



World Society of Victimology

In Consultative Status with the
United Nations ECOSOC and Council of Europe
The Office of the Secretary General

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Mr. Fabian Salvioli,
Special Rapporteur on the promotion of truth,
justice, reparation and guarantees of non-recurrence
OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneve 10, Switzerland
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Dear Mr. Fabian Salvioli,

Call for inputs – Transitional justice measures and the legacy of human rights violations in colonial contexts

The World Society of Victimology is a not-for-profit, nongovernmental organization with Special Category consultative status with the Economic and Social Council (ECOSOC) of the United Nations and the Council of Europe. Brought together by a mutual concern for victims, its world-wide membership includes victim assistance practitioners, social scientists, social workers, physicians, lawyers, civil servants, volunteers, university academics of all levels, and students.

As the Society's Secretary-General and Chair of the WSV UN Liaison Committee, I submit answers to the questionnaire on Transitional justice measures and the legacy of human rights violations in colonial contexts. The principal authors are Professor Jo-Anne Wemmers, PhD, Professeure titulaire, École de criminologie, Centre international de criminologie compare, Université de Montréal and Ismehen Melouka, a PhD student who Professor Wemmers' is supervising.

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Both Professor Robert Peacock, as President of the World Society of Victimology, and I have approved the answers as indicative of the Society's views on transitional justice in a colonial context. We assert that our answers highlight key issues and useful examples that all be they in the main grounded in Canada might be extrapolated into an international context to assist your inquiry.

Though transitional justice is not a panacea against all human rights violations in colonial contexts, it seeks to address such injustices with 'open eyes' and genuine, inclusive participation. Transitional justice should be a reactive response to harm, but also a proactive relational strategy to forge culture connectivity – that is ensuring people affected by injustice feel genuine participants in solution making rather than feel unsupported, indifferent, or ignored, and such engagement is inclusive regardless of the color of their skin, class, gender, and so on. Transitional justice should provide means for victims of human rights violation to thrive and feel valued, to attain recognition and acknowledgment, as well as redress. Furthermore, choice and empowerment as critical to regain agency.

Should you have any questions and/or require further information, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink that reads "Michael O'Connell". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Michael O'Connell AM APM
WSV Secretary General

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Transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts

1. Please indicate which mechanisms have been established in the concerned country to **hold accountable** persons accused of committing or bearing responsibility for gross violations of human rights and serious violations of international humanitarian law in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and 2 opportunities encountered in investigating, prosecuting and sanctioning such crimes.

To hold accountable the offenders, authorities need to **recognize** the victimizations and **validate** the victims.

A distinction needs to be made between recognition and acknowledgment:

- ➔ One can recognize the suffering without acknowledge their own participation/ responsibility to reconcile/heal (colonial status quo)
- ➔ Also, the recognition of past atrocities does not imply that the current/ongoing violence and victimization are acknowledged.

Example: In 2008, the Canadian federal government publicly **apologized** to the Indigenous population for the Indian Residential Schools (IRS) legacy and **recognized** that it had used the IRS policy as a tool of assimilation.

Prior to apologizing, the federal government established the *Indian Residential Schools Settlement Agreement*¹, in 2006. The IRSSA is to date the largest class action lawsuit in the country. The agreement was reached after years of public outcry by IRS survivors and militant groups. The IRSSA is an agreement between Indigenous groups, the federal government and the churches. It symbolizes an official **recognition** of the wrongdoing committed by the State and the church and the suffering experienced by the former residents. The IRSSA had 4 main components: 1) financial compensation (the Common Experience Payment and the Independent Assessment Process), 2) health and healing services, 3) the creation of a Truth and reconciliation commission and 4) commemoration.

The IRSSA did not include criminal justice and no mechanism has been established to hold individual offenders to account. However, from 2005 to 2007, private investigators, who had been hired by the government, exposed the identities of +5000 alleged abusers (i.e., various church staff). The government

¹ <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>

wanted to invite the accused to give their testimony in order to help determine the scope of the financial compensation that could be paid to victims. The accused were assured that their testimony could not lead to criminal accusations. Most of the abusers were very old and many had already died. As a result, there were no criminal prosecutions based on these victimizations.

