author Adam Cohen about his book that revisits *Buck v. Bell* ruling and explores its connection to eugenics movement of the 20th Century); *see also* Peal, *supra* note 22, at 229 ("[I]n 1974, Judge Gesell stated that 'an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs.'").

25. *See* Buck v. Bell, 274 U.S. 200 (1927) (affirming the sterilization of women labeled as "feeble-minded" as a sound practice to prevent an increased population of "feeble-minded" individuals).

26. *See* Kendregan, *supra* note 23, at 125 (citing State v. Feilen, 126 P. 75 (1912), which affirmed lower court ruling that sentenced criminal defendant to undergo sterilization following his conviction on charge of statutory rape).

27. *See* Gross, *supra* note 24 (noting that minorities, poor people, and "promiscuous" women in particular were often targeted by state-mandated sterilization policies).

28. *Id.*

29. Kendregan, *supra* note 23, at 124.

30. *Id.*

31. *See* Buck v. Bell, *supra* note 25 (declaring sterilization of Carrie Buck, a woman described by court as "feeble-minded," constitutional and that women with "defects" should not have right to bear children). Recent scholarship has shown that Carrie Buck's diagnosis was false, that her defense lawyer conspired with a lawyer for the state of Virginia to guarantee that the sterilization law would be upheld in the lower courts, and that Buck's illegitimate child was not a result of promiscuity—Buck was raped by a relative of her foster parents. Paul Lombardo, *Eugenic Sterilization Laws*, IMAGE ARCHIVE ON THE AM. EUGENICS MOVEMENT, http://www.eugenicsarchive.org/html/eugenics/essay8text.html (last visited Oct. 10, 2021). Buck's child, Vivian, was also proven not to be "feeble-minded" based on her school records. Nathalie Antonios & Christina Raup, *Buck v. Bell (1927)*, EMBRYO PROJECT ENCYC. (Jan. 1, 2021),

Despite the holding in *Buck v. Bell*, many of the state statutes providing for sterilization as a punishment for crimes were eventually declared unconstitutional. [32] In *Skinner v. Oklahoma*, the Supreme Court recognized that the right to have offspring was a "sensitive and important area of human rights."[33] The *Skinner* Court overruled a statute in Oklahoma that allowed for the sterilization of "habitual criminals," or individuals who had been convicted of two or more felonies involving "moral turpitude."[34] In its decision, the Court considered the significance of the right to reproduce, and the destructive potential of compulsory sterilization practices declaring that:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[35]

Notwithstanding its recognition of the right to reproduce as a "basic liberty," the Court upheld its earlier decision in *Buck v. Bell*, which allowed for the application of sterilization laws to those who could be considered "feeble-minded."[36] The *Skinner* Court emphasized that the earlier holding in *Buck v. Bell* did not violate the Equal Protection Clause as it helped to achieve the goal of equality by allowing "those who otherwise must be kept confined to be returned to the world and thus open[ing] the asylum to others."[37] In other words, sterilized "feeble-minded" individuals could no longer create more children that would require future institutionalism.[38] The *Skinner* Court's recognition of the damage that could arise as a result of forced and coercive sterilization seems, at first, incompatible with its prior approval in the *Buck v. Bell* decision. However, these two seemingly incompatible holdings actually reveal that the Court may have only been interested in protecting the reproductive rights of certain groups, rather than the reproductive rights of all.

In accordance with the Equal Protection Clause of the Fourteenth Amendment,

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https://embryo.asu.edu/pages/buck-v-bell-1927. Vivian unfortunately passed away in childhood. *Id.*

32. Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, 24 AM. INDIAN CULTURE & RSCH. J. 1, 3 (2000).

33. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

34. In *Skinner*, the defendant had been convicted of stealing chickens in 1929 and robbery with firearms in both 1929 and 1934. *Id.* at 537. He was serving a sentence related to the second robbery charge when the state legislature passed the Habitual Criminal Sterilization Act of 1935. *Id.* In 1936, the state's Attorney General began proceedings against him to forcibly sterilize him. *Id.* The lower court determined the defendant to be a "habitual criminal" under the meaning of the statute and found that he could undergo sterilization "without detriment to his general health." *Id.* In a five-four decision, the Supreme Court of Oklahoma affirmed the judgement directing that a vasectomy be performed on the defendant. *Id.*

35. *Id.* at 541.

36. *See id.* at 542 (citing Buck v. Bell, 274 U.S. 200, 208 (1927)).

37. *Id.*

38. *Id.*

by the 1970s, most states had repealed their compulsory sterilization laws.[39] However, even as these statutes were repealed, forced and coerced sterilization practices significantly increased as a method of population and reproductive control over poor women and women of color.[40] Additionally, although physicians and doctors had previously been cautious to avoid performing voluntary sterilization procedures for fear of possible malpractice suits, the attitudes of healthcare professionals shifted in 1969, when *Jessin v. County of Shasta* determined that "no legislative policy existed" to completely prohibit sterilizations.[41] While such practices impacted a number of minority communities in the United States, Indigenous women were more frequently subjected to these practices, as they often depended on the federal government for all medical care as well as for other important social services.[42]

Another significant event that contributed to the rise of involuntary sterilization practices in the United States was the passage of the Federal Family Planning Services and Research Population Act of 1970, which allocated federal funds to be used for contraceptives for the first time.[43] The Act, often referred to as Title X, aimed to address inequities in access to contraceptives and other family planning services by providing financial support for government-funded health centers.[44] However, when combined with oppressive and coercive health practices, Title X legislation had substantial negative effects on poor and minority women, including Indigenous women.[45] Title X legislation differed from earlier state-sponsored sterilization programs such as those allowed under the *Buck v. Bell* ruling.[46] Rather than legally impose sterilization policies, Title X allowed for discriminatory

39. Torpy, *supra* note 32, at 3.

40. *Id.* at 1; *see also* Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, REPROD. RIGHTS & JUST. STORIES 97, 98 (2019) (noting that while support for eugenics-based sterilization waned following World War II and *Skinner* decision, new justifications emerged—including population control, immigration, and welfare costs—which justifications allowed for coercive practices under the guise of "family planning" aimed at poor patients, who were often women of color); *see also* Erin Blakemore, *The First Birth Control Pill Used Puerto Rican Women as Guinea Pigs*, HISTORY, https://www.history.com/news/birth-control-pill-history-puerto-rico-enovid (Mar. 11, 2019) (describing eugenic origins of still-popular birth control pill and its clinical trials, which recruited women in poorest areas of San Juan and other Puerto Rican cities to serve as subjects). The women in these trials knew that the drug prevented pregnancy but were unaware that it was experimental or that they were participating in a clinical trial. *Id.* They were also not provided with safety information or informed about serious side effects of the pills, which contained much higher doses of hormones than modern-day birth control pills currently available to the public. *Id.*

41. *See* Torpy, *supra* note 32, at 3 (referencing decision in *Jessin v. County of Shasta*, 79 Cal. Rptr. 359 (1969)).

42. *See id.* at 1 ("Tribal dependence on the federal government through the Indian Health Service (IHS), the Department of Health, Education, and Welfare (HEW), and the Bureau of Indian Affairs (BIA) robbed them of their children and jeopardized their future as sovereign nations.").

43. *Id.* at 4.

44. Kinsey Hasstedt, *Shoring Up Reproductive Autonomy: Title X's Foundational Role,* 22 GUTTMACHER POL'Y REV. (July 17, 2019), https://www.guttmacher.org/gpr/2019/07/shoring-reproductive-autonomy-title-xs-foundational-role#.

45. Torpy, *supra* note 32, at 4.

46. *Id.*

practices to arise as a result of state incentives and initiatives.[47] The legislation provided the U.S. Department of Health, Education, and Welfare (HEW)[48] with the means to fund "90% of the annual sterilization costs for poor people" and increased sterilization for women by 350% between 1970 and 1975.[49] This increase arose as the result of a number of factors that changed the attitude of physicians[50] and celebrated the new-found "control" over women's reproductive rights.[51] Existing age-related restrictions for sterilization procedures were also abandoned during this time, allowing physicians to more freely perform sterilization procedures on younger women.[52]

General governmental concern over the growing population also contributed to the acceptance of and increased number of sterilization procedures performed in the United States.[53] In 1970, then-President Richard Nixon created a new Commission on Population Growth and the American Future, reflecting the fear that the world's natural resources would not be able to provide for the future population.[54] Shortly after, the Office of Economic Opportunity was created, which was an organization that provided education and other resources, including contraceptives, to low-income individuals.[55] The new family planning resources, combined with medical advancements and eugenic philosophies, "culminated in disaster for many women,"

47. *See id.* (explaining that political and social pressures to limit family size and promote sterilization contributed to establishment of Office of Economic Opportunity, which provided education, training, and contraception to the poor).

48. The U.S. Department of Health, Education, and Welfare (HEW) no longer exists in its original form. *United States Department of Health, Education and Welfare Records: Administrative Information,* JOHN. F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/asset-viewer/archives/USDHEW (last visited Feb. 12, 2021). The Department of Education Organization Act in 1979 abolished HEW by dividing it into the Department of Education and the Department of Health and Human Services. *Id.*

49. Torpy, *supra* note 32, at 4.

50. *See id.* (noting that under *Jessin v. County of Shasta*, which held that there was no legislative policy prohibiting sterilizations, physicians and hospitals could impose more aggressive sterilization practices without fear of possible malpractice suits).

51. *See id.* (noting that although middle-class women gained easier access to and control over their reproductive rights, poor women and women of color were targeted with coercive sterilization abuse).

52. The "120 Rule," imposed in the 1950s by the American College of Obstetricians and Gynecologists, only allowed a woman to be sterilized if her age, multiplied by the number of children she already has, totaled at least 120. *Id.* at 3–4. Under this rule, a thirty-year-old woman would need to have four children before she could elect to undergo sterilization. This rule was completely abandoned in the mid-1970s. *Id.*; *see also* Julie Deardorff, *Doctors Reluctant to Give Young Women Permanent Birth Control*, CHI. TRIB. (May 13, 2014), https://www.chicagotribune.com/lifestyles/ct-xpm-2014-05-13-ct-met-sterilization-denied-20140513-story.html (discussing modern impact of the "120 Rule").

53. Torpy, *supra* note 32, at 4.

54. *See FG 275 (Commission on Population Growth and the American Future): Abstract*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, https://www.nixonlibrary.gov/finding-aids/fg-275-commission-population-growth-and-american-future-white-house-central-files (last visited Aug. 26, 2021) (discussing how Commission conducted and sponsored research on U.S. population growth and its economic and environmental impact).

55. Torpy, *supra* note 32, at 4.

as physicians and social workers ignored the specific reproductive health needs and rights of low-income and minority women in the application of their services.[56]

2. Indigenous Sterilization Practices Within the Indian Health Service

The Indian Health Service (IHS), the federal medical service designed to address healthcare issues of Indigenous peoples within HEW, also played a significant role in the forced sterilization of Indigenous women in the United States.[57] While a significant number of procedures were completed without consent, others were the result of coercive practices, such as the use of improper consent forms;[58] the provision of inferior translation services;[59] threatening the private and public welfare benefits of individuals;[60] and the failure of IHS physicians to correctly explain the permanence of procedures such as tubal ligation.[61] Specific data is difficult to obtain, but it is estimated that the IHS sterilized at least 25% of Native American women between the ages of fifteen and forty-five during the 1970s.[62] There is evidence that suggests this number could be even higher, with some studies showing that the IHS sterilized as many as 50% of Native American women during a six-year period from 1970–1976.[63]

In 1973, HEW put forth several new regulations that the IHS was required to follow.[64] These regulations prohibited physicians from performing sterilization procedures on any individual under the age of twenty-one, even where consent had been provided.[65] The new regulations also included a general definition of "informed consent" and instituted a waiting period between the time of consent and the surgical procedure.[66] Many of the changes to HEW's regulatory scheme arose in response to the 1974 district court decision in *Relf v. Weinberger*.[67] In *Relf*, new HEW

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56. *Id.*

57. Lawrence, *supra* note 3, at 400.

58. *Id.*

59. *See* Torpy, *supra* note 32, at 13 (explaining that failure to provide interpretation was one of the most common violations of Native American women's right to informed consent).

60. *See id.* (noting that women who were interviewed later verified that welfare agencies threatened to terminate their benefits if they had additional children).

61. *See id.* at 12 (explaining that many doctors failed to explain to women the surgical procedure, its risks, and its permanency).

62. Lawrence, *supra* note 3, at 400.

63. *Id.* at 410.

64. *See id.* at 404–05 (citing Judge Gesell's decision in two cases that directly concerned HEW's sterilization reports: *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974) and National Welfare Rights Organization v. Weinberger, 377 F. Supp. 1196 (D.D.C. 1974)).

65. *See id.* at 405–06 (describing HEW's efforts to regulate sterilization by placing moratorium on sterilization of certain groups and establishing requirements relating to informed consent).

66. *Id.* at 405–06.

