UN HUMAN RIGHTS TREATIES INFORMATION GUIDE ON INDIVIDUAL COMPLAINTS RELATES TO MURDERED AND MISSING INDIGENOUS WOMEN AND GIRLS

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*** This guide contains legal information. It is not intended to provide legal advice. Should you require legal assistance, you are encouraged to directly contact a lawyer to discuss your specific issue.

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Part I: Introduction

1. Introduction

1.1 *Purpose and Strategy*

This document is a preliminary strategy guide for bringing cases involving the abrogation of Aboriginal women in Canada's rights before United Nations [UN] treaty bodies. To that end, the authors have attempted to identify the most relevant provisions under UN treaties that bear on these issues. Individual communications and previous expressions of concern by the respective Committees are identified where relevant. Committee jurisprudence and comments are provided when those documents either illuminate the scope of the rights enshrined in a given treaty or indicate how analogous cases arising in other jurisdictions were treated. In all cases, as the term 'preliminary' suggests, the treatment is superficial. The "Resources" at the end of each section are intended to provide a convenient starting point for further research that can be tailored to the specifics of the case in issue.

At present, there are few individual communications in which UN treaty bodies have adopted views specifically related to the issues facing Aboriginal women in Canada. There are probably several reasons for this, including admissibility requirements that result in the dismissal of many communications without consideration on the merits (considered below), the difficulty of enforcing adopted views on a domestic level, and the lack of certainty of outcome in untested cases. Despite these hurdles, individual communications are important and should be considered when domestic remedies are unavailable or fail to provide a just result. *Per* UN direction, "It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person's real-life situation, the standards contained in

international human rights treaties find their most direct application."[1] Most of the relevant committees have expressed direct concern over Canada's failure to properly address the concerns of Aboriginal women in a number of areas; these statements are identified, as they suggest that further communication in those areas would be welcome. Additionally, the authors have attempted to identify treaty provisions and adopted views that bear, directly or indirectly, on these issues.

While it was not possible to determine, in advance, the exact nature of the matters to which this research will be directed, the authors have given particular attention to certain types of cases. Specifically, the authors identified, wherever possible, jurisprudence that dealt with: the rights of individual Indigenous persons; women's and girls' rights; murders or disappearances; state obligations in relation to human trafficking; state obligations in relation to investigations and prosecutions of individuals responsible for violating treaty rights; state obligations regarding persons held in any form of detention, especially when those persons are racial minorities; and obligations to provide appropriate compensation or redress to those whose rights have been violated.

1.2 *Methodology for Advocates*

For present purposes the jurisprudence pursuant to each treaty is addressed discretely. However, the rights and protections enshrined in the various UN treaties are interrelated. Some provisions explicitly overlap (for example, the prohibition against torture and ill-treatment appears in numerous treaties). Many of the broad rights included in earlier treaties are expanded

[1] UN Office of the High Commissioner for Human Rights (OHCHR). *Human Rights Treaty Bodies - Individual Communications*, online: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#theadmissibility> [accessed 11 December 2015] [*Individual Communications*].

on by later ones (for example, articles 24 through 27 of the ICCPR[2] provide protections against discrimination that are more thoroughly expanded in CERD[3], CEDAW[4], and elsewhere). The jurisprudence and the comments of the treaty bodies should be read collectively rather than in isolation. Where UN jurisprudence fails to provide clarification on the scope of an enshrined right, consideration of the case law of other international organizations is welcomed and persuasive.

1.3 *Format of each Part in this Document*

Each "Part" of this document focusses on a specific treaty and attempts to do two things. First, a cursory overview of previous action or interest expressed by a Committee regarding issues related to Aboriginal women in Canada is provided. Second, an overview of relevant jurisprudence, whether directly relevant or by analogy, is provided. Unless otherwise stated, terms used in shorthand refer only to the relevant mechanism within that section of the document ("Committee" in the section concerning the ICCPR[5] refers to the Human Rights Committee; in the section concerning the CAT[6] it refers to the Committee against Torture, and so on).

2. Admissibility

It is beyond the scope of this document to explore the admissibility issues that face individual communications, but a few notes are necessary. Even a brief survey of past individual communications reveals that the majority of communications fail at this stage. It is incumbent on advocates to ensure the admissibility requirements are met, and to prepare arguments to this end,

[2] ICCPR, *infra* note 154.
[3] CERD, *infra* note 87.
[4] CEDAW, *infra* note 41.
[5] ICCPR, *infra* note 154.
[6] CAT, *infra* note 9.

or no consideration on the merits of the case will ever occur. A UN FAQ provides a useful list of things to consider at the admissibility stage, summarized and paraphrased here:[7]

- A complainant acting on behalf of a third party must have authorization or be justified in doing so.
- Generally, the complainant or person for whom the complainant is acting must be directly adversely affected (communications challenging state law or policy generally are not permitted).
- The complaint must allege a violation of the treaty under which it is filed.
- The complaint must not require the relevant Committee to review findings of fact made by domestic courts or tribunals.
- There must be evidence to substantiate the complaint.
- Subject to certain exceptions, complaints related to violations prior to the entry into force of the complaint mechanism will not be considered.
- The complaint may be inadmissible if previously submitted to another International body.
- Complaints may be precluded by reservations made by states concerning certain treaty provisions.
- The complaint must not be an abuse of procedure.
- Domestic remedies generally must first be exhausted. States tend to challenge communications on this basis. The FAQ provides additional guidance on this point that is worth reproducing:

> A cardinal principle governing the admissibility of a complaint is that the complainant must have exhausted all relevant remedies that are available in the State party before bringing a claim to a Committee. This usually includes pursuing the claim through the local court system. The mere doubts about the

[7] *Individual Communications, supra* note 1. This list appears in more or less the same order in the source.

> effectiveness of a remedy do not, in the Committees' view, dispense with the obligation to exhaust it. There are, however, exceptions to this rule, when proceedings at the national level have been unreasonably prolonged, or the remedies are unavailable or would plainly be ineffective. The complainant should, however, give detailed reasons why the general rule should not apply. On the issue of exhaustion of domestic remedies, the complainant should describe in his/her initial submission the efforts he/she has made to exhaust local remedies, specifying the claims advanced before the national authorities and the dates and outcome of the proceedings, or alternatively stating why any exception should apply.[8]

Advocates should thoroughly review admissibility requirements related to the relevant treaty prior to initiating the communications procedure.

3. Resources

International Service for Human Rights (ISHR). *Simple Guide to the UN Treaty Bodies*, 2015, online: <http://www.ishr.ch/sites/default/files/documents/ishr_simpleguide_eng_final_final_dec15.pdf > [accessed 11 December 2015].

UN Office of the High Commissioner for Human Rights (OHCHR). *23 Frequently Asked Questions about Treaty Body Complaints Procedures*, online: < http://www.ohchr.org/Documents/HRBodies/TB/23FAQ.pdf> [accesssed 11 December 2015].

UN Office of the High Commissioner for Human Rights (OHCHR). *Fact Sheet No 7 / Rev 2, Individual Complaint Procedures Under the United Nations Human Rights Treaties*, 2013, online: < http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> [accessed 11 December 2015].

UN Office of the High Commissioner for Human Rights (OHCHR). *Fact Sheet No 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, June 2005, online: < http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> [accessed 11 December 2015].

UN Office of the High Commissioner for Human Rights (OHCHR). *Human Rights Treaty Bodies - Individual Communications*, online: < http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#theadmissibility> [accessed 11 December 2015].

[8] *Individual Communications, supra* note 1.

Part II: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[9]

Treaty Body: Committee Against Torture [the 'Committee']

1. Quick Guide

- *Relevant Articles:* 1, 2, 10, 11, 12, 13, 14, 16
- *Periodic Reports.* Yes. Article 19. State Parties are required to report every four years, or as requested by the Committee. Civil Organizations are invited to participate in this process at various stages.
- *Individual Communications*. Yes. Article 22. Complaints alleging violation of the CAT may be submitted by individuals or on behalf of individuals, subject to state declaration. Canada has made such a declaration.
- *State Inquiry.* Yes. Article 20. A confidential inquiry in cooperation with the state may be initiated if the Committee receives reliable information that torture is systematically practised within the state.

2. Prior Action

As of 15 August 2015, every individual complaint against Canada that resulted in a finding that Canada had breached the CAT related to the non-refoulement provision in article 3. None of the reported decisions involve the application of the CAT to cases involving missing or murdered Aboriginal women or analogous issues originating in other jurisdictions.

In the concluding observations to Canada's most recent state report, the Committee expressed concern that "(a) marginalized women, in particular Aboriginal women, experience disproportionately high levels of life-threatening forms of violence, spousal homicides and

[9] 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [CAT].

enforced disappearances; and (b) the State party failed to promptly and effectively investigate, prosecute and punish perpetrators or provide adequate protection for victims."[10] The report went on to suggest that state actors "should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in acts of torture or ill-treatment committed by non-State officials or private actors (arts. 2, 12, 13 and 16)."[11]

In anticipation of the upcoming 7th state report,[12] the Committee has requested updates, *inter alia*, regarding Canada's efforts to "to exercise due diligence to intervene to stop and sanction acts of torture or ill-treatment committed by non-State officials or private actors, and to provide remedies to victims" with specific reference to violence against Indigenous women and girls.[13]

No Civil Society Organization or National Human Rights Institution with a specific mandate to address issues related to missing and murdered Aboriginal women submitted a report following the 6th periodic State report. Given the Committee's explicit concern over Canada's failure to meet its obligations, there is an opportunity for further involvement in this area.

3. Potential Violations

3.1 *Articles 2 and 16*

Under the CAT, states must take measures to prevent acts of "torture"[14] and "cruel, inhuman or degrading treatment or punishment ["ill-treatment"[15]] . . . when such acts are

[10] UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Canada*, 25 June 2012, CAT/C/CAN/CO/6 at para 20.
[11] *Ibid*.
[12] Due 1 June 2016.
[13] UN Committee Against Torture, *Prior List of Issues: Canada*, 28 July 2014, CAT/C/CAN/QPR/7 at para 31 (in relation to article 16).
[14] CAT, *supra* note 6, article 2. The elements of torture as defined in article 1 are (1) severe pain or suffering, physical or mental, (2) intentionally inflicted (3) to obtain information, a confession, for punishment, intimidation or coercion, (4) in relation to either the victim or a third person, or, (5) for any reason based on discrimination, (6) at

committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[16] Other obligations are generally read in conjunction with either the prohibition against torture or the prohibition against ill-treatment.