However, these measures all focus on accountability for past victimizations. They do nothing to address ongoing victimizations. If it is sincere, recognizing victimization must include stopping any behaviour that contributes to victimization. For that to happen though, one must recognize and acknowledge the ongoing victimization of Indigenous people beyond the IRS legacy. We return to this later when we discuss **guarantees of non-repetition.**

2. Please indicate which measures have been established in the concerned country to inquire on and **establish the truth about gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts.** If such mechanisms were established, please indicate how was **the outcome** of the inquiries made public and conveyed to victims and civil society in the **affected country as well as to civil society in the former colonizing power.** If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, **whether victims and affected communities have been effectively consulted** in the design and implementation of these measures, and whether a gender perspective was adopted.

The IRSSA allowed some room for truth seeking, but very limited as the victims were ordered to respect certain limitations. Frustration by the limitations imposed by the IRSSA, Indigenous groups requested the creation of the Truth and Reconciliation Commission² (TRC). The aim was to allow for a more complete account of the truth about the legacy of the IRS by allowing survivors to share their experiences of victimization.

The Commission took place between 2009 -2015 and collected 7 000 declarations based on public hearings across the country. There were large formal hearings and small informal, community events where the survivors of the IRS legacy shared their truth. The TRC was chaired by Senator Murray Sinclair (Indigenous honorable judge) with the support of 2 other commissioners (Dr. Marie Wilson and Chief Wilton Littlechild). They were assisted by an “Indian residential school survivor committee”.

²“*Truth and reconciliation commission (summary)*”

http://www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf

Its final report contains 6 volumes of victims' testimonies and includes 94 calls of actions, which invite government, educational and religious institutions, civil society groups and all Canadians to take action. Truth commissions are not easy and from the very beginning, the TRC faced challenges. For example, the resignation of the first three commissioners less than six months after their appointment due to "*conflict with the commissioners, insurmountable challenges and government interference*". Also, although the production of the documentary records was part of the settlement agreement, the new commissioners had difficulty securing with the compliance of the government and church organizations. Indeed, the TRC had to deploy the Court several times in order to settle disputes associated with the collection of documents. The repercussions of the TRC's report on non-Indigenous people are just starting to appear....! According to a survey ³in 2016 (one year after the release of the TRC's final report) and despite a significant media coverage surrounding the release, approximately 4 non-Indigenous in 10 had heard/read something about the TRC. From this proportion of people, only 33% could actually recall something specific from the final report.

- MMIWG ⁴

Another, more recent example is the creation of a national inquiry on Missing and Murdered Indigenous Women and Girls (MMIWG) in 2016.

The Inquiry was part of the federal government's response to the TRC Call to Action. Specifically, the inquiry was mandated to investigate the systemic causes of all forms of violence against women and girls, and remedies for the disproportionate victimization of Aboriginal women and girls and identify links to the intergenerational legacy of residential schools. At its core, the national inquiry is a truth gathering process. The process was separated in 3 parts:

1. Gathering testimonies from survivors and victims' families (community Hearings and Statements Gathering events) → more than 1400 testimonies
2. Gathering information through Institutional Hearings from various experts (governments, academics, community leaders)
3. Gathering testimonies through Knowledge Keepers (and Elders)

³ Environics Institute

https://www.environicsinstitute.org/docs/default-source/project-documents/public-opinion-about-aboriginal-issues-in-canada-2016/indian-residential-schools-and-the-trc.pdf?sfvrsn=25b66577_2

⁴ MMIWG Vol a https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

MMIWG Vol b https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf

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Due to the gender sensitive subject underlying the inquiry, a gender-based perspective was chosen (everything related to violence and victimization of Indigenous women, girls and those of identify as 2SLGBTQQIA). All the process was rooted in “Indigenous methodology” and values. Three out of four commissioners were Indigenous / women and they worked closely with “advisory bodies” such as the National Family Advisory Circle (victim’s families) and Elders / Grandmothers Circle.

Also, the MMIWG enquiry invited everyone effected by the issue to participate in creating and submitting an artistic testimony, expression, or commemoration. The final report recognizes systemic victimization of Indigenous Women and highlighted it as a form of actual genocide⁵.

3. Please indicate which measures have been established in the concerned country to provide **reparation** to victims of gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such processes were established, please indicate which type of reparation was provided to victims (for example: restitution, **compensation**, **satisfaction**, and /or **rehabilitation**). If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

Three types of reparation were established following the IRS legacy: 1) financial compensation, 2) rehabilitation, and 3) satisfaction.

