

# International Human Rights Standards and Instruments Relevant to Indigenous Women

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*Les femmes autochtones du Canada doivent faire face à des inégalités et à des défis qui seront surmontés seulement si tous les niveaux: local, national, international seront interpellés grâce à une action concertée et à des instruments/clés à leur portée, tels ceux mentionnés ci-dessous. Souvent des efforts au niveau international en tandem avec ceux des niveaux local et national ont été tentés dans le but d'améliorer les droits humains chez les femmes autochtones. Des recours au niveau international font pression sur le Canada qui doit répondre de ses obligations face à la communauté internationale. La honte le force à agir.*

There are several international human rights standards and laws that are relevant to advancing the human rights of Indigenous women—as members of Indigenous nations and as individual women. The lived experiences of Indigenous women call for protection to be sought from a variety of sources—those that protect individual rights, such as the right to live free from violence, which has been developed under the framework of “women’s rights” as well as those rights that protect Indigenous Peoples as peoples, most notably, the United Nations *Declaration on the Rights of Indigenous Peoples*. For example, Indigenous women suffer from many human rights violations, as noted below:

Indigenous women in many areas of the world are suffering from the alarming deterioration of health conditions within their communities. Inadequate and limited access to health services, lack of culturally appropriate approaches to health care, lack of outreach clinics in remote areas, deteriorating quality of air, water and land due to unchecked industrial development are just a few of the factors contributing to this downward trend. Other socioeconomic factors, such as the alarming number of indigenous women, (especially in Asia) being trafficked and sold into prostitution, have led to the rapid spread of the HIV/AIDS epidemic and other sexually transmitted diseases into indigenous communities, destroying their social fabric. Changes in the traditional social, cultural and political institutions have led to an erosion or loss of practices and culturally appropriate health rules and codes of behaviour which have been instrumental in ensuring gender-sensitive approaches to health.<sup>1</sup>

These inequalities and challenges facing Indigenous women can only be overcome by advocacy at all levels—local, national and inter-

national. Below, key international instruments that can be used by Indigenous women in Canada and globally are outlined. Many times, international advocacy efforts can work in tandem with local and national efforts aimed at improving the human rights of Indigenous women. International avenues of recourse often place political pressure on Canada to live up to their international obligations, shaming them into action.

The rights outlined below are set out according to the categories of rights, rather than by instrument. These include the rights to equality and non-discrimination, the right to self-determination, the right to live free from violence, the right to an adequate standard of living, the right to culture, the right to free, prior and informed consent, the right to participate in decision-making and the right to property.

## **The Rights to Equality and Non-Discrimination**

The rights to equality and non-discrimination are well established under international law. These rights are important both in relation to equality and non-discrimination between non-Indigenous individuals and Indigenous individuals (such as matrimonial property rights, for example) as well as between Indig-

enous women and Indigenous men (in relation to the right to live free from violence, for example).

Indigenous women often experience inequalities, both in comparison to non-Indigenous women and in comparison to their male counterparts. For example, Indigenous women may suffer from discrimination in housing and employment in urban settings from non-Indigenous peoples. At the same time, Indigenous women often face greater risk of domestic violence within their own communities. Thus, rights to equality and non-discrimination are necessary in order to reduce inequality within Indigenous societies and between Indigenous and non-Indigenous women.

This must be done in a way that promotes self-determination without subverting gender equality.<sup>2</sup> For example, it could be asserted that a patriarchal Indigenous society does not need to institute protections for the female members of their society (such as matrimonial property laws that promote equal distribution of lands between a wife and a husband) and that their right to self-determination grants them the authority to disregard the equality rights of the women in their communities. This type of argument can be refuted by the assertion that the members of these communities have equality rights, or rights to non-discrimination, that are recognized not only in national but international instruments. International instruments apply universally, a fact that has been recognized by Indigenous Peoples who have worked within the United Nations system for its recognition of their right to self-determination for over 20 years (through the development of the UN Declaration on the Rights of Indigenous Peoples) and throughout the history of the UN.<sup>3</sup>

This legal principle of equality is often bolstered by traditional norms and customs of Indigenous Peoples, even in patriarchal societies, where egalitarian principles were tradition-

ally upheld. In some countries, such as Canada, colonization has had an impact on the egalitarian treatment of women in these societies. This is where the application of the principles of equality and non-discrimination can be very helpful.

