
ENGAGING A HUMAN RIGHTS BASED APPROACH TO THE MURDERED AND MISSING INDIGENOUS WOMEN AND GIRLS INQUIRY

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I INTRODUCTION

The situation of murdered and missing Indigenous women and girls is one of the gravest human rights atrocities in Canada right now. Many studies have shown that Indigenous women and girls experience violence including assault, abduction, and murder at rates significantly higher than non-Indigenous women and girls.¹ Indigenous women and girls experience systemic discrimination and violence based on the intersections of race, sex, gender, sexuality, ability, class, and impacts of colonization.² There have been many reports that have studied murdered and missing Indigenous women and girls, and the consensus of these reports

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¹ Pippa Feinstein & Megan Pearce, "Violence against Indigenous women and girls in Canada Review of reports and recommendations - Executive Summary" (2015) 1 at 1, online: Women's Legal Education and Action Fund <www.leaf.ca/wp-content/uploads/2015/02/Executive-Summary.pdf> [Feinstein & Pearce].

² UN Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples*, 12 February 2013, UN Doc E/C.19/2013/9.

is that “the economic and social marginalization of Indigenous women makes them more susceptible to violence and less able to escape violent circumstances.”³

Indigenous peoples have long known about the travesty of murdered and missing Indigenous women and girls. In 2005, the Native Women’s Association in Canada began the Sisters in Spirit research, education, and policy initiative to raise awareness of the high rates of violence against Aboriginal women and girls in Canada. A primary outcome of the first phase of the initiative was a database that found there were more than 592 missing and murdered Aboriginal women and girls in Canada.⁴

Unfortunately the Canadian police, government, and policy makers failed to take any action for over twenty-five years despite knowing about the problem from their own internal records and the many other public reports. In 2004, Amnesty International released its *Stolen Sisters* report, which details the factors that have contributed to a heightened risk of violence against Indigenous women and girls.⁵ The report begins with a discussion of the death of Helen Betty Osborne in 1971, who was sexually assaulted and then murdered by four white men, but which took more than fifteen years to bring one of the men to justice.⁶ The murder of Helen Betty Osborne is one of the earliest and widely known examples of the systemic failures of the criminal justice system to protect Indigenous women and to punish those responsible. The Amnesty International report indicates that the police were aware of the problem of violence against Indigenous women and girls perpetuated by white men, but did not take any action to address the situation.⁷ This systemic problem was also recognized in the 1991 Aboriginal Justice Inquiry in Manitoba, but no effective actions were taken at the provincial or federal level.⁸

After years of lobbying by Indigenous women and family members of murdered and missing Indigenous women and girls, on December 8, 2015, the federal government officially announced the National Inquiry into Missing and Murdered Indigenous Women and Girls (Inquiry).⁹ Before the Inquiry began, the government engaged in consultations with families, national Aboriginal organizations, First Nations, frontline workers, and others to identify the Inquiry’s scope and process. The pre-inquiry process led to several recommendations for the Inquiry, including that it should be independent, transparent, and led by Indigenous women, and that it should look at the economic, cultural, political and social causes of violence

³ Feinstein & Pearce, *supra* note 1 at 1.

⁴ Native Women’s Association in Canada, “Sisters in Spirit”, online: <<https://www.nwac.ca/policy-areas/violence-prevention-and-safety/sisters-in-spirit/>>.

⁵ Amnesty International, “Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada” (2004), online: <<https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf>>.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Manitoba, Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, by AC Hamilton & CM Sinclair (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People 1991) online: The Aboriginal Justice Implementation Commission <www.ajic.mb.ca/volume.html> [Aboriginal Justice Inquiry].

⁹ Government of Canada, *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146>.

against women.¹⁰ The Terms of Reference released in August 2016 mandate the Inquiry to (1) report on systemic and underlying causes of all forms of violence including sexual violence, (2) identify effective institutional policies and practices to reduce violence, (3) recommend concrete and effective action to remove systemic causes of violence and to increase safety, and (4) recommend ways to commemorate and honor the missing and murdered.¹¹ The terms of reference also direct the Inquiry to give “due weight”¹² to the findings of other reports that addressed the issue of murdered and missing Indigenous women and girls including the Final Report of the Truth and Reconciliation Commission,¹³ the Royal Commission on Aboriginal Peoples,¹⁴ the Sisters in Spirit initiative of the Native Women’s Association of Canada,¹⁵ the Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,¹⁶ the report on Missing and Murdered Indigenous Women in British Columbia, Canada¹⁷ by the Inter-American Commission on Human Rights,¹⁸ and the Oppal Commission reports.¹⁹

Many people were critical of the Inquiry’s terms of reference when they were released. Some expressed concern that the terms lacked teeth. Pam Palmater expressed concern that

¹⁰ Canada, *Executive summary of what we heard: Final report of the pre-inquiry engagement process*, (Ottawa: Government of Canada), online: Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1463677212850/1463677388763>>.

¹¹ Indigenous and Northern Affairs Canada, “National Inquiry into Missing and Murdered Indigenous Women and Girls’ Terms of Reference” (Ottawa: 5 August 2016), online: Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1470422455025/1470422554686>>.

¹² *Ibid.*

¹³ Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Honouring the Truth, Reconciling for the Future* (Toronto: James Lorimer and Company, 2015).

¹⁴ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal People*, (Ottawa: October 1996), online: Library and Archives Canada <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

¹⁵ *Supra* note 4.

¹⁶ Convention on the Elimination of All Forms of Discrimination Against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 2015, C/OP8/CAN/1, online: United Nations Human Rights Office of the High Commissioner <tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf>.

¹⁷ Missing and Murdered Indigenous Women in British Columbia, Canada (21 December 2014), Inter-Am Comm HR, OEA/SerL/V/II/Doc 30/14, online: Inter-American Commission on Human Rights <www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>.

¹⁸ Organization of American States (OAS), “Inter-American Commission on Human Rights”, online: IACHR <www.oas.org/en/iachr/>.

¹⁹ Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (British Columbia: Library and Archives Canada Cataloguing in Publication, 2012) at 82-98, online: <www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-ES-web-RGB.pdf> [Forsaken].

there was no specific mention of the role of policing.²⁰ Others still were disappointed that old cases would not be reconsidered.²¹ Criticism also included that provinces and territories were not explicitly included within the terms of reference.²² Despite these concerns, some were cautiously optimistic and hopeful that the Inquiry will succeed in bringing about change.²³

This article advocates for the Inquiry to engage a human rights based approach when analyzing the systemic causes of violence and making recommendations. Such an approach includes using international human rights norms to evaluate and recommend changes to the laws that failed to protect, and in some cases contributed to, murdered and missing Indigenous women and girls. Such an approach would also include international human rights principles such as Canada's duty of due diligence to prevent, investigate, prosecute, punish, and compensate for murdered and missing Indigenous women and girls, as will be discussed in greater detail below. As Rauna Kuokkanen explains, a "human rights framework is the most appropriate way of addressing violence against indigenous women because it avoids the victimization of women."²⁴ A human rights based approach keeps Indigenous women's needs at the center of the Inquiry.²⁵

Much of the literature on murdered and missing Indigenous women and girls—and violence against women generally—focusses on the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)²⁶ and the government's obligation of due diligence to prevent violence against women.²⁷ The Committee on the Elimination of Discrimination against Women conducted an inquiry into murdered and missing Indigenous

²⁰ "Inquiry into missing and murdered indigenous women won't meet crucial deadline: critic", *CTV News* (7 February 2017), online: <www.ctvnews.ca/canada/inquiry-into-missing-and-murdered-indigenous-women-won-t-meet-crucial-deadline-critic-1.3275332>.

²¹ "Missing and Murdered Indigenous Women inquiry launches with hope and concern", *CBC Radio—The Current* (4 August 2016), online: <www.cbc.ca/radio/thecurrent/the-current-for-august-4-2016-1.3706942/missing-and-murdered-indigenous-women-inquiry-launches-with-hope-and-concern-1.3706948>.

²² Native Women's Association of Canada, Press Release, "Government of Canada Officially Launches National Inquiry into Missing and Murdered Indigenous Women and Girls" (3 August 2016), online: <<https://www.nwac.ca/2016/08/press-release-government-of-canada-officially-launches-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls-mmiiwg/>>.

²³ Brenda Gunn, "The legal system has harmed indigenous women enough—make it the focus of the inquiry", Editorial, *The Globe and Mail* (7 August 2017), online: <www.theglobeandmail.com/opinion/the-legal-system-has-harmed-indigenous-women-enough-make-it-the-focus-of-the-inquiry/article31291679/>.

²⁴ Rauna Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34:1 *Hum Rts Q* 225 at 227.