67. *Id.* at 404–06. *Relf v. Weinberger* involved the forced sterilization of two African American sisters who were only twelve and fourteen years old. *Relf v. Weinberger*, S. POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger (last visited Oct. 10, 2021). Their mother signed an "X" on a consent form that she was unable to read and only discovered after the fact that she had consented to the permanent sterilization of her two young daughters. *Id.* According to the Southern Poverty Law Center, which filed the lawsuit, doctors

regulations were determined to be "arbitrary and unreasonable in that they authorize[d] the provision of federal funds . . . for the sterilization of a legally competent person without requiring that such person be advised at the outset and prior to . . . his or her consent to such an operation . . . ."[68] The ruling specifically noted that the regulations lacked any prohibition of the use of coercion to gain the initial consent to sterilize women seeking health services.[69] In response to the court's decision, HEW published new regulations in 1974 that redefined informed consent as "the voluntary, knowing assent" of any person undergoing sterilization procedures and required providers to more thoroughly inform patients of their rights.[70] In the updated regulations, HEW explicitly restricted sterilization procedures to situations in which the patient "voluntarily requested the operation" and where that patient was advised verbally and in writing that their "benefits would not be denied if [they] refused to be sterilized."[71] However, despite these changes in policy, HEW continued to violate federal guidelines in hospitals across the United States, with seven out of ten hospitals performing sterilizations without meeting proper informed consent requirements.[72]

HEW policies that allowed forced and coercive sterilization procedures to persist were challenged in court by a group of Mexican-American women in *Madrigal v. Quilligan* in 1975.[73] While the *Madrigal* case brought an important story about sterilization to light, it also provided a helpful link between a pattern of eugenics-based reproductive injustices and the national family planning and reproductive health policies of the 1970s.[74] In *Madrigal*, ten plaintiffs—called the "Madrigal Ten"—brought a class-action case against HEW, the California State Department of Health, and individual doctors at the Los Angeles County USC Medical Center who had performed or supervised sterilizations.[75] The Madrigal Ten

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threatened poor women with the loss of their welfare benefits in order to convince them to consent to the procedure. *Id.; see also* Manian, *supra* note 40, at 107 (describing significant impact *Relf v. Weinberger* had on HEW regulations and requirements surrounding consent).

68. Relf v. Weinberger, 372 F. Supp. 1196, 1204 (D.D.C. 1974).

69. *Id.* at 1203; *see also* Lawrence, *supra* note 3, at 406 ("Judge Gesell's ruling in Relf v. Weinberger required the HEW to correct deficiencies in the guidelines, including the need for a definition of the term 'voluntary,' the lack of safeguards to ensure that sterilizations were voluntary, and the absence of prohibitions against the use of coercion in obtaining consents.").

70. Lawrence, *supra* note 3, at 406.

71. *Id.*; *see also* Torpy, *supra* note 32, at 9 (examining a case in which hospital physicians allegedly coerced Native American women into undergoing sterilization procedures by implying that the women would lose their welfare benefits if they refused). According to their attorney, all three of the women settled their cases before going to trial, sealing the matters and preserving the anonymity of the victims. *Id.*

72. SMITH, *supra* note 9, at 81.

73. Manian, *supra* note 40, at 97; *see also* Madrigal v. Quilligan, 639 F.2d 789 (9th Cir. 1981).

74. Manian, *supra* note 40, at 99 (citing ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 99–110 (2005)).

75. Dr. Bernard Rosenfeld, a doctor at the Los Angeles County USC Medical Center, uncovered forced sterilization practices in the hospital, which operated a busy maternity ward that served mostly low-income and immigrant patients. Manian, *supra* note 40, at 100. He suspected that Mexican-American women were being sterilized without their consent and began secretly copying medical records and contacting journalists, civil rights groups, and government officials

described coercive tactics used by the doctors, such as presenting consent forms requiring signatures to women while they were in labor or experiencing significant pain, repeatedly and relentlessly requesting consent by various Medical Center staff, and lacking accurate information about the procedure in Spanish, the primary language spoken by all ten plaintiffs.[76]

While the plaintiffs and the California Department of Health eventually reached a settlement agreement that increased California's sterilization consent requirements, the question of financial compensation for the plaintiffs remained.[77] Upon the death of the presiding trial judge, E. Avery Crary, the damages phase of the case was transferred to U.S. District Court Judge Jesse W. Curtis,[78] who was dismissive of testimony and made racist claims in response to the assertions of expert witnesses.[79] In an unpublished opinion, Judge Curtis eventually ruled against the Madrigal Ten, stating that the experiences of the ten women did not expose a pattern of abuse based on gender, race, and class, but were simply "ten distinct random occurrences," and had happened due to a "breakdown in communications between the patients and the doctors."[80] The decision placed the burden of communicating consent on the patient, rather than on the doctor seeking it.[81] This treated consent forms, and other consent requirements regulated by HEW, as defenses against physician liability rather than ways to protect the autonomy and reproductive decisions of women.[82] The ultimate decision in *Madrigal* contrasted significantly with that of the *Relf* case,[83] which required that consent be "voluntary in the full

with the hope of legal action. *Id.* While he and the involved lawyers eventually found ten women willing to come forward to serve as plaintiffs in the case, he had difficulty convincing women to join the lawsuit due to the deep sense of shame they felt regarding the operation. *Id.* at 101. Some of the women did not even tell their husbands or children of their involvement in the lawsuit. *Id.*

76. One of the women, Georgina Hernández, arrived at the hospital bleeding and experiencing labor pains. *Id.* at 102. The staff pressured her to consent to sterilization upon arrival, but she refused. *Id.* Eventually, the doctors informed her that she would have to undergo an emergency cesarean section to deliver her child. *Id.* While she was signing the consent forms for the c-section operation, the doctors again pressured her to consent to a sterilization procedure, this time telling her "the Mexican people were very poor" and that she would not be able to financially support another child. *Id.* at 102–03. Again, she refused, signing only the c-section papers. *Id.* at 103. However, once she was in the operating room, the doctor asserted that she had agreed to a tubal ligation procedure. *Id.* Hernández later described how one the staff members told her, "Mijita, you better sign those papers or your baby could probably die here." *Id.* Hernández finally learned three weeks later at a post-partum checkup appointment that she had been permanently sterilized. *Id.*

77. *Id.* at 107.

78. *Id.* at 108.

79. *Id.* at 108−10. Judge Curtis dismissed the doctor's social motivations for pressuring women, as asserted by a medical student working at the hospital during the relevant time period, and also excluded the expert testimony of an anthropologist that described how the procedures had damaged the women's relationships with their husbands and children. *Id.* In response to the anthropologist's testimony, Judge Curtis simply stated that the testimony could not have an impact on damages awarded because "[w]e all know that Mexicans love their families." *Id.*

80. *Id.* at 110–11.

81. *Id.* at 112.

82. *Id.*

83. *Id.*

sense of that term."[84] Like *Relf,* and despite the ruling against the Madrigal Ten in the damages phase of the case, the case brought these issues into the national spotlight and had a significant impact on regulations and conversations surrounding voluntary and informed consent.[85]

Despite regulations, prominent court cases, and national spotlight, accusations against the IHS—that it was still performing sterilizations without informed consent—continued to emerge.[86] In 1976, the Government Accounting Office (GAO) put together an investigation and report at the request of Senator James Abourezk of South Dakota.[87] Indigenous physician and law student Constance Redbird Pinkerton-Uri, as well as various IHS employees, had informed the Senator of the sterilization practices of the IHS, and urged him to request an investigation.[88] However, the resulting GAO report only examined four of the twelve IHS hospitals in the United States[89] and failed to interview any women about the care they had received at IHS facilities.[90]

Despite its failure to comprehensively investigate the IHS and its practices, the GAO report, which was based solely on hospital records, provided valuable information about violations of HEW regulations and requirements.[91] According to the report, 3,001 Indigenous women of childbearing age were sterilized in the four hospitals studied between 1973 and 1976, totaling 5% of all Indigenous women of childbearing age in these areas[92]—though, many Indigenous activists claim that the total percentage of women sterilized is significantly higher.[93] Some of the most serious IHS violations stemmed from the fact that their informed consent forms did not contain all required information necessary for physicians and clinics to obtain informed consent, such as a statement notifying patients of their right to withdraw consent.[94] The investigation also found that the IHS failed to keep track of whether

84. Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974).

85. Manian, *supra* note 40, at 113. For an update on the plaintiffs and the long-lasting impacts of involuntary sterilization procedures, see *id.* at 115. *See also* Ruthann Robson, *Resisting Attempts to Control the "Hyper-Fertile*,*"* JOTWELL (June 20, 2018), https://equality.jotwell.com/resisting-attempts-to-control-the-hyper-fertile (recognizing that the *Madrigal* case was simultaneously a great victory for bringing attention to the reproductive rights struggles of minority women and a horrible defeat due to the lack of compensation for any of the victims).

86. Lawrence, *supra* note 3, at 406.

87. Torpy, *supra* note 32*,* at 6–7.

88. *Id.*

89. The report studied hospitals in Albuquerque, Phoenix, Aberdeen, and Oklahoma City. SMITH, *supra* note 9, at 82.

90. Torpy, *supra* note 32*,* at 7.

91. *See* SMITH, supra note 9, at 82 (noting GAO report relied exclusively on hospital records as basis of its investigation); Torpy, *supra* note 32*,* at 7–8 (describing GAO report's findings).

92. SMITH, *supra* note 9, at 82.

93. *See id.* (discussing independent investigation that uncovered mass sterilization practices in the 1970s). This investigation was conducted by Dr. Connie Uri, a Cherokee/Choctaw medical doctor. *Id.* Rather than relying on hospital records, Dr. Uri based her investigations on interviews with women who had been sterilized in the Oklahoma City area. *Id.* This led her to conclude that 25% of Native American women in the area had been sterilized without their informed consent. *Id.*

94. Lawrence, *supra* note 3, at 407.

the sterilizations were voluntary or "therapeutic."[95] Additionally, the report documented IHS violations of the required seventy-two-hour waiting period: several consent forms were dated the same day the woman had given birth, while others were dated the day *after* the woman's sterilization procedure.[96] Such signatures were often obtained when the relevant individual was "under the influence of a sedative and in an unfamiliar environment."[97]

The GAO report found violations even where consent had officially been given according to IHS records.[98] Forms claiming that consent had been given failed to comply with IHS requirements and lacked any actual indication that informed consent had been explained to the patients in a complete and comprehensive way.[99] Additionally, because HEW did not require patients to sign the forms confirming their consent, the GAO report relied on the statements provided by doctors regarding whether informed consent was provided.[100] Unsatisfied with the GAO report, Indigenous advocates conducted further research that uncovered blatant consent violations; in one case, two fifteen-year-old girls—several years younger than the minimum age of twenty-one—were sterilized after they were told they were undergoing tonsillectomy operations.[101] While the GAO report did not specifically verify that the IHS performed coerced sterilizations without informed consent to the extent described by independent research, it did show that IHS physicians and facilities had significantly violated the regulations set by HEW in 1974 in several key ways.[102]

3. The Impact of Sterilization on Indigenous Populations

The GAO report, released in 1976, exposed how over 3,400 Indigenous women had been sterilized in just four IHS service areas examined alone.[103] In proportion to the general population at the time, this figure would equal more than 450,000 non-Native sterilizations.[104] It is undeniable that the widespread practices of forced and coerced sterilizations by the IHS on Indigenous women had and will continue to have long-term impacts on Indigenous women and communities. Indigenous communities have historically placed a "high priority" on children as a means of

95. *Id.* A "therapeutic" sterilization is performed primarily to treat a medical ailment rather than to prevent reproduction. *Id.*

96. *Id.* at 407–08.

97. *Id.* at 407.

98. SMITH, *supra* note 9, at 84.

99. Lawrence, *supra* note 3, at 407.

100. SMITH, *supra* note 9, at 84–85.

101. *Id.*

102. Lawrence, *supra* note 3, at 406; *see also* Torpy, *supra* note 32, at 7 (explaining that GAO report found several other blatant violations, including sterilization of at least thirty-six women who were either under age twenty-one or determined to be "mentally incompetent," which were direct violations of the 1973 HEW provision prohibiting such procedures).

103. Torpy, *supra* note 32, at 7.

104. *See id.* ("After studying the report, Senator Abourezk commented that given the fact of the small population of Native Americans, 3,406 Indian sterilizations would be comparable to 452,000 non-Indian women.").

ensuring the survival of their cultural traditions and Native bloodlines.[105] Centuries of devastation by disease, poor health services, inadequate education, wars, the removal of children to foster care or boarding school facilities, and cultural genocide (including the sterilization practices of the 1970s) have contributed to the prioritization of family and the importance of children in Native culture.[106] Reproduction is an essential element of tribal culture due, in large part, to its impact on group survival.[107]

Reproduction and the preservation of Native bloodlines is also important in a legal sense—many Native nations still use a system called "blood quantum" in their citizenship requirements, which was initially created by the federal government in an effort to limit citizenship within Native nations.[108] Blood quantum is essentially a mathematical equation that determines the fraction of "Native blood" an individual may possess.[109] It emerged as a "way to measure 'Indian-ness' through the construct of race," and impacts the number and identity of individuals to whom the federal government owes certain legal duties and treaty obligations.[110] The Department of the Interior's Bureau of Indian Affairs still uses blood quantum to issue individuals ID-type cards called a "Certified Degree of Indian Blood."[111] As a result, the ability of Native women to have children and make their own reproductive decisions directly impacts the legal obligations owed to Native nations and Indigenous communities throughout the United States.