- Compensation

The IRSSA allowed two programs of compensation, namely the Common experience payment (CEP) and the Independent Assessment process (IAP). The CEP had a fund of 19 billion \$ for every former students of the IRS (10k for the first year + 3k for each additional year). 80k survivors were eligible, and almost everyone received their compensation. The IAP was an addition to the CEP, by providing funds to resolve claims of sexual/physical and psychological abuse in a non-criminal hearing (sort of a restorative justice program). The survivor could benefit a compensation after the hearing.

Nevertheless, not all the victims were considered / recognized by the IRSSA and some had to wait until 2016-2017 to perceive compensation/ official apologies. For example, Indigenous people from

⁵ “A legal analysis of genocide”

https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf

Newfoundland and Labrador were excluded because the residential schools they attended were open before the province joined the Confederation of Canada in 1949.

- Rehabilitation

As the victimization took place many years ago without any recognition or acknowledgment, survivors had lived their life with their trauma and cumulative consequences (both individual and collective scale). The IRSSA financed the *Aboriginal healing foundation* and the *Indian residential school's resolution health support program* to provide assistance (psychological and emotional health) to the survivors. The support was mainly provided by elders and Indigenous social workers/psychologists.

- Satisfaction

The public apologies from Prime Ministers and the TRC are forms of satisfaction because they allow national recognition of the harm and gross violations of human rights perpetuated by the IRS system. Moreover, after the MMIW National Inquiry report, the Prime Minister pledged a *National action plan* to implement the calls to action and stated on the occasion of the first anniversary of the final report: “As Canadians, we had to face the heartbreaking reality that we failed the Indigenous women, girls, and LGBTQ and two-spirit people who disappeared, suffered violence, or were killed – and that many of the same realities that led to these tragedies still exist today.” This validation of the ongoing situation is also a form of satisfaction. However, the *National Action Plan* is still not released.

4. Please indicate which measures have been established in the concerned country to **memorialize the gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts**. If yes, please indicate whether memorialization processes were established **in the affected country and /or in the former colonizing power**. If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

In addition to the perspective of truth telling by “honoring” the victims’ stories of victimization, the IRSSA wanted to raise awareness on the historical trauma in Canada and for the non-Indigenous to acknowledge the numerous impacts of the IRS legacy in the indigenous population.

The IRSSA therefore established a fund (20 M\$) specifically for commemorative initiatives all over the country (The TRC was part of the process of the commemoration).

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The *National Centre for Truth and Reconciliation* (NCTR) was also created in response to some recommendations (Call to actions) with the aim to keep and perpetuate the knowledge raised by the TRC (testimonies, victims' statements, official records), to raise awareness and remembrance with all Canadians.

The management of the center is sensitive to Indigenous values and protocols. For instance, a Governance circle (survivors and partners) leads the NCTR and is guided by a Survival Circle, Elders and Knowledge keepers. Also, the staff is 70% Indigenous (IRS survivors and second generation of victims).

One of the programs of the NCTR is the *National Student Memorial Register* to honor all the Indigenous children who died far from home while attending a residential school.

5. Please indicate which measures have been established in the concerned country to **guarantee non-recurrence** of the gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

TRC's final report, which includes 94 calls to action to instigate change, stop systematic racism and end the colonial status quo. To achieve this, authorities need to implement the calls to action, and Indigenous people must regain their autonomy and economic control over resources.

The federal government has vowed to implement the TRC's recommendations ⁶(total of 94). The calls to action cover numerous topics, which reflect the extent to which colonization continues to impact Canadian society. The topics include child welfare, justice, health issues, education, language and culture, commemoration, media, immigration etc. To date, many of the recommendations have not been implemented and problems such as systemic racism and inequality, continue to exist.

Until the recommendations of the TRC are well implemented, there is no **guarantee of non-repetition**. Only when victimization stops, is reconciliation possible. It is the product of measures ensuring that victimizations will not occur again, and the process requires actions that put an end to structural violence. But for that to happen, before we can talk about reconciliation, governments must recognize the ongoing victimization, and its role in it, and ensure change.

⁶ "Calls to Action" http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf