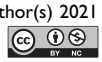
Article

NQHR

Netherlands Quarterly of Human Rights
2021, Vol. 39(1) 30–52



DOI: 10.1177/0924051921992747
journals.sagepub.com/home/nqh


Closing the cultural rights gap in transitional justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls

Colin Luoma
Doctoral Researcher, Brunel Law School, Brunel University, London, UK

Abstract

Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls (the 'MMIWG Inquiry') is the latest truth-seeking body to grapple with legacies of violence against indigenous peoples in settler colonial states. While the name, Missing and Murdered, ostensibly limits its scope of application to bodily integrity crimes, the MMIWG Inquiry instead embraced an expansive understanding of violence to encompass gross violations of indigenous cultural rights and cultural harm more generally. This article argues that this holistic approach represents a stark departure from mainstream transitional justice models which have overwhelmingly prioritised the redress of a limited set of civil and political rights violations, while neglecting the underlying structural violence and cultural harm that permeates divided societies. This article advances a case to understand the MMIWG Inquiry as a transitional justice mechanism and draws upon its Final Report to analyse how truth commissions can engage with cultural rights violations in more meaningful ways. By directly and robustly accounting for indigenous cultural harm, the MMIWG Inquiry challenged the conventional parameters of the field and demonstrated the opportunity and utility of addressing cultural rights violations through a transitional justice framework.

Keywords

Transitional justice, cultural rights, indigenous peoples, truth commissions, missing and murdered indigenous women and girls

Corresponding author:
Colin Luoma, Doctoral Researcher, Brunel Law School, 8 Kingston Ln, Uxbridge, UB8 3PH, Brunel University, London, UK.
E-mail: Colin.Luoma@brunel.ac.uk

1. INTRODUCTION

On 3 June 2019, Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls (the 'MMIWG Inquiry') published its Final Report (the 'Final Report'), documenting the devasting and disproportionate levels of violence levied against indigenous women, girls, and 2SLGBTQQIA ('two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual') individuals.[1] In a historic finding, the MMIWG Inquiry determined that this systemic violence amounts to an ongoing, race-based genocide against indigenous peoples, one that specifically targets women, girls, and 2SLGBTQQIA individuals. While this genocide conclusion is at the core of the Final Report, the propriety of which has spurred considerable public debate, it also overshadowed another key contribution of the MMIWG Inquiry, namely its unprecedented engagement with cultural rights violations, and cultural harm more generally, through a mechanism of transitional justice.[2]

Undeniably, the MMIWG Inquiry was triggered by endemic physical violence against indigenous women and girls. Notwithstanding, its broad mandate and holistic approach empowered it to move beyond a singular focus on bodily integrity violations, and towards a richer and more accurate accounting of the full range of harm experienced by indigenous peoples in Canada, including pervasive violations of their cultural rights under international law. In the context of indigenous peoples, these violations manifest themselves in various ways, including:

> the seizure of traditional lands, expropriation and commercial use of Indigenous cultural objects without permission by indigenous communities, misinterpretation of indigenous histories, mythologies and cultures, suppression of their languages and religions, and even the forcible removal of Indigenous peoples from their families and denial of their indigenous identity.[3]

Not only do these attacks on culture fuel forms of physical violence, but as the MMIWG Inquiry rightly recognised, they also work to destroy the basic social fabric of indigenous society, creating multigenerational, structural injustices that weaken indigenous sovereignty and identity.[4]

The MMIWG Inquiry's progressive approach can be directly juxtaposed against the historic marginalisation of cultural rights in the field of transitional justice. Transitional justice, the internationally endorsed set of practices and principles designed to address mass violence and large-scale human rights abuses, has largely neglected cultural rights violations in both its discourse and praxis. Adhering to conventional approaches rooted in Western liberalism, the field has traditionally prioritised the legal redress of a narrow set of civil and political rights violations, while overlooking many of the underlying harms embedded in transitional societies, including large-scale and ongoing violations of cultural rights. Even as transitional justice has expanded its conceptual boundaries to begin encompassing a broader scope of harm, cultural rights remain on the outermost peripheries. Indeed, commentators consistently challenge the omission of the economic, social and cultural ('ESC') category of rights, yet give no independent consideration to

1. National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.* (2019).
2. The phrase 'cultural harm' is used in this article to encapsulate the broad spectrum of attacks on the cultures, cultural practices, traditions, languages and cultural identities of individuals and/or groups.
3. Alexandra Xanthaki, 'Indigenous Cultural Rights in International Law' (2000) 2 European Journal of Law Reform 343, 343.
4. MMIWG Inquiry, *The Final Report* (n 1) 327–408.

cultural rights. These violations are also overlooked in practice where programming routinely sidelines issues of cultural harm in lieu of addressing the bodily integrity violations deemed graver and more important for transitional societies. While this neglect has arguably subsided in recent years, cultural harm is still rarely framed as violative of State human rights obligations in the same way that civil and political rights violations consistently are. This neglect reflects a serious deficiency in transitional justice's ability to effectuate justice for indigenous peoples and remains a key blind spot in the field.

This article interrogates the cultural rights gap through the lens of the MMIWG Inquiry. In the first instance, dogmatic transitional justice theory would exclude the MMIWG Inquiry as a transitional justice case altogether on account of Canada being an established democracy undergoing no discernable political transition. Strict adherence to certain paradigmatic cases has long confined the application of transitional justice to post-authoritarian and post-conflict societies. This article advances a case for conceptualising the MMIWG Inquiry as a transitional justice mechanism and challenges the peaceful and democratic nature of Canada and other settler colonial states. Narrow conceptions of what amounts to a bona fide transition has largely shielded Western democracies from being forced to reckon with their own violent legacies towards indigenous peoples. Yet, it is highly debatable whether Canada is either peaceful or liberal *vis-à-vis* indigenous peoples. Additionally, there is no reason why the conceptual framework of transitional justice cannot be applied to settler colonial states that are undergoing less obvious, but still significant transitions.

As a transitional justice measure, the MMIWG Inquiry challenged the field's cultural rights gap by confronting indigenous cultural harm through a human rights-based approach. It deviated from dominant approaches by directly and robustly engaging with indigenous cultural harm and indigenous cultural rights violations. The MMIWG Inquiry elicited testimonies of mass cultural disruption and loss, on account of Canada's colonial policies and ideologies, ultimately concluding that these wrongs constitute their own form of violence, as well as contribute to the physical and structural violence experienced by indigenous women and girls.[5] Instead of backgrounding indigenous cultural harm, it placed it on par with the other forms of violence inflicted on indigenous women and girls. By broadly conceiving of violence to include cultural wrongdoing, and linking these abuses to international human rights standards, the MMIWG Inquiry demonstrates how transitional justice measures can begin to engage with cultural rights violations in more meaningful ways.

To analyse and interrogate the field's cultural rights gap and the treatment of these rights in the MMIWG Inquiry, this article employs a desk-based review of the Final Report and its related documents, as well as the rich body of secondary literature that engages with the various intersections between transitional justice and indigenous peoples, ESC rights, and settler colonialism. The corpus of these materials include transitional justice outputs, reports of non-governmental and intergovernmental organisations, and a growing body of critical scholarship pushing the traditional parameters of the transitional justice field. As transitional justice is a global, interdisciplinary field, this review naturally extends beyond the confines of international human rights law and entails a broader analysis of the literature in various disciplines.[6]

5. ibid 327.
6. Christine Bell 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-field"' (2006) 3 International Journal of Transitional Justice 5.

2. THE MMIWG CRISIS

Canada has long embraced a national identity and international reputation as a benevolent, human rights-abiding country. Yet, this has never been a reality for indigenous peoples, whose 500-year relationship with the State continues to be defined by violence. Canada is a settler colonial state, a nation where colonisers imposed their own cultures, structures and laws on indigenous peoples, occupied their lands and then never left.[7] Kyle Powys Whyte points out that settler colonial states 'are responsible for endorsing or failing to reform laws, policies, economic practices, and cultural norms that are violently anti-Indigenous.'[8] This colonial violence is said to be 'woven into the fabric of Canadian history in an unbroken thread from past to present.'[9] These settler colonial structures and ideologies led the MMIWG Inquiry to remark that '[t]his country is at war, and Indigenous women, girls, and 2SLGBTQQIA people are under siege.'[10]

Indigenous women and girls have been particularly targeted by this colonial violence. Historically, women held significant positions of power and influence in many indigenous communities.[11] The Canadian settler state, especially through various Christian missionaries, quickly challenged the leadership of indigenous women and indigenous conceptions of gender.[12] It replaced indigenous cultural systems with Euro-centric worldviews that prioritised individualism and positioned women subservient to men in familial and community hierarchies.[13] For example, Canada's Indian Act originally tied a woman's indigenous status to her husband, later deemed by the UN Human Rights Committee to infringe on the right to enjoy one's own culture under Article 27 of the International Convention on Civil and Political Rights.[14] The Indian Act effectively legislated indigenous women out of power and agency, increasing their vulnerability to settler state violence.