The serious and long-lasting impact of forced sterilization on Indigenous communities throughout the United States, and the world, as well as the fact that such procedures have been conducted as recently as 2018 in certain nations,[112] requires a response from the international legal community. Generally, forced sterilization had enduring consequences for Indigenous communities, including significantly reduced births over an entire generation.[113] Census reports show that from 1970 to 1980, the average number of children per woman by tribe in the United States had been reduced from 3.29 children per woman to only 1.30.[114] Due to the

105. *Id.* at 13.

106. *Id.*

107. Lawrence, *supra* note 3, at 412.

108. Kat Chow, *The Code Switch Podcast: So What Exactly is 'Blood Quantum'?*, NPR (Feb. 9, 2018, 6:00 AM), https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum.

109. *Id.*

110. *Id.*

111. *Id.*; *see also* BUREAU OF INDIAN AFFAIRS, OMB CONTROL NO. 1076-0153, CERTIFICATE OF DEGREE OF INDIAN OR ALASKA NATIVE BLOOD INSTRUCTIONS (2021), bia.gov/sites/bia.gov/files/assets/public/raca/online_forms/pdf/Certificate_of_Degree_of_Indian_Blood_1076-0153_Exp3-31-21_508.pdf (showing requirements for obtaining identification cards).

112. Stote, *supra* note 4.

113. *See* Lawrence, *supra* note 3, at 403 (citing statistics from U.S. Department of Commerce that recognize significant decrease in average number of children per woman by tribe from 1970 to 1980 as a result of forced and coerced sterilization policies).

114. The tribes included in the data are the Navajo, Apache, Zuni, Sioux (combining all Sioux tribes in South Dakota), Cherokee, and Ponca/Omaha (combining all Ponca and Osage tribes in Oklahoma). Lawrence, *supra* note 3, at 403 tbl.1 (citing U.S. DEP'T OF COMMERCE, BUREAU OF

general expansion of available birth control and contraceptive education, the average number of children per white woman also decreased over this time period, but only from 2.42 children per woman in 1970 to 2.14 in 1980.[115] The average number of children per Indigenous woman decreased at a substantially higher rate of 1.99 children per Indigenous woman compared to a decrease of 0.28 per white woman.[116] The significant difference between the declining birth rates of Indigenous and white women illustrates the impact of discriminatory policies and practices imposed by the United States government through the IHS and other healthcare services available to Indigenous communities.

B. Canada

1. The "Sexual Sterilization Acts" of the Twentieth Century and their Impact on Indigenous Populations

Like the United States, Canada has a long history of abuse committed against Indigenous women through eugenic philosophies and population control methods. Various provinces in Canada passed "Sexual Sterilization Acts" in the early twentieth century, granting province-based "Eugenics Boards" discretion over individual sterilization decisions.[117] Once these Eugenics Boards deemed an individual to be "mentally defective," medical providers were not required to obtain patient consent in order to sterilize them.[118] Consequently, thousands of people throughout Canada were involuntarily sterilized before these Acts were finally repealed in 1972.[119]

In Alberta—the first province to legislatively authorize sterilization—representatives of various women's suffrage groups advocated in favor of sterilization policies, warning of increased rates of reproduction among the "mentally deficient" and alleging that sterilization was the only solution.[120] The Acts went so far as to cite "prostitution and sexual promiscuity" as acceptable

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THE CENSUS, 1970 CENSUS REPORT OF THE POPULATION SUBJECT REPORT: AMERICAN INDIANS 141–47 (1971); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF THE POPULATION SUBJECT REPORT: CHARACTERISTICS OF AMERICAN INDIANS BY TRIBES AND SELECTED AREAS: 1980, at 150–202 (1981)).

115. Lawrence, *supra* note 3, at 402.

116. *Id*.

117. *See* Jean-Jacques Amy & Sam Rowlands, *Legalised Non-Consensual Sterilisation – Eugenics Put into Practice Before 1945, and the Aftermath. Part 1: USA, Japan, Canada and Mexico*, 23 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 121, 127 (2018) (explaining Sexual Sterilization Act of 1928 was passed after public pressure and that it empowered the state with the ability to make reproductive health decisions).

118. Paula Rasmussen, *Colonizing Racialized Bodies: Examining the Forced Sterilization of Indigenous Women and the Shameful History of Eugenics in Canada*, ON POLITICS, Fall 2019, at 18, 21; *see also* Manon Fabre and Eleonore Schreiber, *The Coercive Sterilization of Indigenous Women in Canada: A Study of the Sexual Sterilization Act in Alberta and British Columbia*, 2 BETWEEN ARTS & SCIS. 27, 30 (2017) (noting that more than 77% of Indigenous women who were sterilized in years following Sexual Sterilization Act were deemed "mentally defective," removing any legal requirement of patient consent for the sterilization procedure to occur).

119. Amy & Rowlands, *supra* note 117, at 127.

120. *Id.* Alberta authorized sterilizations as early as 1928. *Id.*

justifications for sterilization.[121] While these policies were not enacted and enforced on a federal level, the Canadian government provided the necessary funding to facilitate the sterilization policies of individual provinces.[122] Even so, coercive and forced sterilizations were performed at fourteen different federally-operated Indigenous health facilities across Canada.[123]

Provincial sterilization laws had a significant impact on Indigenous children who had been removed from their parents and placed in residential boarding schools across the country. Provincial statutes allowed the school principal, as the temporary legal guardian of the children, to make decisions about the children's medical procedures.[124] These practices resulted in the sterilization of entire groups of Native children as they reached puberty in institutions like the Provincial Training School in Red Deer, Alberta.[125] Other facilities viewed the sterilization of Indigenous people as an opportunity to test new methods of sterilization, forcing them to drink unknown substances.[126] Thousands of women were sterilized as a result of these schemes.[127]

More recently, a Vancouver lawyer—who once served as counsel on a Canadian national investigation into systemic violence against Indigenous women—alleged in a tweet that social workers forced Indigenous girls in foster care as young as nine to undergo intrauterine device (IUD) insertion without their consent.[128] He later added that he was unable to share additional details due to the fact that the victims he spoke with were not yet ready to "go public themselves."[129] The British Columbia Ministry of Health and the Ministry of Children and Family Development released a joint statement in response, claiming that neither department was aware of this practice happening in the province.[130] British Columbia's Representative for Children and Youth, Jennifer Charlesworth, promised an investigation into the matter, but additional information has not yet come to light.[131] Like forced and coercive sterilization practices, forced birth control practices reflect the larger goals of Canadian authorities with respect to managing the growth of the Indigenous population as well as controlling the rights to Indigenous lands and resources

121. *Id.*

122. *See* Yvonne Boyer, *First Nations, Metis, and Inuit Women's Health: A Rights-Based Approach*, 54 ALTA. L. REV. 611, 615 (2017) (explaining that while the federal government did not explicitly support the provincial litigation pro, it implicitly supported it through financial means).

123. Amy & Rowlands, *supra* note 117, at 127.

124. Leonardo Pegoraro, *Second-Rate Victims: The Forced Sterilization of Indigenous Peoples in the USA and Canada*, 5 SETTLER COLONIAL STUD. 161, 162 (2015).

125. *Id.* (citing KEVIN ANNETT, HIDDEN NO LONGER: GENOCIDE IN CANADA, PAST AND PRESENT (2010)).

126. *Id.*

127. Rasmussen, *supra* note 118, at 21.

128. Brishti Basu, *Social Workers Forced Indigenous Girls Under 10 to Get IUDs, Canadian Lawyer Alleges*, VICE WORLD NEWS (May 28, 2021, 9:17 AM), https://www.vice.com/en/article/bvzj8z/social-workers-forced-indigenous-girls-under-10-to-get-iuds-canadian-lawyer-alleges.

129. *Id.*

130. *Id.*

131. *Id.*

throughout the twentieth century.[132]

Several decades prior to the passage of the Sexual Sterilization Acts in Alberta, and later in British Columbia, Canadian legislation effectively erased the autonomy of Indigenous women through the Indian Act of 1876,[133] which only allowed children to inherit "Indian" status if they were born to "Indian" fathers.[134] Under the Act, women could also lose their own Indigenous status by marrying a non-Indigenous man.[135] Loss of Indigenous status was significant under Canadian law, as it would result in loss of certain treaty benefits, the right to live on certain reserved land, the right to inherit family property, and the right to be buried on reserved land with ancestors.[136] This created a system in which the legal status of women entirely depended on the racial identity of the men to whom they were married.[137] The Act also allowed for the enforcement of gender-based discriminatory laws and practices, eliminating the autonomy of Indigenous women and "constrict[ing] Indigenous ways of living in crippling and violent ways."[138] The Indian Act of 1876 exists to this day, in some capacity, despite amendments made in 1985 following a U.N. ruling that declared it to be in direct violation of the International Covenant on Civil and Political Rights (ICCPR) because it denied Indigenous women the right to belong to their own cultural groups.[139]

Much of the gender-based discrimination caused by the Indian Act and successive acts targeting Indigenous populations were rooted in Western colonial ideas of patriarchy and gender.[140] These roots established a gendered hierarchy that

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132. Amy & Rowlands, *supra* note 117, at 127.

133. *See* Boyer, *supra* note 122, at 617 (mentioning that the Indian Act of 1876 harmed Indigenous women by forcing assimilation into patriarchal Western culture and eroding the importance of their own traditional familial roles).

134. *See* Fabre & Schreiber, *supra* note 118, at 30 (explaining that Indian Act of 1876 imposed colonial Canadian ideas about gender, marriage, and motherhood on Indigenous people, which removed their autonomy and forced them to assimilate to laws and practices of the settler state); *see also* The Indian Act, 1876, S.C. 1876, c 18, art 3(3) (Can.) (defining term "Indian" under Canadian law and excluding from definition illegitimate children of Indigenous women and children of Indigenous women who were married to a non-Indian or non-treaty Indian individual).

135. *See* The Indian Act, 1876, S.C. 1876, c 18, art 3(3)(c) (Can.) (establishing that Indigenous women marrying anyone "other than an Indian or non-treaty Indian" would lose their own status as an Indian under the Act).

136. *See* Erin Hanson, *The Indian Act,* UNIV. B.C. FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/the_indian_act/ (last visited Jan. 29, 2021) (explaining significance of "Indian" status under Canadian law at time the Indian Act was enacted).

137. *Id.*

138. Hilary Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. INTERPERSONAL VIOLENCE 1552, 1553 (2009).

139. Throughout the 1970s and 80s, Indigenous women repeatedly challenged The Indian Rights Act of 1876. Hanson, *supra* note 136. They declared the terms discriminatory and claimed the Act violated the Canadian Bill of Rights. *Id.* While the Supreme Court of Canada ruled against them, Sandra Lovelace took the case to the United Nations in 1981. *Id.* There, the United Nations Human Rights Committee declared certain portions of the existing statute amounted to human rights violations. *Id.*

140. *See* Ralstin-Lewis, *supra* note 19, at 73 (noting that, in contrast to Western patriarchal ideals, Indigenous cultures embraced femaleness as a power status).

decreased the autonomy of Indigenous women within their own communities and beyond.[141] The imposition of Western ideas of inheritance and land rights elevated men and landowners in society, reducing women to a form of second-class citizenship and prioritizing the birth of male children.[142] Meanwhile, Indigenous women could potentially escape sterilization by assimilating to British-Canadian society, since provincial Eugenics Boards based their criterion for sterilization on a "western vision of femininity and motherhood."[143] The discriminatory implementation of practices and policies based in colonial ideas of gender and motherhood thus directly resulted in forced and coerced sterilizations for Indigenous women throughout Canada.[144]

Forced and coercive sterilization practices in Canada were inspired by "pioneering" legislation in the United States that authorized compulsory eugenic sterilization earlier in the twentieth century.[145] As in the United States, Canadian legislation did not specifically target Indigenous women. However, the enactment of statutes which allowed for involuntary sterilization in some capacity was central to the "systematic targeting of Indigenous peoples for assimilation into Canadian society."[146] Under eugenic philosophies, sterilization was seen as an effective strategy to provide a cheaper, policy-based alternative to public health legislation by reducing the number of people living in poverty and requiring government assistance.[147] Due to the long history of marginalization and discriminatory policies in Canada, many Indigenous people were among those included in these categories.[148] While forced and coercive sterilization policies impacted women of all backgrounds, especially low-income women, the disproportionate number of Indigenous women impacted by legislation that allowed sterilization to occur without patient consent exposes the racist application of these policies.[149]

2. Lasting Impact of Sterilization on Indigenous Communities

The forced sterilization of Indigenous communities in Canada had long-term effects similar to those endured by Indigenous communities in the United States.[150] Many Indigenous belief systems, including those of groups in Canada, consider

141. *Id*.

142. Fabre and Schreiber, *supra* note 118, at 32–33.

143. *Id.* at 33.

144. *See generally* Fabre and Schreiber, *supra* note 118.