²⁵ Conny Rijken, "A Human Rights Based Approach to Trafficking in Human Beings" (2009) 20:3 *Security & Human Rights* 212.

²⁶ 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

²⁷ See e.g. Kerensa Johnston, "Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices" (2005) 4:1 *Indigenous LJ* 19; Emma Buxton-Namisnyk, "Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence against Indigenous Women in Australia?" (2014/2015) 18:1 *Austl Indigenous LJ* 119; Heather Monasky, "What's Law Got to Do With It?: An Overview of CEDAW's Treatment of Violence Against Women and Girls Through Case Studies" (2014) *Mich State L Rev* 327.

women and girls and developed several recommendations.²⁸ However, there are many other international human rights instruments that set out important obligations relevant to murdered and missing Indigenous women and girls that are not often considered. This article focusses on three instruments that have particular relevance to murdered and missing Indigenous women and girls: the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁹ the *International Convention on the Rights of the Child*,³⁰ and the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED).³¹ The goal is to highlight the broad range of human rights protections that should inform a human rights based approach to the Inquiry. An exhaustive analysis of international law norms and principles relevant to violence against Indigenous women and girls is beyond the scope of this article, and is in fact the analysis this article argues that the Inquiry should undertake. The aim is merely to exemplify the need for the Inquiry to engage a human rights based approach to addressing the systemic and underlying causes, and to provide some preliminary insights on what might be gained through such an approach. It should be noted, as will be discussed in greater detail below, that there are several international human rights instruments that are relevant—all of which should be considered in developing a human rights normative framework to analyze the underlying and systemic causes of murdered and missing Indigenous women and girls.³² The next section describes a human rights based approach to the work of the Inquiry to set the stage for considering the three specific human rights treaties.

II A HUMAN RIGHTS BASED APPROACH

In order to understand the benefits of a human rights based approach to analyzing the systemic causes of violence, this section provides a general overview of the recommended approach. This section also provides a general introduction to some international human rights instruments that should inform the Inquiry's analysis of systemic causes. This background sets the stage for the following sections, which discuss in greater detail three specific treaties that should inform such an approach to the Inquiry that are not often considered in the literature.

²⁸. Convention on the Elimination of All Forms of Discrimination Against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNCEDAW, 30 March 2015, UN Doc CEDAW/C/OP.8/CAN/1.

²⁹. 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*Torture Convention*].

³⁰. 2 October 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990) [CRC].

³¹. 23 December 2006, 66 UNTS 177 (entered into force 23 December 2010) [ICPED].

³². For example, Canada is a party to several treaties such as the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *International Covenant on Civil and Political Rights*; the *Optional Protocol to the International Covenant on Civil and Political Rights*; the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*; the *International Covenant on Economic, Social and Cultural Rights*; the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict*; the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; and the *Convention on the Rights of Persons with Disabilities*.

A human rights based approach is a conceptual framework based on international human rights principles and norms with the goal of promoting and protecting human rights.³³ This approach is particularly important to guide the work of the Inquiry as a human rights based approach “seeks to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights,”³⁴ such as the situation of murdered and missing Indigenous women and girls. This approach would build upon the rich body of existing reports and recommendations developed by various international human rights bodies, including treaty monitoring bodies on causes and recommendations to address violence against Indigenous women and girls.³⁵ This would include building on the concluding observations of Canada’s periodic review before the Committee on the Rights of the Child, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, to name just a few.³⁶

A human rights based approach should inform the substantive issues considered by the Inquiry and the process of the Inquiry.³⁷ International human rights principles and norms should guide all policies and programming in all phases of the Inquiry.³⁸ Specifically, this approach requires direct participation of Indigenous women and girls in the Inquiry’s process from beginning to end, as the right to participate in decision making is increasingly recognized as a basic right of Indigenous peoples, including and especially Indigenous women. This right is found throughout the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP).³⁹

³³ Office of the High Commissioner for Human Rights, “Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures” (UN), online: <www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> [HRB Approach].

³⁴ *Ibid.*

³⁵ Ineke Boerefijn, “A Human-Rights Based Approach of Violence Against Women” (2007-2008) 4 *Intl Studies J* 181 at 198.

³⁶ For example, UN Committee Against Torture, *Concluding observations of the Committee against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6, 25 June 2012; UN Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Canada*, 42nd Sess, UN Doc CEDAW/C/CAN/Q/7, 7 November 2008; UN Committee on the Elimination of Discrimination Against Women, *Prior List of Issues: Canada*, UN Doc CEDAW/C/CAN/7, 28 July 2014; UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 80th Sess, UN Doc CERD/C/CAN/CO/19-20, 4 April 2012; UN Committee on the Rights of the Child, *Concluding Observations on the initial periodic report of Canada*, UN Doc CRC/C/OPSC/CAN/CO/1, 7 December 2012; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UN Doc CCPR/C/CAN/CO/6, 13 August 2015.

³⁷ Boerefijn, *supra* note 35 at 209.

³⁸ HRB Approach, *supra* note 33.

³⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No. 49, UN Doc A/RES/61/295 (2008) [UNDRIP], arts 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 37, 38, and 40-41.

It has also been recognized in United Nations (UN) human rights treaties as well as in the Inter-American human rights system.⁴⁰

Through engaging in a human rights based approach, the Inquiry would analyze systemic and root causes of murdered and missing Indigenous women from the perspective of Canada's human rights obligations: identifying Canada's international obligations and judging Canada's actions against these standards.⁴¹ Engaging human rights also addresses the concern about provincial involvement in the Inquiry as under international human rights law, the obligations are binding on the state as a whole—all branches at all levels (national, regional, and local)—and internal divisions of powers challenges are not justifiable reasons for failing to implement human rights obligations.⁴² This principle is encapsulated in the *Vienna Convention on the Law of Treaties*' article 27 that indicates a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁴³ This means if a province violates those obligations, it engages Canada's responsibility.⁴⁴

A human rights based approach to the Inquiry's analysis of systemic causes would develop recommendations that promote the realization of Indigenous women's human rights.⁴⁵ In developing its recommendations, the Inquiry should be guided by human rights: "an effective policy on violence against women must be based on the existing human rights framework."⁴⁶ This includes recommendations on the development of new laws and policies to conform with Canada's international human rights obligations.⁴⁷ The Inquiry should also develop

⁴⁰ See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 art 25 (entered into force 23 March 1976, accession by Canada 19 May 1976). See also *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD] as interpreted by the Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples*, UN Doc A/52/18, Annex V. See also the CRC as interpreted by the Committee on the Rights of the Child (CRC), *General comment No 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11 at para 5 [General Comment No 11]. See also International Labour Organization (ILO), C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), 27 June 1989, C169 art 6 (entered into force 5 September 1991) [ILO Convention]. See also UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Mexico*, 27 July 1999, CCPR/C/79/Add.109; UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Norway*, 26 October 1999, CCPR/C/79/Add.112. See also *YATAMA v Nicaragua (Nicaragua)* (2005), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 127; *Saramaka People v Suriname* (2007), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 172.

⁴¹ See Rijken, *supra* note 25 at 212 where she proposes "the central question in this [human rights based] approach is which (state) obligations can be derived from the human rights legal framework."

⁴² Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.1326 (29 March 2004) at para 4.

⁴³ 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 27 (entered into force 27 January 1980).

⁴⁴ *Ibid.*

⁴⁵ Siri Damman, "Indigenous Vulnerability and the Process Towards the Millennium Development Goals—Will a Human Rights-Based Approach Help?" (2007) 14:4 Intl J on Minority & Group Rights 489 at 518–19.

⁴⁶ Boerefijn, *supra* note 35 at 198.

⁴⁷ HRB Approach, *supra* note 33.

recommendations that strengthen the capacity of Indigenous women to know and assert their human rights, as well as strengthen the capacity of the government to uphold those rights.⁴⁸

Under a human rights based approach, there are some core principles that should further guide the work of the Inquiry: universality and inalienability of human rights, indivisibility, interdependence and interrelatedness of human rights, non-discrimination and substantive equality, participation and inclusion of Indigenous peoples in the process, accountability and the rule of law.⁴⁹ The universality of human rights means that all peoples are entitled to the protection of their human rights, and that all people have the same basic human rights; this is sometimes encapsulated by the principles of equality and non-discrimination.⁵⁰ However, this does not mean that everyone must be treated the same. In fact, the Expert Mechanism on the Rights of Indigenous Peoples has noted that substantive equality requires states to take special measures to ensure that Indigenous peoples' human rights are realized.⁵¹ Indivisibility, interdependence, and inter-relatedness means that there is no hierarchy of human rights.⁵² The denial of any right has an impact on other human rights. Canada still tends to view economic, social, and cultural rights as secondary to civil and political rights.⁵³ This preference for civil and political rights is particularly problematic for Indigenous women as the denial of economic, social, and cultural rights contributes to murdered and missing Indigenous women and girls. Economic and social marginalization contributes to Indigenous women's susceptibility to violence and lessened ability to escape violent circumstances. Lack of education and employment opportunities result in high levels of poverty, food insecurity, and overcrowding; homelessness also contributes to Indigenous women's vulnerability to violence.⁵⁴

Engaging a human rights based approach to the Inquiry has also been called for by several organizations, including the Feminist Alliance For International Action and the Native Women's Association of Canada.⁵⁵ Amnesty International's *Stolen Sisters* report was a human rights response to violence against Indigenous women, which recognizes the need for Canada

⁴⁸ *Ibid.*

⁴⁹ Rijken, *supra* note 25 at 215.

⁵⁰ UN General Assembly, *Vienna Declaration and Programme of Action*, 25 June 1993, UN Doc A/CONF.157/23 (adopted by the World Conference on Human Rights in Vienna). See also Office of the High Commissioner for Human Rights, "Human Rights: A Basic Handbook for UN Staff" (UN), online: <www.ohchr.org/Documents/Publications/HRhandbooken.pdf> at 3.

⁵¹ *Summary of responses to the questionnaire seeking the views of States and indigenous peoples on best practices regarding possible appropriate measures and implementation strategies to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples—Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 30th Sess, UN Doc A/HRC/30/54 (2015) at para 124.

⁵² Office of the High Commissioner for Human Rights, "Human Rights: A Basic Handbook for UN Staff" at 3, online: <www.ohchr.org/Documents/Publications/HRhandbooken.pdf>.

⁵³ See e.g. *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, where the Supreme Court of Canada finds that sections 7 and 15 of the *Charter* do not protect socio-economic rights. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, ss 7, 15.

⁵⁴ *Forsaken*, *supra* note 19.

⁵⁵ Feminist Alliance For International Action & Native Women's Association of Canada, "The National Inquiry on Murders and Disappearances of Indigenous Women and Girls Recommendations from the Symposium on Planning for Change: Towards a National Inquiry and an Effective National Action Plan" (2016) 28:2 CJWL 408 at 412.

to uphold its human rights obligations.⁵⁶ The Legal Strategy Coalition on Violence Against Indigenous Women, a nationwide *ad hoc* coalition of groups and individuals formed to marshal resources that address violence against Indigenous women, has also considered international human rights as an avenue to address murdered and missing Indigenous women and girls.⁵⁷

A human rights based approach to the work of the Inquiry is not a magic solution that will automatically eliminate the phenomenon of murdered and missing Indigenous women and girls. It simply provides a framework to examine state policy, and determine whether the Canadian system complies with all of its obligations under international human rights with a goal of increasing the safety and protection of Indigenous women and girls.⁵⁸ As the Senate Committee on Human Rights has recognized, international human rights are an important component for protecting Indigenous women and girls against violence: “human right norms and complaint mechanisms are developed for the benefit of individuals, not the State... [R]atification of international treaties and recognition of the jurisdiction of the bodies created to oversee their implementation give another level of protection not afforded by domestic courts.”⁵⁹ The next section identifies the broad international human rights norms and principles relevant to develop a basic conceptual framework for murdered and missing Indigenous women and girls.

A. Developing a Human Rights Conceptual Framework

There is much international law that is “aimed at securing the survival and flourishing of indigenous peoples” that requires states to take action that involves Indigenous peoples.⁶⁰ A starting place for a human rights based approach to the Inquiry’s work on the causes contributing to violence and particular vulnerabilities of Indigenous women and girls is to develop the conceptual framework of human rights that are relevant to murdered and missing Indigenous women and girls. Developing this framework requires synthesizing international human rights to determine the norms and principles, including Indigenous women’s and girls’ rights and state obligations that should guide the Inquiry’s work.

There is no shortage of relevant international human rights instruments that protect Indigenous women’s and girls’ basic human rights. There are instruments that specifically

⁵⁶ *Supra* note 5.

⁵⁷ Katherine Long & Alessandra Hollands, “Murdered and Missing Indigenous Women Legal Strategies” (14 July 2014) Legal Strategy Coalition on Violence Against Indigenous Women, online: <www.leaf.ca/wp-content/uploads/2015/06/2014-07-14-LSC-Memo-re-MMIW-Legal-Strategies.pdf>.

⁵⁸ Boerefijn, *supra* note 35 at 210.

⁵⁹ Parliament of Canada, *Enhancing Canada’s Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, Report of the Standing Senate Committee on Human Rights (Ottawa: May 2003), online: Senate of Canada <www.parl.gc.ca/content/sen/committee/372/huma/rep/rep04may03part1-e.htm> [*Enhancing Canada’s Role*].

⁶⁰ S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004) at 185.

consider Indigenous peoples' rights,⁶¹ women's rights,⁶² children's rights,⁶³ rights against racial discrimination,⁶⁴ and many others that deal with specific issues.⁶⁵ Some instruments are global, others are regional, such as those developed by the Organization of American States' (OAS) Inter-American human rights system.⁶⁶ Given the development of this conceptual framework based on human rights norms and principles, Canada's obligations "should be informed by the instruments of human right law that are specific to women and those that are specific to indigenous peoples"⁶⁷ as well as general human rights treaties interpreted for the specific Indigenous women context.

Canada is a party to twelve of the eighteen major human rights treaties and optional protocols under the United Nations system: the *International Convention on the Elimination of All Forms of Racial Discrimination*;⁶⁸ the *International Covenant on Civil and Political Rights*;⁶⁹ the *Optional Protocol to the International Covenant on Civil and Political Rights*;⁷⁰ the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*;⁷¹ the *International Covenant on Economic, Social and Cultural Rights*;⁷² the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*;⁷³ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*;⁷⁴ the *Optional Protocol to the Convention on the Rights of the Child on the*

⁶¹ UNDRIP, *supra* note 39. See ILO Convention, *supra* note 40. See also *American Declaration on the Rights of Indigenous Peoples*, AG/RES 2888 (XLVI-O/16) (adopted 15 June 2016) [*American Declaration*].

⁶² CEDAW, *supra* note 26. See *Declaration on the Elimination of Violence Against Women*, UNGAOR, 23 February 1994, GA Res 48/104, UN Doc A/RES/48/104. Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, 9 June 1994, 33 ILM 1534 (entered into force 5 March 1995) [*Violence Against Women Convention*].

⁶³ CRC, *supra* note 30.

⁶⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD].

⁶⁵ See ICPED, *supra* note 31. See also *Torture Convention*, *supra* note 29.

⁶⁶ See Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose, Costa Rica", 22 November 1969, B-32 (entered into force 18 July 1978) [*Pact of San Jose*]. See also Organization of American States (OAS), *The American Declaration of the Rights and Duties of Man*, April 1948, OAS Res XXX (adopted 2 May 1948) [*Rights and Duties of Man*], reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁶⁷ Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival and Self-determination" (2010) 15 UCLA J Intl L & Foreign Aff 187 at 211.

⁶⁸ ICERD, *supra* note 40.

⁶⁹ 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

⁷⁰ 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁷¹ 15 December 1989, A/RES/44/128.

⁷² 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁷³ 15 December 1999, 54 UNTS 49.

⁷⁴ 14 April 2014, A/RES/66/138.

sale of children, child prostitution and child pornography;⁷⁵ and the *Convention on the Rights of Persons with Disabilities* (CRPD).⁷⁶ The obligations found in these treaties should guide the Inquiry's analysis of existing Canadian laws, policies, and practices against the standards set out in these provisions.

The range of human rights relevant to Indigenous women and girls include provisions in the ICCPR protecting the right of peoples to self-determination;⁷⁷ freedom from discrimination, which includes a right to effective remedy;⁷⁸ the right to life;⁷⁹ protection from torture and ill-treatment;⁸⁰ freedom from slavery and servitude;⁸¹ equality before the courts;⁸² freedom from arbitrary or unlawful interference with privacy and unlawful attacks on honour or reputation;⁸³ freedom of thought, conscience, and religion;⁸⁴ legal protection against incitement to discrimination;⁸⁵ freedom of association, including a right to join trade unions;⁸⁶ protection of the family unit;⁸⁷ and the right of minorities to the enjoyment of their religion, culture, and language.⁸⁸ Additionally, the CRPD article 16 on freedom from exploitation, violence, and abuse specifically recognizes the gender aspect to these violations and requires states to take action. As Indigenous women and girls with disabilities experience violence in different ways and may have different vulnerabilities, the CRPD is a useful tool to guide this analysis. The ICESCR has been interpreted to recognize that "gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality."⁸⁹ Further, the Committee on Economic, Social and Cultural Rights states that "failing to protect women against violence or to prosecute perpetrators is a violation of the right to health" under the ICESCR.⁹⁰ Through general

^{75.} 18 January 2002, A/RES/54/263 [OP CRC 1].