These rights are contained within the following instruments:

*Right to Equality:*

- Articles 1 and 7 of the UN *Universal Declaration of Human Rights* (UDHR);
- Articles 3 of the UN *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) and the *International Covenant on Civil and Political Rights* (the ICCPR), (specifically in relation to equality between men and women);
- Articles 2 and 44 of the UN *Declaration on the Rights of Indigenous Peoples* (DRIP).

The Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW) provides for equality between men and women. In particular, article 16(1)(c) of the CEDAW provides for appropriate measures to be taken by States to ensure “the same rights and responsibilities during marriage and at its dissolution” between men and women.

*Right to Non-Discrimination:*

- Article 2 of the UDHR;
- Article 2 (2) of the ICESCR;
- Article 2(1) of the ICCPR;
- Article 2 of the DRIP.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for the elimination of racial discrimination.

### **The Right to Self-Determination**

Gaining recognition of the right to self-determination is critical to indigenous women in addressing the historic wrongs experienced by their

nations. This has been expressed by the International Indigenous Women’s Forum (FIMI) in its Beijing +10 Declaration, where it states:

We maintain that the advancement of Indigenous Women’s human rights is inextricably linked to the struggle to protect, respect and fulfill both the rights of our Peoples as a whole and our rights as women within our communities and at the national and international level.<sup>4</sup>

The right of self-determination, along with two important sub-sets of this right, the right to free, prior and informed consent and the right to participate in decision-making are discussed.

The right of self-determination is protected by article 1 of both the ICCPR and the ICESCR (although the application of article 1 to Indigenous Peoples is contentious).<sup>5</sup> Article 1(1) of both the ICCPR and the ICESCR states that, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This wording is replicated in the DRIP, except the word “All” is replaced with “Indigenous.”<sup>6</sup>

This right should be used as a foundational principle in recognizing the legal systems of the particular Indigenous People concerned. As discussed above, fears about the protection of individual rights can be allayed by the understanding that all self-determining nations are accountable to act in a manner that is respectful of all international peremptory norms, including equality and non-discrimination.

This right is contained within the following additional provisions:

Article 3 of the DRIP explicitly recognizes the right to self-determination of Indigenous peoples. Other articles, such as article 4, 5 and 7 elaborate upon the right of self-determination contained under article

3. The United Nations General Assembly adopted the Declaration on September 13, 2007.

The International Labor Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169) (the ILO Convention 169) provides for a right to self-determination but this is generally recognized to be of a lower standard to that of the UN DRIP.<sup>7</sup>

claims and larger reforms aimed at ending the post-colonial relationship between Indigenous peoples and the Canadian government. In practical terms, this could be done by weighing whether particular reform options will lead to upholding or negating this principle of free, prior and informed consent. This should not be viewed as conflicting with individual human rights, since

stitution. In Canada, Indigenous women have not achieved this equal voice due to colonial influences such as the *Indian Act* which historically forbade women from holding office as Chiefs or Band Councillors. One study found that out of 633 chiefs, only 87 were women.<sup>10</sup>

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### **Free, Prior and Informed Consent**

The principle that a state is required to obtain the free, prior and informed consent of Indigenous Peoples prior to development or removal of their lands, territories and resources is gaining recognition under international law.<sup>8</sup> This is a right that should inform any legislative framework. Without adequate protection of the right of Indigenous Peoples to make their own decisions over lands, resources and territories, the right to self-determination will remain unfulfilled in a meaningful way. Meaningful application of the principle of free, prior and informed consent must be built on the full and effective participation of members of the particular community.

In the case of matrimonial property concerns, it is clear that the dispossession of First Nations from their lands and the imposition of the *Indian Act* is what led to the current situation of inequalities. A specific approach to matrimonial property regime is required immediately to remedy the violations of the rights of individual members, but this must be done in tandem with efforts to resolve outstanding land

a meaningful application of the principle of free, prior and informed consent would be built on the full and effective participation of members of the community in question, as discussed below.

This right is contained in the following instruments:

- Articles 10, 19 and 32 of the DRIP
- Article 16 of the ILO Convention 169
- Article 8 (j) of the Convention on Biological Diversity

### **Right to Participate in Decision-Making**

Indigenous Peoples' right to participate in decision-making on matters affecting their rights is related to the above principle of FPIC. It is particularly pertinent to assertions that Indigenous women must have an equal voice at the legislative and policy levels. Under international law, the principle of the right to participate in decision-making is recognized in implementing economic, social and cultural rights.<sup>9</sup> This is also a principle contained within national legislation, including section 15 of the Charter and section 35(4) of the Canadian Con-

ment, implementation and evaluation of any and all policy and legislative initiatives affecting them. This is because systemic discrimination in many circumstances has prevented Indigenous women from exercising their right to participate in decision-making.

