Native Women's Association of Canada

L'Association des femmes autochtones du Canada

Discussion Paper:

Reparations & Remembrance in Canada for Indigenous Women, Girls & Gender-Diverse Persons

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Head Office
85 Albert Street, 12th Floor Ottawa, Ontario K1P 6A4
Tel: (613) 722-3033 Fax: (613) 722-7687 Toll-free: 1-800-461-4043 reception@nwac.ca

Introduction

The international human rights legal framework requires Canada to make reparations for past harms caused to Indigenous women, girls, and gender-diverse people in the country. This international legal obligation applies both to individuals acting directly on behalf of the Government of Canada and to private citizens who may have committed serious human rights violations.[1]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005 (UN Basic Principles),[2] outline the full scope of the international legal obligation to ensure reparations for past harms by both groups of actors.

As has been widely documented, multiple non-monetary recommendations were issued in recent years by the Truth and Reconciliation Commission (TRC) in 2015[3] and by the National Inquiry into Missing and Murdered Indigenous Women and Girls in 2019.[4] The Calls to Action and Calls to Justice as a result of both inquiries are examined in greater detail below.

Reparations-focused recommendations of past independent inquiries into the treatment of Indigenous persons in Canada date back decades, not just a handful of years. These high-level independent inquiries put forth the key recommendation that Canada should institute broad reparations for the past conduct of its representatives and other private persons acting on its behalf. Most notable of all of the inquiries was the 1996 Royal Commission on Aboriginal Peoples Inquiry,[5] which advocated for sweeping change in its *Highlights of the Report of the Royal Commission on Aboriginal Peoples Inquiry*:

> *The Commission proposes a 20-year agenda for change … In just 20 years, the revitalization of many self-reliant Aboriginal nations can be accomplished, and the staggering human and financial cost of supporting communities unable to manage for themselves will end. From that time forward, the return to the country will continue to grow.*
>
> *That so much is possible in so short a time is good news for Canadians.*

[1] Shelton, The Right to Reparations for Acts of Torture, 99–100.
[2] UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
[3] TRC, *Honouring the Truth, Reconciling for the Future*.
[4] Please see: NIMMIWG, *Reclaiming Power and Place*; NIMMIWG, *A Legal Analysis of Genocide*.
[5] Royal Commission on Aboriginal Peoples, *Highlights of the Report of the Royal Commission on Aboriginal Peoples Inquiry*. See also: NIMMIWG, *Interim Report*, 10.

> *The changes we propose are not modest. We do not suggest tinkering with the Indian Act or launching shiny new programs. What we propose is fundamental, sweeping and perhaps disturbing — but also exciting, liberating, ripe with possibilities.*[6]

Regrettably, little became of the Commission's optimism and high hopes.[7] Furthermore, despite multiple high-level inquiries, much remains to be done to ensure that Indigenous persons, particularly women, girls, and gender-diverse persons, receive full reparations (both monetary and non-monetary) for the many harms caused to them.

It bears noting, however, that the Canadian authorities have undertaken certain limited measures in several high-profile cases to institute monetary reparations for past wrongs. The Indian Residential Schools Settlement Agreement is a case in point, with compensation for the Sixties Scoop Settlement still pending.[8] While the Indian Day School Settlement Agreement procedure may have recently opened, other monetary claims for past human rights wrongs have yet to be determined and may drag on for years. These include the current Residential School Day Scholars, Unverified Day School Survivor, and Indian Boarding Home class-action lawsuits.[9]

Furthermore, in light of the evolving international legal framework as set out in detail below, the full scope of the obligation to provide reparations is now much broader and should, ideally, include a range of reparative actions such as non-remunerative acts of symbolism, education, and public remembrance. These reparatory measures will be explored further in section 6 of this paper.

This discussion paper is structured along the following lines. Section 1 examines the more recent prominent Canadian inquiries that have issued broad reparations-focused recommendations. Section 2 focuses on the developing international legal framework that obliges Canada to ensure reparations are rendered for serious human rights violations. Section 3 examines the historical marginalization of women and other groups in reparation programs. Section 4 looks at the importance of consultation as well as victim or survivor participation in the conception, design and implementation of reparation programs.

In the second part of the discussion paper, Section 5 poses the question recently raised during the September 2019 hearing of the Inter-American Commission on Human Rights on Canada and Murdered and Missing Indigenous Women and Girls: can a transitional justice framework be an appropriate vehicle to address historical wrongs in Canada? Section 6 examines the potential scope of reparation programs, including the importance of remembrance as a form of reparation.

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[6] Royal Commission on Aboriginal Peoples, *Highlights of the Report of the Royal Commission on Aboriginal Peoples Inquiry – Last Words*, section titled "Last Words."
[7] CBC News, 20 Years since Royal Commission on Aboriginal Peoples, Still Waiting for Change.
[8] For detailed information about the Sixties Scoop settlement, please see: Class Action, Sixties Scoop Settlement.
[9] Martens, Green Light for Indian Day Schools Claims.

It is hoped that by the end of the paper, the reader will have gained a much deeper understanding of the nature and potential scope of reparation processes, as well as the challenges that lie ahead with respect to serving some semblance of justice on behalf of Indigenous women, girls, and gender-diverse persons.

1. Recent domestically driven recommendations for Canada to make reparations

Recently, two key domestic inquiries issued recommendations in relation to the past wrongs committed against Indigenous persons in Canada: *Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) and *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (*2019).

The 2015 *Summary of the Final Report of the Truth and Reconciliation Commission of Canada* issued 94 Calls to Action, many of which were necessarily reparative in the broader non-monetary sense of the word. Its key recommendations fell into the following categories of action under the wider headings of *Legacy* and *Reconciliation*[10]:

Legacy:

- Child Welfare
- Education
- Language and Culture
- Health
- Justice

Reconciliation:

- Canadian Governments and the United Nations Declaration on the Rights of Indigenous Peoples
- Royal Proclamation and Covenant of Reconciliation
- Settlement Agreement Parties and the United Nations Declaration on the Rights of Indigenous Peoples
- Equity for Aboriginal People in the Legal System
- National Council for Reconciliation
- Professional Development and Training for Public Servants
- Church Apologies and Reconciliation
- Education for Reconciliation

[10] TRC, *Honouring the Truth, Reconciling for the* Future, 319–337.

- Youth Programs
- Museums and Archives
- Missing Children and Burial Information
- National Centre for Truth and Reconciliation
- Commemoration
- Media and Reconciliation
- Sports and Reconciliation
- Business and Reconciliation
- Newcomers to Canada

References were made in the 94 Calls to Action to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) some 21 times (discussed below).[11]

Certain international authorities such as the UN Expert Mechanism on the Rights of Indigenous Peoples have remarked positively on the overall Truth and Reconciliation Commission's eight-year-long process, noting that it was established jointly by Indigenous peoples and governments and that Indigenous peoples participated fully from the outset. Moreover, it addressed both historical human rights violations and the intergenerational roots of the current situation of Indigenous peoples.[12] The Inter-American Commission on Human Rights also acknowledged the broad transformative effect of the Calls to Action.[13] In its 2019 report, the UN Expert Mechanism on the Rights of Indigenous Peoples noted: "While at its origins the Commission focused on the residential school system and its legacy, the calls to action address a broad range of issues that are crucial for reconciliation and for the implementation of the Declaration [on the Rights of Indigenous Peoples]."[14]

By and large, however, many of the 94 Calls to Action have not been implemented. These include key provisions that have a direct reparatory and reconciliatory dimension. According to one domestic authority, despite several jurisdictions across Canada stating that they are committed to implementing the TRC Calls to Action, "it is too early to assess the success of these specific initiatives."[15]

According to the CBC News' *Beyond 94: Truth and Reconciliation in Canada* research database, as of October 18, 2019, no effort towards implementing 26 Calls to Action has been taken, and while projects relating to 37 Calls have been proposed, none have been started. Progress

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[11] TRC, *Honouring the Truth, Reconciling for the* Future; Calls to Action 24, 27, 28, 42, 43, 44, 45ii, 46iii, 48, 48i, 48ii, 48iii, 48iv, 50, 57, 67, 69i, 70i, 86, 92, and 92iii.
[12] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §48.
[13] Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas*, 111.
[14] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §50.
[15] NIMMIWG, *Interim Report*, 12.

has only been made on 10 Calls to Action.[16] In short, there is a glaring gap between TRC's written word and practice.