3.2 *What Constitutes Torture and Ill-Treatment?*

There is no bright line between torture and ill-treatment and the Committee has stated that "In practice, the definitional threshold between ill-treatment and torture is often not clear."[17]

In *Osmani*[18], a group of impoverished Roma were told to vacate a settlement that was to be demolished. The victim, among others, had nowhere to go. In the course of forcible removal the police hit him and insulted him. His home and personal belongings were destroyed. The Committee held that "the infliction of physical and mental suffering aggravated by the complainant's particular vulnerability, due to his Roma ethnic origin and unavoidable association with a minority historically subjected to discrimination and prejudice reaches the threshold of cruel, inhuman or degrading treatment or punishment"[19].

Dzemajl[20], a case brought by 65 Roma complainants, the complainants' settlement was attacked by an angry mob. Police were aware the attack would take place and did not intervene. The "burning and destruction of houses" was held to fall within the meaning of ill-treatment, aggravated by (1) the fact that the attacks were perpetrated against a "particularly vulnerable"

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the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity. The definition excludes suffering due to lawful sanction.

[15] UN Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2 [CAT, Comment 2] at para 3.

[16] CAT, *supra* note 6, article 16(1).

[17] CAT, Comment 2, *supra* note 15 at para 3.

[18] UN Committee Against Torture, *Osmani v Serbia, Communication No 261/2005*, 25 May 2009, UN Doc CAT/C/42/D/261/2005 [*Osmani*].

[19] *Osmani, supra* note 18 at para 10.4.

[20] UN Committee Against Torture, *Dzemalj et al v Yugoslavia, Communication No 161/2000*, 2 December 2002, UN Doc CAT/C/29/D/161/2000 [*Dzemalj*].

group due to "racial motivation" and (2) the fact that some of the complainants were still in their homes at the time of the attack.[21]

In *Sánchez*[22] the enforced disappearance of the victim by non-state actors while in state custody satisfied the definition of torture, while "anguish and distress for the complainants [the victim's family members] and [the fact] that the authorities were indifferent to their efforts to ascertain his whereabouts and fate" in conjunction with "the absence of a satisfactory explanation from the State party" constituted ill-treatment under article 16.[23]

In *Kirsanov*[24]*,* pre-trial "prolonged detention in the temporary confinement ward" combined with a failure to provide "bedding or toiletry items", "table, toilet or sink", warm water for showers, and walks outside the cell constituted ill-treatment at minimum (and may have fallen within the definition of torture in article 1).[25]

3.3 *Nexus*

The CAT is not breached if acts of torture or cruel, inhuman or degrading treatment are committed by private actors. At minimum, state "acquiescence" is required to successfully bring a complaint. The level of notice required before state inaction constitutes acquiesence has not been clearly established.

The Committee has stated that "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been

[21] *Dzemalj, supra* note 20 at para 9.2.
[22] UN Committee Against Torture, *Colmenarez and Sánchez v Venezuela, Communication No 456/2011,* 26 June 2015, UN Doc CAT/C/54/D/456/2011 [*Sánchez*].
[23] *Ibid* at para 6.10.
[24] UN Committee Against Torture, *Kirsanov v Russia, Communication No 478/2011*, 19 June 2014, UN Doc CAT/C/52/D/478/2011 [*Kirsanov*].
[25] *Ibid* at para 11.2.

threatened" will constitute a violation of state obligations.[26] Regardless of whether the abusing persons are state officials, authorities who witness "and [fail] to intervene to prevent the abuse have, at the very least 'consented or acquiesced' to it, in the sense of article 16".[27] Where the victims are within state control, the state is responsible to take adequate measures to prevent abuses.[28] Indeed, the state is responsible for violations by non-state actors in "all contexts of custody or control"[29], including but not limited to "prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm"[30].

Whether or not constructive notice due, for instance, to a pattern of violations (as opposed to notice of a specific violation) against a specific identifiable group is sufficient to engage state responsibility is unclear, as "jurisprudence on due diligence, consent, and acquiescence remains thin and underdeveloped."[31] As the Committee has not made a finding on this issue, it should not be ruled out.[32]

3.4 *Articles 10-13 – Education, Investigation, Complaints*

Where, however, state parties "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or

[26] *Dzemajl, supra* note 20 at para 9.2.
[27] *Osmani, supra* note 18 at para 10.5.
[28] *Sánchez, supra* note 22 at para 6.4. "States parties must . . .take the necessary steps to prevent individuals from inflicting acts of torture on persons under their control."
[29] CAT, Comment 2, *supra* note 15 at para 15
[30] *Ibid*.
[31] Lorna McGregor, "Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings" (2014) 36:1 Hum Rts Q 210 at 218.
[32] See *Ibid* for an overview of international jurisprudence on this point.

private actors consistently with the Convention"[33], they are in breach. In such instances "a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who may have been involved therein".[34] An ongoing or re-opened investigation years after an alleged incident with "no details concerning the inquiry or any indication of when a decision might be expected" is not sufficient to discharge the obligation.[35] A delay of 15 months between an incident and the commencement of an investigation has been held to be "unreasonable and contrary to article 12".[36]

3.5 *Article 14 - Redress*

Under article 14, the state must ensure that the "victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". Although article 14 applies only to acts of torture as defined in article 1, the Committee has repeatedly held that "article 16 [against "ill-treatment"] . . . include[s] an obligation to grant redress and compensate the victims of an act in breach of that provision."[37] State obligations are not met where compensation consists only of "a symbolic amount" and no attempt is made to prosecute those responsible in a criminal court (viz. A state cannot evade its obligations by simply providing a civil remedy. Some cases will require criminal prosecution, and even where a civil remedy is technically sufficient the outcome must be commensurate with the violation).[38]

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[33] CAT, Comment 2, *supra* note 15 at para 18.
[34] *Kirsanov, supra* note 24 at para 11.2. See also UN Committee Against Torture, *Encarnación Blanco Abad v Spain, Communication No 59/1996*, 14 May 1998, UN Doc CAT/C/20/D/59/1996 at para 8.8.
[35] UN Committee Against Torture, *Ali Ben Salem v Tunisia, Communication No 269/2005*, 22 November 2007, UN Doc CAT/C/39/D/269/2005 at para 16.7.
[36] UN Committee Against Torture, *Radivoje Ristic v Yugoslavia, Communication No 113/1998*, 11 May 2001, UN Doc CAT/C/26/D/113/1998 at para 8.6.
[37] *Osmani, supra* note 18 at 10.8. See also, *Dzemajl, supra* note 20 at 9.6.
[38] *Kirsanov, supra* note 24 at para 11.4.

4. Additional Options

At this time, Canada has not ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [OPCAT][39]. The OPCAT provides two primary mechanisms designed to further the goals of the CAT. First, the Subcommittee on Prevention has the authority to visit states where persons are deprived of liberty to ensure the CAT is upheld and make recommendations to states accordingly. Second, the OPCAT requires states to create independent "National Preventative Mechanisms" to provide domestic oversight that ensures states meet their obligations under the CAT, with a particular focus on those deprived of liberty in places of detention.[40] Given the Committee's concern regarding the status of Aboriginal women in Canada, ratification of the OPCAT could enable effective new mechanisms of protection and increased accountability for the state.

5. Resources

Model Complain Form

http://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICCPR_CAT_CERD.doc

Works Cited

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratification by Canada 24 June 1987).

McGregor, Lorna. "Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings" (2014) 36:1 Hum Rts Q 210.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

[39] 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) [OPCAT].
[40] *Ibid,* Part IV: articles 17-23.

UN Committee Against Torture, *Ali Ben Salem v Tunisia, Communication No 269/2005*, 22 November 2007, UN Doc CAT/C/39/D/269/2005.

UN Committee Against Torture, *Colmenarez and Sánchez v Venezuela, Communication No 456/2011,* 26 June 2015, UN Doc CAT/C/54/D/456/2011.

UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Canada*, 25 June 2012, CAT/C/CAN/CO/6.

UN Committee Against Torture, *Dzemalj et al v Yugoslavia, Communication No 161/2000*, 2 December 2002, UN Doc CAT/C/29/D/161/2000.

UN Committee Against Torture, *Encarnación Blanco Abad v Spain, Communication No 59/1996*, 14 May 1998, UN Doc CAT/C/20/D/59/1996.

UN Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2.

UN Committee Against Torture, *Kirsanov v Russia, Communication No 478/2011*, 19 June 2014, UN Doc CAT/C/52/D/478/2011.

UN Committee Against Torture, *Osmani v Serbia, Communication No 261/2005*, 25 May 2009, UN Doc CAT/C/42/D/261/2005.

UN Committee Against Torture, *Prior List of Issues: Canada*, 28 July 2014, CAT/C/CAN/QPR/7.

UN Committee Against Torture, *Radivoje Ristic v Yugoslavia, Communication No 113/1998*, 11 May 2001, UN Doc CAT/C/26/D/113/1998.

Part III: *Convention on the Elimination of All Forms of Discrimination against Women*[41]

Treaty Body: Committee on the Elimination of Discrimination against Women [the 'Committee']

1. Quick Guide

- *Relevant Articles:*1, 2, 3, 5
- *Periodic Reports.* Yes. Article 18. Each State must submit a report to the Committee within one year of the entry into force of the Convention in the State concerned. A report shall also be submitted at least every four years thereafter.
- *Individual Complaints*. Yes. Article 1 and 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Under this Protocol communications may be submitted to the Committee by or on behalf of individuals or groups of individuals under the jurisdiction of a signatory State Party.[42]
- *State Inquiry.* Yes. Article 8 of the OP-CEDAW. The Committee may initiate a State inquiry if information indicating a grave or systematic violation of the Convention is submitted. Such an inquiry can include a state visit where warranted.

2. Prior Action

The Committee, both in its Concluding Observations and List of Issues submitted to Canada in 2008, frequently commented upon issues related to Aboriginal women. The Committee noted that Aboriginal women "continue to live in impoverished conditions, which include high rates of poverty, poor health, inadequate housing, lack of access to clean water, low

[41] 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].
[42] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 December 1999, 54 UNTS 49, at article 1, 2 [OP CEDAW].

school-completion rates and high rates of violence".[43] Concerns about violence are notably prevalent amongst the Committee's observations. Domestic violence was viewed to be a "significant problem"[44] and "high levels of violence" were noted to plague adolescent girls.[45]

Canada's efforts to remedy these issues were seen as inadequate. The Committee drew attention to the lasting "discriminatory effects of the Indian Act",[46] to funding guidelines which inhibit the ability of NGOs to advocate and lobby for the implementation of CEDAW,[47] to the negative impact the closure of a number of Status of Women Canada's offices had on Aboriginal women's access to programmes and services,[48] and to the "continuing need for shelter repairs and expansion of the capacity to meet demands".[49] The effect of these State actions has been to perpetuate the violence and poverty suffered by many Aboriginal women.