Not only were indigenous women disempowered by colonial laws and policies, but they are often depicted as dirty, lazy, immoral and ultimately disposable. These racist and gendered stereotypes persist in modern Canadian society.[15] This has enabled a culture of impunity with respect to the gender-based violence that necessitated the MMIWG Inquiry.[16] It also helps to explain the shift

7. Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (University of Hawai'i Press 2005); Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387.
8. Kyle Powys Whyte, 'On Resilient Parasitisms, or Why I'm Skeptical of Indigenous/Settler Reconciliation' (2018) 14 J. Global Ethics Journal of Global Ethics 277, 279.
9. Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 6.
10. National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: Executive Summary of The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) 3.
11. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* (2015) 1; National Inquiry into Missing and Murdered Indigenous Women and Girls (n 1) 331.
12. MMIWG Inquiry, *Executive Summary* (n 10) 17. For the purposes of discussing transitional justice in settler colonial states, such as Canada, this article uses the binary 'indigenous-settler' terminology while recognising that the question of who is a settler is highly contested. *See* Shino Konishi, 'First Nations Scholars, Settler Colonial Studies, and Indigenous History' (2019) 50 Australian Historical Studies 285, 295.
13. MMIWG Inquiry, *Executive Summary*(n 10) 61; MMIWG Inquiry, *The Final Report* (n 1) 285.
14. *Sandra Lovelace v Canada*, Human Rights Committee, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 (1985).
15. MMIWG Inquiry, *The Final Report* (n 1) 386.
16. MMIWG Inquiry, *Executive Summary* (n 10) 17-18.

in the respect that was once conferred upon indigenous women, to now an environment where systemic violence towards them has become normalised and institutionalised.

Earlier studies confirmed that indigenous women and girls in Canada experience violence at significantly higher rates than non-indigenous individuals.[17] In 2014, the Royal Canadian Mounted Police issued its own report stating that indigenous women made up roughly 16 percent of all female homicides between 1980 and 2012, despite constituting only 4 percent of the female population.[18] International bodies and experts soon took notice, with the former UN Special Rapporteur on the Rights of Indigenous Peoples calling it a 'disturbing phenomenon.'[19] Despite this, government officials were initially unwilling to acknowledge or address the problem, as epitomised by former Canadian Prime Minister Stephen Harper's 2014 statement that a formal investigation into the MMIWG crisis was 'not really high on our radar.'[20]

In spite of settler indifference, the MMIWG epidemic was forced onto the political landscape by grassroots organisations, largely led by indigenous women. A prominent example is Christi Belcourt's *Walking with Our Sisters* exhibit, a traveling display of moccasin vamps that sought to raise awareness about MMIWG.[21] Another example is *Iskwewuk E-wichiwitochik* [Women Walking Together], a coalition of individuals in Saskatchewan which provides moral support to families of MMIWG.[22] Indeed, there have been many indigenous organisations across Canada advocating on behalf of MMWIG and their families. Among other things, these groups have campaigned for justice, conducted mass searches, raised awareness and provided various levels of support to victims and family members.

After years of grassroots lobbying, mounting pressure and a change in government, Canada announced the launch of the MMIWG Inquiry in December 2015. Prior to its commencement, the government engaged in a pre-inquiry process where it consulted with thousands of stakeholders over the course of one year in order to define the scope and process of the MMIWG Inquiry.[23] One of the primary outcomes of these consultations was the expressed need to reach beyond mere disappearance and homicide statistics, and to begin addressing the underlying root causes of

17. Amnesty International Canada, *Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada.* (Amnesty International Canada 2004) <http://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=3258159> accessed 18 July 2020; Native Women's Association of Canada, *What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative* (Native Women's Association of Canada 2010) <https://www.deslibris.ca/ID/224201> accessed 18 July 2020.
18. Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: A National Operational Overview* (2014) <https://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-national-operational-overview> accessed 1 August 2020. The MMIWG Inquiry maintains that indigenous women and girls now comprise almost 25 per cent of homicide victims in Canada. MMIWG Inquiry, *The Final Report* (n 1) 55.
19. James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Canada' (2015) 32 Arizona Journal of International and Comparative Law 143, 167.
20. 'Full Text of Peter Mansbridge's Interview with Stephen Harper' *CBC News* (Toronto, 17 December 2014) <https://www.cbc.ca/news/politics/full-text-of-peter-mansbridge-s-interview-with-stephen-harper-1.2876934> accessed 1 August 2020.
21. Walking with our Sisters, <http://walkingwithoursisters.ca> accessed on 1 August 2020.
22. Jennifer Ackerman, 'Saskatoon women contribute chapter to book on missing and murdered Indigenous women and girls' *Regina Leader-Post* (Regina, 15 July 2018) <https://leaderpost.com/news/saskatchewan/saskatoon-women-contribute-chapter-to-book-on-missing-and-murdered-indigenous-women-and-girls> accessed 11 November 2020.
23. Government of Canada, National Inquiry in to Missing and Murdered Indigenous Women and Girls: Pre-inquiry design process (3 August 2016) <https://www.rcaanc-cirnac.gc.ca/eng/1449240082445/1534527468971> accessed 11 November 2020.

violence against indigenous women and girls.[24] The pre-inquiry process made it apparent that the physical violence experienced by indigenous women and girls is inextricably linked with other forms of harm, including mass cultural wrongdoing, which also needed to be addressed through the truth-telling process.

In August 2016, five highly qualified commissioners were appointed to lead the MMIWG Inquiry.[25] The pre-inquiry process identified a desire for the commissioners to be majority indigenous women, representative of Canada's First Nations, Métis and Inuit communities, and possess expertise and experience in legal principles and research methods, among other qualifications. The four commissioners that ultimately shepherded the MMIWG Inquiry to conclusion largely met these criteria, all of whom are respected legal experts and/or indigenous rights advocates, and represented a diversity of cultures and geographic areas in Canada.[26]

In June 2019, after nearly three years, 2,380 participants, almost 1500 testimonials, and 24 public hearings, the MMIWG Inquiry published its Final Report, entitled 'Reclaiming Power and Place'. It paints a grim picture for indigenous women, girls and 2SLGBTQQIA individuals in Canada. Not only are they infinitely more likely to be murdered or disappeared compared to any other demographic group, but they also suffer higher rates of assault, robbery and sexual violence.[27] Those who manage to escape this physical violence are still subjected to rampant racism, discrimination and economic, social and cultural marginalisation.[28] The MMIWG Inquiry also went to great lengths to demonstrate the inextricable links between indigenous, gender-based violence and Canada's colonial policies and ideologies.[29] A discussed more fully below, this included a meaningful engagement with indigenous cultural rights violations, and cultural harm more generally, which the MMIWG Inquiry directly attributed to higher rates of physical violence against indigenous women and girls.[30]

3. THE MARGINALISATION OF CULTURAL RIGHTS IN TRANSITIONAL JUSTICE

Analysing the marginalisation of cultural rights in transitional justice requires a basic understanding of what constitutes a cultural right under the international human rights regime. Cultural rights are inherently tied to the definition of culture.[31] However, culture is one of the most complicated