The much-anticipated report *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* was finally published in June 2019.[17] The broad scope of the National Inquiry's mandate allowed it to address a range of inter-related issues concerning all forms of violence against Indigenous women and girls in a holistic manner.[18] As noted previously, the report contains 231 Calls for Justice, described as legal imperatives:

> *Although we have been mandated to provide recommendations, it must be understood that these recommendations, which we frame as "Calls for Justice," are legal imperatives – they are not optional. The Calls for Justice arise from international and domestic human and Indigenous rights laws, including the Charter¸ the Constitution, and the Honour of the Crown. As such, Canada has a legal obligation to fully implement these Calls for Justice and to ensure Indigenous women, girls, and 2SLGBTQQIA people live in dignity. We demand a world within which First Nations, Inuit, and Métis families can raise their children with the same safety, security, and human rights that non-Indigenous families do, along with full respect for the Indigenous and human rights of First Nations, Inuit, and Métis families.*[19]

Like the Truth and Reconciliation Commission's 94 Calls to Action, the National Inquiry presented its raft of recommendations thematically. (See the complete *Calls for Justice* report for more information.[20]) The individual Calls are non-monetary in nature; they are strategically targeted at righting past human rights wrongs and avoiding their repetition across an array of social themes.

For example, the Calls to Justice directed at all levels of government cover a wide range of diverse issues, such as human and Indigenous rights obligations, culture, health and wellness, human security, and justice. Societal actors named in the Calls include the media and social influences, police, health and wellness providers, attorneys and law societies, educators, extractive and development industries, the prison service, and all Canadians.[21]

The full scope of wholesale change required is underscored in the introduction to the *Calls to Justice* compendium document:

> *The steps to end and redress this genocide must be no less monumental than the combination of systems and actions that has worked to maintain colonial violence for generations. A permanent commitment to ending the genocide requires addressing the*

[16] CBC News, Beyond 94.
[17] NIMMIWG, *Reclaiming Power and Place, Volumes 1a and 1b*.
[18] NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 58.
[19] Ibid., 168.
[20] NIMMIWG, *Calls for Justice*.
[21] Ibid, 1–30.

four pathways explored within Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. *As documented in detail, these pathways include:*

- *historical, multigenerational, and intergenerational trauma;*
- *social and economic marginalization;*
- *maintaining the status quo and institutional lack of will; and*
- *ignoring the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people.*

Addressing these four pathways means full compliance with all human and Indigenous rights instruments, as well as with the foundation that began the Final Report and that animates these Calls: that the daily encounters with individuals, institutions, systems, and structures that compromise security must be addressed with a new view toward relationships.[22]

To engender positive change in Canadian society vis-à-vis the treatment of Indigenous women, girls, and gender-diverse persons, the National Inquiry identified seven principles of change[23]:

- a focus on substantive equality and human and Indigenous human rights;
- a decolonizing approach;
- inclusion of family and survivors;
- Indigenous-led solutions and services;
- recognizing distinctions;
- cultural safety; and
- a trauma-informed approach.

The 231 legal imperatives in the form of the Calls to Justice are the means by which Canada should right past wrongs and build a society within which First Nations, Inuit, and Métis families can — to paraphrase the report — raise their children with the same safety, security, and human rights that non-Indigenous families do, along with full respect for their rights. As the report states: "*Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* calls for real, significant, foundational change. The rest of Canada must be prepared to meet this challenge."[24] To what extent the Calls to Justice are met by the rest of Canada remains to be seen.

In a potentially positive development, however, in early December 2019, Crown-Indigenous Relations Minister Carolyn Bennett publicly stated that the federal government is developing an Action Plan to act on the 231 Calls to Justice. This Plan will be published by June 2020.[25] Current skepticism concerning the likelihood of concrete and swift follow-up to the legal

[22] Ibid., *Calls for Justice*, 1.
[23] Ibid., 2–4; NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 169–173.
[24] NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 75.
[25] Global News, Action Plan on Missing, Murdered Indigenous Women Inquiry to be Released in June.

imperatives embodied in the Calls is understandable given the lack of action following previous inquiries and recommendations.[26]

It bears noting that national Indigenous organizations, such as the Inuit Tapirisat Kanatami have endorsed the report's recommendations.[27] The Assembly of First Nations has also passed resolutions supporting the implementation of the Calls to Justice.[28]

2. The international legal framework on the right to an effective remedy and reparations

The international legal basis for the right to an effective remedy and reparation is deeply anchored in international law and has multiple sources, including international conventional and customary law as well as judicial and quasi-judicial decisions at the international, regional and national level. This right is found in an array of international human rights hard-law instruments, including:

- Article 8 of the Universal Declaration of Human Rights;[29]
- Article 2 of the International Covenant on Civil and Political Rights;
- Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination;
- Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- Article 39 of the Convention on the Rights of the Child.[30]

Canada has either endorsed or ratified all of these instruments. Moreover, the right to an effective remedy and reparation is found in several key instruments as yet not ratified by Canada, including Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance and Article 25 of the American Convention on Human Rights.[31] This right is also found in the analogue instruments of the African and European regional human rights

[26] See, for example, the concern by the National Inquiry that there has been very limited movement to implement recommendations from previous reports: NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 168. For concrete follow-up to the National Inquiry's 10 Calls for immediate action from the *Interim Report,* see: NIMMIWG, *Reclaiming Power and Place, Volume 1b,* 66–71.
[27] Inuit Tapiriit Kanatami, Inuit Leadership Supports the Full Implementation of the Calls for Justice.
[28] Please see: Assembly of First Nations, Implementation of Recommendations from the National Inquiry into Missing and Murdered Indigenous Women and Girls.
[29] While the Universal Declaration of Human Rights is not an international treaty, many of its provisions are reflected in customary international law and conventional hard-law instruments.
[30] See: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 33–35; Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §15; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble.
[31] Gualde, *Reparations for Crimes against Humanity as Public Policy*, 14–22; van Boven, Victims' Rights to a Remedy and Reparation, 22.

systems.[32] In sum, the right to an effective remedy — both procedural and substantive — and reparation is deeply rooted in international human rights treaty law.[33]

In the same vein, the role of customary international law is also relevant.[34] In a key United Nations report published over a decade ago by the Office of the High Commissioner for Human Rights, the following point was articulated:

> *At the same time, customary international law, as embodied in the law of State responsibility and in interaction with the progressive development of human rights treaty law, is solidifying the legal basis of a right to remedy and reparation for victims of human rights violations … Obligations assumed by a State under international human rights and humanitarian law entail legal consequences not only vis-à-vis other States but also with respect to individuals and groups of persons who are under the jurisdiction of the State*.[35]

Moreover, as different authorities have noted, various international humanitarian and international law instruments are also relevant in this regard, despite any limitations when compared to the international human rights law framework.[36] It is somewhat surprising, then, that nations often perform extremely poorly when making amends for past human rights wrongs.