The Committee has expressed particular concern regarding murdered and missing Aboriginal women. In their Concluding Observations of 2008, the Committee noted that it "remains concerned that hundreds of cases involving aboriginal women who have gone missing or been murdered in the past two decades have neither been fully investigated nor attracted priority attention, with the perpetrators remaining unpunished".[50] They then urged Canada to "examine the reasons for the failure to investigate", "urgently carry out thorough investigations of the cases", and "carry out an analysis of those cases in order to determine whether there is a racialized pattern to the disappearances and take measures to address the problem if that is the

[43] UN Committee Against All Forms of Discrimination Against Women, *Concluding Observations of the Committee against Discrimination Against Women: Canada*, 22 October 2008, CEDAW/C/CAN/Q/7 at para 43 [CEDAW Conc Ob].
[44] *Ibid* at para 29.
[45] *Ibid* at para 29.
[46] UN Committee Against All Forms of Discrimination Against Women, *Prior List of Issues: Canada*, 28 July 2014, CEDAW/C/CAN/7 at para 24 [CEDAW LOI].
[47] CEDAW Conc Ob, *supra* note 43 at para 27-8.
[48] *Ibid* at para 26.
[49] CEDAW LOI, *supra* note 46 at para 5.
[50] CEDAW Conc Ob, *supra* note 43 at para 31.

case".[51] In 2010, the Special Rapporteur for the follow-up Committee on the Elimination of Discrimination against Women wrote a letter to express concern to Canada. In that letter, she stated that the Committee, "regrets the lack of substantive progress made by the federal government to address the reasons for the failure to investigate, at the national and provincial levels, the hundreds of cases involving Aboriginal women who have gone missing or been murdered, ...the lack of an analysis to determine whether there is a racialized pattern, and the lack of measures for prevention of such cases in the future".[52] The Special Rapporteur wrote another letter to Canada in 2011, expressing similar concerns with Canada's lack of action.[53] The issue of murdered and missing Aboriginal women is a large concern for the Committee and likely a topic that will gain continued attention in the future. While no individual complaints have been brought before the Committee on the topic, the jurisprudence below suggests that such a complaint may be met with success in the right circumstances.

There have been 4 individual complaints filed against Canada under the Optional Protocol. Three of these complaints were ruled inadmissible. The fourth complaint involved Cecilia Kell, an Aboriginal woman living in the Northwest Territories.[54] Kell's conjugal partner had her name removed from the Assignment of Lease for the home they occupied together.[55] When the matter was brought before the territory, inadequate compensation packages were offered and Kell's satisfaction was consistently frustrated by her Legal Aid lawyers.[56] After an unsuccessful application to the domestic court system, Kell filed an individual complaint with the Committee. The Committee ruled that the territorial and federal governments needed to

[51] CEDAW Conc Ob, *supra* note 43 at para 32.
[52] Dubravka Simonovic, "Follow-Up: Canada", 25 August 2010, HDI/follow-up/42/CAN/46 at 2.
[53] Dubravka Simonovic, "Follow-Up: Canada", 10 February 2011, AA/follow-up/42/CAN/46 at 2.
[54] UN Committee on the Elimination of Discrimination Against Women, *Kell v Canada, Communication No 19/2008*, 24 June 2008, UN Doc CEDAW/C/51/D/19/2008 at para 1 [*Kell*].
[55] *Ibid* at para 10.4.
[56] *Ibid* at para 10.5.

properly compensate Kell for the damages caused by their inaction.[57] A more detailed analysis of the implications of this case will be discussed below.

3. Potential Violations

An extensive body of jurisprudence has developed in relation to CEDAW. This jurisprudence lends clarity to many of the articles which makes it easier to discern which state actions will lead to violations. To obtain a remedy from the Committee, a combination of violations is usually required.

3.1 *Definition of Discrimination*

Article 1 defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, ...on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[58] As per *Kell*, the Committee will look at the "combined effect" of the facts of a case to determine whether discrimination in breach of this article occurred.[59] This means that a pattern of smaller, seemingly insignificant abuses of the Convention can amount to discrimination.

3.2 *Article 2 – Investigation and Prosecution*

This article places multiple obligations upon the state to investigate and punish acts of discrimination against women. The paragraphs that are consistently the subject of complaints are (c), (d), (e) and (f). These paragraphs impose an obligation upon the state to "ensure the legal

[57] *Kell, supra* note 54 at paras 11-12.
[58] CEDAW, *supra* note 41 at article 1.
[59] *Kell*, *supra* note 54 at para 10.2.

protection of the rights of women... through competent national tribunals and other public institutions";[60] to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation";[61] "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise";[62] and to "take all appropriate measures... to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".[63]

The Committee holds states to a high standard. In *Yildirim*, a woman who was perpetually victimized by her partner's abuse was eventually murdered by him.[64] The Committee observed that the "State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators".[65] However, a strong model is not enough. For women to truly "enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations".[66] The failure of State actors to genuinely understand the threat faced by Yildirim, and act upon this understanding, meant that an otherwise comprehensive system was deemed inadequate. No amount of rhetoric or policy can cloak the real occurrence of discrimination, intentional or not, in practice.

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[60] CEDAW, *supra* note 41 at article 2(c).
[61] *Ibid* at article 2(d).
[62] *Ibid* at article 2 (e).
[63] *Ibid* at article 2(f).
[64] UN Committee on the Elimination of Discrimination Against Women, *Yildirim v Austria, Communication No 006/2005*, 06 August 2007, UN Doc CEDAW/C/39/D/8/2005 at para 1 [*Yildirim*].
[65] *Ibid* at para 12.1.2.
[66] *Ibid*.

3.3 *Article 3 – Development and Advancement*

Article 3 provides, "State Parties shall take, in all fields... all appropriate measures... to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".[67] While the Committee has specifically ruled that the full development and advancement of women is impeded by domestic violence,[68] and the loss of adequate shelter[69], other impediments likely exist. In *Kell*, the Committee recommended that Canada work towards fulfilling this article by making efforts to recruit Aboriginal women to provide legal aid to women in their communities.[70] This is a recommendation that would require a comprehensive plan involving education and recruitment to fulfill. Such broad recommendations are commonly seen when this article is violated.

3.4 *Article 5 – Elimination of Prejudice*

Article 5 requires States "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[71] In *Vertido*, the Committee found that a judge's reasons for acquitting a rapist were based upon unfounded gender-stereotypes.[72] While the case-law of the offending State was meant to guard against such stereotypes, the reasons of the judge

[67] CEDAW, *supra* note 41 at article 3.
[68] See: *Yildirim, supra* note 64.
[69] *Kell*, *supra* note 54 at 10.4.
[70] *Ibid* at 11.
[71] CEDAW, *supra* note 41 at article 5.a.
[72] UN Committee on the Elimination of Discrimination Against Women, *Vertido v Philippines, Communication No 18/2008*, 16 July 2010, UN Doc CEDAW/C/46/D/18/2008 at para 3.1 [*Vertido*].

showed that this case-law was not enough to eliminate prejudice.[73] As a result, the State failed to uphold this article. The Committee recommended that the State properly train judges, lawyers and other law enforcement personnel on the proper application of the principles enshrined in CEDAW.[74] *RPB* is a case with very similar facts to *Vertido* and in that decision, the Committee also recommended special training for judges and legal professionals to "ensure that stereotypes and gender bias would not affect court proceedings and decision-making".[75]

In *Yildirim*, before the murder occurred, the police and public prosecutor had extensive dealings with the perpetrator and were well-aware of his violent nature.[76] However, despite multiple death threats against the victim and the knowledge that the perpetrator was "extremely dangerous", the Public Prosecutor continued to deny requests to have the perpetrator detained.[77] The Committee found that these failures were a result of the law enforcement official's inability to properly understand the threat posed by domestic abuse situations. They recommended that training on domestic violence be provided for the judges, lawyers and other law enforcement officials.[78]

3.5 *Remedies*

In General Recommendation 19, issued in 1992, the Committee noted, "under general international law and specific human rights covenants, States may... be responsible for private acts if they fail to act with due diligence to prevent violations or to investigate and punish acts of

[73] *Ibid* at 8.4.
[74] *Ibid* at 8.9.b.
[75] UN Committee on the Elimination of Discrimination Against Women, *R.P.B. v Philippines, Communication No 34/2011*, 21 February 2014, UN Doc CEDAW/C/57/D/34/2011 at para 9.b.iv [*RPB*].
[76] *Yildirim*, *supra* note 64 at para 2.3-2.10.
[77] *Ibid* at para 12.1.4.
[78] *Ibid* at para 12.3.b.

violence, and for providing compensation".[79] This principle has been re-stated multiple times in subsequent decisions rendered by the Committee.[80] On multiple occasions the State has been required to provide compensation to victims.

In *Kell*, by allowing Kell's partner to remove her name from the Assignment of Lease, the State failed to ensure "that its agents afford the same rights to her in comparison to her partner's rights in respect of ownership, acquisition, management, administration and enjoyment of the property".[81] Thus, the state failed to act with due diligence. The State was ordered to provide Kell with a home "commensurate in quality, location and size to the one that she was deprived of" and to "provide appropriate monetary compensation for material and moral damages commensurate with the gravity of the violation of her rights".[82]

Vertido and *KPB* both involve the acquittal of alleged rapist's. In both cases, the trials were long delayed[83] and the judge's findings were based in part upon gender-based myths and stereotypes.[84] The Committee, in both instances, ruled that the State was required to provide appropriate monetary compensation commensurate with the gravity of the violations of the victim's rights.[85]

In *Yildirim*, even though the victim was dead, the Committee did not rule out the possibility that the descendants of a dead person could be entitled to compensation under an individual complaint. In that case, the complaint was "submitted... in order to call the State party to account for its omissions and negligence rather than to obtain compensation for their heirs".[86]

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[79] UN Committee on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence against Women*, 1992, CEDAW/A/47/38 [CEDAW Recommendation 19] at para 19.
[80] *Yildirim*, *supra* note 64 at 12.1.1;and *Vertido*, *supra* note 72 at 8.4.
[81] *Kell*, 3.6.
[82] *Kell*, para 11.
[83] *RPB*, *supra* note 75 at para 3.11 and 8.9.b.
[84] *Ibid* at para 3.1.; *Vertido*, *supra* note 72 at 3.5.
[85] *RPB*, *supra* note 75 at para 9.a.i; *Vertido*, *supra* note 72 at 8.9.
[86] *Yildirim*, para 3.11.

As outlined above, the Committee has already found that Canada's treatment of Aboriginal women is in breach of the Convention. The jurisprudence shows that similar breaches to those committed by Canada have resulted in the Committee recommending that the State compensate the victims and implement measures to better protect and promote women's rights. This suggests that, in the many cases of missing and murdered Aboriginal women in Canada, Canada may be required to provide compensation to the victims and their families. While there are no cases dealing specifically with this issue, the jurisprudence suggests that such a complaint could be met with a positive result.

4. Resources

Model Complaint Form

http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx

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Simonovic, Dubravka. "Follow-Up: Canada", 25 August 2010, HDI/follow-up/42/CAN/46.