^{76.} 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratification by Canada 11 March 2010).

^{77.} ICCPR, *supra* note 69, art 1.

^{78.} *Ibid*, art 2. Article 24 refers to discrimination specifically in relation to children. Article 26 refers to discrimination in relation to equality before the law.

^{79.} *Ibid*, art 6.

^{80.} *Ibid*, art 7.

^{81.} *Ibid*, art 8.

^{82.} *Ibid*, art 14.

^{83.} *Ibid*, art 17.

^{84.} *Ibid*, art 18.

^{85.} *Ibid*, art 21.

^{86.} *Ibid*, art 22.

^{87.} *Ibid*, art 23.

^{88.} *Ibid*, art 27.

^{89.} Committee on Economic, Social and Cultural Rights, *General Comment No. 16*, UN Doc E/C12/2005/4 (2005) at para 27.

^{90.} *Ibid* at para 51.

comments and individual complaints processes, Canada's obligations to address the situation of murdered and missing Indigenous women under these treaties have been identified.⁹¹

The UN *Declaration on the Rights of Indigenous Peoples* is critical to understanding the normative content of international human rights of Indigenous peoples.⁹² The UNDRIP is the most recent articulation of Indigenous peoples' globally recognized fundamental human rights. The UNDRIP provides a framework (both in substance and process) for engaging in a nation-to-nation relationship with Indigenous peoples, and is thus critical to informing the Inquiry. Canada has stated its commitment to "recognizing and respecting Aboriginal title and rights in accordance with Canada's Constitution, international treaties and other key instruments such as the United Nations Declaration on the Rights of Indigenous Peoples, which Canada plans to implement."⁹³ Given Canada's commitment to implement the UNDRIP, the standards it sets out should inform the human rights analysis of the Inquiry. However, the UNDRIP is limited in the articulation of Indigenous women's rights with only three specific references: the primary provision being article 22(2), which requires states to take special measures to provide Indigenous women protection against all forms of violence. The UNDRIP has also received criticism for failing to fully account for Indigenous women's rights, only mentioning Indigenous women as vulnerable groups.⁹⁴ Despite these limitations, the broader recognition of social, economic, and cultural rights also apply to Indigenous women, and thus should inform the conceptual framework of human rights.⁹⁵ However, given the attention the UNDRIP has received lately, it will not be considered here as the goal is to highlight treaties not often considered.

The development of the conceptual framework should not be limited to the human rights treaties that Canada is a party to, but rather the framework should draw on all relevant international human rights instruments to gain a comprehensive understanding of the relevant human rights protections. Increasingly, treaty monitoring bodies interpret their own treaties with reference to other human rights instruments to promote greater coherence

⁹¹ See UN Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2 [General Comment No 2]. See also UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38; UN Human Rights Committee, *General Comment No 28, Article 3 (The equality of rights between men and women)*, 29 March 2000, UN Doc CCPR/C/Rev.1/Add.10.

⁹² UNDRIP, *supra* note 39.

⁹³ Rachel Wernick, Assistant Deputy Minister at the Department of Canadian Heritage, *Canada's Opening statement to the Committee on Economic, Social and Cultural Rights* (Geneva, Switzerland: 24 February 2016), online: Government of Canada <canada.pch.gc.ca/eng/1457110453479>.

⁹⁴ Rauna Kuokkanen, "Indigenous Women's Rights and International Law: Challenges of the UN Declaration on the Rights of Indigenous Peoples" in *Handbook on Indigenous Peoples' Rights*, Corrine Lennox & Damien Short, eds, (New York: Routledge, 2016) 129. See also Yakin Ertürk, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Intersections between culture and violence against women*, UNHRC, 4th Sess, UN Doc A/HRC/4/34 (2007) 1.

⁹⁵ Celeste McKay & Craig Benjamin, "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 156.

across the human rights system.⁹⁶ Such an approach also conforms with the Supreme Court of Canada's approach that identifies the normative values and principles in international human rights, rather than focus on the bindingness of a particular instrument.⁹⁷ The Inter-American Commission and Court of Human Rights have engaged such a normative approach when determining Indigenous peoples' rights.⁹⁸

Unfortunately, Canada is not a party to several key human rights instruments that articulate different substantive rights relevant to murdered and missing Indigenous women, including the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,⁹⁹ and the *International Convention for the Protection of All Persons from Enforced Disappearance*. Canada has also failed to take action on several optional protocols that provide complaint mechanisms that increase accountability, including the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*,¹⁰⁰ the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,¹⁰¹ the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*,¹⁰² and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.¹⁰³ These instruments should be considered as part of the human rights based approach that identifies the relevant human rights principles and norms for murdered and missing Indigenous women and girls and create external avenues for addressing Canada's domestic failings. As part of engaging human rights in the Inquiry, recommendations should include that Canada immediately accede to human rights treaties that would provide further protection of Indigenous women and girls'

⁹⁶ For example, see reference to the UNDRIP in UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11. See also Committee on the Elimination of Racial Discrimination, *Concluding Observations on Canada*, April 2012, CERD/C/CAN/CO/19-20, which again references the UNDRIP when discussing Canada's obligations under ICERD, *supra* note 40.

⁹⁷ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70–71, 174 DLR (4th) 193. See also Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Intl L & Pol 501.

⁹⁸ *The Mayagna (Sumo) Awas Tingni Community v Nicaragua (Nicaragua)* (2001), Judgment, Merits, reparations and costs, Inter-Am Ct HR (Ser C) No 79 [*Awas Tingni*]. In determining the property rights of the Awas Tingni Indigenous peoples in Nicaragua, the Inter-American Court of Human Rights took an evolutionary approach to interpret international human rights instruments in order to determine the applicable human rights norms. By engaging in such an approach, the Court looked beyond the particular human rights instrument in question (the *American Convention on Human Rights*) to determine the Awas Tingni's property rights as more broadly defined in international law. This approach has also been followed by the Inter-American Commission of Human Rights in determining rights of Maya Indigenous peoples in Belize and Western Shoshone Indigenous peoples in the United States, and can be valuable in developing a conceptual framework for the analysis of Canada's obligations. See *Maya indigenous community of the Toledo District v Belize* (2004), Merits, Inter-Am Ct Hr, Case 12.053, No 40/04, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5/rev.1 [*Belize*]. See also *Mary and Carrie Dann v United States* (2002), Inter-Am Ct Hr, Case 11.140, No 75/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.LN/II.1 17/doc.I/rev. I [*Dann*].

⁹⁹ 18 December 1990, A/RES/45/158 (entered into force 1 July 2003).

¹⁰⁰ 5 March 2009, A/RES/63/117.

¹⁰¹ 18 December 2002, 2375 UNTS 237, 42 ILM 26 (entered into force 22 June 2006).

¹⁰² 14 April 2014, A/RES/66/138 (entered into force 14 April 2014).

¹⁰³ 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008).

fundamental human rights. International human rights instruments are developed to prevent and address human rights violations and provide direction to states to address violations. Thus the Inquiry's recommendations to remove systemic causes of violence and increase the safety of Indigenous women and girls should include extending Canada's human rights obligations.

Providing greater external oversight is an important tool given the current failings of the Canadian legal system to protect Indigenous women. International oversight may be important to promote compliance with the recommendations of the Inquiry and provide a safeguard where changes are not sufficient to address the current situation of murdered and missing Indigenous women and girls. While there may be limited power for the treaty bodies to enforce their concluding observations, the international pressure associated with these international bodies has played a role in changing domestic Canadian policy in the past.¹⁰⁴ This can be critical to ensure that investigations and actions on murdered and missing Indigenous women continue even if there is a change in government. Finally, it is important to many Indigenous peoples, some of whom have turned to international fora to address the failings of Canada domestically, to have an external mediator for disputes.

There are additional human rights instruments under the OAS, including the *American Declaration on the Rights of Indigenous Peoples*,¹⁰⁵ *American Declaration on the Rights and Duties of Man*,¹⁰⁶ the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*,¹⁰⁷ and the *American Convention on Human Rights* that should inform the Inquiry's human rights based approach to analyzing the systemic and underlying causes.¹⁰⁸ As part of the human rights based approach to the Inquiry, the recommendations produced should encourage Canada to accede to relevant treaties that they are not yet a party to, such as the *American Convention on Human Rights*.¹⁰⁹ Acceding to the *American Convention on Human Rights* would extend external oversight through the Inter-American Court of Human Rights, the decisions of which are binding and enforceable through the OAS General Assembly.¹¹⁰ The Inter-American system has been critical to advancing the understanding and protection of Indigenous peoples' rights throughout the Americas, including

¹⁰⁴. For example, see *Sandra Lovelace v Canada*, Communication No. 24/1977; Canada 30/07/81, UN Doc CCPR/C/13/D/24/1977.