The jurisprudence of the treaty bodies and national, regional and international courts has equally confirmed that a country's obligation to provide remedy and reparation both procedurally and substantively is wide in scope.[37] The Special Rapporteur on the promotion of truth, justice, and reparation and guarantees of non-recurrence has stated that this obligation "extends far beyond monetary compensation to encompass such additional requirements as: public investigation and prosecution; legal reform; restitution of liberty, employment or property; medical care; and expressions of public apology and official recognition of the State's responsibility for violations."[38] The expansive scope of the obligation to provide reparation is outlined in Section 6 of this paper.

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[32] Shelton, The Right to Reparations for Acts of Torture, 100–102; van Boven, Victims' Rights to a Remedy and Reparation, 22.
[33] For a discussion on the two components of an effective remedy, see: Shelton, *Remedies in International Human Rights Law*1, 7–9; Lober & Schuechner, Article 14, Right of Torture Victims to Adequate Remedy and Reparation, 388–416; van Boven, Victims' Rights to a Remedy and Reparation, 22–24.
[34] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 39–42.
[35] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 6.
[36] Please see: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 31–33; Gillard, Reparation for Violations of International Humanitarian Law; REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations*, §3.
[37] See: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 35–36, ch. 3; van Boven, Victims' Rights to a Remedy and Reparation, 22–24.
[38] UN, Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §17.

Currently, the international legal obligation of a nation to provide reparation can be found in international conventional and customary law, as well as in national, regional and international judicial and quasi-judicial jurisprudence.[39]

Yet, as the National Inquiry has found, Canada has routinely failed to protect an array of human and Indigenous rights. In particular, it has failed to acknowledge and remedy the human rights violations that have been consistently perpetrated against Indigenous women, girls, and gender-diverse persons.[40] It is no coincidence that the National Inquiry's Final Report also called for the creation of a National Indigenous and Human Rights Ombudsperson and a National Indigenous and Human Rights Tribunal.[41]

More generally, arguments put before the Canadian courts on the issue of remedies and human rights violations intervenors have argued that remedies cannot be illusory and the right to a remedy is the right to an effective remedy. As set out by the Canadian Association of Refugee Lawyers in its intervener factum before the Supreme Court of Canada, the right to an effective remedy for gross human rights violations is also a preemptory norm of international law.[42] Notwithstanding the gravity of the right, for many Indigenous persons, a denial of justice has eclipsed the international legal right to an effective remedy and reparation, both of which have remained highly elusive in practice.

Consequently, it is relevant to note that the failure of Canadian authorities to ensure the right in practice violates several sections of the Canadian Charter of Rights and Freedoms, including sections 7 (life, liberty and security of person), 15(1) (equality before and under law and equal protection and benefit of law), and 24(1) (enforcement of guaranteed rights and freedoms).

Notwithstanding such violations, while the practice of the courts has been somewhat inconsistent in addressing the relevance and persuasiveness of international human rights law in given cases, including on the part of the Supreme Court of Canada,[43] the interconnectedness of the international framework with domestic legislation is beyond doubt.[44] For example, the Supreme Court has often turned to international human rights treaties and agreements in interpreting the meaning and scope of particular rights and liberties in Canadian law.[45] As Arbour and Lafontaine have succinctly observed: "Canada has much to gain and nothing to lose in opening up to international tools for solving its domestic troubles."[46] In view of the peremptory nature of this

[39] For a fuller discussion on related developments, see: Ferstman, The Right to Reparation for Victims of Armed Conflict, Part IV – The Award of Reparations.
[40] NIMMIWG, *Reclaiming Power and Place*, *Volume 1b*, 174.
[41] Ibid., 178.
[42] David Asper Centre for Constitutional Rights and International Human Rights Program University of Toronto Faculty of Law, Court File No. SCC35034, §17.
[43] Oliphant, Interpreting the *Charter* with International Law, 105, 129.
[44] Arbour & Lafontaine, Beyond Self-Congratulations, 239, 250–251; Cromwell & Gelinas-Faucher, William Schabas, the Canadian Charter of Rights and Freedoms, and International Human Rights Law, 54–55.
[45] Cromwell & Gelinas-Faucher, William Schabas, the Canadian Charter of Rights and Freedoms, and International Human Rights Law, 54–55; Davison, Understanding the Connections Between International Law and Canadian Criminal Law.
[46] Arbour & Lafontaine, Beyond Self-Congratulations, 239, 257.

international right to an effective remedy and reparation and its deep and solid anchoring in the Canadian Charter of Rights and Freedoms, its relevance to the domestic context is thus beyond question.

(A) UN Basic Principles

Notwithstanding such systematic shortcomings on the part of Canadian governments, the following pages provide a more detailed account of key international instruments dealing with the right to reparation.

As highlighted in the outset of this paper, the key document in the international legal framework for reparations is the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in 2005 (UN Basic Principles).[47]

The Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence has described the UN Basic Principles as "a milestone" which have had "a role in catalyzing a better understanding of the right to reparation and in guiding action in this domain, as shown by the fact that reference is increasingly being made to this document in the jurisprudence of various courts."[48] The leading international human rights NGO, REDRESS, also describes them as serving "as a key reference point for the determination of duties in states in international, regional and domestic systems in situations of mass violations."[49] Evans has observed that they provide a crucial benchmark, as they synthesize and define key areas of reparations (please see below).[50]

Leading international expert and multiple past UN mandate-holder Professor Theo van Boven emphasized that the UN Basic Principles mark a milestone in the lengthy process to frame victim-oriented policies and practices.[51] He also stated that the very fact that the UN Basic Principles were the outcome of a lengthy process of consideration and review by non-governmental and governmental experts and were adopted by the UN General Assembly without a dissenting vote is reason enough to consider the text as declaratory of legal standards in the areas of victims' rights, in particular the right to remedy and reparation.[52]

The right of victims to remedies is outlined in the UN Basic Principles as follows:

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[47] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
[48] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §18. See also: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 37–38.
[49] REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations*, §4.
[50] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 37.
[51] van Boven, Victims' Rights to a Remedy and Reparation, 21.
[52] Ibid., 32.

> *Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:*
>
> *(a) Equal and effective access to justice;*
> *(b) Adequate, effective and prompt reparation for harm suffered;*
> *(c) Access to relevant information concerning violations and reparation mechanisms*.[53]

With respect to the right to reparation for harm suffered, the UN Basic Principles delve into considerable detail on what this obligation comprises. The document captures the right to reparation in the following terms:

> *Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim*.[54]

The above excerpt illustrates how the UN Basic Principles underscore the crucial point that states should attempt to establish national programs for reparation and provide other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.[55] Thus, responsibility for the abuses committed by non-state actors are covered under the UN Basic Principles, as has — to some extent — been the case in Canada.

With respect to the above, victims should be provided with full and effective reparation for harm suffered, which includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[56] The UN Basic Principles spell out in considerable detail what is covered in each of these five components.[57] For reasons of brevity, the full scope of these five

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[53] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, §11.
[54] Ibid., §15.
[55] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, §16. See also: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 38; Lober & Schuechner, Article 14, Right of Torture Victims to Adequate Remedy and Reparation, 380.
[56] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, §18.
[57] Ibid., §19–23.

categories will not be examined in detail in this paper.[58] Nonetheless, these key articles have been included in Annex 1 of this paper, to which interested readers might refer for further information.

Even so, it does well to bear in mind that the UN Basic Principles are designed to be flexible on the forms of reparation that might be implemented in order for justice to be rendered.[59] In other words, not every aspect of the five categories needs to be implemented in equal measure.