Simonovic, Dubravka. "Follow-Up: Canada", 10 February 2011, AA/follow-up/42/CAN/46 at 2.

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Part IV: *International Convention on the Elimination of All Forms of Racial Discrimination*[87]

Treaty Body: Committee on the Elimination of Racial Discrimination [the "Committee"]

1. Quick Guide

- *Relevant Articles:* 1 through 7.
- *Periodic Reports.* Yes. Article 9. A report is required every two years but in practice two combined reports are submitted approximately every 4 years.
- *Individual Communications*. No. The Committee receives communications subject to state declaration under article 14. Canada has not made the necessary declaration.
- *State Inquiry.* No.

2. Prior Action

Since Canada has not made the necessary declaration under article 14, the Committee has not adopted any views related to Aboriginal women in Canada.

In the concluding observations to the 19th-20th report, the Committee expressed concern over a number of areas related to Aboriginal women. In particular, they referred to "disproportionately high rates of incarceration of Aboriginal people including Aboriginal women"[88]; disproportional rates of life-threatening violence, spousal homicide, and disapperances[89]; discriminatory effects of the *Indian Act*[90]; "persistent levels of poverty among Aboriginal peoples, and the persistent marginalization and difficulties faced by them in respect of employment, housing, drinking water, health and education, as a result of structural

[87] 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD].
[88] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, 4 April 2012, CERD/C/CAN/CO/19-20 [*Concluding 19-20*] at para 12.
[89] *Ibid* at para 17.
[90] *Ibid* at para 18.

discrimination whose consequences are still present"[91]; failure to consult Aboriginal peoples on the standard of free, prior and informed concent and the related barriers involved in resolving land and policy disputes by the adversarial means of litigation[92]; and obstacles facing Aboriginal peoples "in recourse to justice"[93].

Although individual communications originating in Canada are not at this time accepted by the Committee, the jurisprudence remains valuable when considering complaints brought before other UN treaty bodies that address related issues.

3. Potential Violations

Articles 1 through 7 of the ICERD place a wide range of obligations on state parties. Racial discrimination means "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[94] In addition to general requirements to ensure law, policy, public authorities and institutions are in conformity with the precepts of the Convention,[95] states are required to enact sanctions and effectively punish the dissemination of racial propaganda and incitement to discrimination.[96] Equality before the law must be guaranteed. Article 5 enumerates specific rights, including political rights, security of the person, equal treatment before judicial organs, a

[91] *Concluding 19-20, supra* note 88 at para 19.
[92] *Ibid* at para 20.
[93] *Ibid* at para 21.
[94] ICERD, *supra* note 87, article 1.
[95] *Ibid,* article 2.
[96] *Ibid,* article 4.

number of civil rights, and a number of economic, social, and cultural rights.[97] States must ensure that both effective protection and meaningful remedies are available.[98] Finally, states are obliged to actively combat prejudice while promoting tolerance and understanding.[99]

A review of communications involving the substative rights protected under the Convention is not possible in this space. Regardless of the specific breach, findings that a violation has occurred often turn on state failure to take adequate protective measures or provide adequate remedial action to victims.

3.1 *Article 7 - Combating Prejudice*

The Committee has never adopted views in individual communications related to article 7, which places a positive obligation on states to "adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination"[100]. Nevertheless, the Committee has held that individuals may successsfully bring complaints that do not allege adverse affects on the enjoyment of their substantive rights. In a case concerning state obligations under article 4, the State (Norway) contended that the authors of the complaint were required to show how their enjoyment of substantive rights had been infringed under section 5 of the ICERD. The complaint itself alleged that the state had failed, *inter alia*, to "condemn all propaganda" in violation of article 4. Siding with the authors, the Committee held,

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[97] ICERD, *supra* note 87*,* article 5. Enumerated civil rights include rights to: freedom of movement and residence; leave or return to one's country; nationality; marriage and choice of spouse; property alone and in association; inherit; freedom of though, conscience and religion; freedom of expression and opinion; freedom to peaceful assembly and association. Enumerated economic, social and cultural rights include rights to: work, along with attendant conditions of employment and remuneration; form and join trade unions; housing; public health services; education and training; equal participation in cultural activities.
[98] *Ibid,* article 6.
[99] *Ibid,* article 7.
[100] *Ibid.*

> article 14 states that the Committee may receive complaints relating to 'any of the rights set forth in this Convention'. The broad wording suggests that the relevant rights are to be found in more than just one provision of the Convention. Further, the fact that article 4 is couched in terms of States parties' obligations, rather than inherent rights of individuals, does not imply that they are matters to be left to the internal jurisdiction of States [sic] parties, and as such immune from review under article 14.[101]

The decision is significant in relation to article 7 inasmuch as it opens the possibility of bringing complaints due to state failure to take effective measures to combat prejudice through public training and education.

3.2 *Racial Bias and the Administrative of Justice*

The Committee has affirmed in numerous cases that "the enactment of law making racial discrimination a criminal act [does not] in itself [represent] full compliance with the obligations of States parties under the Convention".[102] State parties are obligated to take steps to "prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and nondiscrimination."[103] This has been held to specifically include a juror who was not removed after making remarks indicative of racial bias, but in principle extends to all parties involved in judicial proceedings.[104]

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[101] UN Committee on the Elimination of Racial Discrimination, *Jewish Community of Oslo et al v Norway, Communication No 30/2003,* 22 August 2005, UN Doc CERD/C/67/D/30/2003 at para 10.6.
[102] UN Committee on the Elimination of Racial Discrimination, *LK v Netherlands, Communication No 4/1991*, 16 March 1993, UN Doc CERD/C/42/D/4/1991 [*LK*] at para 6.4.
[103] UN Committee on the Elimination of Racial Discrimination, *Michel LN Narrainen v Norway, Communication No 3/1991*, 15 March 1994, UN Doc CERD/C/44/D/3/1991 [*Narrainen*] at para 10.
[104] *Ibid* at para 8.7.

3.3 *Articles 4 & 6 – Effective Protection and Appropriate Remedies*

Under article 6, states must provide effective remedies and protection from racially discriminatory statements or acts. In *Hagan*[105]*,* the Committee held that the failure of the state to remove the offensive nickname of a sporting hero ("E.S. 'Nigger' Brown Stand") from a public plaque constituted a violation of the ICERD. Elsewhere, the Committee has noted, "the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated".[106] In addition to punishing perpetrators of discrimination, state parties should "consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate".[107] However, while compensation should be considered, not all cases will require compensation to remain in conformity with the Convention.[108]

In *Ahmad*[109]*,* the Committee held that a failure to properly investigate derogatory remarks made by school teachers, who referred to the complainant and his friends as "a bunch of monkeys", violated article 6. In that case the issue was brought before the police, who soon after dropped the investigation on the basis that the remarks were made in a heated moment and did not necessarily constitute hate speech. Since the complainants had no right, once the investigation was dropped, to pursue further remedial action, the Committee held that "the author has been denied effective protection against racial discrimination and remedies attendant

[105] UN Committee on the Elimination of Racial Discrimination, *Stephen Hagan v Australia, Communication No 26/2002*, , UN Doc CERD/C/62/D/26/2002 [*Hagan*].
[106] UN Committee on the Elimination of Racial Discrimination, 56th Sess, *General Recommendation XXVI on article 6 of the Convention*, 24 March 2000, [*Recommendation XXVI*] at para 1.
[107] *Recommendation XXVI, supra* note 106 at para 2.
[108] UN Committee on the Elimination of Racial Discrimination, *BJ v Denmark, Communication No 17/1999*, 17 March 1999, UN Doc CERD/C/56/D/17/1999 [*BJ*] at paras 6.2-6.3.
[109] UN Committee on the Elimination of Racial Discrimination, *Kashif Ahmad v Denmark, Communication No 16/1999*, 8 May 2000, UN Doc CERD/C/56/D/16/1999 [*Ahmad*].

thereupon by the State party".[110] Thus, where a claim of racial discrimination, whether based on acts or statements, is brought before the authorities, the Convention will be breached if a fair and thorough investigation is not conducted to establish whether or not the victim's substantive rights under the Convention have been violated.

3.4 *Discriminatory Remarks by Politicians*

Similarly, potentially discriminatory remarks made by politicians or public officials, even in the context of political debate, have been held to engage state obligations under articles 2, 4, and 6. In *Gelle,*[111] a Member of Parliament wrote a public letter (a "letter to the editor") in which she suggested that Somalis as a group, as the primary perpetrators in the country of the crime of female genital mutilation, were akin to pedophiles and rapists.[112] The Public Prosecutor chose not to carry out an investigation into the matter based largely on the fact that it arose "in connection with a current political debate and express the general political views of a party represented in Parliament."[113]

The Committee disagreed, noting that the impugned "remarks can be understood to generalize negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions"[114]. The fact that "statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination".[115] The Committee adverted to its previous direction to states to "Take resolute action to counter any

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[110] *Ibid* at para 6.4.
[111] UN Committee on the Elimination of Racial Discrimination, *Mohammed Hassan Gelle v Denmark, Communication No 34/2004*, 10 March 2006, UN Doc CERD/C/68/D/34/2004 [*Gelle*].
[112] *Ibid* at para 2.1.
[113] *Gelle, supra* note 111 at para 2.4.
[114] *Ibid* at para 7.4.
[115] *Ibid* at para 7.5.

tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large".[116]

3.5 *Discriminatory Law or Policy*

LR et al[117] is of particular interest when considering complaints related to discriminatory law or policy. That case involved two muncipal resolutions connected with a low-income housing plan for a group Roma. The first resolution approved a plan to build low-cost housing for the community of 1800 Roma, who, at the time, lived in "'appalling' conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets or drainage or sewage systems"[118]. After the resolution was passed, non-Roma members of the community petitioned against the plan based on fears that the plan would lead to an "influx of inadaptable citizens of Gypsy origin"[119]. The municipality passed a second resolution, cancelling the first, that made explicit reference to the petition. The Roma requested that the District Prosecutor investigate the authors of the discriminatory petition and reverse the second resolution, but the Prosecutor refused.

The complaint before the Committee alleged violations based on the duty of public officials to act in conformity with the ICERD (article 2), the duty to prohibit racial discrimination *via* the failure to investigate or prosecute the petitioners (article 4), the failure to

[116] UN Committee on the Elimination of Racial Discrimination, 65th Sess, *General recommendation XXX on discrimination against non-citizens*, 19 August 2004, at para 12.
[117] UN Committee on the Elimination of Racial Discrimination, *LR et al v Slovakia, Communication No 31/2003*, 10 March 2005, UN Doc CERD/C/66/D/31/2003 [*LR et al*].
[118] *LR et al, supra* note 117 at para 2.1.
[119] *Ibid* at para 2.2.

protect the right to adequate housing (article 5, paragraph (e)), and the failure to provide an effective remedy (article 6).[120]

Although the second resolution did not contain any explicitly discriminatory statements or even refer specifically to the Roma, the Committee noted that the ICERD applies to indirect discrimination as well, which requires "full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially".[121] Furthermore, the state was not saved by the fact that the resolution was merely a component of a complex process of "administrative and policy-making steps by . . . the relevant authorities" that did not give rise to a substative right to the complainants.[122] Instead,

> it would be inconsistent with the purpose of the Convention and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5 (c) of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights.[123]

Thus, the state party was in violation based on a change in policy for discriminatory reasons. Finally, the state was in breach of article 6 since, given that an act of racial discrimination had occurred, the complainants were precluded from an effective legal remedy when the Public Prosecutor refused to investigate the case.