24. Brenda Gunn, 'Engaging a Human Rights Based Approach to the Murdered and Missing Indigenous Women and Girls Inquiry,' (2017) 2 Lakehead Law Journal 89, 90-91.
25. Government of Canada(n 23).
26. The Inquiry's four commissioners were Marion Buller (Cree, Mistawasis First Nation), Michèle Audette (Innu), Qajaq Robinson, and Brian Eyolfson (Saulteaux, Couchiching First Nation). One of the original 5 commissioners, Marilyn Poitras, resigned in 2017. See 'Marilyn Poitras on why she resigned as MMIWG commissioner and her hopes for change', *CBC News* (Toronto, 16 July 2017) <https://www.cbc.ca/news/indigenous/marilyn-poitras-mmiwg-commissioner-resign-q-a-1.4207199> accessed 11 November 2020.
27. MMIWG Inquiry, *The Final Report* (n 1) 55.
28. ibid 56.
29. This article also does not explicitly probe the Inquiry's rich, intersectional approach to gender-based violence, which also makes the Final Report a unique transitional justice output. For an explication on indigenous gendered violence and the MMIWG Inquiry, see the contributions in Volume 28 of the Canadian Journal of Women and the Law (2016).
30. MMIWG Inquiry, *The Final Report* (n 1) 408.
31. Janusz Symonides, 'Cultural Rights: A Neglected Category of Human Rights' 50 International Social Science Journal 559, 560.

words in the English language.[32] It has been described as 'complex',[33] 'fluid'[34] and 'constantly evolving'.[35] In turn, hundreds of definitions have been proffered across various disciplines. Notwithstanding, it is now widely accepted that culture encompasses an entire 'way of life' of a social group.[36] Under this conception, culture broadly includes values, knowledge, beliefs, language, literature, philosophy, religion, science, and technology, among other concepts.[37] This expansive interpretation has been particularly important for indigenous peoples, who do not necessarily differentiate between law, religion and culture in the same way that the majority of people do in the West.

Broadly speaking, cultural rights are those human rights that promote, protect and preserve the rights of individuals and communities to develop and maintain their cultural identities and practices.[38] However, constructing a definitive list of cultural rights is arguably futile with the endorsement of culture as a way of life. For indigenous peoples, distinctions between cultural rights and their rights to land, religion and education cannot be clearly demarcated. In addition to the signature cultural rights protections, such as the right to take part in cultural life under Article 15(a)(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') or the right of minorities to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights ('ICCPR'), there are also numerous human rights that have direct links to culture. These include, *inter alia*, the freedoms of religion, association and expression and the right to education.[39] Moreover, other human rights with no apparent link to culture almost always have important cultural implications.[40]

The UN Declaration of the Rights of Indigenous Peoples ('UNDRIP') delineates the most specific, detailed cultural rights protections. With respect to culture, UNDRIP explicitly protects indigenous peoples' right to (i) maintain, develop, practice and revitalise cultural traditions, ceremonies, customs, histories; (ii) practise, develop and teach their spiritual and religious traditions, customs and ceremonies; (iii) control and access cultural sites and objects; (iv) demand the repatriation of their human remains; (v) revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures; (vii) maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions; (viii) establish and control culturally appropriate educational systems; and

32. Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford University Press 1983), 87.
33. Valentina Vadi, 'The Cultural Wealth of Nations in International Law' (2012) 21 Tulane Journal of International and Comparative Law 87, 113.
34. Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Brill, 2007).
35. Dominic McGoldrick, 'Culture, Cultures, and Cultural Rights', in Mashood A. Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007) 440.
36. Xanthaki (n 3) 355-58.
37. Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press 1993) 188.
38. Yvonne Donders, 'Foundations of collective cultural rights in international human rights law,' in Andrej Jakubowski (ed), *Cultural Rights as Collective Rights* (Brill Nijhoff 2016) 85.
39. ibid.
40. For example, the right to health, the right to food, and housing rights have important cultural dimensions and their effective realisation is conditioned on them being provided in culturally appropriate ways. Committee on Economic, Social and Cultural Rights ('CESCR'), 'General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)', 21 December 2009, UN Doc. E/C.12/GC/21, para 16(e).

promote, develop, and maintain their institutional structures and juridical systems.[41] Additionally, and in lieu of an express reference to ethnocide, UNDRIP prohibits forced assimilation and destruction of indigenous culture, as well as the forcible transfer of indigenous children.[42]

The definitional ambiguity surrounding cultural rights is partially to blame for their historical neglect in the human rights domain. Despite the fact that States have repeatedly affirmed the universal, indivisible, interdependent and interrelated nature of all human rights, cultural rights have been consistently overlooked and underdeveloped.[43] Dominic McGoldrick colorfully states that '[c]ultural rights are the failed Cinderella of the international human rights lexicon – pretty to pick sure but they don't quite make it to the ball'.[44] Civil and political rights have long been considered more important and prioritised above ESC rights in human rights practice and discourse. Even when the literature focuses on ESC rights, it routinely does so without giving any real consideration to cultural rights.[45] This neglect is reflected in numerous human rights instruments, which either omit any reference to cultural rights or, alternatively, place them towards the end of the document.[46]

The neglect of cultural rights in the parent field of human rights is a prejudice that has undeniably carried over to transitional justice and has resulted in the invisibility of such rights within post-conflict measures.[47] This article maintains that cultural rights constitute a significant blind spot in transitional justice, one that has yet to be sufficiently interrogated on either theoretical or practical levels. It has been repeatedly said that the field embraces an exceedingly narrow idea of what type of violence is worthy of transitional scrutiny.[48] There is, as Ruben Carranza suggests, a 'prevailing assumption' that transitional justice mechanisms 'are meant to engage mainly, if not exclusively, with civil and political rights violations that involve either physical integrity or personal freedom'.[49] Thus, doing justice in times of transition has long meant the legal redress of a limited set of civil and political rights violations (genocide, war crimes, torture, forced disappearances, sexual violence) to the exclusion of all other forms of violence, including mass cultural harm.

The supreme emphasis placed on redressing discrete, bodily integrity violations has generally worked to exclude issues of structural violence and cultural harm, greatly restricting the scope of transitional justice. Seemingly extraordinary acts of physical harm are prioritised, but the

41. Arts. 11, 12, 13, 15, 34 United Nations Declaration on the Rights of Indigenous Peoples*, Resolution* (adopted on 13 September 2007), UNGA Res 61/295.
42. ibid, Articles 7 and 8.1.
43. Symonides (n 31).
44. McGoldrick (n 35) 447.
45. The former Special Rapporteur in the Field of Cultural Rights has went so far as to state that 'cultural rights have been the poor cousin of economic and social rights, receiving scant attention at the national and international levels. Farida Shaheed, 'Report of the Special Rapporteur in the Field of Cultural Rights', UN Doc A/HRC/14/36 (22 March 2010).
46. After years of neglect, increased attention is beginning to be afforded towards cultural rights, particularly as a result of key developments at the UN, such as the adoption of UNDRIP, the appointment of a Special Rapporteur in the Field of Cultural Rights, and the CESCR's adoption of General Comment 21, which serves as the authoritative interpretation of the right to take part in cultural life contained in Article 15(a)(1) of the ICESCR.
47. Zinaida Miller, 'Effects of Invisibility in Search of the "Economic" in Transitional Justice' (2008) 2 International Journal of Transitional Justice 266, 277.
48. Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275, 284-86.
49. Rubén Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 International Journal of Transitional Justice 310, 310.

quotidian, invisible violence that permeates post-conflict and divided societies remains a problem for post-transitional processes, development actors and long-term national reforms.[50] ESC rights are not seen as real, justiciable rights worthy of adjudication in transitional justice processes.[51] So, while egregious episodes of physical violence fit comfortably within the traditional boundaries of the field, endemic cultural harm is largely treated as outside its remit.

This neglect is apparent in transitional justice discourse, as well as in the field's practical interventions. Numerous authors now routinely challenge the long-standing exclusion of economic and social rights from transitional justice.[52] They extensively grapple with whether and how the field can more adequately address socio-economic harm, to the point where it can no longer be claimed that transitional justice ignores economic and social rights. Yet, despite the significant momentum behind this socio-economic critique, it has not been extended specifically to address the omission of cultural rights. Evelyne Schmid and Aoife Nolan recognise this gap in the literature, remarking that 'the particular challenges posed by [cultural] rights[. . .]have not generally been given adequate attention by transitional justice scholars and deserve further research'. However, overwhelming the absence of cultural rights violations is not even acknowledged.

Perhaps unsurprisingly, given their paucity in the discourse, cultural rights violations are equally overlooked in practice. Transitional justice programming remains overwhelmingly fixated on redressing violations of civil and political rights, ordinarily in the form of large-scale acts of physical violence. With few exceptions, mechanisms fail to confront violations of cultural rights, even when they feature prominently in underlying conflicts. This neglect runs through all of the traditional mechanisms in the proverbial toolbox of transitional justice, as recognised by the UN Office of the High Commissioner for Human Rights, which concluded that, along with socio-economic rights violations, there had not been a 'widespread move' to include violations of cultural rights in transitional justice programming.[53]

Some early truth commissions, such as Peru's Truth and Reconciliation Commission (the *Comisión de la Verdad y Reconciliación del Perú*, or 'CVR') and Guatemala's Commission for Historical Clarification (*Comision para el Esclarecimiento Historico*, or 'CEH') engaged with indigenous cultural harm, albeit in limited and problematic ways. The CVR found that Peru's internal conflict disproportionately impacted indigenous peoples and their cultural identities, with 75 per cent of the 70,000 casualties being speakers of indigenous languages.[54] Yet, despite a relatively broad mandate, the CVR focused exclusively on civil, political and economic rights violations.[55] In Guatemala, the CEH determined that, as a result of the country's decades-long civil

50. Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Social and Legal Studies 171, 179.
51. Amanda Cahill-Ripley, 'Foregrounding socioeconomic rights in transitional justice: Realising justice for violations of economic and social rights' (2014) 32 *Netherlands Quarterly of Human Rights* 183, 188.
52. In particular, *see* the special issue in the International Journal of Transitional Justice dedicated to the nexus between transitional justice and development. (2008) 2 *The International Journal of Transitional Justice.*
53. United Nations and Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (HR/PUB/13/5, 2014) 1 <https://www.ohchr.org/Documents/Publications/hr-pub-13-05.pdf> accessed on 20 November 2020.
54. ComisioÌn de la Verdad y ReconciliacioÌn, *Informe Final de la ComisioÌn de la Verdad y ReconciliacioÌn*, Vol. 1 (Lima, 2004).
55. ibid; See also César Rodríguez-Garavito and Yukyan Lam, 'Addressing Violations of Indigenous Peoples' Territory, Land, and Natural Resource Rights During Conflicts and Transitions,' in International Center for Transitional Justice, *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (New York, 2012).

war, indigenous Mayans were prevented from honouring their cultural and religious rites, forced to conceal their ethnic and cultural identities, and prohibited from transmitting their culture to subsequent generations.[56] It further emphasised how massacres, forced disappearances and other egregious acts of physical violence were used to attack Mayan culture.[57] Notwithstanding, this cultural wrongdoing was analysed through the prism of bodily integrity violations and not as independent violations of cultural rights with corresponding State obligations under international law.[58]

In many ways, Canada's Truth and Reconciliation Commission ('the TRC') served as a model for the MMWIG Inquiry and other truth commissions initiated in settler colonial states. The TRC centered the cultural wrongdoing committed by Canada against indigenous peoples, most saliently by finding that Canada had committed cultural genocide through the operation of the Indian residential school system, which was designed to eliminate indigenous cultural identities and practices. Cultural genocide is not enshrined in any binding, legal instrument, but progressive jurisprudence has helped to develop the concept under international law, including in the Inter-American human rights system.[59] Among other things, the TRC concluded that Canada had seised indigenous lands, forcibly transferred indigenous communities, banned languages and spiritual practices and disrupted the intergenerational transmission of cultural values and identities.[60] Despite this culture-centric approach, the TRC's engagement with cultural rights violations was hindered by a restrictive mandate that neither empowered it to consider abuses outside the context of residential schools or frame any cultural wrongdoing as violative of State obligations under international law. Accordingly, while there have been modest developments in practice, cultural rights violations are still highly marginalised in the field of transitional justice.

4. THE MMIWG INQUIRY: A TRANSITIONAL JUSTICE RESPONSE?

Like other settler colonial states, Canada tends to support transitional justice initiatives in the developing world, but balks at any notion that its own actions should be the subject of such scrutiny.[61] Canada does not refer to the MMIWG Inquiry or any other internal domestic process as a mechanism of transitional justice.[62] The Final Report does not call itself a transitional justice output, nor does it identify what Canada is transitioning away from or towards. Therefore, it is perhaps logical to question whether the MMIWG is a transitional measure.

56. Comisión para el Esclarecimiento Histórico ('CEH'), Memoria Del Silencio (Guatemala, 1999).
57. ibid.
58. Neither the CEH or CVR was designed and implemented in consultation with indigenous communities and thus failed to incorporate their worldviews and justice processes. Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39 University of New South Wales Law Journal 512, 523.
59. *See, e.g. Plan de Sanchez Massacre v Guatemala*, Reparations, Judgment of 19 November 2004; *see also* Third Report on the Situation of Human Rights in the Republic of Guatemala. OEA/Ser.1/V/II.67, doc. 9 1986, 114 <http://www.cidh.org/countryrep/Guatemala85sp/indice.htm> accessed on 20 November 2020.
60. Truth and Reconciliation Commission of Canada (n 11) 1.
61. Jennifer Balint, Julie Evans and Nesam Mcmilan 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8 International Journal of Transitional Justice 194, 195.
62. Jennifer Matsunaga, 'Two Faces of Transitional Justice: Theorizing the Incommensurability of Transitional Justice and Decolonization in Canada' (2016) 5 Decolonization: Indigeneity, Education 24, 29.

For many commentators, the act of a transition is the differentiating factor between transitional and 'ordinary' justice.[63] However, it has never been clearly articulated what exactly amounts to a transition or what societies are purportedly transitioning from or to.[64] From a semantical perspective, the application of transitional justice does not dictate a specific type of change or endpoint. This is supported by the UN's definition (the mostwidely cited and influential definition in the discourse) describing transitional justice as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of largescale past abuses', without tying it to an identifiable transition.[65] Despite this, the field has been exceedingly rigid in what it accepts as a transition.[66] Narrow constructions of the term can be traced to the late 1980's and early 1990's, when situations considered deserving of extraordinary justice were limited to States experiencing political shifts from authoritarian rule to liberal democracy.[67] Later, the idea of a transition was expanded to encompass the period of time immediately following the cessation of protracted armed conflict. Transitional justice was no longer strictly confined to political transitions, but could be employed in societies moving from mass violence to peace. These emerged as the two paradigmatic cases of transitional justice.[68]

Unlike traditional post-conflict and post-authoritarian societies, Canada is considered a stable, peaceful democracy.[69] No 'rupture point' akin to the termination of armed conflict or a regime change is present in the Canadian case. There is no clean or obvious break with the past, where a new dawn is to be realised.[70] As such, some commentators question the applicability of transitional justice in countries like Canada, which they argue are quintessentially non-transitional.[71] Even staunch supporters of more robust forms of transitional justice acknowledge the inherent difficulty of attaching the transitional justice label to efforts aimed at addressing historical injustices in established democracies.[72]

Padraig McAuliffe calls established democracies 'far removed from that of a paradigmatic transition.'[73] He advocates for the retention of an orthodox conception of transition, one that excludes peaceful, liberal democracies. He principally argues that the efficacy of transitional justice can best be evaluated within the context of the paradigmatic transitions and maintains that labeling other contexts transitional, such as established democracies, is a 'convenient fiction' that

63. Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 International Journal of Transitional Justice 199, 207; *but see* Eric Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 Harvard Law Review 762.
64. Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay.' (2007) 1 The International Journal of Transitional Justice 23, 35.
65. UN. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General.* (UNSC S/2004/616, 2004) para 8.
66. A. Dirk Moses, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15 Citizenship Studies 145, 145.
67. Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 75–89.
68. Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7 International Journal of Transitional Justice 224, 227.
69. The supposedly peaceful nature of settler colonial states has been strenuously challenged and skillfully debunked. *See generally* Regan (n 9).
70. Balint, Evans and McMilan (n 61) 200.
71. *See, e.g.* Padraig McAuliffe, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition' (2011) 2 Journal of Conflictology 32.
72. Nagy (n 48) 281.
73. McAuliffe (n 71) 36.

'risks conceptual incoherence'.[74] Instead of extending the theoretical apparatus of transitional justice to what McAuliffe calls 'non-transitional circumstances', he suggests treating such humanitarian projects as separate from the mechanisms employed in the paradigmatic transitions.[75]

Admittedly, the conceptual expansion of what constitutes a transition should not be an unrestrained exercise.[76] At the same time, arguments that seek to bar the application of transitional justice in established democracies commonly fail to account for the nature of the violence attendant with settler colonialism. For instance, McAuliffe suggests that problems faced by established democracies are 'less intractable', in part because there are 'decades between the wrongdoing and the application of [transitional justice]'.[77] Such a strict temporal outlook, however, ignores the continuing violence of settler colonialism, where settler states continue to maintain and enforce colonial laws and systems that oppress and marginalise indigenous peoples. That is why the late Patrick Wolfe called settler colonialism a structure rather than an event.[78] In the settler colonial context, these harms cannot be relegated to a distant past because the policies and structures that sustain such violence continue largely unabated. Thus, centuries after the arrival of colonial powers, the relationship between settler societies and indigenous peoples remains fractured and volatile, suggesting a level of intractability on the same plane as the field's paradigmatic transitions.

It is also highly questionable whether established democracies have actually reached the desired end points of the paradigmatic cases. Authoritarian and conflict-affected nations do not hold a monopoly on the commission of serious and systemic human rights abuses.[79] On the surface, Canada may be considered a peaceful, democratic State. However, this overlooks the structural violence and mass cultural harm that continues to jeopardise the lives of indigenous peoples in a similarly repressive and violent manner.[80] Indeed, it is arguably misleading to suggest that Canada is liberal or democratic with respect to its relationship with indigenous peoples and these communities strenuously dispute the myth of Canada's benevolence. Gerald Taiaiake Alfred, for instance, argues that Canada, 'operating in the guise of a liberal democratic state is, by design and culture, incapable of just and peaceful relations with Indigenous peoples.'[81] Thus, while Canada is less associated with the repression and violence that characterises many of the conventional transitional societies, large-scale violence against indigenous communities remains pervasive, making it an apt case for a transitional justice response.

There is also an urgent need to deviate from the field's preoccupation with the paradigmatic transitions when addressing indigenous harm. Transitions to liberal democracy, typically viewed as an unqualified good, have actually been the cause of much harm to indigenous communities.[82] Democratisation in settler colonial states has its foundations in the genocide and mass

74. ibid 33,40.
75. ibid 40.
76. Hobbs (n 58) 514.
77. McAuliffe (n 71) 36.
78. Wolfe (n 7) 388.
79. Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 271 Human Rights Quarterly 172, 174.
80. Andrew Woolford 'Transition and Transposition: Genocide, Land and the British Columbia Treaty Process' (2011) 4 New Proposals: Journal of Marxism and Interdisciplinary Inquiry 67, 69.
81. Gerald Taiaiake Alfred, 'Restitution Is the Real Pathway to Justice for Indigenous Peoples' in Gregory Younging and others (eds), *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (2011) 184.
82. Woolford (n 85) 69–70.

dispossession of indigenous peoples. Thus, liberal democracy is not the endpoint but really the origin of violence in these contexts.[83] The liberal democracy model assumes that indigenous peoples will, among other things, eventually, assimilate into wider society – a clear violation of indigenous peoples' rights to self-determination and culture.[84]

Instead of outright rejecting democratic, settler colonial states as transitional justice cases, this article agrees with Dustin Sharp that the concept of a transition needs to be reconceptualised to 'capture[. . .] the complex realities of an expanding field'.[85] It could be fairly said that Canada is experiencing a less obvious, but still significant transition with respect to its relationship with indigenous peoples. It is worth noting that the MMIWG Inquiry was initiated after a change in government, and at a minimum, a diminished level of resistance to the idea that legacies of violence against indigenous women and girls deserved to be reckoned with on a national level. The transition at issue can be fairly conceptualised as one from a violent and unjust relationship with indigenous peoples to one that is at least less violent and more just.[86] This re-theorisation of what constitutes a transition supports a transitional response in Canada without rendering the project conceptually incoherent.

Whether this transition is fully realised is yet to be determined, and there are many indications to suggest that Canada will fall woefully short of a peaceful and just relationship with indigenous peoples. At the same time, almost all transitions are protracted and uncertain. Stephen Winter astutely maintains that a transition can be 'gradual, cumulative, contested and perhaps incomplete.'[87] Thus, a partial or even an unlikely transition does not foreclose applying the theoretical lens of transitional justice in Canada.

Even if Canada can be the proper subject of transitional justice as an established democracy, the MMIWG Inquiry must also be justified as a transitional justice measure. Truth commissions are a signature mechanism in the field, but not every investigatory body amounts to one. These bodies also do not transform into transitional justice mechanisms by being labeled truth commissions, nor are they excluded by having a different title. They go by various names, including truth commissions, truth and reconciliation commissions, truth and justice commissions, royal inquiries, national inquiries, and official inquiries, among others.

Priscilla Hayner, perhaps the foremost expert in the area, provides the most comprehensive criteria for what constitutes a truth commission, describing them as bodies that:

1. are focused on past, rather than ongoing, events;
2. investigate a pattern of events that took place over a period of time;
3. engage directly and broadly with the affected population, gathering information on their experiences;
4. are temporary, with the aim of concluding with a final report; and
5. are officially authorised or empowered by the state.[88]

83. Sarah Maddison and Laura J. Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice' (2014) 2 Peacebuilding Peacebuilding 253, 266.
84. UNDRIP (n 41), Arts. 3, 8.
85. Dustin N Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2015) 9 International Journal of Transitional Justice 150, 157.
86. Balint, Evans and McMilan (n 61) 214.
87. Winter (n 68) 230–31.
88. Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011) 11-12.

This definition aptly captures the essence of what distinguishes truth commissions from other investigative bodies.

The MMIWG Inquiry was initiated under Canada's Inquiries Act (1985), which gives authority to the government to 'cause inquiry to be made into and concerning any matter connected with the good government of Canada[. . .]'.[89] These commissions of inquiry are a common tool throughout the Commonwealth, often used to investigate discrete issues that few would seriously contend fall within the ambit of transitional justice.[90] In contrast to other commissions of inquiry however, the MMIWG Inquiry is not focused on addressing an isolated event, but rather a history of large-scale violence against indigenous women, girls and 2SLGBTQQIA individuals. Admittedly, the MMIWG crisis in Canada is ongoing. At the same time, it would be difficult to identify any transitional society where human rights abuses are confined solely to past. As it meets all of the other criteria set forth by Hayner, and acknowledging the need to not define the concept too rigidly, the MMIWG can be fairly understood as truth commission worthy of analysis as a mechanism of transitional justice.[91]

5. THE MMIWG INQUIRY'S ENGAGEMENT WITH CULTURAL RIGHTS VIOLATIONS

The MMIWG Inquiry represents a remarkable act of truth-telling, a nearly three-year process of investigating and documenting widespread violence against indigenous women, girls, and 2SLGBTQQIA individuals in Canada. As the first transitional justice mechanism to specifically focus on indigenous women and girls, its intersectional approach to gender-based violence was a defining feature of the MMIWG Inquiry and a unique intervention in the field.[92] The MMIWG Inquiry also seised upon the opportunity to delve into the full range of harm that enabled and contributed to the MMIWG crisis, including mass cultural wrongdoing.

As a transitional justice mechanism, the MMIWG Inquiry has uniquely foregrounded cultural rights violations. Recognising the close nexus between cultural loss and indigenous, gender-based violence, the MMIWG Inquiry reached beyond the bodily integrity violations (in the case of MMIWG, forced disappearances and killings) that comprise the focus of mainstream transitional justice and instead, directly engaged with indigenous cultural harm as a separate form of violence and linked it to Canada's committments under international human rights law. In doing so, this article maintains that the MMIWG Inquiry has pushed the traditional parameters of the transitional justice field in a significant way.

5.1. Expanded scope of 'violence'

Truth commissions often fail to engage with structural violence and cultural harm due to restrictive mandates, which empower them to only account for civil and political rights violations. However,

89. Inquiries Act, R.S.C. 1985, C.I-11.

90. In Canada, alone, there have been hundreds of commissions of inquiry tasked with investigating isolated events. *See* Government of Canada, Commissions of Inquiry, <https://www.canada.ca/en/privy-council/services/commissions-inquiry.html#wb-auto-5> accessed on 1 August 2020.

91. Hayner (n 88) 12.

92. Feminist activists and scholars have long pushed to incorporate issues of gender into transitional justice processes with varying degrees of success. Bell and O'Rourke (n 64); Pascha Bueno-Hansen, *Feminist and Human Rights Struggles in Peru: Decolonizing Transitional Justice* (University of Illinois Press 2017).

unlike prior transitional justice initiatives, the MMIWG Inquiry was empowered with one of the more expansive mandates ever given to a truth-seeking body. Pursuant to its Terms of Reference, the Commissioners were directed to inquire and report on:

> systemic causes of all forms of violence — including sexual violence — against Indigenous women and girls in Canada, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada[. . .].[93]

Tasked with inquiring and reporting on all forms of violence, and without a temporal limitation, the Commissioners had discretion to analyse violence against indigenous women, girls, and 2SLGBTQQIA individuals in a more holistic way.[94]

The Commissioners were not restricted to addressing a specific type of harm or gross human rights violations, language which is sometimes erroneously interpreted as comprising only violations of civil and political rights.[95] Further, by explicitly referencing cultural causes of harm, the MMIWG Inquiry was purposely charged with addressing the cultural rights violations which led to ongoing physical violence against indigenous women and girls. It expressly mandated the Commissioners to account for cultural harm, leaving them little discretion to neglect or relegate such abuses to historical context.

This directive was critical because much of the violence experienced by indigenous communities in Canada is cultural harm: state-sanctioned laws, policies and practices that are weaponised to assimilate, civilise and culturally erase indigenous communities.[96] As recognised by the TRC, a central aim of Canada's colonial policy was to destroy indigenous identities and cultures so as to eliminate them as distinct nations and gain permanent access to their territories and resources.[97] This objective was pursued through a series of injurious State actions, including the adoption of the paternalistic and racist Indian Act, forced relocations of indigenous communities, the operation of the Indian residential school system, forced sterilisations of indigenous women, the fostering and adoption of indigenous children in non-indigenous homes during the 'Sixties Scoop', and later through discriminatory child-welfare practices.[98]

Not only was the MMIWG Inquiry sanctioned to account for abuses falling outside the strict confines of bodily integrity harm, but without a temporal limitation, it could also reach beyond recent acts of violence to address historical cultural wrongs.[99] Most truth commissions are restricted to short time periods immediately preceding the cessation of conflict or repressive rule. This is often necessitated by practical constraints, but it also serves to elide the complexity of

93. 'Terms of Reference for the National Inquiry into Missing and Murdered Indigenous Women and Girls', (Indigenous and Northern Affairs Canada, 12 December 2016) <http://www.mmiwg-ffada.ca/wp-content/uploads/2018/06/terms-of-reference.pdf> accessed 1 August 2020.
94. MMIWG Inquiry, *The Final Report* (n 1) 58.
95. Diane Orentlicher, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principal 26(a), UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005).
96. Chris Cunneen, 'Colonialism and Historical Injustice: Reparations for Indigenous Peoples' (2005) 15 Social Semiotics Social Semiotics 59, 60.
97. Truth and Reconciliation Commission of Canada (n 11) 1.
98. Anaya (n 19) 145.
99. Some of these acts do not constitute cultural rights violations under international law as they predate the ratification of international treaties.

settler/indigenous conflicts which are intricately tied to both the colonial past and the present.[100] This is particularly the case in settler colonial states where colonial wrongdoing regularly intersects with contemporary violence against indigenous communities. The MMIWG Inquiry confronted cultural wrongs from decades earlier, but also directly linked it to the modern MMIWG crisis. This generally aligns with indigenous worldviews which do not view colonial wrongs as historical acts, but rather as abuses that have been taking place over centuries in a continuous, uninterrupted manner.[101]

The breadth of the MMIWG Inquiry's mandate can be contrasted with the TRC, which was saddled with a much narrower directive and a finite time frame. Importantly, the TRC was only empowered to address a single aspect of the broader campaign of colonial violence against indigenous peoples - the Indian residential school system and its legacy.[102] The Indian residential school systems pursued a state-sanction policy of assimilation, arguably the most effective way to disappear indigenous peoples in settler colonial states.[103] The Indian residential school system did not seek to physically eliminate indigenous children, but instead, to kill them culturally, by separating them from their families, Christianising them, suppressing their native tongue and denigrating their traditional way of life.[104] Indigenous scholars often discuss this as a sort of social death, where community and social relations are broken down and destroyed.[105] As a result, many indigenous peoples in Canada have been raised with only attenuated connections to their culture. The impact of this cultural loss has been far-reaching, being closely linked to many structural inequalities and social problems among indigenous communities.[106]

The Indian residential school system was undoubtedly instrumental to the settler colonial project in Canada, but it was only one component, among many other violently anti-indigenous policies and actions. The TRC's narrow focus sidelined other forms of indigenous cultural harm, as well as their ongoing impacts on indigenous communities. It also isolated Indian residential schools from the rest of the colonial and contemporary violence experienced by indigenous peoples, which tacitly permitted settler society to position indigenous wrongdoing as a historical mistake, something that it could put firmly in the past.[107] In contrast, the MMIWG Inquiry expressly linked colonial wrongs to the contemporary MMIWG crisis, forcing Canada to confront ongoing, structural and cultural harm.

Not only was the MMIWG Inquiry's mandate broadly drafted, but the Commissioners also gave it an expansive interpretation. They elected to conceptualise violence 'broadly and across time and space', to encompass many forms, including cultural violence.[108] The MMIWG Inquiry relied on

100. Balint, Evans and McMilanalint (n 61) 201.
101. Eve Tuck and K. Wayne Yang. 'Decolonization is not a metaphor' (2012) 1 Decolonization: Indigeneity, Education & Society 1, 5.
102. Indian Residential Schools Settlement Agreement, Schedule N - Mandate for the Truth and Reconciliation Commission' (8 May 2006) <http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf> accessed 1 August 2020.
103. Margaret D. Jacobs, 'Seeing Like a Settler Colonial State' (2018) 1 Modern American History 257, 259.
104. Truth and Reconciliation Commission of Canada (n 11).
105. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press 2014).
106. David K. Androff, 'Adaptations of Truth and Reconciliation Commissions in the North American Context: Local Examples of a Global Restorative Justice Intervention' (2012) 13 Advances in Social Work 408, 414.
107. Jeff Corntassel, Chaw-win-is and T'lakwadzi, 'Indigenous Storytelling, Truth-Telling, and Community Approaches to Reconciliation' (2009) 35 ESC: English Studies in Canada 137, 144–45.
108. MMIWG Inquiry, *The Final Report* (n 1) 76.

Johan Galtung's definition of cultural violence and observed that it included 'racist ideologies and assimilationist policies' since they derive 'from racist beliefs deeply embedded in Canadian culture'.[109] They further acknowledged that some of the most devastating forms of violence perpetrated against indigenous peoples were state-sanctioned attacks on their culture – racist and assimilationist policies that sought to eliminate their indigenous identities, cultural systems and traditional ways of life.[110]

Accordingly, the MMIWG Inquiry moved beyond conventional transitional justice approaches by understanding violence in a more inclusive manner, reflecting the complex, intersecting and interrelated forms of harm experienced by indigenous peoples through settler colonialism. This is significant considering that settler society in Canada tends to dispute the idea that any sort of violence lies at the core of indigenous-settler relations.[111] And while the breadth of the mandate presented enormous challenges, it empowered the Commissioners to situate the physical violence levied against indigenous women and girls within the broader context of cultural and colonial harm.[112] By rethinking what constitutes violence, the MMIWG Inquiry was able to bring indigenous cultural rights violations from the peripheries to the forefront of its truth-telling mission.

5.2. Accounting for cultural rights violations

With the benefit of an expansive mandate, the MMIWG Inquiry proceeded to dedicate an entire chapter to the 'Right to Culture' in its Final Report, describing the cultural rights violations experienced by indigenous peoples and their ongoing impacts. It detailed how colonial policies and practices have worked to oppress and destroy indigenous cultures. Canada regulated indigenous identities and forcibly assimilated indigenous peoples into mainstream society in order to eliminate them as distinct nations and communities. Among other things, the MMIWG Inquiry found that the cultural loss associated with these abuses disrupted family and community dynamics which reverberated across generations.[113]

The MMIWG Inquiry was also confronted with numerous stories about how the government consistently disregarded the importance of culture and family in the context of indigenous life. Participants repeatedly stressed the need to respect and protect indigenous cultures, directly linking the physical violence experienced by indigenous women and girls to violations of their cultural rights.[114] They also viewed access to indigenous cultures, languages and land as key to safety, support and healing.[115]

Heeding the call to more adequately account for root causes of violent conflict, the MMIWG Inquiry positioned attacks against indigenous cultures as underlying forces behind the physical violence inherent in the MMIWG epidemic.[116] It expressly linked higher rates of violence to

109. ibid 77.
110. ibid 327–408.
111. Regan (n 9) 21.
112. The difficulty in fulfilling their mandate was compounded by the Canadian government's refusal to grant a two-year extension requested by the Commissioners. MMIWG Inquiry. *The Final Report* (n 1) 74–75.
113. ibid 230, 327–408.
114. ibid 327–408.
115. MMIWG Inquiry, *Executive Summary* (n 10) 50-51.
116. Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 New York University Journal of International Law and Politics 1.

assimilationist policies concerning the expression and exercising of indigenous cultural rights.[117] The Commissioners plainly stated that, 'attacks on culture, which include residential schools, the Sixties Scoop and other assimilatory policies, are the starting points for other forms of violence Indigenous women, girls, and 2SLGBTQQIA people experience today[118]'.

Victim and expert testimony further emphasised that cultural rights violations made indigenous women, girls and 2SLGBTQQIA individuals more vulnerable to violence.[119] The cultural dislocation and lack of access to culture not only leads to further forms of physical violence, but also compounds the economic and social marginalisation of indigenous women, girls and 2SLGBTQQIA individuals.[120] Thus, the MMIWG Inquiry reiterated the indivisibility and interrelatedness of cultural rights from other human rights.[121]

Significantly, however, the MMIWG Inquiry went beyond describing cultural harm as simply a driver of other rights violations. Individual witnesses testified not only about their missing and murdered family members and loved ones, but also how the loss of their culture was its own form of violence, in and of itself. They described how colonial policies traumatised indigenous communities by destroying their cultural systems.[122] The MMIWG Inquiry determined that indigenous women, girls, and 2SLGBTQQIA individuals are denied their right to learn, practice and develop their own cultures, suffered genocide through an inability to transmit cultural knowledge across generations, are subjected to an education that excludes their culture, language and history, and are denied their right to cultural belonging.[123]

By devoting substantial attention to cultural rights, the MMIWG Inquiry placed these abuses on par with other rights violations traditionally deemed worthier of redress in transitional justice. Rather than relegate cultural rights violations to historical context, as other truth commissions have done, the MMIWG Inquiry treated them as fundamental to the crisis. By acknowledging and foregrounding this harm, it rendered cultural rights more visible and arguably set a better tone for more comprehensive and inclusive post-transition agendas.

The MMIWG Inquiry not only robustly accounted for indigenous cultural harm, but it did so through the lens of human rights law. Truth-seeking bodies rarely expound applicable cultural rights standards, frame cultural harm as violative of international human rights norms or explicitly link any State action to the violation of a specific cultural protection. To close this gap, truth commissions need to analyse cultural wrongdoing as violations of State human rights committments and make specific findings in this regard. The MMIWG Inquiry took a modest step in this direction by explicitly employing a human rights-based approach to addressing cultural harm. A human rights-based approach is a conceptual framework relying on international human rights norms and principles which provide guidance towards protecting, promoting and fulfilling human rights.[124] A human-rights based approach to addressing indigenous cultural harm in transitional justice thus envisages incorporating and relying upon the existing body of international law that

117. MMIWG Inquiry, *The Final Report* (n 1) 407.
118. MMIWG Inquiry, *Executive Summary* (n 10) 23.
119. MMIWG Inquiry, *The Final Report* (n 1) 329.
120. MMIWG Inquiry, *Executive Summary* (n 10) 24, 27.
121. MMIWG Inquiry, *The Final Report* (n 1) 329.
122. ibid 327–408.
123. ibid 407–08.
124. UN OHCHR, 'Applying a Human-Rights Based Approach to Climate Change Negotiations, Policies and Measures' (2010) <http://hrbaportal.org/wp-content/files/InfoNoteHRBA1.pdf> accessed 1 August 2020.

protects the rights of indigenous peoples to access, develop, participate in, and benefit from their cultures.

UNDRIP, in particular, provides critical guidance to addressing indigenous cultural rights violations in transitional justice. Although Canada was originally one of only four States to object to the adoption of UNDRIP, it now wholly endorses the declaration. Notwithstanding, it has so far failed to incorporate UNDRIP into its domestic law. The MMIWG Inquiry referenced and acknowledged the cultural rights standards enshrined in UNDRIP in its analysis of Canada's responsibility for the MMIWG epidemic.[125] Critically, UNDRIP calls for States to provide effective mechanisms of redress for cultural rights violations.[126]

Despite the fact that law has been used at times to infringe on indigenous peoples' rights and sovereignty, the Commissioners ultimately chose to analyse the violence against indigenous women and girls through the lens of international human rights law.[127] Chapter 3 of the Final Report is devoted to how human rights standards can be leveraged to promote the rights of indigenous women and girls, including their cultural rights. The MMIWG Inquiry embraced the broadened conception of culture as constituting a 'way of life' in line with prevailing international standards.[128] It also demarcated the scope of cultural rights under international law to include 'the right of access to, participation in, and enjoyment of culture', including:

> the right of individuals and communities to know, understand, visit, make use of, maintain, exchange and develop cultural heritage and cultural expressions' and the 'right to participate in the identification, interpretation, and development of cultural heritage, or, the customs, practices, and values chosen to be passed on to the next generation.[129]

It further noted that the right to 'practice and pass on cultural traditions, language, and ways of relating to other people and to the land' is integral to indigenous peoples.[130] While this explication of indigenous cultural rights is far from comprehensive, the MMIWG Inquiry's explicit reference and reliance on these standards represents a unique development in truth commission practice.

The MMIWG Inquiry also generally linked the cultural harm experienced by indigenous women and girls to Canada's human rights obligations, which the Commissioners remarked:

> [. . .]address many of the ways in which witnesses told us their rights to culture were placed in jeopardy, through the disruption of relationships with land, the separation of families, the impoverishment of communities, and the lack of access to traditional knowledge, language, and practices that would have contributed to a sense of cultural safety.[131]

The Final Report plainly states that Canada has an obligation to protect and promote indigenous cultural rights.[132] It drew upon specific cultural rights protections under international law which

125. MMIWG Inquiry, *The Final Report* (n 1) 200–01.
126. UNDRIP (n 41) Articles. 8(2), 11(2).
127. The Final Report also emphasised the equal importance of what the Commissioners term 'indigenous rights,' a distinct but complementary concept based on indigenous laws and principles of respect, reciprocity and interconnectedness. MMIWG Inquiry, *The Final Report* (n 1) 129–31.
128. ibid 329.
129. ibid 119.
130. MMIWG Inquiry, *Executive Summary* (n 10) 23.
131. MMIWG Inquiry, *The Final Report* (n 1) 402.
132. ibid 85.

have been either ratified or endorsed by Canada, including: the International Convention on the Elimination of All Forms of Racial Discrimination (non-discrimination in cultural life), the ICCPR (right of minorities to enjoy one's culture and use one's language), the ICESCR (right of everyone to take part in cultural life), the Convention on the Elimination of All Forms of Discrimination Against Women (right of women to participate in all aspects of cultural life), the Convention on the Rights of the Child (right of children to enjoy one's culture and use one's language) and UNDRIP (numerous cultural rights protection afforded specifically to indigenous peoples).[133] The MMIWG Inquiry also found that Canada has failed to meaningfully implemented many of these provisions in the context of indigenous women and girls.[134] No truth commission has gone so far in delineating the legal framework concerning a State's cultural rights obligations under international law.

A human rights-based approach envisions not only identifying Canada's human rights committmentss, but also judging its actions against these standards. [135] As the MMIWG Inquiry recognised, human rights standards, binding and non-binding, can be used to hold States responsible to indigenous peoples.[136] Among other things, when cultural harm is framed as violative of international human rights norms, it becomes harder for settler societies to outright reject indigenous grievances.[137] It takes State action out of the realm of policy and towards legal obligations, framing violence as a denial of rights rather than needs of a community.[138] By explicitly connecting cultural violence to State wrongdoing, as opposed to inevitable facts of life, it also puts pressure on States to engage in more substantive reforms.[139]

Pursuant to its mandate, the MMIWG Inquiry was restricted from 'expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organisation'.[140] However, it was not expressly prevented from attributing State conduct to the violation of a human rights obligation or standard. In numerous places, the Final Report generally noted that the cultural rights of indigenous peoples had been violated by Canada.[141] In at least one instance, the Commissioners directly adjudged Canada's conduct against a specific international standard by finding that the Indian Act violates Article 33 of UNDRIP, which provides for the right for indigenous peoples 'to determine their own identity or membership in accordance with their customs and traditions'.[142] Despite this positive development, the MMIWG Inquiry could have gone much further to directly link State wrongdoing to corresponding cultural rights protections and arguably missed an opportunity in this regard.

5.3. Cultural 'calls for justice'

The Final Report concludes with 231 'Calls for Justice', recommendations deemed necessary (legal imperatives, according to the Commissioners) to end and resolve the genocidal violence

133. ibid 181.
134. MMIWG Inquiry, *Executive Summary* (n 10) 60.
135. Gunn (n 24) 107.
136. MMIWG Inquiry, *The Final Report* (n 1) 222.
137. Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 International Journal of Transitional Justice 331, 342
138. MMIWG Inquiry, *Executive Summary* (n 10) 35.
139. Laplante (n 137) 342.
140. Terms of Reference for the MMIWG Inquiry (n 93) para P.
141. MMIWG Inquiry, *The Final Report* (n 1) 327, 329, 331–32.
142. ibid 408.

against indigenous women, girls and 2SLGBTQQIA individuals. Many of these are monumental undertakings, what the MMIWG Inquiry calls an 'absolute paradigm shift' in Canada's relationship with indigenous peoples. Like the body of the Final Report, the Calls for Justice embrace a human-rights based approach to cultural harm, in part by calling on Canada's various central, provincial and tribal governments to implement and comply with a number of relevant human rights instruments. They also maintain that all remedial actions must be based in human rights.[143]

With respect to indigenous cultural rights, Section 2 of the Calls for Justice is dedicated specifically to the area of culture, wherein the Commissioners make several recommendations concerning the respect, protection and fulfillment of indigenous cultural rights. Among other things, they call upon governments to (i) acknowledge, recognise and protect the rights of indigenous peoples to their cultures and languages; (ii) recognise indigenous languages as official languages of the State; (iii) ensure safe, permanent and meaningful access to their culture; (iv) provide education for children in their indigenous languages; (v) provide resources for the preservation of language and traditional knowledge, (vi) implement special measures to 'restore and revitalise identity, place, and belonging for Indigenous Peoples and communities who have been isolated from their Nations due to colonial violence'; and (vii) create an fund devoted to supporting indigenous-led initiatives for access to cultural knowledge and supporting cultural rights.[144] In addition to calls directly implicating cultural rights, there are also repeated demands for recommendations to be implemented in culturally appropriate and culturally relevant ways and in accordance with the cultural needs of indigenous communities.

The MMIWG Inquiry's Calls for Justice compose the most comprehensive set of recommendations aimed at the redress of cultural rights violations through a transitional justice mechanism. However, it is yet to be seen whether sufficient political will exists to implement them. Like all rights violations, the implementation of a truth commission's recommendations to address cultural right violations depends on the political will of the State. To date, little progress has been made. The Commissioners recently marked the one-year anniversary of the Final Report by decrying 'deafening silence and unacceptable inaction from most governments'.[145] Thus, whether the MMIWG Inquiry's cultural recommendations are translated into concrete reforms remains highly uncertain.

6. CONCLUSION

In the three decades since transitional justice emerged as a cognisable field, it is still trying to strike the right balance between the myriad issues facing societies grappling with past violence and injustice. Under dominant approaches, cultural rights violations, and cultural harm more generally, have not been considered worthy of this extraordinary justice. Even in conflicts featuring systemic cultural wrongdoing, large-scale violations of cultural rights are routinely sidelined in favor of redressing the civil and political rights violations deemed more critical for transitioning societies to more democratic and peaceful futures. Their neglect represents a core blind spot in transitional justice, one that has yet to be independently challenged in the field's burgeoning, critical discourse.

143. MMIWG Inquiry, *Executive Summary* (n 10) 55.

144. ibid 65.

145. 'Statement Marking the One-Year Anniversary of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls' (3 June, 2020), <https://www.aptnnews.ca/wp-content/uploads/2020/06/EN-Commissioner-Statement-one-year-anniversary-June-3-2020.pdf> accessed on 20 November 2020.

This cultural rights gap has become increasingly untenable in recent years, especially with respect to indigenous peoples. There is a renewed sense of urgency in many settler colonial states to begin reckoning with long-standing, unresolved legacies of indigenous cultural harm. Indeed, future truth commissions are being established or contemplated in a number of countries seeking to address legacies of violence against indigenous peoples.[146] More generally, unrest stemming from the Black Lives Matter social movement has reignited debates concerning the utility of transitional justice in seemingly stable, established democracies who have otherwise failed to confront the horrors of colonialism, slavery or racial injustice.[147] To the extent these measures come to fruition and similar ones proliferate, transitional justice will be increasingly faced with opportunities to address mass cultural harm and corresponding violations of cultural rights.

The principal claim advanced in this article is that the MMIWG Inquiry's direct engagement with indigenous cultural rights violations represents a significant development and a noticeable departure from mainstream transitional justice. Rather than respond to the MMWIG crisis under a familiar transitional justice paradigm, the MMIWG Inquiry challenged the status quo by conceiving of violence in a way that includes not only the physical violations brought upon indigneous women and girls, but the underlying cultural harm that permeates indigenous life in Canada. Cultural wrongdoing was treated as its own form of violence, rather than merely analysed as an element of bodily integrity violations. The MMIWG Inquiry further linked and framed this cultural harm as violative of international human rights law, taking Canada's cultural wrongdoing out of the realm of policy-making and into its legal committments under international law. All told, it represents one of the most serious and robust engagements with cultural rights violations through a transitional justice framework.

The MMIWG Inquiry's increased engagement with cultural rights might seem to be a modest development; yet, it comes at a time when transitional justice is ripe with pessimism and distrust.[148] The field has now fully embraced its critical turn, with commentators and practitioners scrutinising almost every aspect of the enterprise.[149] Notwithstanding, the MMIWG Inquiry demonstrates how transitional justice programming can be designed and implemented to more adequately engage with cultural harm, while staying true to the spirit and traditional modalities of the transitional justice project. This is not to suggest that transitional justice measures should automatically be employed in settler colonial states to address indigenous cultural harm or any

146. For example, Norway, Sweden and Finland have all recently initiated truth commissions to examine abuses committed against indigenous peoples and minorities in those countries. John Last, 'Canadian-style reconciliation commissions draw mixed reaction across Arctic Europe' *CBC News* (Toronto, 2 July 2020) <https://www.cbc.ca/news/canada/north/sami-truth-commissions-1.5633569> accessed 1 August 2020.

147. *See e.g.* Brianne McGonigle Leyh, 'No Justice, No Peace: The United States of America Needs Transitional Justice', (*Opinio Juris*, 5 June 2020) <http://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/> accessed 11 November 2020; Kojo Koram, 'Britain needs a truth and reconciliation commission, not another racism inquiry', *The Guardian* (London, 16 June 2020) <https://www.theguardian.com/commentisfree/2020/jun/16/britain-truth-reconciliation-commission-racism-imperial> accessed 11 November 2020; 'UN human rights chief calls for reparations to make amends for slavery', *The Guardian* (London, 17 June 2020) <https://www.theguardian.com/world/2020/jun/17/un-human-rights-chief-calls-for-reparations-to-make-amends-for-slavery> accessed 11 November 2020.

148. Pablo De Grieff, suggests that '[t]here is no transitional country that can legitimately claim great successes in this field.' Pablo de Greiff, 'Theorizing Transitional Justice' (2012) 51 Nomos 31, 35.

149. Dustin N. Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13 International Journal of Transitional Justice 570.

other injustices experienced by indigenous peoples. This is a decision for indigenous peoples themselves, in accordance with their rights to self-determination and free, prior and informed consent. Rather, it merely seeks to demonstrate that cultural rights violations can be accounted for through transitional justice frameworks in much the same manner as other rights violations. Ultimately, the MMIWG Inquiry's unique and holistic approach represents an important advancement in the field and one that could serve as a model for future truth commissions seeking to address violence against indigenous peoples in more meaningful ways.

Acknowledgement

The author would like to thank Professor Alexandra Xanthaki for providing invaluable comments to earlier drafts of this article.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Colin Luoma https://orcid.org/0000-0002-2688-6482