Despite their importance, certain authorities are of the opinion that the UN Basic Principles have limitations. On this point, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance has stated: "The Basic Principles and Guidelines now constitute an important element of the United Nations human rights system. At the same time, the Basic Principles and Guidelines do not capture the full range of views on reparations and remedies in the United Nations human rights system."[60] In particular, such concerns relate to temporal restrictions placed on reparations for historical violations such as colonialization and slavery based on the principle of non-retroactive application of international law.[61]

Despite such perceived limitations, there remains little doubt that the UN Basic Principles are highly significant both globally and in the Canadian context. That the National Inquiry's Final Report has termed the violence committed against Indigenous peoples in Canada as race-based genocide should dispel any doubts that the UN Basic Principles has merit in the Canadian setting.[62]

(B) Other Key Instruments

The right to reparation for harm suffered is embodied in other key international legal instruments.

The **Updated Set of principles for the protection and promotion of human rights through action to combat impunity** is an important legal source.[63] The principles are widely accepted as constituting an authoritative point of reference for efforts to fight against impunity for gross human rights abuses and serious violations of international humanitarian law. Principles 31 to 34 set out the right to reparation and the guarantee of non-recurrence. The Updated Set of Principles and the UN Basic Principles are considered to be "largely complementary in setting out the principles and prescriptions of punitive and reparative justice."[64]

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[58] See also: Shelton, The Right to Reparations for Acts of Torture, 105–109; Shelton, Remedies and Reparation, 377–379.
[59] van Boven, Victims' Rights to a Remedy and Reparation, 39.
[60] Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, §38.
[61] See the discussion in: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, §38, 48.
[62] NIMMIWG, *Reclaiming Power and Place, Volume 1a*, 49. See also: NIMMIWG, *A Legal Analysis of Genocide*.
[63] Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.
[64] van Boven, Victims' Rights to a Remedy and Reparation, 37.

The right to reparation is also anchored in the **Human Rights Committee's General Comment No. 31**, even in instances (as discussed previously) where harm is perpetrated by a private actor. In this respect, General Comment No. 31 states:

> *However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.*[65]

In addition to effective protection of Covenant rights, the document explicitly states that Article 2(3) of the ICCPR requires nations/states to ensure that individuals have accessible and effective remedies to vindicate those rights, make reparation to individuals whose Covenant rights have been violated, and take measures to prevent recurrence of a violation of the Covenant.[66] Moreover, nations/states must ensure that parties who violate certain Covenant rights are brought to justice.[67]

Paragraph 16 of General Comment No. 31 underscores the key point that without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.[68] The relevance of General Comment No. 31 to the Canadian context is arguably extremely high in view of the clear reluctance on the part of the federal government to act on key reparatory measures outlined in the final reports of national inquiries, some of these dating back decades.

While primarily focusing on sexual violence committed in situations of armed conflict, the **Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation** contains key principles of direct significance to the Canadian context. The Declaration echoes essential aspects of the right to remedy and reparation as found in the wider international legal framework, including the UN Basic Principles,[69] namely that:

> *Women and girls have a right to a remedy and reparation under international law. They have a right to benefit from reparation programs designed to directly benefit the*

[65] UN Human Rights Committee, General Comment No. 31, §8.
[66] Ibid., §15–17.
[67] Ibid., §18.
[68] Ibid., §16.
[69] Couillard, The Nairobi Declaration, 5–7.

victims, by providing restitution, compensation, reintegration, and other key measures and initiatives under transitional justice that, if crafted with gender-aware forethought and care, could have reparative effects, namely reinsertion, satisfaction and the guarantee of non-recurrence.[70]

It is striking that, in spelling out the key aspects of reparation for women and girls, the Nairobi Declaration states that reparation must go above and beyond the immediate reasons and consequences of the crimes and violations, and must aim to address the political and structural inequalities that negatively shape women's and girls' lives.[71] In a word, reparations should be a transformative and participative process.[72] Finally, even though the Nairobi Declaration is not a binding covenant, to draw on the words of Couillard, "its value is in offering solutions that have the potential to make reparation a reality."[73]

Both the Truth and Reconciliation Commission and National Inquiry into Missing and Murdered Indigenous Women and Girls were similarly expansive in scope, tackling human rights concerns beyond the immediate focus of the inquiries.

The fact that the Truth and Reconciliation Commission made some 21 references to **UN Declaration on the Rights of Indigenous Peoples** (see above)[74] underscores the importance of this instrument with respect to reparation. To briefly recap, the following two TRC Calls to Action stated:

(43) We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

(44) We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration
on the Rights of Indigenous Peoples.[75]

The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls also references UNDRIP.[76] The report specifically calls upon all governments to immediately implement and fully comply with all relevant rights instruments, including UNDRIP.

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[70] Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation, §3A – Key Aspects of Reparation for Women and Girls.
[71] Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation, §3H – Key Aspects of Reparation for Women and Girls. See also: Ferstman, The Right to Reparation for Victims of Armed Conflict, 211–212.
[72] Couillard, The Nairobi Declaration, 1, 7–9.
[73] Ibid., 1, 9; Manjoo, Introduction: Reflections on the Concept and Implementation of Transformative Reparations, 1196–1200.
[74] NIMMIWG, *Honouring the Truth, Reconciling for the Future*, Calls to Action 24, 27, 28, 42, 43, 44, 45ii, 46iii, 48, 48i, 48ii, 48iii, 48iv, 50, 57, 67, 69i, 70i, 86, 92, 92iii.
[75] Ibid., Calls to Action 43, 44.
[76] See, for example: NIMMIWG, *Calls for Justice*, 6.

The importance of UNDRIP in the wider reparatory context has been reinforced by a key UN body, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). In its 2019 report, EMRIP stated:

> *The United Nations Declaration on the Rights of Indigenous Peoples should be the main framework for recognition, reparation and reconciliation. Recognition of indigenous peoples, as well as reparation and reconciliation relating to past and current injustices, are essential elements for the effective implementation of the Declaration. Likewise, the Declaration itself is an instrument to pursue recognition, reparations and reconciliation.*[77]

When looked at from this perspective, one can see why UNDRIP was cited on so many occasions by the TRC in its final document. A closer reading of the individual articles of UNDRIP reveals that redress should be provided for a range of harms done to Indigenous persons. For example, Article 8(2) states:

> *States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.*[78]

Over the decades, the violations itemized in Article 8(2) have been committed against Indigenous persons in Canada.

Progress by the federal government to act on the TRC's UNDRIP-framework recommendation may be imminent. Newly re-elected Prime Minister Justin Trudeau instructed Minister of Crown-Indigenous Relations Carolyn Bennett in a Mandate Letter on December 13, 2019, to "**s**upport the Minister of Justice and Attorney General of Canada in work to introduce co-developed legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples by the end of 2020." While it remains to be seen how this legislative process will develop, its prioritization by the federal government must, nonetheless, be welcomed.

The right to reparation is similarly anchored in the analogue regional instrument for the Americas, the **American Declaration on the Rights of Indigenous Peoples**, to which at least some passing mention should be made. Article 33 of this recently adopted Organization of American States instrument states the following:

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[77] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §70.
[78] UN Declaration on the Rights of Indigenous Peoples, §8(2).

> *Indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The states, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.*[79]

Even though the American Declaration is less well-known in Canada than UNDRIP, its underlying principles on the point of reparation are not without relevance.

Mention should also be made of the **Sustainable Development Goals**, especially SDG No. 16: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[80] The ending of violence, promotion of the rule of law, strengthening institutions, and increasing access to justice are all integral components of SDG No. 16 and have a direct bearing on the right to reparation.

In conclusion, it is hoped that the above discussion has succeeded in emphasizing that the nation's/state's obligation to ensuring that the right to effective remedy and reparation is provided is extremely well established in international customary as well as hard conventional and soft declaratory law. The importance of the core reparatory elements, as anchored in the UN Basic Principles, are reinforced by a range of international and regional instruments.

Nevertheless, despite the copious amount of ink committed to drafting these international documents, reparation programs that have been designed and implemented are often at odds with the international legal framework and fraught with shortcomings.