[120] *Ibid* at paras 3.1-3.4.
[121] *LR et al, supra* note 117 at para 10.4.
[122] *Ibid* at para 10.6.
[123] *Ibid* at para 10.7.

4. Resources

Model Complaint Form

http://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICCPR_CAT_CERD.doc

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UN Committee on the Elimination of Racial Discrimination, *Stephen Hagan v Australia, Communication No 26/2002*, , UN Doc CERD/C/62/D/26/2002.

Part V: *International Convention on the Rights of the Child*[124]
Treaty Body: Committee on the Rights of the Child [the "Committee"]

1. Quick Guide:

- *Relevant Articles:*1, 4, 6, 19, 20, 34, 39
- *Periodic Reports.* Yes. Article 44. Requires State Parties to submit an initial report within 2 years of signing the Convention and every 5 years thereafter.
- *Individual Complaints*. No. While the *Optional Protocol on a Communications Procedures* allows individuals to submit communications to the Committee, Canada has not signed on. It is worth noting that, should Canada ever sign this Protocol, individuals could file complaints in regards to breaches of the Convention, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on the Involvement of Children in Armed Conflict.[125]
- *State Inquiry.* No. However, the *Optional Protocol on a Communications Procedure* does allow the Committee to conduct a state "inquiry procedure for grave or systemic violations" which could include a state visit. As mentioned above, Canada has not signed this Protocol.

***2.* Prior Action**

As Canada has yet to sign the *Optional Protocol* on a Communications Procedure, there are no individual communications about alleged Convention violations to consider. However, the Convention's periodic reporting system reveals much about Canada's adherence to the

[124] 2 October 1989, 1577 UNTS 3 (entered into force 2 September 1990) [ICRC].
[125] *Optional Protocol to the Convention on the Rights of the Child on a communications procedures*, 14 April 2014, A/RES/66/138, at article 5.1.a-c [OP CRC Communications].

Convention. In Canada's most recent State Report, which was submitted in 2012, issues related to "Aboriginal, immigrant and refugee children" were one of the 8 key topics that the report focused on.[126] The Committee has also expressed concern over Aboriginal-related issues in Canada. In their Concluding Observations to Canada's 2012 State Report, the Committee specifically mentions the need for Canada to take "urgent measures" to address the vulnerable position many Aboriginal children occupy.[127] The Committee expressed continued concern "at the prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin and other grounds".[128] Similar concern is expressed in the Committee's Concluding Observations on Canada's adherence to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[129] In recent reports, there has been an elevated awareness of Canada's systemic mistreatment of Aboriginal people.

3. Potential Violations:

The Optional Protocol on a Communications Procedure entered into force on April 14th, 2014.[130] Only one communication has been registered as of this writing. As a result, some uncertainty surrounds the meaning of the Convention and how the Committee will exercise its power. For the moment, the best source of information about the articles and potential violations by Canada can be found in Canada's State Reports and the Committee's Concluding Observations to those reports.

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[126] Canada, *State Report 2012*, 20 November 2009, CRC/C/CAN/3-4 at para 2 [Can State Report CRC].
[127] UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 6 December 2012, CRC/C/CAN/CO/3-4 at para 33a [Conc Ob CRC].
[128] *Ibid* at para 32.
[129] UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 7 December 2012, CRC/C/OPSC/CAN/CO/1 at para 26, 27c, 35c [CRC OP Conc Ob].
[130] Status of Optional Protocol; <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en>

3.1 *Definition of Child*

The Convention defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[131] In Canada, this means that the Convention protects every person below the age of 18.

3.2 *Article 4 - Required State Action*

Article 4 proclaims, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".[132] It is clear that, in the context of Aboriginal children, Canada has not fulfilled this standard. In 2012 the Committee noted that, due to a lack of proper data collection by the State, it would be difficult to meaningfully assess the progress Canada has made in implementing the Convention.[133] However, they still identified many concerns and consistently pointed to issues related to the measures taken by Canada in regards to Aboriginal children. The Committee ordered Canada to "take urgent measures to address the overrepresentation of Aboriginal... children in the criminal justice system and out-of-home care".[134] They were also concerned that no national strategy had been "developed to comprehensively address child poverty" which had profound impacts on Aboriginal children.[135] The Committee's concerns were not limited to Aboriginal children either. They also consistently expressed concern over

[131] ICRC, *supra* note 124 at article 1.
[132] ICRC, *supra* note 124 at article 4.
[133] Conc Ob CRC, *supra* note 127 at para 20.
[134] *Ibid* at para 33a.
[135] *Ibid* at para 67.

Canada's failure to properly consider the "gender perspective" in their measures aimed at combating violence and poverty.[136]

3.3 *State Action under the Optional Protocol on Child Prostitution*

Canada is a signatory State to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. This Protocol imposes additional obligations above and beyond those contained in the Convention. Article 9 of the Protocol reads, "State Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol".[137] The Committee has observed that Canada has failed to fulfill this obligation. In their 2012 Concluding Observations, the Committee states that it is "deeply concerned that cases involving Aboriginal girls, including those who may have been involved in the sex trade, have gone missing or have been murdered, have not been fully investigated, with the perpetrators going unpunished".[138] They recommend that Canada "establish a plan of action to coordinate and strengthen law enforcement investigation practices in cases of child prostitution, especially in Aboriginal communities, and to vigorously ensure that all cases of missing girls are investigated and prosecuted to the full extent of the law".[139] Missing and murdered Aboriginal women is an issue of importance to the Committee. Action or inaction on the part of the government which fails to remedy this situation can be seen as a violation of this article and this recommendation. This is an area in which a non-governmental organization

[136] *Ibid* at para 32.c.
[137] *Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography*, 18 January 2002, A/RES/54/263, at article 9 [OP CRC Child Prostitution].
[138] CRC OP Conc Ob, *supra* note 129 at para 26.
[139] *Ibid* at para 27.c.

could do meaningful work by monitoring the actions of Canada and keeping the Committee updated on the success or failure of these actions.

3.4 *Protection of the Child*

Article 6 of the Convention protects the life of a child in a broad sense: the State "shall ensure to the maximum extent possible the survival and development of the child".[140] Article 19 mandates that State Parties "take all appropriate... measures to protect the child from all forms of physical or mental violence... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".[141] In a case where a child is "temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment," that child "shall be entitled to special protection and assistance provided by the State".[142] Many Aboriginal children have been taken from their homes as arms of the Canadian government have determined that it is not in the best interests of the child to remain in their home environment. The Committee has noted that Canada uses child removal "as a first resort in cases of neglect or family hardship or disability" and that this tactic causes "poorer outcomes" and often leads to further abuse and neglect.[143] If Canada abided by the Convention, these children would be entitled to "special protection and assistance". Often, this protection is not provided. One needs to look no further than the recent murder of Tina Fontaine,[144] along with other similar occurrences, to see that Canada, in large part, has failed to honour this provision.

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[140] ICRC, *supra* note 124 at article 6.
[141] *Ibid* at article 19.
[142] *Ibid* at article 20.
[143] Conc Ob CRC, *supra* note 127 at para 55.
[144] See, Jillian Taylor, "Tina Fontaine: 1 year since her death, has anything changed?", CBC News (16 August 2015) online: <http://www.cbc.ca/news/canada/manitoba/tina-fontaine-1-year-since-her-death-has-anything-changed-1.3192415>.

Many of the recommendations that the Committee has made regarding the protection of the child have centered upon Aboriginals and females. The Committee noted, "The lack of a gender perspective in the development and implementation of programmes aimed at improving the situation for marginalized and disadvantaged communities, such as programmes to combat poverty or the incidence of violence, especially in light of the fact that girls in vulnerable situations are disproportionately affects".[145] They recommended that Canada better incorporate such a gender perspective when addressing violence, poverty and other vulnerabilities children face.[146] Further, the Committee urged Canada to "ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and provincial/territorial plans".[147] Pursuant to this observation, they recommended that Canada "ensure that all child victims of violence have immediate means of redress and protection".[148]

3.5 *Sexual Exploitation*

Article 34 of the Convention requires "State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse".[149] The Committee has expressed concern that Canada "has not taken sufficient action to address other forms of sexual exploitation, such as child prostitution and child sexual abuse".[150] They also make a connection between victims of sexual exploitation and missing and murdered Aboriginal women. The Committee expresses

[145] Conc Ob CRC, *supra* note 127 at para 32.c.
[146] *Ibid* at para 33c.
[147] *Ibid* at para 47b.
[148] *Ibid* at para 47c.
[149] ICRC, *supra* note 124 at article 34.
[150] Conc Ob CRC, *supra* note 127 at para 48.

grave concern "about cases of Aboriginal girls who were victims of child prostitution and have gone missing or were murdered".[151]

3.6 *Victim Recovery*

The Convention places an obligation upon the State to help child victims of all forms of abuse. Article 39 states, "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child".[152] The Optional Protocol on Child Prostitution mentions compensation as one such recovery mechanism. Article 9.4 of that Protocol requires State Parties to "ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible".[153] In the Committee's Concluding Observations to Canada's state report on the Protocol, the Committee recommends that Canada adopt specific programs for Aboriginal child victims of prostitution, implying that culturally sensitive rehabilitation programs are important to ensure victim recovery.[154]

[151] Conc Ob CRC, *supra* note 127 at para 48.
[152] *ICRC*, *supra* note 124 at 39.
[153] OP CRC on Child Prostitution, *supra* note 137 at article 9.4.
[154] Conc Ob CRC, *supra* note 127 at para 35.c.

4. Resources

Works Cited

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Optional Protocol to the Convention on the Rights of the Child on a communications procedures, 14 April 2014, A/RES/66/138.

Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography, 18 January 2002, A/RES/54/263.

UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 7 December 2012, CRC/C/OPSC/CAN/CO/1.

***International Covenant on Civil and Political Rights*[155]**
Treaty Body: Human Rights Committee [the "Committee"]

1. Quick Guide

- *Relevant Articles*: 1, 2, 6, 7, 8, 14, 17, 18, 20, 22, 26, 27.
- *Periodic Reports*. Yes. Article 40. Whenever the Committee requests, which is generally every 4 years but in practice highly variable. The next report is due 24 July 2020 (though state submissions have typically been well behind schedule). The most recent report was submitted 9 April 2013.
- *Individual Communications.* Yes. Subject to the first *Optional Protocol.*[156]
- *State Inquiry*. No.

2. Prior Action

The Committee has not, to date, adopted views on individual communications specifically related to Aboriginal women in Canada.

In the concluding observations to Canada's most recent state report, the Committee indicated that Canada needed to do more to protect the rights of Aboriginal women in a number of areas. Identified areas of concern included (1) high rates of domestic violence against Aboriginal women coupled with low reporting, insufficient support services, and the failure to investigate and punish perpetrators;[157] (2) the lack of information and failure to sufficiently investigate and prosecute those responsible in relation to the high rates of missing and murdered

[155] 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].
[156] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR-OP1].
[157] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada,* 13 August 2015, UN Doc CCPR/C/CAN/CO/6 [Concluding observations] at para 8 (referring, in particular, to articles 3, 4, and 7).

Aboriginal women;[158] (3) the failure of the state to ensure basic needs of some Indigenous peoples, including insufficient funding for child welfare services and insufficient redress in relation to some who attended Residential Schools.[159]

3. Potential Violations

While individual communications may be brought under the ICCPR, the rights protected within the treaty are broad and are often of most use when read in conjunction with more specific provisions arising in other UN treaties.[160] The most relevant provisions include the right of peoples to self-determination;[161] freedom from discrimination, which includes a right to effective remedy[162]; the right to life[163]; protection from torture and ill-treatment[164]; freedom from slavery and servitude[165]; equality before the courts[166]; freedom from arbitrary or unlawful interference with privacy and unlawful attacks on honour or reputation[167]; freedom of thought, conscience, and religion[168]; legal protection against incitement to discrimination[169]; freedom of association, including a right to join trade unions[170]; protection of the family unit[171]; and the right of minorities to the enjoyment of their religion, culture, and language.[172]

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[158] Concluding observations, *supra* note 157 at para 9.
[159] *Ibid* at para 19 (referring, in particular, to articles 2 and 27).
[160] See UN Human Rights Committee, *General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc CCPR/C/21/Rev1/Add13.
[161] ICCPR, *supra* note 155, article 1.
[162] *Ibid*, article 2. Article 24 refers to discrimination specifically in relation to children. Article 26 refers to discrimination in relation to equality before the law.
[163] *Ibid,* article 6.
[164] *Ibid,* article 7.
[165] *Ibid,* article 8.
[166] *Ibid,* article 14.
[167] *Ibid,* article 17.
[168] *Ibid,* article 18.
[169] *Ibid,* article 21.
[170] *Ibid,* article 22.
[171] *Ibid,* article 23.
[172] *Ibid,* article 27.

3.1 *Article 27 – Enjoyment of Culture*

Individual communications on Indigenous issues have tended to involve state regulation or impairment of cultural and economic activities protected under article 27 in conjunction with a number of other provisions.[173] Communications may be brought by individuals or groups of individuals and are most likely to be successful when state action "substantively compromise[s] the way of life and culture of the author [complainant]"[174], without granting the affected community "participation in the decision-making process [that is] effective"; namely, consultation rising to the standard of free, prior and informed consent.[175]

3.2 *Article 14 – Equality Before the Courts*

In *Näkkäläjärvi*[176], a decision to award a "substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants"[177] was held to violate article 14 in conjunction with article 2. Although the Committee did not find a violation of authors' rights in relation to their substantive complaint (in relation to state impairment of their ability to herd reindeer, following article 27), the Committee held that the ICCPR would be breached where non-discretionary court costs

[173] See e.g., UN Human Rights Committee, *Lubicon Lake Band v Canada, Communication No 167/1984*, 26 March 1990 UN Doc A/45/40 (on Aboriginal title, self-determination, enjoyment of means of subsistence, violation found); UN Human Rights Committee, *Hutchins v Canada, Communication No 879/1999,* 4 August 2005, UN Doc CCPR/C/84/D/879/1999 (on Aboriginal fishing rights, enjoyment of culture, no violation found); UN Human Rights Committee, *Apirana Mahuika et al v New Zealand, Communication No 547/1993*, 16 November 2000, UN Doc CCPR/C/70/D/547/1993 (fishing rights, no violation found); UN Human Rights Committee, *Kari Alatorvinen et al v Finland, Communication No 2102/2011*, 5 June 2014, UN Doc CCPR/C/110/D/2102/2011 (herding regulations, no violation found); UN Human Rights Committee, *Jarle Jonassen et al v Norway, Communication No 942/2000*, 12 November 2002, UN Doc CCPR/C/76/D/942/2000 (herding regulations, inadmissible).
[174] UN Human Rights Committee, *Ángela Poma Poma v Finland, Communication No 1457/2006*, 24 April 2009, UN Doc CCPR/C/95/D/1457/2006 at para 7.7. In which the State depleted the land by extracting water to such an extent that the Indigenous community's cultural and economic means of survival were significantly impaired.
[175] *Ibid* at para 7.6.
[176] UN Human Rights Committee, *Anni Äärelä and Jouni Näkkäläjärvi v Finland, Communication No 779/1997*, 7 November 2001, UN Doc CCPR/C/73/D/779/1997 [*Näkkäläjärvi*].
[177] *Ibid* at para 7.2.

impaired the ability of complainants to bring cases before domestic courts. The Committee has elaborated extensively on the significance of article 14 elsewhere, noting, *inter alia*, "Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice."[178]

3.3 *Discriminatory Treatment of Indigenous Women and Girls*

The ICCPR specifically requires that states provide protection against discrimination for women, minors, and minorities. Undue focus on a woman's morals or sexual history, or the re-victimization of women at any stage in an investigation or prosecution related to violence against women will run afoul of the precepts of the Convention.

In *LNP*[179], a young Indigenous woman was raped by non-state actors. When she attended the police station shortly after she was forced to wait for hours prior to a medical examination, which confirmed her injuries. Nevertheless, the subsequent investigation and trial focused primarily on her "morals" and the question of whether or not she was a prostitute.

The Committee found numerous violations of the ICCPR. The focus on the status and sexual life of the victim amounted to "discriminatory treatment by the police, health and judicial authorities aimed at casting doubt on the morality of the victim"[180]. Poor treatment of the victim, first at the police station where she was made to wait for an undue length of time without reason; second, in the hands of medical examiners who performed invasive and unnecessary tests; and

[178] UN Human Rights Committee, *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, UN Doc CCPR/C/GC/32 at para 9. The elements of Article 14 are thoroughly flushed out here. "Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.10 In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them." *Ibid* at para 11.
[179] UN Human Rights Committee, *LNP v Argentine Republic, Communication No 1610/2007*, 16 August 2011, UN Doc CCPR/C/102/D/1610/2007 [*LNP*].
[180] *Ibid* at para 13.3.

finally by judicial personnel who made offensive remarks, amounted to a violations of article 24, which protected her status as a minor.[181] "Irregularities" in court proceedings, including the decision to hold the trial entirely in Spanish without interpretation (impairing the ability of both the victim and other witnesses to give evidence), and the failure to engage her in court proceedings or notify her of the acquittal of the accused violated article 14.[182] Overall, the proceedings, including the re-victimization of the victim *via* discriminatory statements made in court violated the prohibition against ill-treatment under article 7, which the Committee re-affirmed includes both physical and mental suffering.[183] Irrelevant enquiries by the social worker into her "sexual life and morality" were held to "constitute arbitrary interference with her privacy and an unlawful attack on her honour and reputation" in contravention of article 17.[184]

3.4 *Additional Guidance on Equality Between Men and Women*

General Comment 28[185] provides extensive guidance for states regarding the meaning of article 3 (equality of rights between men and women) in relation to the Convention as a whole. In particular, the Committee notes that "laws and practices that may interfere with women's rights to enjoy privacy" must be eliminated. Specifically, "the sexual life of a woman [must not be] taken into consideration in deciding the extent of her legal rights and protections, including protection against rape"[186]. The failure of the state to protect a woman's right to freely consent to

[181] *LNP, supra* note 179 at para 13.4.
[182] *Ibid* at para 13.5.
[183] *Ibid* at para 13.6.
[184] *Ibid* at para 13.7.
[185] UN Human Rights Committee, *General Comment No 28, Article 3 (The equality of rights between men and women)*, 29 March 2000, UN Doc CCPR/C/Rev.1/Add.10 [*Comment 28*]
[186] *Ibid* at para 20.

procedures related to her reproductive functions (including, for instance, sterilization) similarly constitutes interference in breach of the Convention.[187]

Additionally, article 8 (slavery and servitude) should be read to include trafficking, forced prostitution, and slavery disguised as "domestic or other kinds of personal service".[188]

4. Resources

Model Complaint Form

http://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICCPR_CAT_CERD.doc

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UN Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13.

[187] *Comment 28, supra* note 185 at para 20.
[188] *Ibid* at para 12.

UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, UN Doc CCPR/C/GC/32.

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UN Human Rights Committee, LNP v Argentine Republic, Communication No 1610/2007, 16 August 2011, UN Doc CCPR/C/102/D/1610/2007.

UN Human Rights Committee, Lubicon Lake Band v Canada, Communication No 167/1984, 26 March 1990 UN Doc A/45/40.

International Convention for the Protection of All persons from Enforced Disappearance[189]
Treaty Body: Committee on Enforced Disappearances [the "Committee"]

1. Quick Guide:

- *Relevant Articles:* 1, 2, 3, 6, 24, 30.
- *Periodic Reports.* No. Article 29. Within two years of signing the Convention, State Parties are expected to submit their initial reports. There is no provision that requires states to submit periodic reports thereafter. However, as per article 36, the Committee itself releases an annual report that may include information about the violations of certain states. Canada is not a party to this Convention, thus it is not required to submit an initial report.
- *Individual Complaints*. No. Under article 31 a State Party may declare that it "recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction".[190] Canada, not being a party to this Convention, has not made such a declaration.
- *State Inquiry.* No. Under article 33 and 34 a State Inquiry can be initiated if the Committee "receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party". This information, in appropriate circumstances, may be brought to the urgent attention of the General Assembly of the United Nations. The Committee can also request to visit the State, if the State consents, in order to properly investigate the issue. As mentioned above, this does not apply to Canada.

[189] 23 December 2006, 66 UNTS 177 (entered into force 23 December 2010) [ICPED].
[190] *Ibid* at 31.1.