This right is contained within the following instruments:

- Articles 18 and 22 of the DRIP;
- Article 7 of the CEDAW.

### **The Right to Live Free From Violence**

The right to live free from violence is strongly inter-related to the promotion of the overall socio-economic status of Indigenous women. This right under international law has developed over time.<sup>11</sup> This right is highly inter-related numerous other rights, such as equality, non-discrimination, sexual and reproductive rights and matrimonial property rights. It is well-recognized that where Indigenous women face violence they are left vulnerable to other human rights violations, such as lack of housing, lack of sexual and reproductive rights, etc. Statistics and the daily experiences of Indigenous women make it clear that

this is a problem that disproportionately affects Indigenous women, as compared to both non-Indigenous women and Indigenous men.<sup>12</sup>

This right can be found in the following instruments:

- Article 22 of the DRIP;
- Article 5 (b) of the CERD;
- The UN Declaration on the Elimination of Violence against Women.

### **The Right to an Adequate Standard of Living**

The right to an adequate standard of living is particularly important to improving the socio-economic status of Indigenous women and is essential to ensuring that their basic human needs are not jeopardized. Currently, Indigenous women suffer from, for example, inadequate housing, food insecurity, ill health and disabilities at disproportionate rates. The lack of the right to an adequate standard of living realized by Aboriginal women in Canada has been the subject of grave criticism by the international and national human rights community.<sup>13</sup>

Similar to the right to live free from violence, the right to an adequate standard of living calls for legislative and policy reforms aimed at ensuring that the underlying socio-economic conditions are addressed through effective measures.

This right is contained within the following instruments:

- Article 25 of the UDHR;
- Article 11 of the ICESCR.

### **The Right to Culture**

The right to culture is important in asserting the rights of Indigenous women from a holistic perspective:

Aboriginal women must take their rightful place in Aboriginal governments, and in shaping the future of Aboriginal nations. Capacity development

and Aboriginal women's leadership, as well as the restoration of the traditional roles of Aboriginal women are essential to the restoration of Aboriginal governance.<sup>14</sup>

In Canada, the right to culture was successfully used by Sandra Lovelace to claim her right to live in her community when she was excluded under section 12(1)(b) of the *Indian Act*, which was inherently sexist and granted different rights to status to women than men. The United Nations Human Rights Commission ruled in favour of Ms Lovelace, determining that the provisions of the *Indian Act* were unilaterally enacted by the government of the day in violation of her right to culture.

The promotion of the right to culture must be understood in a way that recognizes the right of all members of the society on an equal, non-discriminatory basis. Framing the right in such a manner requires a nuanced approach to understanding the universality of human rights and culture as a fluid concept, as discussed above.<sup>15</sup> In this manner, forms of self-determination that do not respect peremptory norms such as equality and non-discrimination are challenged, as are forms of continued colonialism where oppression from states on Indigenous Peoples' rights to self-determination lead to continued suppression of Indigenous cultures.

This right is contained within the following instruments:

- Article 27 of the ICCPR provides that persons belonging to "...minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture..." (*Lovelace v. Canada* (24/1977)(R.6/24), ICCPR, A/36/40 (30 July 1981) 166);
- Article 15. 1 (a) of the ICESCR provides for the right of everyone to "take part in cultural life";

•Article 5 of the DRIP provides for a right of Indigenous peoples to their distinct cultural institutions (as well as political, economic, legal and social ones);

•Article 8 of the DRIP provides for protection against "forced assimilation or destruction of their culture";

•Article 9 of the DRIP provides for the right to belong to an Indigenous nation in accordance with community customs and traditions. Regarding the protection of customs, languages and traditions, see also Articles 11 to 16, 27, 33, 34, 35 and 36 of the DRIP;

•Article 5 (e) (vi) of the CERD;

•Article 30 of the Convention on the Rights of the Child.

### **Right to Property**

The right to property is a basic human right that requires all individuals and collectivities, or in this case, all Indigenous persons and all Indigenous Peoples, respectively, to own property without arbitrary distinctions being made. For example, in this context, a claim that a traditional society could discriminate against women, on the basis of their right to self-determination, is inconsistent with this international right. Other instruments outlined below make it clear as well that non-discrimination on the basis of gender, race, etc. must be upheld in relation to property division.