Efforts to secure reparations for victims in Bosnia and Herzegovina after the Dayton Peace Agreement in 1995, for example, have been described as 'patchy,' while the lack of a comprehensive approach to address the causes and consequences of victimization has left many victims without a remedy.[81] Women, in particular, are often marginalized following the implementation of such reparation programs. The contrasting experiences of women during the respective reconciliation processes in South Africa and Timor-Leste in recent decades are illustrative cases in point.[82]

Similarly, in Colombia, sexual violence crimes committed during the decades-long state-paramilitary conflict from the 1960s have essentially gone unnoticed; in fact, the invisibility of women has characterized the peace and justice process.[83] In Guatemala, there has been a lack of follow-up to gender aspects of the reparations programs undertaken since the Truth Commission's

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[79] American Declaration on the Rights of Indigenous Peoples, §XXXIII.
[80] Sustainable Development Goals, *Knowledge Platform – Sustainable Development Goal 16*.
[81] Ferstman & Rosenberg, Reparations in Dayton's Bosnia and Herzegovina, 485.
[82] See: Correa, Guillerot, & Magarrell, Reparations and Victim Participation, 398–399. For detailed information about reparations in East Timor, see: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 185–202.
[83] Orozco & Goetz, Reparations for Victims in Colombia, 453–454.

Final Report of 1999, despite the acknowledgement that sexual violence and rape took place on a large scale in the country, especially in the 1980s.[84] In Sierra Leone following the civil war of the late 1990s, tangible reparation for the widespread sexual violence committed against women and girls has been slow and limited.[85]

When it comes to ensuring adequate reparations, practice remains several steps removed from theory.[86] This unfortunate reality underlines the central importance of consulting women and other groups in the conception, design, and implementation of such programs. The following discussion offers some crucial lessons for Canada.

3. The marginalization of women and other groups in reparation programs

Regrettably, a less than encouraging reality exists regarding the institution of reparation programs in practice globally, more so when it touches on gender.[87] While on one hand, women represent a disproportionately large number of the survivors of serious human rights violations,[88] on the other hand, women are often disregarded when the voices of victims are sought.[89] What is more, reparation programs frequently exclude violations that disproportionately affect women and marginalized groups.[90] The Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence succinctly summarized developments in relation to reparation programs and gender in the following terms:

> *In spite of significant conceptual progress … and some positive practices at the domestic level, in far too few instances have individuals received reparation for serious gender-related violations through programmes with an inherent gender-sensitivity aspect.*[91]

A number of impediments have come between the legal entitlement to reparation and the implementation of reparation programs. Impediments include procedural legal shortcomings, political obstacles, economic set-backs, and the under-empowerment of victims due to a lack of knowledge and capacity to present and pursue claims.[92] These factors are compounded by the

[84] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 158–159.
[85] Ibid., 176–178, 180–183.
[86] Ibid., 132.
[87] Manjoo, Introduction: Reflections on the Concept and Implementation of Transformative Reparations, 1193, 1200–1201; Report of the Special Rapporteur on violence against women, its causes and consequences, §24.
[88] Nathan, Introductory Remarks, 10.
[89] Ferstman, The Right to Reparation for Victims of Armed Conflict, 207; Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 20.
[90] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §27.
[91] Ibid., §69.
[92] Ferstman, The Right to Reparation for Victims of Armed Conflict, 207–208; van Boven, Victims' Rights to a Remedy and Reparation, 20.

vulnerability of victimized persons, notably women, children, members of specific racial, ethnic or religious groups, and people with mental and physical disabilities.[93]

This reality is all the more alarming when one considers that during instances of mass atrocity, the victims of serious human rights violations have been predominantly women and/or Indigenous people. Over the course of several decades of atrocities in Guatemala, the country's Truth Commission found in 1999 that over 80 per cent of the 200,000 victims, many of whom were killed or disappeared, were Mayan.[94] Many Indigenous women also suffered sexual violence on a large scale.[95] A finding of genocide was also determined in four regions of the country during the 1981–1983 period.[96]

In stark contrast, the Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation emphasizes the imperative that women and girls should be included in reparation processes.[97] The Declaration states that the full participation of women and girls victims should be guaranteed in every stage of the reparation process — design, implementation, evaluation, and decision-making[98] — and that such fulsome engagement is essential.[99] The overall requirement to make reparation programs gender-sensitive has been outlined in other key documents.[100] For example, a report issued by the Office of the High Commissioner for Human Rights states:

> *Even before a reparations programme is designed, gender-sensitive strategies must be set in place to gather gender-specific information that will be relevant for the programme downstream and to secure the participation of women in debates about the design of the programme. Their presence might be crucial if decisions about criteria of access (including, importantly, application deadlines and evidentiary thresholds) are to be taken in ways that increase the likelihood that women will be appropriately served by an eventual programme.*[101]

The document also notes that more complex programs, in addition to material compensation, create possibilities for addressing the needs of female beneficiaries — offering a greater variety of distinct benefits, including educational support, health services, truth-telling, and other symbolic measures.[102] This question of the scope of reparations will be returned to in section 6 of this discussion paper below.

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[93] van Boven, Victims' Rights to a Remedy and Reparation, 20.
[94] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 152–153.
[95] Ibid., 148.
[96] Ibid., 153.
[97] Couillard, The Nairobi Declaration, 1, 2; Labenski, Countering Conflict Related Sexual and Gender-Based Violence through Reparations, 3–4.
[98] Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation, §2B.
[99] See also: Saris & Lofts, Reparation Programmes: A Gendered Perspective, 92; Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, Principle 32.
[100] Labenski, Countering Conflict Related Sexual and Gender-Based Violence through Reparations, 4.
[101] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 36.
[102] Ibid., 37.

It is notable that the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence has set out the following key elements aimed at ensuring gender sensitivity in reparation programs:

- *The participation of women and girls in the early stages of debates on the design of reparation programmes will contribute to ensuring that serious gender-related violations are not excluded from the range of rights that, if violated, will trigger reparation benefits.*

- *Procedural and evidentiary rules should be so designed as not to constitute sources of exclusion.*

- *Reparations must not contribute to the entrenchment of pre-existing patterns of structural discrimination and inequalities, which provide a breeding ground for gender-related violations to occur in the first place.*

- *Reparation programmes should aim to empower their beneficiaries and not draw them into another form of dependency.*[103]

The Inter-American Commission on Human Rights has also underlined the need to address the underlying structural causes of human rights violations and their gendered manifestations, particularly with a view to avoiding the repetition of such violations in practice,[104] a view echoed by other authoritative sources.[105]

Despite the provisions of the Nairobi Declaration, their application in practice remains to be seen. As a case in point, an in-depth study of the Greater North of Uganda and the related violence committed by the Lord's Resistance Army (LRA) and the Government of Uganda (GoU) from the 1990s onward found the following: "Importantly, while the Nairobi Declaration documents the long list of rights that victims of serious crimes have to remedy and reparation, few of those rights have actually been delivered in terms of remedy and reparation to victims of the conflict between the GoU and LRA."[106] The related report advanced recommendations to address the lack of a gender-just remedy and reparation in the country.[107]

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[103] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §70–73.
[104] Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas*, 109–110.
[105] Lober & Schuechner, Article 14, Right of Torture Victims to Adequate Remedy and Reparation, 406–407; Labenski, Countering Conflict Related Sexual and Gender-Based Violence through Reparations, 4; Report of the Special Rapporteur on violence against women, its causes and consequences, §85.
[106] Isis-Women's International Cross Cultural Exchange & Feinstein International Center, *Making Gender-Just Remedy and Reparation Possible*, 4.
[107] Ibid., 24. See also: Office of the High Commissioner for Human Rights & Ugandan Human Rights Commission, "The Dust Has Not Yet Settled," xxi–xxii.

In summary, as the UN Special Rapporteur has concluded, there is ample room for reparation programs to improve in terms of gender sensitivity.[108] These same key points should be borne in mind by actors instituting reparation programs in Canada. In so doing — and in acting on the Calls to Action and Calls for Justice, respectively, of the Truth and Reconciliation Commission and National Inquiry into Missing and Murdered Indigenous Women and Girls, for instance — the country could become a best practice model for other regions of the world.

4. The importance of community consultation and survivor participation

From the above section, the conclusion is inevitably reached that a consultation process should be held in advance of implementing any reparation program. The risks of not doing so are described in the following terms:

> *No matter how neat a blue print for reparation might be, it is unlikely that a reparation programme can fulfil its fundamental aim of providing recognition and fostering civic trust if it is simply foisted on victims.*[109]

> *In the face of the scandalously poor level of compliance with national and international obligations concerning reparations, and of the relatively poor record of implementation of the recommendations of truth commissions and other bodies, there is no better way to improve the degree of compliance with the relevant obligations than through an active, well organized and involved civil society. The Special Rapporteur calls on Governments to establish meaningful victim participation mechanisms regarding reparations, where success is measured not merely in terms of token measures but also in terms of satisfactory outcomes.*[110]

Other authoritative actors have echoed this point.[111] To paraphrase the UN Secretary General in a key OHCHR report on reparation programs, the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out.[112]

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[108] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §90.
[109] Ibid., §76.
[110] Ibid., §80.
[111] See: Correa, Guillerot, & Magarrell, Reparations and Victim Participation: A Look at the Truth Commission Experience, 388.
[112] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 4. See also: Ferstman, The Right to Reparation for Victims of Armed Conflict, 211–212.

It should also not be forgotten that there is a legal requirement for national consultations under international human rights law.[113] The right to be consulted can be identified in a number of human rights instruments, including Article 25 of the International Covenant on Civil and Political Rights (guaranteeing the right of every citizen to take part in the conduct of public affairs), Article 12 of the Convention on the Rights of the Child (regarding respect for the views of a child), and Principle 35 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.[114]

The UN Expert Mechanism on the Rights of Indigenous Peoples has also stressed the importance of process from an Indigenous perspective:

> *In designing, implementing and analysing attempts at reparation and reconciliation, indigenous peoples and States should take into consideration that the process is as important as the outcome. Indigenous perspectives need to be incorporated at all stages, and indigenous peoples' full and effective participation is essential if the outcomes of such processes are to be successful and, indeed, legitimate.*[115]

With an Indigenous perspective in mind, the UN Expert Mechanism issued the following recommendations:

> *Any process of reparation and reconciliation must be approached from an indigenous perspective, taking into account cultural specificities, including the spiritual connection of indigenous peoples to their lands, their traditions related to identifying and healing injuries and their right to participate fully and effectively in decision-making.*
>
> *Indigenous peoples view recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of the right of indigenous peoples to self-determination (including free, prior and informed consent), their rights to autonomy and political participation, their claims to their lands and the recognition of indigenous juridical systems and customary laws should be considered an essential part of recognition, reparation and reconciliation.*[116]

The UN Expert Mechanism and other international authorities thus make a cast-iron case for the inclusion of a range of different voices in the creation and implementation of reparation

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[113] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 2.
[114] Ibid., 2, 29.
[115] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §40.
[116] Ibid., §72–73.

programs, including the voices of Indigenous women and girls. The Inter-American Commission on Human Rights has recently advanced this same crucial point.[117]

It also bears observing that the National Inquiry stressed through its focus on substantive equality and human and Indigenous rights as one of its so-called *principles of change* (see section 1 of this paper) that women and girls should not be treated solely as victims, but as independent rights holders.[118] Moreover, the report underlined that (1) families and survivors should be included in the implementation of the Calls to Justice and services and (2) solutions must be led by Indigenous governments, organizations, and people.[119] As such, it is incumbent upon the Canadian authorities to include Indigenous women, girls, and gender-diverse persons in the conception, design, and implementation of such reparatory programs in the short, medium and longer terms.

As will be discussed in the section devoted to the scope of reparation below, consultation is also an indispensable component of the processes of remembrance. The success of reparation programs will depend on the processes that are undertaken towards the development of the related project.[120]

5. The relevance of the transitional justice framework to the Canadian context

On September 24, 2019, the Inter-American Commission on Human Rights held a hearing on missing and murdered Indigenous women and girls in Canada (ex-officio) at its United States headquarters in Washington, DC.[121] During the hearing when welcoming the proposal to establish an Action Plan to implement the National Inquiry into Murdered and Missing Indigenous Women and Girls, Inter-American Commission member Antonia Urrejola Noguera, who is the Commission's Rapporteur on the Rights of Indigenous Peoples and of Memory, Truth, and Justice, stated the following :

> *I also think it is very important you do a plan of transitional justice … and that plan must have a chapter regarding truth, and when I talk about truth, I mean also justice. You mentioned that the violence and genocide is not only from the past, it is happening today, so I assume that the perpetrators are alive today. So those people must be taken to justice, those people must be trialed, those people must be sanctioned, and I think that it is very important that this transitional plan must focus not only on the past and on symbolic justice, but on criminal justice.*

[117] Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas*, 108.
[118] NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 169.
[119] Ibid., 171.
[120] International Coalition of Sites of Conscience, *From Memory to Action*, ch. 4.
[121] Inter-American Commission on Human Rights, 173 Period of Sessions, September 23 to October 2, 2019.

... [t]here are a lot of experiences in Latin America and also in Africa and other countries and the Commission can help Canada to look up best practices and do a plan. We have done a lot of work in other countries and can help with technical assistance to do a plan on transitional justice so that we can look at truth and justice, we can look at reparations, and also – which is very important, on non-repetition ... and also very, very important is memory, which is related to non-repetition. We have to respect the memory of the victims and the country has to remember what has happened when a country has committed genocide ... the country must remember what happened and memory is very important. So, this plan also has to focus on how we are going to symbolize the memory and honour of the victims. There must be actions regarding memory so the country doesn't forget its past and, in that sense, doesn't do these things in the future.[122]

In his 2004 report, the UN Secretary General defined the notion of transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[123] However, the extent to which transitional justice frameworks have considered the issue of reparations and victims is open to debate.[124]

Even so, the UN Expert Mechanism on the Rights of Indigenous Peoples has also recognized the transitional justice framework as a useful concept when discussing reparation and reconciliation.[125] This UN expert body stated:

While the application of transitional justice has traditionally centred on post-conflict or post-dictatorship contexts, its objectives and precepts provide a framework to address reparation and reconciliation for indigenous peoples. The aims of transitional justice will vary depending on the context but certain features are constant: the recognition of the dignity of individuals, the redress and acknowledgment of violations, and the aim to prevent them from happening again. Transitional justice also places great emphasis on the participation of the victims themselves throughout the process, which is in line with the right of indigenous peoples to participate in decision-making and the duty of the State to obtain their free, prior and informed

[122] The video presentation of the session can be viewed at: https://www.youtube.com/watch?v=fkQ4G5iEnAI.
[123] UN, Report of the Secretary General – *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, §8.
[124] For a brief discussion on transitional justice and reparations, see: Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 133–139.
[125] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §44.

> *consent. These objectives and principles correspond to indigenous peoples' demands for justice for historical violations or for recent violations rooted in historical causes.*[126]

A key document published by the Office of the High Commissioner for Human Rights states, however, that for transitional efforts to be effective, they must be grounded in international human rights standards — namely, they must be human rights-based, consistently focus on the rights and needs of the victims and their families, and be designed only after in-depth consultation with affected communities.[127]

In a word, any Canadian national action plan — whether of a reparatory or transitional justice nature — should be consultative, gender-sensitive, and centred on survivors and their families. Moreover, Canada should remain open to international good practice concerning transitional justice, and that this good practice should inform its domestic processes. Canada should also actively seek advice and support from key international actors, including the Organization of American States, on the broad potential scope that such reparatory and reconciliatory activities might assume.