2. Prior Action

The ICPED entered into force on December 23, 2010 with its first session being held in November 2011.[191] Under the Convention, each signatory state, "has the duty to ensure that enforced disappearance constitutes an offence under its criminal law, and to establish in its internal legislation that the widespread or systematic practice of enforced disappearance is a crime against humanity".[192] Canada has neither signed nor ratified the Convention. As a result, there are no reports to gauge Canada's adherence to the articles of the treaty and no mechanisms by which a person can enforce adherence. However, the Convention does have some relevant articles that could prove to be useful in the context of murdered and missing Aboriginal women, should Canada sign it in the future. It should be noted that, even if Canada does sign the Convention, not all acts of enforced disappearance will come under the Committee's jurisdiction. The Committee will have jurisdiction only over those acts "which commenced after the entry into force of this Convention" in Canada.[193]

3. Potential Violations

In the ICPED, enforced disappearance is defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person".[194] However, the Convention is not limited to enforced disappearances

[191] Emmanuel Decaux, "Letter", 25 January 2012, at 1 [Decaux Letter].
[192] *Ibid* at 1.
[193] ICPED, *supra* note 189 at article 35(2).
[194] *Ibid* at article 2.

perpetrated by the State. Under article 3, the ICPED demands that each "State Party take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice".[195] This last requirement ensures that State Parties make genuine efforts to solve matters related to missing persons.

3.1 State Obligations

Under the ICPED, States have various obligations pertaining to disappeared persons. These include punishment of perpetrators, finding missing persons, and reparations. First, the State must take the "necessary measures to hold criminally responsible… any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance".[196] Second, the State must also "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains".[197] Finally, the "State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation".[198] Reparations should cover both "material and moral damages"; where appropriate, various forms should be considered, including but not limited to: restitution, rehabilitation, satisfaction which can include restoration of dignity and reputation, and guarantees of non-repetition.[199] Due to the current lack of jurisprudence in this area it remains to be seen how these will be applied to particular cases.

[195] ICPED, *supra* note 189 at article 3.
[196] *Ibid* at article 6(1)(a).
[197] *Ibid* at article 24(3).
[198] *Ibid* at article 24(4).
[199] *Ibid* at article 24(5).

3.2 Urgent Actions

Article 30 provides that, "a request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency".[200] The request can be submitted by a wide range of people, from relatives of the disappeared person to their counsel or any other person who may have a legitimate interest.[201] To be considered by the Committee, the request must meet certain criteria: it must not be manifestly unfounded; it must not constitute an abuse of the right of submission; it must have been duly presented to the competent body of the State Party concerned; it must not be incompatible with the provisions of the Convention; and it must not be under investigation by another international body of a similar nature.[202] These are not difficult criteria to meet. Of the 60 requests for urgent action submitted during the 2015 reporting period, 51 successfully met these criteria.[203] If the request is granted, the Committee "shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee".[204] This sets off a process of communication between the State and the Committee which could result in the Committee making recommendations, "including interim measures, to locate and protect the person concerned… within a specified period of time".[205]

The Committee's annual reports outline the situations in which the urgent action mechanism is invoked. As the Convention is relatively new, the mechanism is still in a nascent stage. Most of the invocations of article 30 involve instances in which a State actor or supposed State actor enforces the disappearance. However, there are also instances in which urgent action

[200] ICPED, *supra* note 189 at article 30.
[201] *Ibid* at article 30(1).
[202] *Ibid* at article 30(2)(a-e).
[203] Committee on Enforced Disappearances, *Report of the Committee on Enforced Disappearances*, A/70/56 [CED Report 2015] at para 51.
[204] ICPED, *supra* note 189 at article 30(2).
[205] *Ibid* at 30(3).

was taken by the Committee even when the perpetrator of the disappearance may not be acting with the authorization, support or acquiescence of the State. These instances are most relevant to missing and murdered Aboriginal women in Canada.

Daniel Alfaro was a teacher in Mexico when he disappeared while travelling between two villages.[206] His belongings were discovered in the middle of a deserted field during a search of the area by the local community.[207] Despite indications that Alfaro was forcefully disappeared, the local authorities failed to take meaningful action and much of the search was left up to friends and family of Alfaro.[208] In this circumstance, the Committee recognized that the Convention had been violated and granted the request for urgent action.[209] A dialogue was then initiated with the state. After repeated letters demanding information were sent to Mexico, the State finally replied, indicating that they had assigned the case to a Special Unit and that "relatives of the victim were provided with psychological attention and support" by the Attorney General's Victims' Unit.[210] The Committee has continued to correspond with the State and requests more updates about the status of the investigation and the measures implemented to protect the victim and others in danger.[211]

An urgent action request was also granted in relation to Jairo Perez, despite no indication that a State party (Colombia) was involved in his disappearance.[212] Perez was last seen in a taxi leaving a home he occupied during a business trip.[213] The Committee and the State held regular

[206] Committee on Enforced Disappearances, *Report of the Committee on Enforced Disappearances*, A/69/56 [CED Report 2014] at para 61.
[207] *Ibid*.
[208] *Ibid*.
[209] *Ibid* at para 62.
[210] *Ibid* at para 62.
[211] *Ibid* at para 62.
[212] CEPD Report 2015, *supra* note 203 at para 53.
[213] *Ibid*.

communications about the investigation up to the point when Perez's remains were found.[214] After that point, the Committee continued to monitor the situation and requested that "interim or protective measures" be adopted for the victim's family.[215] The Convention only requires that the Committee "continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved".[216] However, this instance shows that the Committee is willing to monitor a situation beyond that point.

3.3 Individual Communications

Article 31 provides that, "a State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration".[217] The Committee received its first such communication on September 30th, 2013, and while the communication was declared admissible, the parties are still going through the initial stages of submissions and the details of the submission are not currently available.[218] As such, no decision of any significance has been rendered and it is unclear how this provision will be used.

[214] CEPD Report 2015, *supra* note 203 at para 54.
[215] *Ibid* at 54-5.
[216] ICPED, *supra* note 189 at article 30(4)
[217] *Ibid* at 31.
[218] CEPD Report 2015, *supra* note 203 at para 71.

3.4 State Visits

The Convention allows for the Committee to visit a violating state in particular circumstances. Article 33 states, if the Committee "receives reliable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay".[219] The key issues to consider are what "reliable information" is, and what a serious violation of the Convention is. While it is still unclear what the Committee considers "reliable information", it has invoked this article based upon information received from non-governmental organizations.[220] This at least implies that NGOs are a source capable of providing reliable information.

The standard of what constitutes "seriously violating the provisions of the Convention" is clearer. In the two instances in which the Committee tried to invoke this article, the alleged violations were vast and severe. In 2013, 4 non-governmental organizations submitted information alleging that Mexico was involved in the "perpetration of enforced disappearances", was failing to instigate proper investigations, was not holding perpetrators accountable, and was not ensuring the victims received adequate reparations".[221] The Committee acknowledged that, "on the basis of the observations received, it could request a visit under article 33 of the Convention".[222] In the second attempted invocation of article 33, the unnamed States' violations included, "the perpetration of enforced disappearances, the existence of secret detention facilities, the lack of security and protection of the civilians from such acts, the lack of proper

[219] ICEPD, *supra* note 189 at 33.1.
[220] CPED Report 2014, *supra* note 206 at 68.
[221] *Ibid* at 68.
[222] *Ibid* at 69.

investigations, accountability of perpetrators and adequate reparations for victims".[223] As these two examples indicate, the Committee has set the standard of a serious violation of the Convention quite high.

4. Resources

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[223] CPED Report 2015, *supra* note 203 at 74.

Part VIII: *Convention on the Rights of Persons with Disabilities*[224]

Treaty Body: Committee on the Rights of Persons with Disabilities [the "Committee"]

1. Quick Guide

- *Relevant Articles:* The purpose of the Convention is twofold: "to protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"[225]. The provisions to that end are exhaustive and attempting to identify relevant articles in this case would be particularly arbitrary. Advocates should review the provisions of the Convention in any matter that involves, or may involve, a person with a disability.
- *Periodic Reports.* Yes. Article 35. Every 4 years.
- *Individual Communications*. No. The Committee receives individual communications subject to article 1 of the *Optional Protocol*[226]. Canada has not ratified the *Optional Protocol*.
- *State Inquiry.* No. The Committee may conduct inquiries subject to article 6 of the *Optional Protocol*. Canada has not ratified the *Optional Protocol*.

2. Prior Action

Canada submitted its first report under the CRPD on 11 February 2014. To date, no shadow reports have been submitted by any Civil Society Organization and the Committee has not yet considered the report. Little in the report is specifically related to Aboriginal women's issues, though Canada does refer to a number of initiatives in which the purposes of the

[224] 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratification by Canada 11 March 2010) [CRPD].
[225] *Ibid,* article 1.
[226] *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008).

Convention and Aboriginal concerns may overlap. Namely, the state refers to its "Aboriginal Skills and Employment Training Strategy" in relation to habilitation and rehabiliation[227]; *The Action Plan for Mental Health in New Brunswick 2011-2018*[228]; and the Government of British Columbia's efforts to implement the First Nations Health Plan[229].

3. Potential Violations

As both the CRPD and the Optional Protocol have only been in force since May 2008, the Committee has produced little jurisprudence thus far (10 decisions as of this writing). Nevertheless, the rights enshrined within the CRPD are well elaborated within that text and provide a significant level of guidance as to what they entail. In the few decisions that have been published, the Committee has extensively reproduced the specific language of the CRPD (unlike in many of the older international treaties, which enshrine rights in very broad terms which require significant interpretive development in the jurisprudence and other UN documents).

3.1 *Enshrined Rights and Obligations*[230]

The Convention does not specifically define "disability", focussing instead on the general principles which are outlined in article 3.[231] It includes specific protections and obligations in relation to equality and non-discrimination[232]; the "multiple discrimination" faced by women and girls with disabilities[233]; children with disabilities[234]; state obligations to raise awareness of

[227] Canada, *Initial reports of States parties due in 2012*, 7 July 2015, UN Doc CRPD/C/CAN/1 at para 69.
[228] *Ibid* at para 175.
[229] *Ibid* at para 322.
[230] Except where the authors deemed clarification was needed this paragraph simply reproduces the headings of the articles. It is intended to provide a quick guide for the reader to the specific protections and obligations contained in the CRPD.
[231] CRPD, *supra* note 224, article 3.
[232] *Ibid*, article 5
[233] *Ibid,* article 6.

issues facing persons with disabilities[235]; the need to ensure full accessibility, or the right "to live independently and participate fully in all aspects of life"[236]; the right to life[237]; equal recognition before the law[238]; effective access to justice[239]; liberty and security of the person, including reasonable accommodation in situations where persons are lawfully deprived of liberty[240]; freedom from torture and ill-treatment[241]; freedom from exploitation, violence, and abuse[242]; the protection of both physical and mental integrity[243]; freedom of movement and nationality[244]; measures to ensure both independence and participation in community[245]; personal mobility[246]; freedom of expression and access to information[247]; respect for privacy[248]; respect for home and privacy[249]; education[250]; access to "the highest attainable standard of health without discrimination on the basis of disability"[251]; "comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services"[252]; work and employment[253]; adequate standard of living and social protection[254]; participation in political and public life[255]; and participation in cultural life[256].