145. Pegoraro, *supra* note 124, at 163.

146. Rasmussen, *supra* note 118, at 23 (quoting KAREN STOTE, AN ACT OF GENOCIDE: COLONIALISM AND THE STERILIZATIONS OF ABORIGINAL WOMEN 26 (2015)).

147. *Id.*; Fabre and Schreiber, *supra* note 118, at 28 (citing Karen Stote, *The Coercive Sterilization of Aboriginal Women in Canada,* 36 AM. INDIAN CULTURE & RSCH. J. 117 (2012)).

148. Rasmussen, *supra* note 118, at 23–25.

149. *See generally* Fabre & Schreiber, *supra* note 118.

150. *See generally* Ankita Rao, *Indigenous Women in Canada Are Still Being Sterilized Without Their Consent*, VICE (Sept. 9, 2019, 7:00 AM), https://www.vice.com/en/article/9keaev/indigenous-women-in-canada-are-still-being-sterilized-without-their-consent.

reproduction to be a sacred ability of women.[151] As a result, attacks on Indigenous motherhood are often seen as larger attacks on the "survival of Indigenous nations, cultures, and traditions for future generations."[152]

The mental and physical impact of forced and coerced sterilizations on Indigenous women and communities runs deeper than population data points and continues to play a role in the community life of Indigenous people today.[153] First-hand accounts from victims confirm this.[154] S.A.T., an Indigenous woman from the Saskatchewan region, was sterilized without her consent in 2001 at the age of 29.[155] After giving birth to her sixth child, her newborn was taken away and she was wheeled into an operating room.[156] The medical team refused to explain what they were doing to S.A.T., despite her multiple requests.[157] She reported that the procedure caused significant strain on her marriage and that she has avoided state-sponsored healthcare programs since the operation.[158]

Another account comes from "Janet," an Indigenous woman who already had three children and did not want any more at the time.[159] She was repeatedly visited by IHS hospital employees.[160] She was told by the IHS employees that she should undergo sterilization procedures to prevent having any more children at that time, but they also told her that the operation was reversible.[161] She only found out about its permanence through the work of an activist group in Oklahoma.[162] She spent the next fifteen years undergoing treatment for severe depression, and her daughter continues to refuse all health services and medical care offered by IHS facilities.[163] Other women who were victims of forced or coerced sterilization practices continue to "deal with higher rates of marital problems, alcoholism, drug abuse, psychological difficulties, shame, and guilt."[164] These issues, as well as higher levels of divorce for victims of sterilization, impacted an entire generation of Indigenous people in both the United States and Canada.[165]

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151. Rasmussen, *supra* note 118, at 24.

152. *Id.* (quoting Elizabeth Rule, *Seals, Selfies, and the Settler State: Indigenous Motherhood and Gendered Violence in Canada,* 70 AM. Q. 741, 750 (2018)).

153. *See* Rao, *supra* note 150 (noting that forced sterilizations impacted family size and harmed their general health and economic welfare); Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 28, 2019, 11:47 AM), https://time.com/5737080/native-american-sterilization-history/#:~:text=Over (explaining long-term impact of legislation that permitted forced and coercive sterilization practices to persist in large numbers).

154. *See generally* Lawrence, *supra* note 3.

155. Rao, *supra* note 150.

156. *Id.*

157. *Id.*

158. *Id.*

159. Lawrence, *supra* note 3, at 413.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 410.

165. *See id.* (detailing negative effects of sterilization such as the dissolution of both marriages

Another significant result of forced and coerced sterilization practices on Indigenous women that continues to affect the entire Indigenous community is the lingering distrust of state-sponsored medical facilities and resources.[166] The blatant mistreatment of women at the hands of government-sponsored health and medical services has cultivated a deep distrust of those resources.[167] The Indigenous birth rate in Canada fell from forty-seven births per 1,000 people in the 1960s to only twenty-eight births per 1,000 people by 1980.[168] The dramatic reduction in the number of births within Indigenous communities presents a barrier for the transmission of culture and tradition through future generations.[169] Forced and coercive sterilization and the resulting decrease in the average number of children per Indigenous woman have had a destructive impact on the survival of certain tribes in the United States and Canada.[170]

3. Forced and Coercive Sterilization in Canada in the Twenty-First Century

While the vast majority of the practices that led to significant numbers of forced and coerced sterilizations were discontinued in the late 1970s and throughout the rest of the twentieth century, some legislatures, such as the Federal Parliament of Canada, continue to show reluctance to outlaw the practice in its entirety.[171] The failure to fully outlaw these practices has allowed them to persist in certain areas, such as the Canadian province of Saskatchewan.[172] In 2015, two Indigenous women living in Saskatchewan came forward to a regional newspaper, stating that they had experienced significant pressure to consent to sterilization procedures in 2010 and

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and friendships); *see also* Rao *supra* note 150 (explaining that indigenous communities are experiencing the impact of the absence of a generation).

166. *See* Torpy, *supra* note 32, at 18 (explaining that forced and coerced sterilization has led to widespread belief in Indigenous communities that the actions of health care and government officials may completely wipe out their population).

167. *See* Rao, *supra* note 150 ("And she [S.A.T.] spent decades after avoiding the health system altogether, refusing to face doctors she couldn't trust, even as her body went into early menopause as a side effect of the procedure.").

168. John Douglas Belshaw, *11.3 Natives by the Numbers,* CANADIAN HISTORY: POST-CONFEDERATION (2016), https://opentextbc.ca/postconfederation/chapter/11-3-natives-by-the-numbers/#footnote-2958-4.

169. *See* Lawrence, *supra* note 3, at 412 (citing studies conducted by Emily Moore and Ann Clark that asserted that children were essential to tribal culture and group survival values along with overall family happiness).

170. Torpy, *supra* note 32, at 11.

171. *See* Kristy Kirkup, *Feds Won't Change Criminal Code to Outlaw Forced Sterilization, Despite First Nations Outcry*, CANADIAN PRESS (Dec. 7, 2018, 6:37 AM), https://globalnews.ca/news/4739302/forced-sterilization-criminal-code-first-nations/ (discussing reluctance of Canadian legislature to explicitly outlaw coerced sterilization and their rejection of resolution passed by First Nations chiefs and its widespread support from First Nations peoples across Canada).

172. Betty Ann Adam, *Saskatchewan Women Pressured to Have Tubal Ligations*, SASKATOON STARPHOENIX (Nov. 17, 2015), https://thestarphoenix.com/news/national/women-pressured-to-have-tubal-ligations.

2012. [173] One of the women, Brenda Pelletier, said that social workers and nurses repeatedly insisted that she sign the consent form, despite her continuous refusal to do so.[174] She was even told an operating room was being prepared for her, despite her expressed refusal.[175] Pelletier finally consented, exhausted after giving birth to her seventh child and wanting to be left alone by the hospital employees.[176] As recently as 2018, over 100 additional women have come forward to report similarly coercive and nonconsensual procedures in Canada.[177] Some women have described the same relentless pressure that Pelletier experienced, often administered shortly after the women gave birth, while others have explained that they only agreed to undergo the procedure because they believed it was a temporary birth control measure that could be reversed.[178]

At least sixty women joined a class action lawsuit against the publicly-funded healthcare system and the government of Canada.[179] This lawsuit calls for significant reforms to the health system and individual damages for the victims of the procedures.[180] The plaintiffs come from across Canada, illustrating that although forced and coerced sterilizations may not be as common as they once were, the practice continues to be disturbingly widespread.[181] All of the women described feeling extreme pressure to give consent, experiencing harassment at the hands of nurses and social workers in some situations.[182] Some women claim that the operations occurred after consent was expressly withdrawn.[183] The plaintiffs also described the lasting trauma they have experienced as a result of the procedures.[184] While some health providers, such as the Saskatoon Health Region, claim to have altered their policies, additional legal action is necessary to provide justice and reparations to victims, and to ensure that these practices do not continue in the

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Rao, *supra* note 150.

178. *See* Adam, *supra* note 172 (stating that Pelletier was under the impression that her tubal ligation would be reversible).

179. Padraig Moran, *Indigenous Women Kept from Seeing Their Newborn Babies Until Agreeing to Sterilization, Says Lawyer*, CBC RADIO (Nov. 13, 2018, 1:17 PM), https://www.cbc.ca/radio/thecurrent/the-current-for-november-13-2018-1.4902679/indigenous-women-kept-from-seeing-their-newborn-babies-until-agreeing-to-sterilization-says-lawyer-1.4902693.

180. *Id.*

181. *See* Avery Zingel, *Indigenous Women Come Forward with Accounts of Forced Sterilization, Says Lawyer*, CBC NEWS (Apr. 18, 2019, 7:48 AM), https://www.cbc.ca/news/canada/north/forced-sterilization-lawsuit-could-expand-1.5102981 (noting that a Canadian lawyer looking into a class-action lawsuit on behalf of coerced sterilization victims has uncovered reports from the Northwest Territories, Yukon, Manitoba, Ontario, Alberta, British Columbia, and Quebec).

182. *Indigenous Women in Canada File Class-Action Suit over Forced Sterilization*, NPR (Nov. 19, 2018, 4:59 AM), https://www.npr.org/2018/11/19/669145197/indigenous-women-in-canada-file-class-action-suit-over-forced-sterilization.

183. *Id*.

184. *See* Zingel, *supra* note 181.

future.[185]

III. INTERNATIONAL LEGAL CONTEXT

While a decision has yet to be issued in the Saskatchewan case, Alisa Lombard—the leading attorney on the case—presented on the issue to the U.N. Committee Against Torture (CAT) in 2018, resulting in a number of recommendations from the Committee to the Canadian government.[186] The CAT recommendations call for Canada to conduct impartial investigations into all allegations of forced or coerced sterilization and to adopt policies and legislation that prevent and criminalize such practices.[187] While the CAT recommendations are non-binding, they can provide leverage to Indigenous organizers advocating for legislative changes regarding sterilization policies.[188] Thus far, though state-sponsored health providers have made apologies to victims,[189] Canadian provincial legislatures have thoroughly rejected efforts to criminalize and explicitly outlaw forced and coercive sterilization and have not offered any reparation options for victims.[190]

The U.N. Special Rapporteur on Violence Against Women also assessed Canada's progress on the elimination of violence against women in 2018.[191] She urged that current sterilization procedures be investigated in the context of "systemic discrimination against Indigenous peoples."[192] Though the CAT recommendations

185. *See* Betty Ann Adam, *Saskatoon Health Region Apologizes for Forced Tubal Ligations, Says Report 'Provides Clear Direction*,*'* SASKATOON STARPHOENIX (July 28, 2017), https://thestarphoenix.com/news/local-news/saskatoon-health-region-apologizes-for-forced-tubal-ligations-says-report-provides-clear-direction (noting that a more collaborative approach involving Indigenous women is needed moving forward).

186. Dennis Ward, *Forced Sterilization a Symptom of "Colonial Hangover" Says Lawyer*, APTN NAT'L NEWS (Apr. 7, 2020), aptnnews.ca/facetoface/forced-sterilization-a-symptom-of-colonial-hangover-says-lawyer/; Concluding Observations on the Seventh Periodic Report of Canada, Comm. Against Torture, Sixty-Fifth Session, U.N. Doc. CAT/C/CAN/CO/7 (2018).

187. Concluding Observations on the Seventh Periodic Report of Canada, *supra* note 186, ¶ 51.

188. *See* Penny Smoke, *UN Committee Recommends Canada Criminalize Involuntary Sterilization*, CBC NEWS (Dec. 7, 2018, 4:00 PM), https://www.cbc.ca/news/indigenous/un-committee-involuntary-sterilization-1.4936879 (reporting that Assembly of First Nations National Chief Perry Bellegarde backs recommendation to make involuntary sterilization of First Nations women a criminal offence in Criminal Code of Canada).

189. Charles Hamilton & Guy Quenneville, *Report on Coerced Sterilizations of Indigenous Women Spurs Apology, but Path Forward Unclear*, CBC NEWS (July 27, 2017, 10:52 AM), https://www.cbc.ca/news/canada/saskatoon/report-indigenous-women-coerced-tubal-ligations-1.4224286.

190. Kirkup, *supra* note 171.

191. *See U.N. Special Rapporteurs Highlight Forced Sterilization of Indigenous Women in Canada,* INT'L JUST. RSCH. CTR. (July 18, 2019), https://ijrcenter.org/2019/07/18/un-special-rapporteurs-highlight-forced-sterilization-of-indigenous-women-in-canada/ (describing U.N. Special Rapporteur's awareness of reports of cases of sterilizations and her highlighting of Saskatoon Health Regional Authority's apology for practice and its acknowledgment of racism within healthcare system).