6. The potential scope of reparation programs, including memorialization

As previously observed, reparation programs are administrative schemes; they can come in individual and collective forms and may have a material as well as symbolic component.[128] The Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence describes reparation procedures in the following broad terms:

> *At their best, reparation programmes are administrative procedures that, among other things, obviate some of the difficulties and costs associated with litigation. For the claimants, administrative reparation programmes compare more than favourably to judicial procedures in circumstances of mass violations, offering faster results, lower costs, relaxed standards of evidence, non-adversarial procedures and a higher likelihood of receiving benefits. This is not a reason to deny access to the courts for purposes of reparation but, it is a reason to establish administrative programmes*.[129]

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[126] Ibid., §44.
[127] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States,* 1.
[128] Correa, Guillerot, & Magarrell, Reparations and Victim Participation, 388; Ferstman, The Right to Reparation for Victims of Armed Conflict, 211–212; Lober & Schuechner, Article 14, Right of Torture Victims to Adequate Remedy and Reparation, 380.
[129] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §4.

Most authorities on reparation argue that the process should comprise a multi-pronged approach to the issue, be complete and inclusive in scope, and afford material and moral benefits to victims.[130] The dangers of focusing exclusively on the monetary element of reparations has been aptly highlighted during the highly problematic reparations process that followed the South African Truth and Reconciliation Commission's work and the payments provided to victims of human rights violations from 2003 onward.[131]

In stark contrast, the reparations program implemented in the post-military dictatorship period in Argentina was wide-ranging, establishing pecuniary and satisfaction measures as well as developing measures for the rehabilitation of victims and rebuilding national history and collective memory.[132] Similarly, the reparatory measures recommended in the Guatemalan Truth Commission's Final Report in 1999 were relatively broad in scope,[133] even though their implementation was at times problematic.[134] A similar outcome transpired for Timor-Leste following the broad reparatory recommendations outlined in the Final Report by the Commission for Reception, Truth and Reconciliation in 2005.[135]

As noted previously, the UN Basic Principles and Guidelines foresee a process consisting of five main components, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[136] These five key components have yet to be fully realized in practice.[137] The UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence has stated: "Operationally, however, the five categories go well beyond the mandate of any reparation programme to date: no reparation programme has been thought to be responsible for distributing the whole set of benefits grouped under the categories of satisfaction and guarantees of non-repetition in the Basic Principles."[138]

From an Indigenous perspective, the need to ensure that reparation programs encompass both monetary and non-monetary measures is crucial. The UN Expert Mechanism on the Rights of Indigenous Peoples outlines why monetary compensation may not suffice as a form of reparation:

> *From an indigenous peoples' perspective, given their spiritual connections with their lands and territories, monetary reparation may not, on its own, provide sufficient*

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[130] Report of the Special Rapporteur on violence against women, its causes and consequences, §85; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, §55–63; van Boven, Victims' Rights to a Remedy and Reparation, 40.
[131] Makhalemele, Still Not Talking: The South African Government's Exclusive Reparations Policy, 564.
[132] Gualde & Luterstein, The Argentinian Reparations Programme for Grave Violations of Human Rights, 424–425, 433.
[133] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 154–155.
[134] Ibid., 155–161.
[135] Ibid., 197.
[136] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, §18.
[137] Report of the Special Rapporteur on violence against women, its causes and consequences, §21.
[138] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §21.

> *redress and reconciliation. The limits of monetary payment are of course readily apparent when it comes to injuries such as genocide or the removal of children, for which no amount of money could ever compensate. In the context of indigenous peoples, the limits of monetary payment are also readily apparent in many cases of land and resource dispossession, where the spiritual and cultural value of the land also transcends economic terms*.[139]

Ferstman argues a similar point in the context of reparations and armed conflict, namely, that reparations can rarely be 'full' partially due to the impossibility of being able to undo or repair certain types of harm,[140] a view echoed by other important authorities.[141] In answering the question as to what types of benefits a reparation program should provide, the UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence underlines a crucial point — that fashioning a program that distributes a variety of benefits (not all of them material or monetary) will help increase its coverage, albeit without necessarily increasing its cost to the same degree.[142] This UN authority argues:

> *The combination of different kinds of benefits is what the term "complexity" seeks to capture. A reparation programme is more complex if it distributes benefits of more distinct types and in more distinct ways than its alternatives. Material and symbolic reparations can take different forms and be combined in different ways. Material reparations may assume the form of compensation, i.e. payments in cash, or of service packages, which may in turn include provisions for education, health, housing etc. Symbolic reparations may include official apologies, the change of names of public spaces, the establishment of days of commemoration, the creation of museums and parks dedicated to the memory of victims, or rehabilitation measures such as restoring the good name of victims*.[143]

The fundamental reasons for creating complex reparations programmes are therefore to (1) maximize resources and (2) reach more victims by dint of having a broader variety of benefits, and thus making it more likely that the harm caused can be redressed to some extent.[144]

The importance of symbolic reparations cannot be understated. Both individual and collective symbolic reparations are described by one international expert in the following terms:

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[139] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, §40.
[140] Ferstman, The Right to Reparation for Victims of Armed Conflict, 209–210. See also: Gualde & Luterstein, The Argentinian Reparations Programme for Grave Violations of Human Rights, 434; Lober & Schuechner, Article 14, Right of Torture Victims to Adequate Remedy and Reparation, 407.
[141] Report of the Special Rapporteur on violence against women, its causes and consequences, §18.
[142] Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §29.
[143] Ibid., §30.
[144] Ibid., §31.

> *Individualized letters of apology signed by the highest authority in Government, sending each victim a copy of the truth commission's report and supporting families to give a proper burial to their loved ones are some of the individual symbolic measures that have been tried with some success in different contexts. Some of the collective symbolic measures that have been tried are renaming public spaces, building museums and memorials, rededicating places of detention and torture, turning them into sites of memory, establishing days of commemoration and engaging in public acts of atonement.*[145]

Where resources are scarce and generous monetary compensation schemes unfeasible, it has been accentuated that symbolic reparations may have powerful remedial consequences.[146]

Building on the work of other actors, in a key report the Special Rapporteur in the field of cultural rights has scoped out the different forms that symbolic reparations such as memorials can take.[147] In her view, memorial expressions are extremely diverse and may include the following:

- authentic sites, such as former concentration camps, torture and detention centres, sites of mass killings and graves, and emblematic monuments of repressive regimes;
- symbolic sites, such as permanent or ephemeral constructed monuments carrying the names of victims, renamed streets, buildings or infrastructure, virtual memorials, and museums of history/memory;
- activities, such as public apologies, reburials, walking tours, parades, and temporary exhibits; and
- cultural expressions, such as artwork, films, documentaries, literature, and sound and light shows addressing a tourist audience.[148]

The goals of memorialization processes have been described as multi-faceted, emphasizing private/reflective and public/educative processes:

> *They are geared not only towards the past (recalling events, recognizing and honouring victims and enabling stories to be related), but equally to the present (healing processes and rebuilding of trust between communities) and the future (preventing further violence through education and awareness-raising). Memorialization processes can promote a culture of democratic engagement by stimulating discussion regarding the representation of the past and contemporary challenges of exclusion and violence.*[149]

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[145] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, 23. See also: Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, §33.
[146] Saris & Lofts, Reparation Programmes: A Gendered Perspective, 92.
[147] Report of the Special Rapporteur in the field of cultural rights, Memorialization processes, §7.
[148] Ibid., §6.
[149] Ibid., §13.