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[234] *Ibid,* article 7.
[235] CRPD, *supra* note 224*,* article 8.
[236] *Ibid,* article 9.
[237] *Ibid,* article 10.
[238] *Ibid,* article 12.
[239] *Ibid,* article 13.
[240] *Ibid,* article 14.
[241] *Ibid,* article 15.
[242] *Ibid,* article 16.
[243] *Ibid,* article 17.
[244] *Ibid,* article 18.
[245] *Ibid,* article 19.
[246] *Ibid,* article 20.
[247] *Ibid,* article 21.
[248] *Ibid,* article 22.
[249] *Ibid,* article 23.
[250] *Ibid,* article 24.
[251] *Ibid,* article 25.
[252] *Ibid,* article 26.
[253] *Ibid,* article 27.
[254] *Ibid,* article 28.
[255] *Ibid,* article 29.
[256] *Ibid,* article 30.

3.2 *Article 12 – Equality before the Law*

Article 12 guarantees equal protection before the law. The Committee has clarified the nature and scope of this right, noting that persons with disabilities must be granted full legal capacity. "Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)"[257] and "is indispensable for the exercise of civil, political, economic, social and cultural rights."[258] The right extends to "All persons with disabilities, including those with physical, mental, intellectual or sensory impairments".[259] Particular attention should be given to the exercise of the right in relation to "persons with cognitive or psychosocial disabilities" who have typically been "disproportionately affected by substitute decision-making regimes and denial of legal capacity".[260] The CRPD is unique among UN treaties inasmuch as it is the only instrument to date that specifically distinguishes between mental and legal capacity.

3.3 *Article 14 – Persons with Disabilities Deprived of Liberty*

In *X*[261], the author was subject to pre-trial detention. Following a surgical procedure to replace a disc in his spine, he "suffered a stroke which resulted in left homonymous hemianopsia, a sensory balance disorder, a cognitive disorder and impaired visuospatial orientation. In addition, the . . . plate was incorrectly inserted during the spinal surgery and

[257] UN Committee on the Rights of Persons with Disabilities, *General comment No 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014, UN Doc CRPD/C/GC/1 at para 13.
[258] *Ibid* at para 8.
[259] *Ibid* at para 9.
[260] *Ibid*.
[261] UN Committee on the Rights of Persons with Disabilities, *X v Argentina, Communication No 8/2012*, 18 June 2014, UN Doc CRPD/C/11/D/8/2012 [*X*].

subsequently became lodged, unattached, against his oesophagus [sic]"[262]. The author requested transfer to house-arrest and was denied. Although some steps were taken to accommodate the author's condition by way of modifications of the prison hospital, the Committee found multiple violations of the CRPD. Clarifying the requisite standard of accommodation, the Committee stated,

> The State party is under an obligation to ensure that prisons afford accessibility to all persons with disabilities who are deprived of their liberty. Accordingly, States parties must take all relevant measures, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of detention; such measures include ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services.[263]

Failure to meet this standard resulted in violations of article 14 (liberty) and 9 (accessibility).

The author further claimed violations of article 26, which requires state parties to "enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life".[264] While expressing concern that "the prison [had] failed to provide the rehabilitation therapy prescribed by his attending physicians . . . on a regular basis"[265] the Committee ultimately did not find a violation of article 26 in *X*, due in part to the fact that the author himself had sometimes refused the rehabilitative treatment that was offered, and in part because the he had failed to substantiate his claims.[266] Although some of the author's claims were not substantiated, *X* demonstrates that the Committee will hold states to a high standard in relation persons with disabilities deprived of liberty.

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[262] *Ibid* at para 2.1.
[263] *X, supra* note 261 at para 8.5.
[264] CRPD, *supra* note 224, article 26.
[265] *X, supra* note 261 at para 8.10.
[266] *Ibid*.

4. Resources

Model Complaint Form

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/3/REV.1&Lang=en

Additional Guidance

Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors. Professional Training Series No. 17 (OHCHR, 2010) online: <http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf>.

Works Cited

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Part IX: *International Covenant on Economic, Social and Cultural Rights*[267]

Treaty Body: Committee on Economic, Social and Cultural Rights [the "Committee"]

1. Quick Guide

- *Relevant Articles:*1, 2, 3, 10, 15.
- *Periodic Reports.* Yes. Within 1 year of the entry into force of the Covenant each state must submit a report. Reports will be submitted every 2 years after that point.
- *Individual Complaints*. No. The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* entered into force on May 5, 2013. This Protocol allows CESCR to receive and consider communications from individuals or groups of individuals under the jurisdiction of a signatory state.[268] Canada has not signed this Protocol.
- *State Inquiry.* No. While the Optional Protocol allows for the Committee to undertake an inquiry process, Canada has not signed the document and is not subject to such inquiries.

2. Prior Action

Canada has not signed the Optional Protocol to ICESCR. This means that no individual complaints can be filed against the State and the Committee cannot undertake an inquiry into Canada. The Protocol entered into force in 2013 and only one decision has been rendered by the Committee since that time. No prior actions pertaining to Canada will be relevant for this section.

[267] 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].
[268] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 5 March 2009, A/RES/63/117 [CESCR OP].

3. Potential Violations

The articles of the Covenant are broad and it can be difficult to discern exactly what obligations they place upon the state and what aspects of civilian life they protect. A lack of jurisprudence based on the Covenant does little to provide clarity. However, the scope of the Covenant can be discerned through other sources. By looking at the List of Issues the Committee submitted to Canada, and the Committee's general comments about particular provisions, I will attempt to narrow the scope of the relevant articles so that Canada's adherence to them can be meaningfully assessed. It is important to remember that the List of Issues is a good indicator of the areas that the Committee is particularly concerned about in regards to a state. If the state is unable to address the issues in a sincere manner in their report, then it is probable that the issues will become official recommendations in the Committee's Concluding Observations. Breaches of an official recommendation can be the subject of an individual complaint or a submission from an NGO.

3.1 *Article 1 - Self Determination*

Article 1 simply states, "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[269] To understand the scope of this right it is necessary to look at the List of Issues the Committee submitted to Canada during the current reporting cycle. For Canada, the Committee has determined that this right includes the broad protection of Aboriginal people, which includes "the full protection of inherent indigenous treaty rights and titles".[270]

[269] ICESCR, *supra* note 267 at article 1.
[270] UN Committee On Economic, Social and Cultural Rights, *Prior List of Issues: Canada*, 31 March 2015, E/C.12/CAN/Q/6 [CESCR LOI] at para 2.

In regards to industrial incursions that may interfere with the enjoyment of land, the Committee wants Canada to gain "the free, prior and informed consent of the indigenous peoples affected by such projects in advance to the government launching these projects".[271] This comment indicates that the Committee considers this article to protect the self-determination rights of Canada's Aboriginal people. Further, the Committee wants Canada to consider a "gender-based analysis of development projects... before embarking on such projects on or nearby lands, territories and resources traditionally owned, occupied or otherwise used or acquired by indigenous peoples".[272] The gender dimension imported into this article shows the Committee's awareness of the breadth of governmental action that can impact the rights of Aboriginal women. An environmental assessment process that does not gain the free, prior and informed consent of the affected Aboriginal people and that does not consider the unique ways in which women are impacted by development projects would violate this article.

3.2 *Discrimination*

Article 2 requires State Parties to "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex... or other status".[273] Canada has been asked to provide an update on "measures taken to reduce disparities between indigenous and non-indigenous peoples in relation to poverty prevalence and access to basic rights, including housing, education and health-care services".[274] The rights guaranteed by the Covenant include rights to housing, education and health-care. Where Canada

[271] CESCR LOI, *supra* note 270 at para 3.
[272] *Ibid*.
[273] ICESCR, *supra* note 267 at article 2.
[274] CESCR LOI, *supra* note 270 at para 8.

fails to ensure that these rights are enjoyed by Aboriginal and non-Aboriginals alike, they breach this article.

Article 3 of the Covenant ensures gender equality. It requires States to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".[275]

3.3 *Domestic Abuse*

The Convention recognizes the family as the "natural and fundamental group unit of society" that needs to be protected.[276] An integral part of protecting this unit is by protecting children from economic exploitation and discrimination based upon their parentage.[277] In their List of Issues submitted to Canada, the Committee inquired as to whether Canada had adopted measures to address violence against women and facilitated access to shelters and long-term housing solutions for victims of domestic violence.[278] Many issues surrounding murdered and missing Aboriginal women in Canada involve victims of domestic abuse or children displaced by domestic abuse aimed at others. Holding Canada up to its obligations under this article could have a preventative impact on violence against Aboriginal women.

3.4 *Cultural Rights*

The protection and free exercise of cultural rights can have widespread, positive impacts upon communities. Article 15 ensures that States "recognize the right of everyone... to take part

[275] ICESCR, *supra* note 267 at article 3.
[276] *Ibid* at article 10.1.
[277] *Ibid* at article 10.3.
[278] CESCR LOI, *supra* note 270 at para 17.

in cultural life".[279] Further, the article requires states to take steps "to achieve the full realization of this right" through the conservation and development of culture.[280] In the Committee's General Comment on this article they identified 5 "core obligations" of Party States. One of these obligations requires the State, to "allow and encourage the participation of persons belonging to... indigenous peoples... in the design and implementation of laws and policies that affect them".[281] Coupled with article 1 and article 15, this "core obligation" could be used to support Aboriginal groups interested in using traditional practices to deal with criminal and family issues. These practices, in comparison to the Western approach imposed upon Aboriginal communities, may be more effective in preventing violence done to Aboriginal women.

In the Committee's General Comment related to article 15, they noted that poverty "seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture".[282] To properly protect this right, the Committee believes States must "adopt, without delay, concrete measures to ensure adequate protection and the full exercise of the right of persons living in poverty and their communities to enjoy and take part in cultural life".[283] This comment is particularly powerful in the context of Canada, as the State is responsible for much of the poverty prevalent amongst Aboriginal people. Canada is required, by this treaty, to take more active steps to remedy these issues of poverty in order to enable the practice of cultural rights.

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[279] ICESCR, *supra* note 267 at article 15.1.a.
[280] *Ibid* at article 15.2
[281] UN Committee on Economic, Social and Cultural Rights, *General Comment No 21:Right of everyone to take part in cultural life*, 21 December 2009, E/C.12/GC/21 [CESCR General Comment 21] at 55.e.
[282] *Ibid* 38.
[283] *Ibid* 39.

4. Resources

Model Complaint Form

http://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx

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International Covenant on Economic, Social and Cultural Right, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

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UN Committee On Economic, Social and Cultural Rights, *Prior List of Issues: Canada*, 31 March 2015, E/C.12/CAN/Q/6.