¹⁰⁵. *American Declaration*, *supra* note 61.

¹⁰⁶. *Rights and Duties of Man*, *supra* note 66. There was also an inquiry into murdered and missing Indigenous women and girls conducted by the Inter-American Commission of Human Rights.

¹⁰⁷. *Violence Against Women Convention*, *supra* note 62.

¹⁰⁸. *Pact of San Jose*, *supra* note 66.

¹⁰⁹. Canada has expressed concern that the right to life might not accord with domestic abortion laws. Recent developments in international law including "the interpretation by the Human Rights Committee of article 6 of the *International Covenant on Civil and Political Rights* guaranteeing the right to life, a woman's right to abortion and access to adequate reproductive health services is an essential component of the right to life, security, and equality under international law" are taken into account when interpreting "article 4(1) of the *American Convention*, given the requirement, under article 29, not to restrict the enjoyment of exercise of any right of freedom recognized by virtue of the laws of any State party or by virtue of another convention to which the State is a party." These developments mean that the right to life under the *American Convention* can no longer be interpreted as limiting a woman's right to an abortion. *Enhancing Canada's Role*, *supra* note 59.

¹¹⁰. The Senate Committee recommended that Canada take action to accede to the *American Convention on Human Rights* by 2008. See *Enhancing Canada's Role*, *supra* note 59.

the right to property and the right to participate in decision making on the basis of free, prior and informed consent.¹¹¹

When identifying the human rights norms and principles that should guide the work of the Inquiry, the intersection of Indigenous identity and gender must be remembered, even though they are not often discussed together in international human rights.¹¹² This normative approach to human rights must also recognize that Indigenous women's experiences are not universal, but rather vary depending on sexual orientation and gender identity, residence in urban versus rural communities, socio-economic status, education, and ability.¹¹³ Further, it must recognize that violence against Indigenous women and girls is not just a violation of individual rights, but also the collective rights of Indigenous peoples.¹¹⁴ These differences must be considered as part of the national Inquiry process.

This article highlights key aspects of three treaties not often considered in the literature, to begin the process of identifying the range of international human rights protections that should guide the work of the Inquiry. It is beyond the scope of this article to develop the conceptual framework of international human rights to guide the work of the Inquiry, and is in fact the work that this article argues the Inquiry should undertake. However, this section surveyed the range of international human rights instruments to demonstrate the breadth and depth of existing standards that are available to inform the work of the Inquiry.

B. Duty of Due Diligence: A Human Rights Norm

A human rights based approach will set out Canada's obligation and international responsibility to address the situation of murdered and missing Indigenous women and girls. According to international law, states are responsible for internationally wrongful acts, which can include acts and omissions.¹¹⁵ The critical component here is that the state is only responsible for actions (or omissions) of the state or state actors. Even though the doctrine of state responsibility is evolving, the challenge remains for the doctrine to be interpreted to "acknowledge the systematic and structural nature of gender discrimination and the role that states play in maintaining gender discrimination"¹¹⁶ including Canada's responsibility for

¹¹¹ See e.g. *Awas Tingni*, *supra* note 98. See also *Belize*, *supra* note 98; *Dann*, *supra* note 98 for decisions on Indigenous peoples' right to property. See also *Case of the Saramaka People v Suriname*, *Saramaka People v Suriname*, Interpretation of the judgment on preliminary objections, merits, reparations and costs, Inter-Am Ct HR (Ser C) No 185, I/HRL 3058, 12 August 2008.

¹¹² Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2013) 19 *Austl Intl LJ* 17 at 30 (noting that even under the UNDRIP Indigenous women do not have a unique status as Indigenous women and as rights-bearers, but only their special needs are emphasized).

¹¹³ Penelope Andrews, "Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework" (1997) 60 *Alb L Rev* 917 at 918.

¹¹⁴ UN Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples*, 12 February 2013, UN Doc E/C.19/2013/9 at para 6.

¹¹⁵ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Supp No 10, UN Doc A/56/10, art 1.

¹¹⁶ Ivana Radacic, "Feminism and Human Rights: The Inclusive Approach To Interpreting International Human Rights Law" (2008) 14 *UCL Jurisprudence Rev* 238 at 250.

murdered and missing Indigenous women and girls. This section will discuss Canada's duty of due diligence as an example of a general international norm that should guide the Inquiry's analysis of systemic causes of violence against Indigenous women and the recommendations it is mandated to develop.

One way in which the doctrine of state responsibility is evolving is through the broader duty of due diligence. Under international human rights law, it is now recognized that Canada has an obligation of due diligence to prevent human rights violations, including violence against women and to investigate, prosecute, and punish actors who violate human rights. The development of due diligence is an important tool for Indigenous women to analyze Canada's actions and omissions to determine whether Canada has effectively fulfilled its obligations.¹¹⁷ This will provide an important lens in the work of the Inquiry because it is relevant when states fail to act.

In 1988, the Inter-American Court of Human Rights articulated the duty of due diligence, holding that the state is obligated to ensure the free and full exercise of human rights.¹¹⁸ The duty of due diligence requires states to "prevent, investigate and punish any violation of the rights."¹¹⁹ States must "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."¹²⁰ The Court explained that under the *American Convention on Human Rights*, states must "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."¹²¹ The Court continued to explain that state responsibility may be found even where a state actor did not directly violate the Convention, if the state failed to exercise due diligence in preventing or responding to the violation.¹²²

The duty of due diligence applies beyond the Inter-American system and enforced disappearances, and has been specifically extended to violence against women, including within the UN system. The duty of due diligence was articulated in the UN *Declaration on the Elimination of Violence against Women*: states should "pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end should... exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."¹²³ The UN Special Rapporteur on Violence against Women Coomaraswamy opined that the states are as guilty as the perpetrators if they fail to act against violence against

¹¹⁷ Rashida Manjoo, "State Responsibility to Act with Due Diligence in the Elimination of Violence Against Women" (2013) 2:2 Intl Human Rights L Rev 240 at 242.

¹¹⁸ *Velásquez Rodríguez v Honduras* (1988), Inter-Am Ct HR (Ser C) No 4 at para 166.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid* at para 174.

¹²² *Ibid* at para 172.

¹²³ *Violence Against Women Convention*, *supra* note 62, art 4.

women.¹²⁴ The duty of due diligence therefore is important to identifying state obligations to address and eliminate violence against women.¹²⁵

This duty of due diligence extends beyond the specific obligations articulated under various international human rights instruments. The Committee on Elimination of Discrimination against Women's general recommendation on violence against women explains that according to international law, state responsibility applies when states fail to act with due diligence to prevent, investigate, punish, and compensate violence against women.¹²⁶ It is increasingly recognized as a general principle of international law and has been applied to a range of human rights issues from trafficking in persons to the obligations of transnational corporations.¹²⁷ It has even been argued that the duty of due diligence is part of customary international law.¹²⁸ Canada's obligations must be broadly understood to include all the human rights violations that are interconnected with murdered and missing Indigenous women and girls. The duty of due diligence applies beyond obligations to directly address and prevent violence against women, to include due diligence to realize broader social, economic, cultural, civil, and political rights.

The next sections provide more detailed information on the human rights obligations found in several human rights treaties including the *Convention Against Torture*, the *Convention on the Rights of the Child*, and the *Convention for the Protection of all Persons from Enforced Disappearances* to demonstrate what can be gained through engaging a human rights based approach to the Inquiry by identifying areas where Canada is currently failing to meet international standards. These sections also highlight the benefits of the individual complaint procedures for ongoing international oversight to encourage Canada to comply with its obligations.

¹²⁴ Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, pt II, 26, UNCHR, 52nd Sess, UN Doc E/CN.4/1996/53 (1996).

¹²⁵ Lee Hasselbacher, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection" (2010) 8:2 Northwestern J Intl Human Rights 190.

¹²⁶ Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19 Violence Against Women*, 1992, UN Doc A/47/38 at para 9.

¹²⁷ See Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1; Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 as noted in Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, UN Doc E/CN.4/2006/61 (20 January 2006) at para 28 [Ertürk].

¹²⁸ Ertürk, *supra* note 127 at para 29.

III CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) contains relevant sections for Canada's obligations related to the Inquiry. Canada signed this Convention in 1985 and ratified it in 1987. The CAT entered into force on June 26, 1987. As the name suggests, the Convention addresses more than torture; it covers ill-treatment as well. Under CAT, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹²⁹

Unfortunately, CAT does not provide a clear definition of ill-treatment other than under article 16.1 which explains that states are obligated to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The scope of this Convention is broad and is relevant to the situation of murdered and missing Indigenous women because many advocates have argued that the police have been directly involved in, or acquiesced to the problems by failing to fully investigate. As noted above, one of the criticisms of the terms of reference was the failure to specifically mention the need to investigate police actions. In particular, the Committee Against Torture has noted that women's experiences of violence, and vulnerability to rights violations, under this Convention varies depending on race, nationality, religion, sexuality, age, and immigration status.¹³⁰ When identifying root causes and recommendations, the Inquiry should engage the Convention to examine Canadian laws to identify the special and particular risks Indigenous women face.

Under CAT, Canada is obligated to take effective action to prevent torture and ill-treatment,¹³¹ as well as "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."¹³² The chronic inaction of Canadian police forces to adequately prevent the murder and disappearance of Indigenous women and girls may be a violation of CAT. For example, the Committee Against Torture, which oversees CAT, has stated that "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" is a violation of CAT.¹³³ While the *Dzemailj* case may be different than murdered and missing Indigenous women and girls, there have long been criticisms that Indigenous women have been over policed and under protected.

¹²⁹ *Torture Convention*, *supra* note 29, art 1.

¹³⁰ *General Comment No 2*, *supra* note 91 at para 22.

¹³¹ *Torture Convention*, *supra* note 29, art 2.

¹³² *Torture Convention*, *supra* note 29, art 12.

¹³³ UNCAT, *Dzemailj et al v Yugoslavia*, *Communication No 161/2000*, UN Doc CAT/C/29/D/161/2000 (2002) at para 9.2.

The Inquiry should consider police actions in light of these international standards. This article is not meant to pre-determine whether police actions meet or breach these standards, but rather suggests that the Inquiry's work should be guided by these standards when reviewing police action.

Canada's responsibility extends beyond responsibility for state actions. The state can be responsible for violations by non-state actors if the state consented or acquiesced to acts of torture,¹³⁴ which is critical for addressing violence against women.¹³⁵ Acquiescence may occur when state officials or authorities witness violations and fail to act to prevent the abuse.¹³⁶ If the state has knowledge or reason to believe that non-state officials or private actors are engaging in acts of torture or ill-treatment, states must exercise due diligence to prevent, investigate, prosecute, and punish those private actors. CAT has noted that Indigenous women in Canada "experience disproportionately high levels of life-threatening forms of violence, spousal homicides and enforced disappearances," and that Canada has "failed to promptly and effectively investigate, prosecute and punish perpetrators or provide adequate protection for victims."¹³⁷

Canada has been aware of the situation of murdered and missing Indigenous women and girls for decades. Arguably, Canada failed to exercise due diligence and thus failed to uphold its obligations under CAT. Canada was obligated to undertake a criminal investigation to determine the nature and circumstances of the acts and identify the persons responsible.¹³⁸ A delay of fifteen months between an incident and the commencement of an investigation was held to be contrary to article 12.¹³⁹ As Canada has known of the situation for a significant period and has not acted, the delay itself can be a violation of CAT. While Canadian police forces may have engaged in some investigations of murdered and missing Indigenous women and girls, systemic racism within policing has been noted as contributing to the failings of police to fully and properly investigate cases, such as that of Helen Betty Osborne noted earlier.¹⁴⁰ Again, this article argues that the Inquiry should judge Canada's actions against these international human rights standards.

CAT also applies to the treatment of Indigenous women and girls in prison and the child welfare system. If the victims are within state control, the state must take adequate

¹³⁴ UNCAT, *Concluding Observations of the Committee against Torture: Canada*, 25 June 2012, CAT/C/CAN/CO/6 at para 20 [*Concluding Observations*].

¹³⁵ Lori A Nessel, "'Willful Blindness' to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture" (2004) 89 Minn L Rev 71 at 118.

¹³⁶ UNCAT, *Osmani v Serbia*, Communication No 261/2005, 25 May 2009, UN Doc CAT/C/42/D/261/2005 at para 10.5.

¹³⁷ *Concluding Observations*, *supra* note 134 at para 20.

¹³⁸ UNCAT, *Kirsanov v Russia*, Communication No 478/2011, 19 June 2014, UN Doc CAT/C/52/D/478/2011 at para 11.2 [*Kirsanov*]. See also UNCAT, *Encarnación Blanco Abad v Spain*, Communication No 59/1996, 14 May 1998, UN Doc CAT/C/20/D/59/1996 at para 8.8.

¹³⁹ UNCAT, *Radivoje Ristic v Yugoslavia*, Communication No 113/1998, 11 May 2001, UN Doc CAT/C/26/D/113/1998 at para 8.6.

¹⁴⁰ *Aboriginal Justice Inquiry*, *supra* note 8.

measures to prevent abuses.¹⁴¹ This includes all circumstances of custody or control,¹⁴² such as “prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”¹⁴³ Through the course of the Inquiry, information should be sought about the general treatment of Indigenous women and girls in these institutions, which contribute to murders and disappearances. The Inquiry should review policies and procedures connected with these institutions to ensure that they uphold Canada’s obligations under CAT.

Another area where Canada may be failing to uphold its obligations is under article 14.1 which requires states to ensure that the Canadian legal system provides redress and compensation to victims of torture.¹⁴⁴ State obligations are not met where compensation is only a symbolic amount and no attempt is made to prosecute those responsible in a criminal court.¹⁴⁵ Redress encompasses the obligation to ensure an effective remedy and reparations required under international law.¹⁴⁶ A state cannot evade its obligations by simply providing a civil remedy. Some cases will require criminal prosecution.¹⁴⁷ Under article 14, complaint mechanisms and investigations must take positive steps to take into account gender aspects to ensure victims of “sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress.”¹⁴⁸ There has not been any comprehensive or systematic approach to providing compensation for aspects of the situation of murdered and missing Indigenous women that amount to violations of Canada’s obligations under CAT.

Canada has not ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).¹⁴⁹ However, on May 2, 2016, Foreign Minister Dion indicated Canada intends to sign on to the OPCAT.¹⁵⁰ The OPCAT provides two primary mechanisms: the Subcommittee on Prevention has the authority to visit states where persons are deprived of liberty to ensure the CAT is upheld and make recommendations to states accordingly, and the National Preventative Mechanisms are independent mechanisms the state is to create to provide domestic oversight that ensures states meet their obligations under CAT, with a particular focus on those deprived of liberty in places of detention.¹⁵¹ The OPCAT would offer new mechanisms of protection and increased

¹⁴¹ UNCAT, *Colmenarez and Sánchez v Venezuela*, Communication No 456/2011, 26 June 2015, UN Doc CAT/C/54/D/456/2011 (“States parties must...take the necessary steps to prevent individuals from inflicting acts of torture on persons under their control” at para 6.4).

¹⁴² *General Comment No 2*, *supra* note 91 at para 15.

¹⁴³ *Ibid* at para 15.

¹⁴⁴ *Torture Convention*, *supra* note 29, art 24(4).

¹⁴⁵ *Kirsanov*, *supra* note 138 at para 11.4.

¹⁴⁶ UNCAT, *General Comment No 3*, UN Doc CAT/C/GC/3 (2012) at para 2 [*General Comment No 3*].

¹⁴⁷ *Kirsanov*, *supra* note 138 at para 11.4.

¹⁴⁸ *General Comment No 3*, *supra* note 146 at para 33.

¹⁴⁹ 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) [OPCAT].

¹⁵⁰ The Canadian Press, “Dion official: Canada to join UN anti-torture protocol after more than a decade”, *CTV News* (2 May 2016), online: <www.ctvnews.ca/politics/dion-official-canada-to-join-un-anti-torture-protocol-after-more-than-a-decade-1.2884291>.

¹⁵¹ OPCAT, *supra* note 149, arts 17-23.

accountability for Canada in relation to murdered and missing Indigenous women and girls and the interrelated issue of overrepresentation of Indigenous women in prisons.