The same author recognizes that there has been a memorialization of the histories of Indigenous people,[150] noting that Indigenous people are among those actors engaging with their respective governments in order to establish memorials of past genocides and/or to acknowledge their histories and contributions to their respective societies.[151]

Throughout the process of any successful memorialization, collaboration between authorities, citizens, and civil society is essential, especially individuals who are representing the interests of people directly impacted by past events.[152] Another key point is that the participation of civil society in the design and implementation of symbolic reparations projects "is perhaps more significant than for any other reparations measure, given their semantic and representational function."[153] This recommendation reinforces the international advice highlighted in section 4 of this paper.

In certain countries, memorialization is an important element of reparation programs. In Argentina, for example, the reparation program implemented in the post-military dictatorship period was wide-ranging and included activities designed to rebuild national history and collective memory.[154] Activities included the recovery of physical locations, where the repressive apparatus used to operate, and the creation of a network for the management of such places of memory, as well as the creation of a national archive for documenting the past. Monuments and other symbolic or historic structures have been erected in places of symbolic importance.[155]

The International Coalition of Sites of Conscience[156] has developed a detailed checklist of items to consider when embarking upon a memorialization or remembrance project. The checklist covers issues as diverse as goals, timing and sequencing, initiators, stakeholders, resources, consultations, public awareness, research, making linkages, and long-term vision.[157]

It was encouraging that the Truth and Reconciliation Commission issued several Calls to Action that speak to a remembrance function. Similarly, the National Inquiry into Missing and Murdered Indigenous Women and Girls devoted a chapter of its findings to the topic of commemoration.[158] Writing about these Calls to Action, the National Inquiry's Final Report stated:

> *... [t]he Truth and Reconciliation Commission's (TRC) Calls to Action have changed the dialogue around commemoration, compelling non-Indigenous Canadians to begin to acknowledge and remember the ongoing impact of colonialism on Indigenous*

[150] Ibid., §86–89.
[151] Ibid., §86.
[152] Ibid., §99, 106(b).
[153] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States,* 23.
[154] Gualde & Luterstein, The Argentinian Reparations Programme for Grave Violations of Human Rights, 430–433.
[155] See also: Gualde, Reparations for Crimes against Humanity as Public Policy, 54–58.
[156] Please see: International Coalition of Sites of Conscience website at https://www.sitesofconscience.org/en/home/.
[157] International Coalition of Sites of Conscience, *From Memory to Action,* 41–42.
[158] NIMMIWG, *Reclaiming Power and Place, Volume 1b,* 53–82.

> *Peoples and communities. The TRC's Calls to Action 79, 80, 81, and 82 all speak to the importance of approaching commemoration through a new lens. This includes Indigenous representation in decisions on commemoration, the establishment of new initiatives, such as a National Day for Truth and Reconciliation, and residential schools monuments across the country for victims of the system. In addition, Call to Action 83 is a call for the Canada Council for the Arts "to establish, as a funding priority, a strategy for Indigenous and non-Indigenous artists to undertake collaborative projects and produce works that contribute to the reconciliation process"*[159]

The Final Report welcomed the establishment in February 2019 of a federal commemoration fund, whose stated objectives are to:

- honour the lives and legacies of missing and murdered Indigenous women and girls and LGBTQ2S individuals; and
- increase awareness about missing and murdered Indigenous women and girls and LGBTQ2S individuals.[160]

In June 2019, some $13 million had been awarded to over 100 different public initiatives "from coast to coast to help honour the lives and legacies of missing and murdered Indigenous women and girls, including LGTBQ and Two Spirit people."[161,162] It can only be hoped that the federal government also embraces the wider process of commemoration/remembrance for past human rights wrongs in line with international best practice.

Commemoration aside, the inter-related question of whether Indigenous women, girls, and gender-diverse persons should be provided with monetary as well as symbolic reparations for the multiple harms they have endured as a result of Canada's race-based genocide remains entirely open — and will, undoubtedly, be the subject of intense debate as well as possible future legal action. To draw on a well-known line taken from the official comments on Article XIII of the Draft Convention on the Crime of Genocide from 1947: "If the country in which genocide was committed is not to be held responsible for reparations, who is?"[163]

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[159] NIMMIWG, *Calls for Justice*, 2–4; NIMMIWG, *Reclaiming Power and Place, Volume 1b*, 53–54.
[160] Status of Women Canada, *About the Missing and Murdered Indigenous Women and Girls Commemoration Fund*.
[161] Women and Gender Equality Canada, Missing and Murdered Indigenous Women and Girls.
[162] For a list of funded projects, see: Status of Women Canada, *Missing and Murdered Indigenous Women and Girls Commemoration Fund Projects*.
[163] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 16.

Conclusion

It is hoped that this paper has succeeded in presenting a useful insight into Canada's international legal obligation to ensure an effective remedy and reparations for past human rights violations of women, girls, and gender-diverse persons. This right is enshrined in various international legal sources, including international conventional and customary law, and confirmed in the jurisprudence of national, regional, and international judicial and quasi-judicial instances. Furthermore, these sources have been accompanied by important, authoritative soft-law initiatives, particularly the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law from 2005. Also relevant are the UN Declaration on the Rights of Indigenous Peoples and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations.

On the basis of this expanding legal corpus as well as the disappointingly haphazard implementation of reparation programs in practice, several important lessons can be drawn for Canada. In particular, the inclusion of women, girls, and gender-diverse persons as well as their communities in the conception, design, and implementation of reparation programs is imperative (see Sections 3 and 4). Furthermore, these programs should include a broad range of material and non-material benefits for survivors and their families (see Section 6). The importance of symbolism should not be discounted. Finally, Canada should not shy away from seeking international technical advice and expertise, including from the Organization of American States, when undertaking measures to address serious historical human rights violations. Important lessons can be drawn from national country contexts and international bodies have considerable expertise in this area.

If reparation programs have been poorly implemented in other countries, then it behooves Canada to learn from these shortcomings and to fully act on its international legal obligation to provide victims of past violence and abuse with an effective remedy and reparations program. Regrettably, Canada's history of doing so is unimpressive, as underpinned by the paucity of measures it took in the wake of the 1996 Royal Commission on Aboriginal Peoples Inquiry and the TRC's Calls to Action.

The final reports issued by the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls offer a comprehensive set of recommendations of a reparatory and reconciliatory nature upon which governments at the federal, provincial, and territorial levels can draw and act if they so wished. To what extent they will do so and to what degree they will include and consult with impacted communities during the reparation process remains to be seen.

Annex 1: Key Excerpt from the UN Basic Principles – Restitution, Compensation, Rehabilitation, Satisfaction, and Guarantees of Non-Repetition

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

19, Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property.[164]

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
(*a*) Physical or mental harm;
(*b*) Lost opportunities, including employment, education and social benefits;
(*c*) Material damages and loss of earnings, including loss of earning potential;
(*d*) Moral damage;
(*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[165]

21. Rehabilitation should include medical and psychological care as well as legal and social services.[166]

22. Satisfaction should include, where applicable, any or all of the following:

(*a*) Effective measures aimed at the cessation of continuing violations;
(*b*) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

[164] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, §19.
[165] Ibid., §20.
[166] Ibid., §21.

(*c*) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
(*d*) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(*e*) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(*f*) Judicial and administrative sanctions against persons liable for the violations;
(*g*) Commemorations and tributes to the victims;
(*h*) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[167]

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(*a*) Ensuring effective civilian control of military and security forces;
(*b*) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(*c*) Strengthening the independence of the judiciary;
(*d*) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
(*e*) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(*f*) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(*g*) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(*h*) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[168]

[167] Ibid., §22.
[168] Ibid., §23.

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