Indigenous women have faced many violations to their right to property, particularly in the context of matrimonial property rights on reserve. While individuals living off reserve have matrimonial real property protections (such as equal division of the matrimonial home) found in provincial and territorial laws, these protections do not extend to individuals living on reserve where the *Indian Act* governs land management, rendering provincial and territorial laws inapplicable.<sup>16</sup>



This causes grave injustices to Indigenous women who may be left without access to the matrimonial home on reserve upon marital breakdown. Indigenous women facing violence are even more vulnerable due to these lack of property rights.

The right to property without discrimination and on an equal basis to others, is contained within the following instruments:

- Article 17 of the UDHR provides that everyone has a right to own property individually and collectively and that no one should “be arbitrarily deprived” of one’s property;
- Article 21 of the DRIP provides for the right, without discrimination, to socio-economic improvements, including housing;
- Article 5 (d) (v) of the CERD;
- Article 16 (1)(h) of the CEDAW.

## Conclusion

The reality is that in Canada and across the world, many Indigenous women suffer from grave human rights violations, at all levels—from the right to live free from violence, to the right to self-determination to the right to own property, to name only a few examples. It is hoped that this summary of some of the key human rights instruments and standards available to advance the human rights of Indigenous women will be of assistance in remedying the human rights violations facing Indigenous women, their families and their nations.

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<sup>1</sup>Permanent Forum on Indigenous Issues, Report of the Third Session (10-21 May 2004), UN Doc. No. E/C.19/2004/23, p. 23.

<sup>2</sup>See article 46(2) of the United Nations *Declaration on the Rights of Indigenous Peoples* which calls for a balancing of human rights and fundamental freedoms of all and article 46(3) which sets out the principles of “justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” in the interpretation of the rights contained in the Declaration.

<sup>3</sup>See MADRE/FIMI, Marin Iwanka Raya: *Indigenous Women Stand Against Violence: A Companion Report to the United Nations Secretary-General’s Study on Violence Against Women* (New York: MADRE/FIMI, 2007) at 29 where the “rights versus culture” discourse is identified as a false dichotomy: “By the 1990s, the notion of culture as the exclusive purview of Indigenous, eastern, or other ‘primitive’ people had lost much of its legitimacy. But a new doctrine of ‘cultural relativity’ emerged, arguing an inherent tension between universal human rights standards and local cultural practices. The dichotomy maintains the assumption that cultures are monolithic and homogeneous, rather than dynamic, fluid processes.” The authors call for an integrated understanding of human rights, noting that “the work of Indigenous anti-violence activists is not predicated on a rejection of their culture

as merely a site of oppression, but is grounded in the understanding that culture can be deployed in multiple, even conflicting, ways, including in defense of women’s human rights.

Along with the notion of culture as static and sacred, there is another conception of culture that threatens Indigenous women, rooted in western colonial conquest. This view suggests that ‘culture’ is found only in ‘primitive’ or backward places, not in ‘western civilization.’ (Thus, date rape and child beauty pageants in the U.S. are not considered harmful cultural practice.” (at 29)

<sup>4</sup>FIMI, Declaration of the International Indigenous Women’s Forum, Indigenous women beyond the ten-year review of the Beijing Declaration and Program of Action, 2005.

<sup>5</sup>Indigenous peoples have asserted this right to self-determination on an equal basis to all other peoples throughout history. The UN General Assembly strongly recognized and reaffirmed this right when it adopted the UN Declaration in September 2007. For a discussion on the development of this right under international law see S. James Anaya, *Indigenous Peoples in International Law: Second Edition* (Oxford: Oxford University Press, 2004) at 8 and at 49 where he states, “Shaped by Western perspectives and political power, international law developed a complicity with the often brutal forces that wrested lands from indigenous peoples, suppressed their cultures and institutions, and left them among the poorest of the poor.” See also Rodríguez-Piñero *supra* note 4 at 261-262, “The political discourse of the international indigenous movement was founded on a critical reformulation of the bases of international law that did not recognize the legal personality of indigenous peoples and relegated them to a predicament of internal colonialism within their own territories. Indigenous peoples reminded the world that the consequences of colonialism persisted after formal decolonization, and

pleaded for recognition of their right to a full measure of self-determination as the cornerstone of their aspirations to cultural preservation and development, the exercise of full-government and jurisdiction, and control over their traditional lands and natural resources. The indigenous movement was successful in articulating those aspirations in human rights terms, contributing to the generation of new normative understandings concerning the specific catalogue of rights pertaining to these peoples *qua* peoples. [References omitted].