IV INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD

One of the critical international human rights instruments applicable to a human rights based approach to the Inquiry is the *International Convention on the Rights of the Child* (CRC), which entered into force on September 2, 1990. Canada ratified the CRC in 1991, under which a child is defined as a human being under eighteen years of age.¹⁵²

Canada has several obligations under the CRC to protect children. Canada is required to take legislative, administrative, and other measures to implement the CRC.¹⁵³ In the case of Indigenous children, the Committee on the Rights of the Child recognizes the need to take special measures to ensure the full realization of Indigenous children's rights.¹⁵⁴ The Committee on the Rights of the Child further recognizes that the development of these special measures must be done in consultation with Indigenous peoples, and in a culturally appropriate manner.¹⁵⁵

The Convention requires states to "ensure to the maximum extent possible the survival and development of the child."¹⁵⁶ States must take measures to protect children against physical and mental violence from their parents, legal guardians or any person who has care of the child.¹⁵⁷ If a child is removed from their family, the state must provide special protection and assistance.¹⁵⁸ When determining the best interest of Indigenous children, states "should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group", and this determination should be done with the participation of Indigenous communities.¹⁵⁹ In Canada, there is a connection between the high number of Indigenous children in the child welfare system and murdered and missing Indigenous women and girls. Employing a human rights based approach to the Inquiry includes examining policies that contravene Canada's obligation under the CRC to protect Indigenous children.

The Committee on the Rights of the Child, which oversees the CRC, is quite critical of Canada and has indicated several ways Canada has failed to uphold its obligations to Indigenous children. The Committee has commented on the situation of Indigenous children in the child welfare system. The Committee has criticized Canada for using removal "as a first resort in cases of neglect or family hardship or disability" because this approach causes

¹⁵² CRC, *supra* note 30, art 1.

¹⁵³ *Ibid*, art 4.

¹⁵⁴ *General Comment No 11*, *supra* note 40 at para 5.

¹⁵⁵ *Ibid* at para 20.

¹⁵⁶ CRC, *supra* note 30, art 6.

¹⁵⁷ *Ibid*, art 19.

¹⁵⁸ *Ibid*, art 20.

¹⁵⁹ *General Comment No 11*, *supra* note 40 at para 31.

poorer outcomes and often leads to further abuse and neglect.¹⁶⁰ The Committee recommended Canada take urgent action to address the overrepresentation of Indigenous children in the criminal justice and child welfare systems.¹⁶¹ The Inquiry must look at the connection between the child welfare system, the criminal justice system, and murdered and missing Indigenous women and girls using the CRC as a baseline to judge Canada's actions and inactions.

The Committee has further expressed concern over "the lack of a gender perspective in the development and implementation of programmes aimed at improving the situation for marginalized and disadvantaged communities, such as programmes to combat poverty or the incidence of violence, especially in light of the fact that girls in vulnerable situations are disproportionately affected."¹⁶² The Committee then recommended that Canada take steps to "ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and provincial/territorial plans"¹⁶³ and "ensure that all child victims of violence have immediate means of redress and protection."¹⁶⁴ They were also concerned that no national strategy exists to comprehensively address child poverty which has profound impacts on Indigenous children.¹⁶⁵ The CRC should guide the Inquiry as it analyzes systemic causes and develops recommendations.

Under the CRC, states must take "measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."¹⁶⁶ Article 34 requires states to protect children from all forms of sexual exploitation and sexual abuse.¹⁶⁷ The Committee on the Rights of the Child has noted that "indigenous children whose communities are affected by poverty and urban migration are at a high risk of becoming victims of sexual exploitation and trafficking."¹⁶⁸ The Committee has commented that Canada has failed to take action to address child prostitution and sexual abuse.¹⁶⁹ The Committee also connects victims of sexual exploitation and missing and murdered Indigenous women, expressing grave concern about Indigenous girls involved in prostitution and who disappeared or were murdered.¹⁷⁰ The Committee has also recommended that Canada adopt specific culturally sensitive rehabilitation programs for Indigenous child victims of prostitution.¹⁷¹ The Committee specifically identifies

¹⁶⁰ UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 7 December 2012, CRC/C/OPSC/CAN/CO/1 at para 55 [UNCRC *Observations*].

¹⁶¹ *Ibid* at para 33a.

¹⁶² *Ibid* at para 32c.

¹⁶³ *Ibid* at para 47b.

¹⁶⁴ *Ibid* at para 47c.

¹⁶⁵ *Ibid* at para 67.

¹⁶⁶ CRC, *supra* note 30, art 39.

¹⁶⁷ CRC, *supra* note 30, art 34.

¹⁶⁸ *General Comment No 11*, *supra* note 40 at para 72.

¹⁶⁹ UNCRC *Observations*, *supra* note 160 at para 48.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* at para 35.c.

the need for Canada to take urgent measures to address the vulnerable position many Indigenous children are in.¹⁷²

Canada is a party to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. Article 9 of the Protocol requires states to “adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent” the sale of children, child prostitution and child pornography.¹⁷³ The Committee has concluded that Canada has failed to fulfill this obligation. Article 9.4 of the Protocol requires states to ensure that children who have been victims of prostitution “have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”¹⁷⁴ The Committee states that it is “deeply concerned that cases involving Aboriginal girls, including those who may have been involved in the sex trade, have gone missing or have been murdered, have not been fully investigated, with the perpetrators going unpunished.”¹⁷⁵ The Committee recommended that Canada “establish a plan of action to coordinate and strengthen law enforcement investigation practices and procedures in cases of child prostitution, especially in Aboriginal communities, and to vigorously ensure that all cases of missing girls are investigated and prosecuted to the full extent of the law.”¹⁷⁶ Again here, the value of the CRC in the work of the Inquiry can be seen as there are wide ranging analyses and recommendations that already exist to address the systemic and root causes of missing and murdered Indigenous women and girls.

It is unfortunate that Canada has not ratified the *Optional Protocol on a Communications Procedures* which allows individuals to submit communications to the Committee.¹⁷⁷ Particularly due to the high level of vulnerability of children, it is important to provide external oversight to encourage Canada to take all appropriate measures to realize Indigenous girls’ human rights. The Inquiry should consider recommending that Canada accede to this *Optional Protocol*.

V INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

One of the most relevant international human rights treaties to the Inquiry is the ICPED,¹⁷⁸ which entered into force on December 23, 2010. Unfortunately, Canada is not a party to this Convention. Despite the limitation in this Convention’s application of Canada, it is still critical to include in the work of the Inquiry if it is to be guided by basic international human rights standards because the Convention builds on existing international human rights law.

¹⁷² UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 6 December 2012, CRC/C/CAN/CO/3-4 at para 33a.

¹⁷³ OP CRC 1, *supra* note 75, art 9.

¹⁷⁴ *Ibid*, art 9.4.

¹⁷⁵ UNCRC *Observations*, *supra* note 160 at para 26.

¹⁷⁶ *Ibid* at para 27.c.

¹⁷⁷ *Optional Protocol to the Convention on the Rights of the Child on a communications procedures*, 14 April 2014, A/RES/66/138 art 5.1.a-c.

¹⁷⁸ ICPED, *supra* note 31.

As such, Canada may have obligations to protect against enforced disappearances even without acceding to this treaty.¹⁷⁹ After an extensive review of international law, Nikolas Kyriakou argues that the prohibition against enforced disappearance is a rule of customary international law.¹⁸⁰ If the prohibition is a rule of customary international law, it is presumed to be directly incorporated into Canadian common law, regardless of Canada's position on ICPED.¹⁸¹ In addition, enforced disappearance is recognized to violate numerous other recognized human rights, including many recognized under other international human rights treaties.¹⁸² For example, enforced disappearance violates civil and political rights such as "the right to recognition as a person before the law; the right to liberty and security of the person; the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment; the right to life, when the disappeared person is killed; the right to an identity; and the right to a fair trial and to judicial guarantees."¹⁸³ Enforced disappearance also violates rights protected under ICESCR: "the right to protection and assistance to the family; the right to an adequate standard of living; the right to health; the right to education."¹⁸⁴ Enforced disappearances of children as well as the disappearance of parents would be a violation of the *Convention on the Rights of the Child*.¹⁸⁵ Canada's obligations under these international human rights treaties provide some protection against enforced disappearances. Building on general international law on enforced disappearance, the ICPED is important to understanding the scope of state obligations and thus this section considers the scope of protection related to murdered and missing Indigenous women and girls, which should be included in a human rights based approach to the Inquiry.

Under ICPED, enforced disappearance is defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the

¹⁷⁹ *Baker*, *supra* note 97.

¹⁸⁰ Nikolas Kyriakou, "The International Convention for the Protection of all Persons from Enforced Disappearance and its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition" (2012) 13:1 Melbourne J Intl L 424.

¹⁸¹ *R v Hape*, 2007 SCC 26 at para 39, [2007] 2 SCR 292. Justice LeBel, writing for the majority, held:

In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

See also *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] SCR 208, [1943] 2 DLR 481.

¹⁸² Office of the High Commissioner for Human Rights, "Enforced or Involuntary Disappearances: Fact Sheet No. 6/Rev.3" at 3, online: <www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> (UN).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* at 3–4.