192. See *id.* for a discussion of U.N. Special Rapporteur on Violence Against Women Dubravka Šimonović's visit to Canada from April 13 to April 23, 2018.

and statements from the U.N. Special Rapporteur on Violence Against Women have not been fully effective in creating significant policy changes, they provide an example of the ways in which international law and its principles may be applied to influence state policy and practice.[193] The significant criticism of the Canadian government from the CAT and the U.N. Special Rapporteur on Violence Against Women is founded on a basis of international legal norms, specifically those created by the Genocide Convention, which explicitly established forced or coercive sterilization as a violation of international law.[194] In the larger international legal context, there are a number of declarations and documents that protect the reproductive rights and autonomy of Indigenous women, many of which have been created as resolutions through various organs of the United Nations.[195]

A. Protections for Indigenous Peoples Under International Law

The United Nations and its various organs were founded in 1945 on the ideas of "faith in fundamental human rights"[196] and "fundamental freedoms for all without distinction as to race, sex, language, or religion."[197] As members of the United Nations, states are obligated to adhere to these goals.[198] The United Nations has routinely emphasized the importance and expansion of fundamental human rights under international law in subsequent covenants and international treaties.[199] The most comprehensive of these documents is the Universal Declaration of Human Rights (UDHR), which entitles all individuals to human rights, regardless of race, color, language, religion, political or other opinion, national origin, or other status.[200] The UDHR does not create specific obligations for states in the way that binding treaties do.[201] Instead, it is considered a reflection of the fundamental values that are shared by the international community as a whole.[202] Its provisions are considered reflective of modern custom and human rights law and have given rise to a number of other international agreements that are binding in nature, including the ICCPR and the International Covenant of Economic, Social, and Cultural Rights (ICESCR).[203]

In addition to the many treaties espousing human rights, the United Nations has provided an essential and meaningful forum for the recognition and discussion of

193. *See id.* (describing Special Rapporteur's endorsement of Canadian legislation to criminalize forced or coerced sterilization with an emphasis on free, prior, and informed consent).

194. Genocide Convention, *supra* note 12, art. II, § d.

195. *See generally* U.N. DEP'T OF ECON. & SOC. AFFS., *supra* note 7.

196. U.N. Charter pmbl.

197. *Id.* art. 1, ¶ 3.

198. *Id.* art. 4, ¶ 1.

199. *See* Bradley Reed Howard, *Human Rights and Indigenous People: On the Relevance of International Law for Indigenous Liberation*, 35 GERMAN Y.B. INT'L L. 105, 128 (1992) (describing expansion of fundamental rights in covenants and international treaties created after ratification of U.N. Charter).

200. UDHR, *supra* note 17.

201. *Id.*

202. *Id.*

203. *Id.*

issues facing Indigenous populations, often at the hands of state governments in the course of efforts to integrate Indigenous people into the "mainstream society" of the colonizer state.[204] The global Indigenous movement, as it is known today, originated in the work of Indigenous activists around the world and arose as a response to the frustration many Indigenous people felt towards the colonizer governments in the states where they resided.[205] For example, throughout the twentieth century, the United States continually ignored and violated the terms of several treaties made with various Native nations.[206] Indigenous peoples frequently lacked appropriate legal recourse for violations of these important treaties, which addressed issues such as the return of land and the formation of special courts on Indigenous affairs.[207] In Canada, the Indian Act of 1876 and its subsequent amendments—along with the imposition of Canadian property laws that seized Indigenous land in violation of Six Nations laws—ignored the basic rights of Indigenous people and communities.[208] In response, Indigenous leaders and activists in the United States and Canada turned to the world stage.

The journey to international recognition of Indigenous rights began in 1923 when Chief Deskaheh of the Iroquois League traveled from Canada to Geneva to attend meetings of the League of Nations in the hopes that the organization would recognize Iroquois sovereignty.[209] He described the Iroquois League as "united in the oldest League of Nations"[210] and argued for the admission of the Six Nations of the Iroquois into the League in order to secure rights like independent home-rule.[211] Though the League of Nations refused to hear his arguments, the fight for

204. Howard, *supra* note 199, at 122.

205. *Id.*

206. *See id.* at 117–22 (discussing history of federal treaties with and treatment of Indigenous Peoples throughout twentieth century).

207. *Id.*; *see also* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE, 88–90 (2d ed. 1985) (discussing general disregard for legal standing and rights of Indigenous peoples against European colonizers).

208. Letter from Deskaheh, Sole Deputy and Speaker of the Six Nations Council, to The Honourable Sir James Eric Drummond, Secretary-General of the League of Nations (Aug. 6, 1923) http://cendoc.docip.org/collect/deskaheh/index/assoc/HASH9252/c582fe50.dir/R612-11-28075-30035-6.pdf.

209. *See Historical Process at the United Nations*, DOPIC: INDIGENOUS PEOPLES' CTR. FOR DOCUM., RSCH., & INFO., https://www.docip.org/en/oral-history-and-memory/historical-process/ (last visited Jan. 29, 2021) (providing history of recognition of rights of Indigenous people in international law).

210. The Haudenosaunee Confederacy, or the Iroquois League of Nations in English, was founded several hundred years ago, and is sometimes called the "Oldest League of Nations" due to its position as the oldest known association of distinct nations and ones of the longest lasting participatory democracies in the world. *Id.* The five original native nations that made up the League include the Mohawk, Oneida, Onondaga, Cayuga, and Seneca nations. *Id.* The Tuscarora nation eventually joined the Confederacy after migrating from what is now the southern part of the United States. *Id.*; *see generally Who We Are: About the Haudenosaunee Confederacy*, HAUDENOSAUNEE CONFEDERACY, https://www.haudenosauneeconfederacy.com/who-we-are/ (last visited Aug. 20, 2021); *About Us: Today*, ONONDAGA NATION, https://www.onondaganation.org/aboutus/today/ (last visited Aug. 20, 2021).

211. Letter from Deskaheh, *supra* note 208, paras. 2, 20.

international recognition of Indigenous rights and sovereignty did not end in 1923.[212]

In 1974, the International Indian Treaty Council (IITC) was formed in response to the United States' continued disregard of Indigenous land rights.[213] The IITC's mission is to recognize and protect the human and treaty rights of Indigenous peoples with the goal of addressing the international community as one of the world's nations.[214] In 1977, IITC became the first Indigenous people's organization to be recognized as an Non-Governmental Organization (NGO) with Consultation Status to the United Nations Economic and Social Council.[215] The IITC also assisted in the organization of a U.N. NGO conference on Discrimination Against Indians in the Americas that same year.[216]

The World Council of Indigenous Peoples ("WCIP") is another NGO that worked to obtain international recognition for Indigenous rights throughout the later twentieth century.[217] WCIP was created by members of Indigenous communities in Canada, New Zealand, and Scandinavia in 1975.[218] WCIP eventually gained NGO status, allowing its members to observe and advise U.N. discussions of Indigenous rights.[219] Though the organization dissolved in 1996, its work in sponsoring various international conferences on issues of Indigenous liberation left an important legacy.[220] These organizations played an essential role in promoting the recognition and discussion of Indigenous issues in the international arena.[221] The new focus on these issues set the foundation for the U.N. Working Group on Indigenous Populations ("WGIP"), which was formed by the U.N. Economic and Social Council's Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1982.[222] The group provided a forum for the discussion of Indigenous peoples' rights in a setting that was significantly less formal than traditional U.N. mechanisms, allowing conversations that could freely criticize states for their

212. *See* DOPIC: INDIGENOUS PEOPLE'S CENTRE FOR DOCUM., RSCH., & INFO., *supra* note 209 (discussing continued fight for international recognition of Indigenous rights and sovereignty).

213. Howard, *supra* note 199, at 122–23.

214. *See Our Mission,* INT'L INDIAN TREATY COUNCIL, https://www.iitc.org/about-iitc/ (last visited Jan. 29, 2021) (describing goals and purpose of International Indian Treaty Council as seeking self-determination and sovereignty status for its members as well as recognition and protection for their rights and cultures).

215. *Id.*

216. Howard, *supra* note 199, at 123.

217. *Id.* at 124.

218. *Id.*

219. *See* Ulia Gosart, *Opinion: Celebrating Indigenous Peoples and How They Gained a Voice on the World Stage*, L.A. TIMES (Aug. 7, 2017, 3:00 PM) https://www.latimes.com/world/global-development/la-fg-global-ulia-gosart-oped-20170801-story.html (recounting history of advocacy by Indigenous people in context of international law and the world stage).

220. *See* Howard, *supra* note 199, at 124 (discussing history and legacy of WCIP).

221. *Id.*

222. *See* Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT'L L. 439, 444 (2008) (noting that WGIP is the first human rights mechanism that has been established to consider issues impacting Indigenous populations).

historical and continued conduct.[223] The ability to directly discuss states' violations against Indigenous populations, as well as the significant involvement of Indigenous people in the conversation, allowed for Indigenous people to set the foundation for a new international instrument or multilateral agreement to declare the protection of their own rights. [224]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007 after over twenty years of hard work by various indigenous rights organizations—work that cleared the way for the adoption of a declaration that specifically recognizes and protects the unique cultural rights of Indigenous people around the world.[225] While the Declaration is a non-binding instrument, it is nevertheless significant as it is the only human rights instrument that specifically discusses rights in relation to the lived experiences of Indigenous peoples.[226] It is also the most progressive international instrument relating to Indigenous peoples' rights to self-determination, land, collective rights, and cultural rights in areas like education and health.[227]

The early draft was created with "unprecedented input" from Indigenous groups through nearly a decade of collaboration.[228] The early work of WGIP eventually transitioned to the Working Group on the Draft Declaration on the Rights of Indigenous Peoples when the draft was submitted to the Commission on Human Rights for consideration.[229] The Commission on Human Rights continued to consult and collaborate with Indigenous organizations as negotiations with states began, though to a significantly lesser extent.[230]

Although a final draft was eventually reached, the negotiations lasted for over a decade and significant barriers existed along the way.[231] Over sixty states and nearly seventy Indigenous and non-governmental organizations contributed throughout the entire drafting process of UNDRIP, which allowed the final Declaration to reckon with centuries of historical discrimination and oppression at

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223. *Id.* at 445.

224. *See id.* (describing active participation of Indigenous people in text's drafting).

225. *See id.* at 440 (detailing history of activism by various Indigenous groups throughout late 20th century).

226. Sandra Pruim, *Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples,* 35 ADEL. L. REV. 269, 269 (2014).

227. Claire Charters, *Reparations for Indigenous Peoples: Global International Instruments and Institutions*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INT'L AND COMPAR. PERSPECTIVES 163, 168 (Federico Lenzerini ed., 1st ed. 2008).

228. Pruim, *supra* note 226, at 275.

229. *Id.*

230. *See* Jeremie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 INT'L J. ON MINORITY & GROUP RTS. 207, 214 (2007) (describing how frequently there was no formal space for indigenous peoples' representation in the discussions).

231. *See* Pruim, *supra* note 226, at 276–77 (noting that some indigenous representatives went on a hunger strike due to their frustration); *see also* Gilbert, *supra* note 230, at 212–15 (detailing working groups' contests and describing negotiation process's main sticking points as the issues of self-determination, collective rights, and land rights).

the hands of sovereign states to some extent.[232] This wide-spread involvement resulted in a comprehensive declaration that recognized the distinct cultures, languages, and traditions of Indigenous peoples.[233] This collaborative process also reflected one of the main goals of the Declaration—that it should stand "as a standard of achievement to be pursued in a spirit of partnership and mutual respect."[234]

UNDRIP requires states to recognize that Indigenous peoples have the right to enjoy all of the rights established under the U.N. Charter and the Universal Declaration of Human Rights,[235] as well as other human rights established under international law.[236] The documents and international law referred to by UNDRIP not only require the realization of general human rights for Indigenous populations but also specifically refer to the rights of motherhood, childbirth, and reproductive health—as outlined in other, more specific U.N. documents, such as the Convention on the Elimination of Discrimination Against Women (CEDAW).[237]

One of the most applicable sections of UNDRIP is Article 8 which specifically outlines the right of indigenous peoples to be free from any form of forced assimilation and destruction of culture.[238] Though the final version of this article does not protect against "ethnocide and cultural genocide," phrases which were explicitly included in earlier drafts for the Declaration,[239] it nevertheless acts "as a concrete recognition" of the rights of Indigenous peoples to freely enjoy, develop, and participate in their own cultures.[240] This article, as well as Article 7 which immediately precedes it, protect the rights of Indigenous people to be free from genocide and other acts of violence.[241] Despite not explicitly mentioning the phrase, these provisions of UNDRIP therefore work together to protect against "cultural genocide,"[242] defined as genocide based on "an individual's culture or political views."[243] Practices of forced sterilization employed by states such as the United States and Canada contribute to the destruction of Indigenous culture, in violation

232. Pruim, *supra* note 226, at 275.

233. UNDRIP, *supra* note 6.

234. *Id.* pmbl.

235. *Id.* art. 1.

236. *Id.* art. 17.

237. See *infra* Section III.B for a discussion of reproductive rights and women's rights as protected by the Convention on the Elimination of Discrimination Against Women (CEDAW) and other U.N. documents.

238. UNDRIP, *supra* note 6, art. 8.

239. Pruim, *supra* note 226, at 279–83.

240. *Id.* at 721.

241. UNDRIP, *supra* note 6, art. 7, ¶ 2.

242. *See* Pruim, *supra* note 226, at 272 (illustrating connection between Articles 7 and 8 of UNDRIP and cultural genocide, despite term's exclusion from Genocide Convention).

243. Lindsay Glauner, *The Need for Accountability and Reparations: 1830–1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 925 (2002). While the Genocide Convention does not explicitly include the term "cultural genocide," it still may be used as a basis for recourse against state-sponsored policies and practices of forced and coerced sterilizations of Indigenous peoples under the Article 2(d) definition of genocide within the Convention. See *infra* Section V.D for further explanation.

of Articles 7 and 8 of UNDRIP, and amount to genocide under international legal standards.

B. Women's Rights and Protection from Sterilization Under International Law

Human rights relating to reproductive health and childbirth are also upheld by a number of U.N. declarations and treaties.[244] Within the text of the UDHR, motherhood is awarded "special care and assistance."[245] Autonomy over one's reproductive health and decisions is inherent in these rights, including freedom from involuntary sterilization.[246] Human rights related to reproductive health and decision-making are further developed in subsequent U.N. conventions and declarations. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires that signatories protect the rights of women in all matters relating to their children, including the right to freely decide on the number and spacing of their children.[247] CEDAW also requires that women have access to appropriate health care services for family planning.[248]

Subsequent recommendations from the Committee on the Elimination of Discrimination Against Women expanded on the meaning of appropriate health care services as presented in CEDAW.[249] These recommendations require that states ensure women are able to fully consent to and understand all medical procedures they are to undergo, including those relating to reproductive rights, and that states should not permit any type of coercion.[250] Non-consensual sterilization is specifically cited as a coercive practice prohibited in states that are party to CEDAW.[251] Additional recommendations call for an intersectional approach to women's rights and the obligations of states under CEDAW.[252] Issues of discrimination based on sex and gender are "inextricably linked with other factors that affect women," such as race, ethnicity, class, and religion, among others.[253] This is evidenced by the disproportionate number of Indigenous women (and minority women more generally) who have undergone forced or coerced sterilization in

244. See *infra* Section III.B for a discussion of conventions and treaties, such as the Universal Declaration on Human Rights, and of documents specifically relating to the rights of women, such as CEDAW.

245. UDHR, *supra* note 17, art. 25, ¶ 2.

246. Women have the right to decide "freely and responsibly on the number and spacing of their children," and to have access to all information and education to allow them to fully exercise these rights. Convention on the Elimination of All Forms of Discrimination Against Women art. 16, ¶ 1(e), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW Convention].

247. *Id.*

248. *Id.* art. 12, ¶ 1.

249. *See generally* Rep. of the Comm. on the Elimination of Discrimination Against Women, ch. I, U.N. Doc. A/54/38/Rev.1 (1999).

250. *Id.* ch. I, ¶ 22.

251. *Id.*

252. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW Rec. No. 28].

253. *Id.*

comparison to their white counterparts.[254] CEDAW recommends that states recognize the intersectional impact of discrimination and that they strive to create policies that recognize and eliminate such issues.[255]

Indigenous peoples around the world are entitled to the human rights promised by the U.N. Charter and the documents that follow, including those that protect motherhood and reproductive rights. Though the previously discussed declarations and conventions such as UNDRIP and CEDAW are non-binding, and many were not yet in existence when the most significant human rights violations against Indigenous peoples occurred,[256] these agreements work together to create the context within which the forced sterilization of Indigenous peoples may be examined under international norms. Additionally, states—such as the United States and Canada—that are signatories or parties to these conventions and declarations[257] are subject to sanctions from the international legal community when their provisions relating to reproductive health and informed consent to sterilization procedures are violated.[258] Just as human rights law protects the rights of Indigenous peoples to express and freely enjoy their culture,[259] so too does international law protect the rights of women to make their own reproductive choices, free from coercion.[260] The work of various advocacy groups to ensure recognition issues relating to Indigenous people and reproductive and sexual health in the international arena, and the creation of international legal mechanisms surrounding those issues, provide a practical framework for the evaluation of state policies and practices of forced and coerced sterilization in an international arena.

IV. FINDING LIABILITY UNDER INTERNATIONAL LAW AND PROVIDING REPARATIONS TO VICTIMS

Under the declarations and conventions described above, states are required to protect the human rights of Indigenous women, including rights related to

254. See *supra* Section II.A for a comparison of the decline in birth rates in various populations.

255. CEDAW Rec. No. 28, *supra* note 252, ¶ 18.

256. See *supra* Section II.A for an account of the high rates of forced and coerced sterilization of Indigenous women in the United States in the 1970s.

257. While UNDRIP is not binding, the United States and Canada officially removed their "objector" status in 2016 to show their support of the declaration. U.N. DEP'T ECON. & SOC. AFF, *supra* note 7. Additionally, while Canada is a party and therefore subject to CEDAW, the United States is one of the few U.N. members states that has not ratified CEDAW. *CEDAW Information Note 4: List of State Parties,* UNITED NATIONS, https://www.un.org/womenwatch/daw/cedaw/cedaw20/list.htm (last visited Aug 20, 2021). As a signatory, the United States may not act in a way that defeats the purpose of the Convention. *Legal Obligations of Signatories and Parties to Treaties*, INSIDE JUSTICE, https://www.insidejustice.com/intl/2010/03/17/signatory_party_treaty/ (last visited Nov. 8, 2021).

258. See *supra* Section II.B for a description of forced sterilizations happening in significant numbers to Indigenous women in Canada, some perhaps as recently as 2017.

259. *See* UNDRIP, *supra* note 6 (protecting Indigenous human rights and culture).

260. *See* CEDAW Convention, *supra* note 246 (protecting the right of women to freely make their own reproductive health choices).

reproductive autonomy.[261] These agreements—from UNDRIP to CEDAW—provide helpful guidance for state policymaking and practice. However, pushing states to action through the signing and ratification of international legal documents has, thus far, failed to adequately protect the rights of Indigenous women.[262] Additionally, though UNDRIP outlines the rights to which Indigenous people around the world should be entitled, it does not actually bind U.N. member states to the provision of those rights.[263] UNDRIP also fails to account for the lasting damage of previous forced and coercive sterilization practices in Indigenous communities around the world.[264] These continued practices, and their discriminatory application, amount to genocide under international law.[265] As a result, international law must turn to a more forceful approach in order to hold states accountable for their past actions and to prevent state-sanctioned sterilization programs and initiatives that disproportionately impact Indigenous women and communities.

A. The Convention on the Prevention and Punishment of the Crime of Genocide and Its Definitions

The forced sterilization of Indigenous women in the United States and Canada amounts to acts of genocide and is not only in violation of customary international law, but also of the Genocide Convention on the Prevention and Punishment of Genocide. [266] Genocide, as outlined in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), is considered one of the "most heinous international crimes under customary international law."[267] Customary international law is established based on the "general and consistent practice of states followed by them from a sense of legal obligation."[268] In evaluating the general and consistent practices of states and whether or not they form a consensus that would allow such crimes to be considered customary international law, the length of time of the practice and its diverse forms must be considered.[269] This evaluation allows international legal norms to be recognized and raised to the level of customary international law.[270] Genocide is also recognized as a *jus cogens* international crime, as it is "universally condemned by the international

261. See *supra* Sections III.A and III.B for discussions on the specific protections of Indigenous peoples' rights and women's rights within U.N. declarations and documents.

262. See *supra* Section II.B for reports of forced and coercive sterilization practices that occurred as recently as 2017.

263. Pruim, *supra* note 226, at 302.

264. *Id.*

265. Genocide Convention, *supra* note 12, art. I.

266. Glauner, *supra* note 243, at 912–13.

267. *Id.* at 913.

268. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1986); *see also* Glauner, *supra* note 243, at 917 (stating that customary international law is created through the existence of uniformity and generality of state practice and of the idea that such is required by law—"*opinio juris necessitates*").

269. *See* Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1896 (2016) (noting that state practice may take a number of different forms, such as diplomatic acts, statutes, judicial decisions, official statements, and domestic regulations, among others).

270. *Id.*

community."[271] This condemnation is evident from the almost universal ratification and acceptance of the Genocide Convention, with 152 states ratifying or acceding to the Convention, including significant world powers such as the United States (though not without significant—and sometimes crippling—reservations).[272] Because the Genocide Convention has risen to the level of customary international law and genocide is a *jus cogens* international crime, any entity found to have committed genocide should be subject to legal recourse on an international level.[273]

The Genocide Convention ("Convention") was adopted on December 9, 1948 and entered into force on January 11, 1951,[274] after existing human rights documents were found to be insufficient in creating criminal liability for atrocious human rights violations committed outside of any armed conflict.[275] Upon its creation, the Convention filled this gap and created an opportunity to prosecute those responsible for committing such acts.[276] While the actual definition of "genocide" is rather straightforward—meaning the "destruction of a national, racial or religious group"[277]—the Genocide Convention provides helpful context to that definition, outlining specific acts that amount to genocide and various procedural elements for the implementation of the Convention.[278] As defined in Article II of the Convention, the following crimes are considered to be genocide, so long as they are committed with the "intent to destroy, in whole or part, a national, ethical, racial, or religious group:"

> (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) *imposing measures intended to prevent births within the group*; and (e) forcibly transferring children of the group to another

271. Glauner, *supra* note 243, at 914. Glauner also notes that in addition to genocide, other crimes that are recognized as *jus cogens* international crimes include piracy, slavery, slave-related practices, apartheid, crimes against humanity, war crimes, aggression, and torture. *Id.*

272. Henry T. King Jr. et al., *Origins of the Genocide Convention*, 40 CASE W. RSRV. J. INT'L L. 13, 17–18 (2007). For an up-to-date list of all states party to the Genocide Convention, see *The Genocide Convention*, U.N. Office on Genocide Prevention & Resp. to Protect, https://www.un.org/en/genocideprevention/genocide-convention.shtml (last visited Nov. 8, 2021).

273. Glauner, *supra* note 243, at 914.

274. William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J. L. PUB. POL'Y 36, 36 (2010).

275. *See* King et al., *supra* note 272, at 13–14 (describing failure of the International Military Tribunal—the Nuremberg Court—to find liability for peacetime genocide under existing international law because its judgement was limited to "wartime genocide"); *see also* Glauner, *supra* note 243, at 920 (recognizing that for prosecution under international law existing definitions of conduct amounting to "Crimes Against Humanity" required that such acts be committed during an armed conflict and acknowledging the Armenian Genocide was a "peace-time" genocide that escaped prosecution); King et al., *supra* note 272, at 16 (explaining that the London Charter—the document created to regulate procedures by which to prosecute major Nazi war criminals for genocide—failed because "genocidal activity" was limited to wartime genocide and "crimes against humanity" were limited to those occurring prior to or during the war).

276. Glauner, *supra* note 243, at 922.

277. King et al., *supra* note 272, at 14.

278. *See generally* Genocide Convention, *supra* note 12, arts. II, VI.

group.[279]

This definition of genocide is widely accepted under international law, and has been raised to the level of customary international law by the International Court of Justice,[280] a standing which has been reaffirmed by various international criminal tribunals in the years since.[281] Based on the specific acts outlined in Article II, forced and coercive sterilization practices, especially at the hands of state-sponsored healthcare and medical service programs, should unequivocally be considered genocide, and should be recognized in the international legal community as such.[282] Through Article IV of the Convention, all persons who commit the acts as outlined in the earlier portions of the Convention are subject to punishment, whether they are public officials or private individuals.[283]

B. Civil Liability Under the Jurisdiction of the International Court of Justice and Its Possible Limitations

Parties in violation of the Genocide Convention are to be tried by a tribunal of the state in which the genocidal acts were physically committed,[284] though parties may call upon organs of the United Nations, such as the International Court of Justice (ICJ), to take action to prevent such acts.[285] The ICJ is the principal judicial organ of the United Nations, established by the 1945 U.N. Charter.[286] Under the Charter, all U.N. member states are automatically considered parties to the Statute of the ICJ,[287] which outlines additional organizational and procedural aspects of the Court.[288] The Statute of the ICJ provides that only states may appear as parties in cases before the Court.[289] The Statute defines jurisdiction for the ICJ in a relatively broad manner, allowing it to hear "all cases which the parties refer to it and all matters specifically provided for in the Charter of the U.N. or in treaties and conventions in force."[290] In particular, the Court has jurisdiction over legal disputes concerning treaty interpretations, questions of international law, violations of international obligation, and the nature and extent of any reparations that may arise

279. *Id.* art. II (emphasis added).

280. *See* Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L. J. 243, 247 (2016) (examining Rome Statute's *travaux preparatoires*, which called this definition authoritative and stated that it reflected customary international law under ICJ jurisdiction due to its wide acceptance by states).

281. *See id.* (citing various judgements of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) that raise Genocide Convention's article II definition of genocide to level of customary international law).

282. Genocide Convention, *supra* note 12, art. II(b), (d); Glauner, *supra* note 243, at 925.

283. Genocide Convention, *supra* note 12, art. IV.

284. *Id.* art. VI.

285. *Id.* art. VIII.

286. U.N. Charter, art. 92.

287. *Id.* art. 93, ¶ 1.

288. *See generally* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

289. *Id.* art. 34, ¶ 1.

290. *Id.* art. 35, ¶ 1.

as a result of violations of international obligations.[291] Under this expansive scope of ICJ jurisdiction, claims of genocide—both as a general violation of international law and as a specific violation of the Genocide Convention—may be brought before the Court.[292]

While forced and coerced sterilizations clearly fit the defined genocidal acts under the Genocide Convention and are therefore subject to ICJ jurisdiction, there are still significant barriers to the actual application of the Genocide Convention to prosecute these cases. The first barrier is the exclusion of the term "cultural genocide" from the final draft of the Convention.[293] Cultural genocide is the destruction of specific practices and structures that allow a cultural group to exist independently and remain as a group.[294] The term includes policies and practices that force a cultural group to assimilate to the dominant culture and restrict the minority group's ability to freely enjoy and participate in their own unique culture.[295] Second, there are several practical issues that arise relating to the actual likelihood that a party would bring a charge of genocide against an influential nation like the United States. Due to the fact the Indigenous communities are not considered "states" under international law, they cannot raise a claim themselves.[296] Finally, significant resistance to the Convention persists from major powers through various mechanisms—such as reservations regarding aspects of the Convention—making it much weaker in its actual application.[297]

1. The Exclusion of Cultural Genocide from the Genocide Convention

Early conversations surrounding the Genocide Convention considered the inclusion of the term "cultural genocide," however, there is no mention of the term in the final draft.[298] The term was similarly excluded from the final draft of UNDRIP, though the overlap of other provisions within UNDRIP extend its protections to encompass issues relating to cultural genocide.[299] Cultural genocide refers to the destruction of the social and political structures and practices that "allow the group to continue as a group."[300] In the context of Indigenous rights, actions such as land

291. *Id.* art. 36, ¶ 2.

292. *Id.*

293. *See* Glauner, *supra* note 243 at 924–25 (detailing how fears that certain member states would interpret "cultural genocide" as condemning assimilation of minority groups resulted in the exclusion of this term from the Convention). For a discussion of the term "cultural genocide" in the context of UNDRIP, see *supra* Section III.A.

294. *See* Akhavan, *supra* note 280, at 246.

295. *Id.*

296. *Id.*

297. King et al., *supra* note 272, at 17–18.

298. Glauner, *supra* note 243, at 924–25; *see also* Sheryl Lightfoot & David B. MacDonald, *The United Nations as Both Foe and Friend to Indigenous Peoples and Self-Determination*, *in* THE UNITED NATIONS: FRIEND OR FOE OF SELF-DETERMINATION? 32, 33 (Jakob R. Avgustin ed., 2020) (explaining that the term "cultural genocide" was removed from drafts of the Genocide Convention because settler states were actively performing cultural genocide on Indigenous people through policies that would have been prohibited by inclusion of the term).

299. Pruim, *supra* note 226, at 279–83.

300. *See* Akhavan, *supra* note 280, at 246 (quoting TRUTH AND RECONCILIATION COMM'N

seizures, prosecution or disruption of spiritual practices, and forced removal of children—both through residential school and foster care or adoption outside of the Indigenous community—constitute cultural genocide.[301]

These violations differ from physical genocide because they may be committed without actually taking measures to reduce the population of the targeted group.[302] Rather, acts of cultural genocide are committed through programs that force assimilation into the dominant culture of a state and prevent Indigenous peoples from the free enjoyment of their culture and the ability to bequeath that culture to future generations.[303] The failure of the international legal community to recognize acts of cultural genocide as legitimate violations of the Genocide Convention could potentially present an insurmountable barrier to Indigenous victims of forced and coerced sterilizations from seeking legal redress and reparations otherwise available under international law.

2. Other Significant Barriers to Civil Liability of States

There was also significant state resistance to the adoption and ratification of the Genocide Convention, with nations such as the United States taking almost forty years to ratify the Convention.[304] Significant reservations have also been applied by certain powerful states, including the United States, as conditions to ratification.[305] For the United States, these reservations include the requirement of specific consent to jurisdiction in any dispute in which the United States is named a party.[306] This particular reservation makes it difficult to name the United States as a party in any international dispute before the ICJ, since the United States can avoid jurisdiction simply through a lack of consent.[307] The U.S. Senate also published "understandings" of certain portions and phrases of the Genocide Convention, the most significant of which is an interpretation of the phrase "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group . . . ."[308] The understanding shifts the word "intent" to "specific intent."[309] This subtle change makes it more difficult to find an actual intent to commit genocide through

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OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 1 (2015)).

301. *See id.* at 244–45 (describing conclusions of the Truth and Reconciliation Commission of Canada regarding specific acts of cultural genocide perpetrated against Indigenous peoples in Canada).

302. *Compare* Genocide Convention, *supra* note 12, art. II (noting specific acts outlined as genocide), *with* Akhavan, *supra* note 280, at 246 (defining cultural genocide).

303. *See* Akhavan, *supra* note 280, at 246 (quoting TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 1 (2015)).

304. King et al., *supra* note 272, at 17.

305. *Id.* at 17–18.

306. INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. TREATY DOC. NO. 81-15 (1986) [hereinafter CONSIDERATION OF TREATY DOCUMENT].

307. King et al., *supra* note 272, at 18.

308. CONSIDERATION OF TREATY DOCUMENT, *supra* note 306.

309. *Id.*

implementation of population control and health policies since genocide is not the official goal of those policies.

The ICJ addressed the issue of reservations to the Genocide Convention through an advisory opinion issued after the adoption of the Convention.[310] The ICJ's advisory opinion stated that there was no "absolute answer" to the question of whether member states could make reservations to the Genocide Convention, and that member states must evaluate reservations on an individual basis to determine whether they violate the object and purpose of the Convention.[311] Undeniably, reservations such as those made by the United States weaken the application of the Genocide Convention under international law. It should also be noted that a charge of genocide may only be brought in front of the ICJ by another United Nations member state.[312] This can limit the accountability of powerful nations such as the United States because other states may be reluctant to criticize their practices, and Indigenous groups within the states can be prevented from holding these states accountable (i.e., a state cannot and would not bring itself before the ICJ).

C. The Possibility of Criminal Liability Under the Jurisdiction of the International Criminal Court

While the ICJ provides a forum of international civil recourse for states on the basis of violations arising as the result of state-sponsored practices, the International Criminal Court (ICC) provides a forum in which criminal charges may be brought against individuals who have committed the "most serious crimes of international concern," including the crime of genocide.[313] The Rome Statute, which established the ICC and its jurisdiction when it entered into force in 2002, takes its definition of genocide from the existing Genocide Convention.[314] As a result, the ICC may prosecute acts of forced or coerced sterilizations—"measures intended to prevent births"—so long as the "intent to destroy, in whole or part, a national, ethnical, racial or religious group" can be found.[315]

Because the ICC aims to hold individuals accountable rather than states, its jurisdiction only extends to living individuals who have committed human rights violations.[316] In the case of the involuntary sterilization of Indigenous women, the scope of ICC jurisdiction is limited to physicians and healthcare providers who actually performed forced and coercive sterilizations.[317] ICC jurisdiction is also limited to events that have occurred after the court was established on July 1,

310. *See* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Op., 1951 I.C.J. Rep. 15 (May 28, 1951) (determining whether and the extent to which member states can make reservations to Genocide Convention).

311. *Id.*

312. *See How the Court Works*, INT'L CT. JUST., https://www.icj-cij.org/en/how-the-court-works (last visited Mar. 12, 2021) (stating that only members can be parties to contentious cases).

313. Rome Statute of the International Criminal Court, *supra* note 15, art. 1.

314. *See id.*, art. 6; *see also* Genocide Convention, *supra* note 12, art. II.

315. *See* Rome Statute of the International Criminal Court, *supra* note 15, art. 6.

316. INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 5 (2021).

317. *See id.* (stating only individuals alleged to have committed crime within the jurisdiction of the ICC may be brought before the ICC).

2002.[318] As a result, the majority of forced and coerced sterilizations of Indigenous women are not subject to jurisdiction under the ICC.[319] This limitation stems from the fact that the vast majority of forced and coercive sterilizations in the United States and Canada were performed during the 1970s.[320] Arguably, any procedures that occurred in the years after the court was established in 2002 could perhaps be brought to the ICC if a responsible individual could be identified. For example, this jurisdictional timeframe would allow for the prosecution of individuals involved in the recent involuntary sterilization of Indigenous women in Canada through 2013.[321] Unfortunately, because the United States is not a party to the Rome Statute—and is therefore not subject to ICC jurisdiction for human rights violations that occur within its own borders—jurisdictional issues still present significant barriers to any type of prosecution for forced and coerced sterilizations performed by individuals in the United States.[322]

Even in Canada, and other countries that are subject to ICC jurisdiction, the Rome Statue's requirement to prove "intent" is still a significant barrier to successful prosecution of individuals who committed forced and coercive sterilization practices.[323] Even though forced and coerced sterilization procedures seem to be explicitly included in the Rome Statute's definition of genocide, such acts may only be considered genocide if they are carried out with the "intent to destroy" a group,[324] which in this context would be Indigenous peoples. Although forced sterilization practices certainly violate the human rights of the individuals subjected to them, it is unclear whether such practices definitively constitute genocide under the Rome Statute. Without the phrase "cultural genocide"—or at least an understanding of it—appearing in the statute itself and unless a party can prove that the intent behind these policies was to destroy the Indigenous community as a whole, it is unlikely that ICC prosecutions would be successful.[325] This intent requirement would be particularly difficult to prove in the case of individual physicians and healthcare professionals, as they had little part in enacting the widespread policies. Despite the discriminatory and lingering impact on Indigenous women and communities left by policies created and enforced under the guise of population control, such policies may not, on their own, amount to the level of "intent to destroy a group" as required for prosecution in the ICC.

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318. *Id.*

319. *See id.* (stating that the ICC does not have jurisdiction over events that took place before July 1, 2002).

320. See *supra* Part II for a discussion of the historical practices of forced and coerced sterilizations in the United States and Canada.

321. These incidents were investigated by the U.N. CAT in 2018. See *supra* Section II.B for a discussion of recent forced sterilizations of Indigenous women in Canada. See Section II.B.3 for a discussion of the resulting class-action lawsuit brought by some of these women.

322. *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH, https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#5 (last visited Aug. 27, 2021).

323. Ricardo Pereira, *Government-Sponsored Population Policies and Indigenous Peoples: Challenges for International Human Rights Law*, 33 NETH. Q. HUM. RTS. 437, 476–77 (2015).

324. Rome Statute of the International Criminal Court, *supra* note 15, art. 6.

325. Pereira, *supra* note 323, at 476–77.

D. Civil Remedy through Reparations Under International Law

1. Proposed Reparations

The Universal Declaration of Human Rights provides that all individuals have the right to an "effective remedy" for "acts violating the fundamental rights granted him by the constitution or by law."[326] The U.N. has called the concept of "effective remedy" an "all too often neglected" part of the overarching international system of justice.[327] The U.N. has also recognized that, in many situations, even the most generous remedy cannot resolve the original violation of the victim's rights.[328] However, the need for an effective remedy has been reiterated in various declarations and resolutions addressing international human rights.[329] In 2005, the U.N. Commission on Human Rights adopted a resolution that describes the obligations of states to investigate and prosecute allegations of human rights violations and highlights the importance of providing "effective remedies," including reparations.[330] The right to an effective remedy for victims has been repeatedly recognized by international organizations and entities, reinforcing its importance in international law.[331]

The remedies described under the Resolution include (i) "effective access to justice," (ii) "[a]dequate, effective[,] and prompt reparation for harm suffered," and (iii) access to all relevant information regarding the violations and the possible avenues for reparation.[332] The resolution goes on to provide context for a number of different forms of remedy, declaring that they should be applied appropriately and proportionally under domestic and international law.[333] The Resolution clearly defines the standard for full and effective reparation, and the different forms in which

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326. UDHR, *supra* note 17, art. 8.

327. *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 8: Right to Remedy,* OFF. HIGH COMM'R ON HUM. RTS., https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23893 (last visited Feb. 12, 2021).

328. *Id.*

329. *See, e.g.*, UNDRIP, *supra* note 6, art. 40 ("Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.").

330. Commission on Human Rights Res. 2005/35, U.N. Doc. E/CN.4/2005, at § 2, ¶ 3 (Apr. 19, 2005).

331. *See* International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 (recognizing a right to effective remedy); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Jan. 4, 1969, 660 U.N.T.S. 195 (obligating state parties to assure protection, remedies, and access to just and adequate reparation for violations of rights assured by the document); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, June 26, 1985, 1465 U.N.T.S 112 (mandating state legal systems ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including means for as full rehabilitation as possible).

332. Commission on Human Rights*, supra* note 330, art. 7, ¶ 11.

333. *Id.* § 9, ¶ 15.

it may appear.[334] These forms include restitution,[335] compensation,[336] rehabilitation,[337] satisfaction,[338] and guarantees of non-repetition.[339] These remedies may be applied individually or in combination with one another due to the nature of the violation.[340]

In the months following the adoption of the Resolution, similar resolutions were adopted by a number of other U.N. organs, including the Economic and Social Counsel and the General Assembly with language that mirrors that of the U.N. Commission on Human Rights resolution, reaffirming the importance of reparation in all its forms under international law.[341] Although reparations, including financial compensation, happen after the violation of international law has occurred, they can improve compliance with international law generally by preventing future violations.[342] Further, while compensation may not return an individual to the exact circumstances that existed prior to any violation (especially in situations of forced or coercive sterilization), it can help victims to access essential resources and rebuild their lives.[343] For Indigenous women who have undergone sterilization without their knowledge or against their will, monetary reparations could improve access to mental health services and counseling resources and would generally begin to remedy some of the long-lasting impacts of involuntary sterilization practices.

In addition to the right to remedies and reparations for human rights violations generally under international law, UNDRIP specifically declares a right to "effective remedies for all infringements of [Indigenous peoples'] individual and collective rights."[344] While the Declaration does not specifically address the kinds of reparations to which Indigenous people are entitled, it is clear that violations of reproductive rights would be included as a violation of individual rights for which effective remedy should be provided because of the lasting impact and damage of

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334. *Id.* § 9, ¶ 18.

335. *See id.* § 9, ¶ 19 (noting that restitution ideally should restore victim to their state before any violation occurred and finding that restitution includes that of liberty, the enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, employment, and return of property).

336. *See id.* § 9, ¶ 20 (describing compensation as quantifiable monetary damages proportionate to the gravity and circumstances of each case).

337. *See id.* § 9, ¶ 21 (describing rehabilitation as encompassing medical and psychological care along with legal and social services).

338. *See id.* § 9, ¶ 22 (defining satisfaction as cessation of violations, public disclosure of the truth, restoring dignity of the victim, public apology, sanctions, commemoration, or accurate accounting of the violations); *see also* Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 531 (2003) (noting that satisfaction includes any non-material injuries considered an affront to injured persons or States).

339. *See* Commission on Human Rights, *supra* note 330, art. 9, ¶ 23 (defining guarantees as ensuring civilian control of the military, judiciary independence, human rights education, codes of conduct, monitoring social conflict, or reviewing laws).

340. Gillard, *supra* note 338, at 531.

341. *E.g.*, ESCOR Res. 2005/30 (July 25, 2005); G.A. Res. 60/147 (Dec. 16, 2005).

342. *See* Gillard, *supra* note 338, at 530 (describing reparation role as a significant tool for both enforcement and deterrence).

343. *Id.*

344. UNDRIP, *supra* note 6, art. 40.

such policies and practices on Indigenous communities around the world.

In the context of forced and coerced sterilization, remedy should begin with sweeping apologies from national health services such as the IHS and from national governments that employed such practices, such as the United States and Canada. Any apologies must be paired with generous monetary reparations paid directly to Indigenous women who have suffered as victims of such practices.[345] All remedies given—including reparations—must take into account the physical and mental harm suffered, lost opportunities, and the costs required for legal or expert assistance, medicine, and medical and psychological services.[346] Because the impact of forced and coercive sterilization practices extends beyond the women who experienced the procedures, remedies should also be provided more broadly to Indigenous communities throughout the United States and Canada. Finally, any meaningful remedy should include guarantees of non-repetition, with recognition of the measures states will take to prevent human rights violations from continuing in the future.[347] In the context of forced and coerced sterilization practices, this guarantee must include meaningful and effective policy changes and legislation that outlaw and criminalize the practice, as well as improved access to healthcare and education for Indigenous communities.[348]

2. An Example of Reparation Under International Law – Maria Mamérita Mestanza Chávez v. Perú

The Inter-American Commission on Human Rights (IACHR) provides a useful example of monetary reparations awarded to a victim of forced sterilization under international law.[349] A claim was brought against Peru for the forced sterilization of Maria Mamérita Mestanza Chávez, a Peruvian Indigenous woman and mother of seven children.[350] For a period of two years, starting in 1997, Mestanza Chávez received visits from Peruvian government health officials who attempted to pressure her into consenting to sterilization and threatened her and her partner with criminal sanctions if she refused.[351] After many intimidating visits, she was coerced into

345. *See* OHCHR, UN WOMEN, UNAIDS, UNDP, UNFPA, UNICEF & WHO, ELIMINATING FORCED, COERCIVE, AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT 16 (2014) [hereinafter ELIMINATING FORCED, COERCIVE STERILIZATION] (noting that complete remedy and redress would include reparations, such as compensation for long-term consequences and acknowledgment of wrongs committed, for all peopled subjected to forced or coercive sterilization procedures).

346. Commission on Human Rights, *supra* note 330, § 9, ¶ 20.

347. *Id.* art. 9, ¶ 23.

348. *See* ELIMINATING FORCED, COERCIVE STERILIZATION, *supra* note 345, at 13–16 (describing the various remedies and redress that should be provided for victims of involuntary sterilization practices).

349. *See, e.g.*, María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. Comm'n H.R., Report No. 66/00, OEA/Ser./L./V/II.111, doc. 20 rev. (2000), http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Peru12.191.htm (discussing case of María Mamérita Mestanza Chávez).

350. *Id.*

351. *María Mamerita Mestanza Chávez v. Peru (Inter-American Commission on Human Rights): Peru Admits Responsibility for its Forced Sterilization Policies*, CTR. FOR REPROD. RTS.,

giving consent and received a tubal ligation.[352] However, the government health officials who performed the procedure failed to provide appropriate medical assistance and information about the risks and consequences relating to the procedure.[353] Mestanza Chávez experienced significant complications and died nine days after the procedure.[354]

The Peruvian government agreed to settle the case in 2003, entering into an agreement with Mestanza Chávez's surviving husband and children.[355] In the settlement, the Peruvian government recognized its violations of human rights and admitted responsibility for those violations under international law.[356] The Peruvian government also pledged to further investigate the facts of the case and bring criminal penalties against anyone found responsible for the coercion and eventual death of Mestanza Chávez.[357] The government awarded compensation to Mestanza Chávez's surviving husband and children,[358] as well as permanent health insurance, free primary and secondary education in public schools for the children, and funds for her husband to purchase a home in the name of the children.[359] Finally, the Peruvian government promised to change its policies related to reproductive health and family planning to eliminate any discriminatory impact of the existing laws and policies.[360] Unfortunately, as of 2020, the surviving family members of María Mamérita Mestanza Chávez have not yet received all of the reparations they were promised.[361] Additionally, there are over 1,300 other women in Peru who have filed similar legal complaints without any form of criminal accountability or reparations.[362]

Though there are no references to genocide—cultural or otherwise—in the petition filed against the Peruvian government,[363] the petition asserted violations of

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https://reproductiverights.org/case/maria-mamerita-mestanza-chavez-v-peru-inter-american-commission-on-human-rights/ (Mar. 18, 2021) [hereinafter *Peru Admits Responsibility*].

352. *Id.*

353. *Id.*; *see also* Ñusta P. Carranza Ko, *Making the Case for Genocide, the Forced Sterilization of Indigenous Peoples of Peru*, 14 GENOCIDE STUD. & PREVENTION: AN INT'L J. 90, 97 (2000) (describing how medical personnel ignored Mestanza Chávez's concerns about post-surgery complications).

354. *Peru Admits Responsibility*, *supra* note 351.

355. *Id.*

356. María Mamérita Mestanza Chávez v. Peru, Petition 12.191, Inter-Am. Comm'n H.R., Report No. 71/03, OEA/Ser./L./V/II.118, doc. 70 rev. 2 (2003), https://www.cidh.oas.org/annualrep/2003eng/peru.12191.htm.

357. *Id.*

358. *See id.* ¶ 14(4th) (awarding the family compensation for "moral injury," mental health costs, and funeral and burial expenses).

359. *Id.* ¶¶ 14(8th)–14(10th).

360. *See id.* ¶ 14(11th) (outlining Peruvian government's pledge and promises for new legislation including penalties for violators of human rights and reparations for victims).

361. *See* Carranza Ko, *supra* note 353, at 101 (citing evidence that the daughters and sons of Mestanza Chávez family have not received financial assistance related to education).

362. *Id.*

363. *See id.* at 91 (arguing that systematic sterilization of thousands of Indigenous women in Peru during authoritarian Fujimori regime from 1990–2000 should be considered genocide under international law).

various inter-American agreements, as well as violations of CEDAW relating to state health policies and general access to safe and respectful healthcare for women.[364] The use of international law agreements to argue for and receive reparations is significant and should be reproduced on an even larger international scale.

3. Limits to Reparation

While international law requires reparations be provided to Indigenous people for forced and coercive sterilization practices, there are a number of limits that make any award of reparations unlikely in the near future. Like many other avenues to liability, a state cannot be held responsible for the actions of an individual perpetrating violations of human rights.[365] This poses a problem in determining whether a state is responsible for the actions of individual doctors and healthcare providers who imposed forced and coercive sterilization practices, despite the lack of any official federal mandate. In the United States, for example, Title X created state incentives that resulted in discriminatory reproductive healthcare practices.[366] While it could be argued that these policies constitute the necessary intent element of genocide under the ICJ and ICC, the stated goal of Title X was not to impose forced or coerced sterilization on any particular group of individuals. Instead, Title X aimed to improve access to contraceptive services and reproductive health options for low-income women and their families.[367] Accordingly, efforts to label actions under Title X and other federally funded programs in the United States as "state-sanctioned" policies in violation of human rights are unlikely to succeed.

Reparations for victims are not very likely because reparations have rarely been used to address major violations of human rights in the past. Victims of countless human rights violations, many of which had more significant and farther-reaching consequences, have gone without reparations. Perhaps the most significant of these violations is slavery.[368] Arguments for reparations for slavery under international law demand recognition of injuries relating to the invasion of African territories and the extermination of culture, the contribution of the slave trade to present wealth of certain Western nations such as the United States, and the continued impact of

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364. *See María Mamerita Mestanza Chávez v. Peru*, LII, https://www.law.cornell.edu/women-and-justice/resource/maria_mamerita_mestanza_chavez_v_peru (last visited Aug. 27, 2021) (noting that the petition cited articles 12 and 14 of CEDAW).

365. *See* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 223 (2006) (noting that creation of a duty for states to provide reparations for violations by non-state actors is not an established norm).

366. See *supra* Section II.A for a discussion of the historical context of discriminatory forced sterilization practices in the United States.

367. Sneha Barot, *Governmental Coercion in Reproductive Decision Making: See It Both Ways*, 15 GUTTMACHER INST. POL'Y REV., no. 4, Fall 2012, at 7, 9.

368. *See generally* Max du Plessis, *Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery*, 25 HUM. RTS. Q. 624 (2003) (considering issue of reparation for slavery and claims for reparations made by African states against the West arising out of Atlantic slave trade from 1440–1870).

slavery on racial inequality between individuals and between nations.[369] Another context in which reparations should be (but have not yet been) paid is colonialism, with its economic and social impact on formerly colonized nations and people around the world.[370] These two larger contexts provide examples of circumstances in which reparations have not been awarded, despite the fact that the practices involved were explicitly sanctioned and promoted by federal governments.[371]

While Indigenous women who were made victims of forced and coercive sterilization practices under discriminatory federal programs may be entitled to remedy through reparation under international law, it is unlikely that such relief will be awarded, particularly in the form of compensation.[372] However, while compensation may not currently be available to Indigenous women and their communities as a remedy, other forms of reparation such as satisfaction through public apology[373] and guarantees of non-repetition[374] may provide temporary alternatives while communities wait for more meaningful remedies under international law.

369. *Id.* at 645.

370. *See id.* at 656–57 (describing economic and social impact of European colonialism in Africa); Chris Cunneen, *Colonialism and Historical Injustice: Reparations for Indigenous Peoples*, 15 SOC. SEMIOTICS 59, 59–60 (2010) (calling for reparations for Indigenous people for harms caused by colonial law and practice, particularly for Aboriginal people in Australia and Indigenous people in the Americas).

371. *See, e.g.*, U.S. CONST. art. I, § 9 (outlining legality of Atlantic slave trade, permitting its existence until January 1, 1808, and allowing slavery to continue under federal law); The Indian Removal Act of 1830, 25 U.S.C. § 174 (authorizing forced removal of Native Americans from their rightful land across a number of states in southeastern United States).

372. See *supra* notes 365–71 and accompanying text for a description of the limitations on reparations for a variety of significant human rights violations under international law.

373. Commission on Human Rights, *supra* note 330, art. 9, ¶ 22 (describing satisfaction as being achieved through a number of means, including immediately ceasing any practices that violate human rights, making public apologies, acknowledging the facts, and accepting responsibility).

374. *See id.* art § 9, ¶ 23 (recommending guarantees of non-repetition include review and reformation of laws that contribute to or allow gross violations of international human rights and humanitarian laws).

V. CONCLUSION

The long-lasting impacts of forced and coerced sterilization of women and the continued practice of such procedures in certain states demand a response from the international legal community. These practices disproportionately violated the human rights of Indigenous women, resulting in lasting wounds on Indigenous communities around the world. Recognizing that such practices and their impacts are still contemporary and ongoing will allow legislators and policymakers to better understand the needs of the communities impacted and provide more than empty apologies. While some avenues of liability will be more difficult to pursue than others, there are existing opportunities to obtain justice for victims. Finding liability and paying reparations will be productive first steps in the long road to providing justice for Indigenous people around the world who have long suffered under genocidal state policies.