<sup>6</sup>Article 3 of the UN *Declaration on the Rights of Indigenous Peoples*.

<sup>7</sup>For a full discussion of the ILO Convention No. 169 see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford: Oxford University Press Inc., 2005). There are many regional examples of instruments that recognize the right to self-determination, but it is beyond the scope of this paper to discuss these instruments.

<sup>8</sup>See *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Permanent Forum on Indigenous Issues, 4<sup>th</sup> Sess., UN Doc. E/C.19/2005/3, (2005) (PFII FPIC) which outlines the origins of this right. In its Conclusions at 10, the report states that, "Various international instruments, such as the ILO Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries, and the Convention on Biological Diversity, as well as pronouncements of international human rights treaty bodies, provide a normative basis for free, prior and informed consent." For a complete listing of these instruments, see *ibid* at 24. See also *General Comment 23 supra* note 133. See also I/A Comm. H. R. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C. No. 79 (2001) (*Awas Tingni*).

<sup>9</sup>See for example, *Women and Health*

(*Article 12*) (*General Recommendation No. 24*), UN Committee on the Elimination of Discrimination against Women, 20<sup>th</sup> Sess., UN Doc. A/54/38 (1999) 5 at para. 31 (a).

<sup>10</sup>Judith F. Sayers and Kelly A. MacDonald, "A Strong and Meaningful Role for First Nations Women in Governance" in Judith F. Sayers et al. *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001) at 11.

<sup>11</sup>See *CEDAW, supra* note 10, arts 1, 2, 5, 6. While CEDAW does not specifically include the right to live free from violence, several of its provisions are related to eliminating discrimination against women, for example, Articles 1, 2 and 5, as well as Article 6, which requires States to take appropriate measures to "suppress all forms of traffic in women and exploitation of prostitution of women". However, the Committee on the Elimination of Discrimination against Women clarified that the right to live free from violence is a right contained in CEDAW in its General Recommendation No. 19: *Violence against women (General Recommendation No. 19)*, UN Committee on the Elimination of Discrimination against Women, 11<sup>th</sup> Sess., UN Doc. CEDAW /C/1992/L.1/Add.15 (1992).

<sup>12</sup>See: *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Advanced Unedited Version: Canada*, UN Human Rights Committee, 85<sup>th</sup> Sess., UN Doc. CCPR/C/CAN/CO/5/ at para. 23, where it states that, "The State party should gather accurate statistical data throughout the country on violence against Aboriginal women, fully address the root causes of this phenomenon, including the economic and social marginalization of Aboriginal women, and ensure their effective access to the justice system. The State party should also ensure that prompt and adequate response is provided by the police in such cases, through training and regulations."

<sup>13</sup>Standing Senate Committee on

Human Rights, "Seventeenth Report to Examine and Report Upon Key Legal Issues Relating to the Division of On-Reserve Matrimonial Real Property," (Ottawa: Standing Senate Committee on Human Rights, 2005); Standing Senate Committee on Human Rights, *A Hard Bed to Lie In: Matrimonial Real Property on Reserve: Interim Report of the Standing Senate Committee on Human Rights* (Ottawa: Standing Senate Committee on Human Rights, 2003); Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum, Mission to Canada, UN Commission on Human Rights, 61<sup>st</sup> Sess., UN Doc. E/CN.4/2005/88/Add.3 (2004) at para. 90 [Stavenhagen Report]; Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, UN Committee on Economic, Social and Cultural Rights, 36<sup>th</sup> Sess., UN Doc. E/C.12/CAN/CO/4 E/C.12/CAN/CO/5 (2006) at para. 45; Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Advanced Unedited Version: Canada, UN Human Rights Committee, 85<sup>th</sup> Sess., UN Doc. CCPR/C/CAN/CO/5/ at para. 22 [HRC Concluding Observations 2005]; UN Human Settlements Programme (UN-HABITAT) and Office of the High Commissioner for Human Rights (OHCHR), *Indigenous peoples' right to adequate housing: A global overview* (Nairobi: UN-HABITAT and OHCHR, 2005) [UN-HABITAT] at 89.

<sup>14</sup>Native Women's Association of Canada, "Restoring Balance, Addressing Poverty and Building Healthy Communities: A Policy Paper Prepared for the Second National Aboriginal Women's Summit II" (Ottawa: NWAC, 2008) at 7.

<sup>15</sup>*Supra*, footnote 3.

<sup>16</sup>1986, *Derrickson v. Derrickson*.