¹⁸⁵ *Ibid* at 4.

disappeared person.”¹⁸⁶ Article 3 requires Canada to take measures to investigate enforced disappearances “committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.” Under the Convention, enforced disappearances must be a criminal offence; as well, widespread or systemic practices of enforced disappearances must constitute a crime against humanity.¹⁸⁷ The current state of Canadian law may fulfill this obligation, but specific reference to enforced disappearance would strengthen existing provisions.¹⁸⁸ But it is also worth noting that the widespread and systemic situation of murdered and missing Indigenous women and girls in Canada may meet the threshold for a crime against humanity. While I have not heard any advocate claim that Canada is directly involved in disappearing or murdering Indigenous women, there have been allegations that state actors, including police, may have acquiesced to the disappearances by failing to act when they knew about the situation for decades before taking any major action. Further, if Canada fails to act on the recommendations of the Inquiry, the question remains whether Canada continues to violate this international standard.

The Convention is not limited to enforced disappearances perpetrated directly by the state. States are obligated to take appropriate measures to investigate enforced disappearances “committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.”¹⁸⁹ This obligation is meant to ensure states make genuine efforts to solve missing persons cases. States must also take “measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.”¹⁹⁰ For example, an urgent action request was granted in the disappearance of Jairo Perez, despite no indication that Colombia was involved in his disappearance.¹⁹¹ The Committee on Enforced Disappearances (CED) and Colombia held regular communications about the investigation until Perez’s remains were found.¹⁹² After that point, the Committee continued to monitor the situation and requested that interim or protective measures be adopted for the victim’s family.¹⁹³ This case demonstrates that Canada may be responsible under ICPED for disappearances even if the disappearance is not directly perpetrated by the state, which may be the case for many murdered and missing Indigenous women and girls.

Under ICPED, states must take measures to hold criminally responsible “any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance.”¹⁹⁴ The CED accepted an urgent action request in the disappearance of Daniel Alfaro, who disappeared while travelling between two

¹⁸⁶ ICPED, *supra* note 31, art 2.

¹⁸⁷ ICPED, *supra* note 31, art 1.

¹⁸⁸ See *Criminal Code*, RSC 1985, c C-46. See also *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

¹⁸⁹ ICPED, *supra* note 31, art 3.

¹⁹⁰ ICPED, *supra* note 31, art 24(3).

¹⁹¹ Committee on Enforced Disappearances, *Report of the Committee on Enforced Disappearances*, A/69/56 [Enforced Disappearances Report] at para 53.

¹⁹² *Ibid* at para 54.

¹⁹³ *Enforced Disappearances Report*, *supra* note 191 at paras 54–55.

¹⁹⁴ ICPED, *supra* note 31, art 6(1)(a).

villages in Mexico.¹⁹⁵ When local Mexican authorities failed to take meaningful action, the Committee engaged in a dialogue with Mexico on the case.¹⁹⁶ After repeated letters demanding information, Mexico finally indicated that they had assigned the case to a special unit and that “relatives of the victim were provided with psychological attention and support.”¹⁹⁷ The Committee continued corresponding with Mexico and requesting updates about the status of the investigation and the measures implemented to protect the victim and others in danger.¹⁹⁸ This case demonstrates how international pressure and oversight can be important when a state is slow to respond to an incident, as has been the case of murdered and missing Indigenous women and girls in Canada. This obligation to investigate and hold criminally responsible those who have engaged in enforced disappearances should inform the scope of the Inquiry into murdered and missing Indigenous women and girls. Canada has consistently failed to investigate disappearances. Some questions may also exist on previously closed files where insufficient investigation occurred.

The Convention also requires states to ensure that their domestic legal system provides victims with the “right to obtain reparation and prompt, fair and adequate compensation.”¹⁹⁹ Reparations should cover both material and moral damages, including restoration of dignity and reputation.²⁰⁰ Again here, even if remedies exist in theory in Canada, they are not effectively available to many Indigenous women and girls.

The ICPED provides several complaint mechanisms including individual urgent action requests and state inquiries. An urgent action petition can be submitted requesting “that a disappeared person be sought and found.”²⁰¹ The request can be submitted by a wide range of people, from relatives of the disappeared person to their counsel or any other person who may have a legitimate interest.²⁰² A state inquiry can be initiated if the Committee “receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party.” This information may be brought to the urgent attention of the UN General Assembly. The Convention permits the Committee to engage the state as long as the case of the disappeared person remains unresolved.²⁰³ The Committee can also request to visit the State to investigate the issue.

Beyond corresponding with and putting pressure on states, the ICPED can visit a state if the Committee receives reliable information that a state is violating the ICPED.²⁰⁴ In 2013, four non-governmental organizations alleged that Mexico was involved in the “perpetration of enforced disappearances, was failing to instigate proper investigations, was not holding

¹⁹⁵. *Enforced Disappearances Report*, *supra* note 191 at para 61.

¹⁹⁶. *Ibid* at para 62.

¹⁹⁷. *Ibid*.

¹⁹⁸. *Ibid*.

¹⁹⁹. ICPED, *supra* note 31, art 24(4).

²⁰⁰. *Ibid*, art 24(5).

²⁰¹. *Ibid*, art 30.

²⁰². *Ibid*, art 30(1).

²⁰³. *Ibid*, art 30(4).

²⁰⁴. *Ibid*, art 33.

perpetrators accountable, and was not ensuring the victims received adequate reparations.”²⁰⁵ In this case, the Committee responded by requesting a state visit.²⁰⁶ The Inquiry should investigate Canada’s actions and failures to act against the standards set out in ICPED to determine if Canada is responsible (directly or indirectly) for the disappearances of Indigenous women and girls.

The urgent action and state visit processes are important safeguards for murdered and missing Indigenous women and girls that provide international investigations if Canada fails to act, as they have done in the past. As part of the human rights based approach, the Inquiry should recommend Canada accede to the ICPED and make a declaration under article 31 permitting individual complaints. While it may be difficult to garner the necessary political will for Canada to accede to the ICPED and make a declaration for individual complaints, such a recommendation from the Inquiry may be pertinent as a concrete action Canada can take to increase the safety of Indigenous women and girls by creating additional external checks on Canada’s actions going forward.

VI CONCLUSION

The Inquiry should take a human rights based approach. Through such an approach, international human rights standards would be used to examine and evaluate the current state of Canadian law and make recommendations to change law and policies to promote greater realization of Indigenous women and girls’ human rights. This approach would also ensure Canada has signed, ratified, and transformed all international human rights instruments into Canadian law. Further, to ensure maximum protection of human rights, Canada should take steps to accede to any human rights treaties to which Canada is not yet a party. This includes the optional protocols and declarations that provide complaint processes.

A human rights based approach to the Inquiry should emphasize Canada’s duty of due diligence to prevent, investigate, prosecute, punish, and provide redress for murdered and missing Indigenous women and girls. Through such an approach, the Inquiry should recommend “adopting or modifying legislation; developing strategies, action plans and awareness-raising campaigns and providing services; reinforcing the capacities and power of police, prosecutors and judges; adequately resourcing transformative change initiatives; and holding accountable those who fail to protect and prevent, as well as those who perpetrate violations of human rights of women.”²⁰⁷ Emphasizing the duty of due diligence as articulated through all the human rights instruments, the Inquiry can engage in a process of “societal transformation to address structural and systemic gender inequality and discrimination.”²⁰⁸

While Canada has often argued that additional human rights protections are not necessary because we have human rights legislation and the *Canadian Charter of Rights of Freedoms*, the vast and systemic nature of murdered and missing Indigenous women and girls demonstrates that the current system in Canada to protect Indigenous women and girls is not working. It is time for a new approach, one that seeks to uphold human rights and ensure Indigenous

²⁰⁵. *Enforced Disappearances Report*, *supra* note 191 at para 68.

²⁰⁶. *Ibid* at para 69.

²⁰⁷. Manjoo, *supra* note 117 at 262.

²⁰⁸. *Ibid*.

women receive protection under the law, perpetrators of gross human rights violations are prosecuted, and the complicity of the state is addressed. A human rights based approach will help meet these ends because it “emphasizes universality, equality, participation and accountability.”²⁰⁹

Exhibit: *National Inquiry into Missing and Murdered Indigenous Women and Girls*

Location/Phase: Part III: Quebec City

Witness: Brenda Gunn

Submitted by: Big Canoe, C. Counsel

Add'l info: P03 P02 P0301

Date: MAY 16 2018

Initials

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²⁰⁹. The Secretariat of the UN Permanent Forum on Indigenous Issues, “Indigenous Peoples and the MDGs: Inclusive and Culturally Sensitive Solutions”, UN Chronicle XLV:1 (March 2008) 40 at 41.