



International Human Rights Standards and Instruments Relevant to Indigenous Women

An Information Paper

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Introduction

There are several international human rights standards that are relevant to advancing the human rights of Indigenous women and reducing the socio-economic gap between Indigenous women and their families and other Canadians. 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. Below, a brief description of each of these rights, and their sources, will be outlined. In Appendix “A” the status of ratification of each instrument by Canada is set out.

1. 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 (in arguing for the right to equal matrimonial property rights, as one example) as well as between Indigenous women and Indigenous men (in relation to the right to live free from violence, for example).

In order for equality and non-discrimination to be fully realized for Aboriginal women, their right to be treated equally, or without discrimination, as compared to non-Aboriginal women and as compared to Aboriginal men must be protected. For example, it will be important to find ways to remedy the current inequalities between individuals living off reserve versus those living on reserve. This must be done in a way that promotes self-determination but not at the expense of equality rights of Aboriginal women as compared to Aboriginal men. For example, it could be argued that a patriarchal Indigenous society, such as some Cree or Ojibway Nations, do not need to institute matrimonial protections for the members of their society 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 in these communities have equality rights, or rights to non-discrimination, that are recognized not only in national but international instruments. International instruments apply universally, which 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.

This legal principle of equality is often bolstered by traditional norms and customs of Indigenous peoples, even in patriarchal societies, where egalitarian principles were traditionally upheld. 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.

2. The Right to Self-Determination

Recognition of the right to self-determination promotes seeking solutions that respect Indigenous controlled systems of governance and laws. This right is protected by article 1 of both the ICCPR and the ICESCR (although the application of article 1 to Indigenous Peoples is contentious).¹

¹ Indigenous peoples have asserted this right to self-determination on an equal basis to all other peoples throughout history. The UN Human Rights Council strongly recognized and reaffirmed this right when it adopted the UN Declaration in June 2006. It is critical that the UN General Assembly also adopts this instrument. For a discussion on the development of this right under international law see S. James Anaya,

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.” The wording contained within the DRIP is identical, except the word “All” is replaced with “Indigenous”.

This right should be used as a foundational principle in recognizing the legal systems of the particular Indigenous people concerned. This is consistent with self-government agreements (one form of self-determination), recognition by the Canadian legal system of traditional governance structures (such as the Haudenosaunee’s legal system) or federal legislative measures that provide for parallel legal systems reflective of Indigenous legal systems (such as the *First Nations Land Management Act*). Such initiatives represent improvements to the lives of Indigenous women since the promotion of collective human rights is highly related to the promotion of individual human rights.² 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 UN Human Rights Council adopted the Declaration in June 2006. The UN General Assembly has deferred consideration of adoption of the Declaration until between now and the end of the current session of the UN General Assembly, which is in September 2007. All provincial and territorial governments and Canada should support states and the Global Indigenous Peoples Caucus’ efforts to immediately adopt

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].

² For Indigenous Peoples and Indigenous women, exercising our rights – both as Indigenous Peoples and as women – depends on securing legal recognition of our collective ancestral territories. Our territories are the basis of our identities, our cultures, our economies, and our traditions...For Indigenous women, the systematic violation of their collective rights as Indigenous People is the single greatest risk factor for gender based violence – including violence perpetrated within their communities.” (Dr. Myrna Cunningham in MADRE, Mairin 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, 2007) at 15.)

this Declaration without amendment.³ To date, the new Conservative government has opposed this positive international law development, which has caused Canada to be viewed by the international human rights community as an obstructionist, rather than defender of human rights.

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. Canada did not ratify this Convention.⁴

The Organization of American States (OAS) draft American Declaration on the Rights of Indigenous Peoples (the OAS draft Declaration) is a regional instrument currently being developed that will provide for the right of self-determination at the regional level of the Americas.⁵

3. 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.⁶ This right is highly inter-related to 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.⁷

³ See www.ipcaucus.net.

⁴ 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).

⁵ For a full discussion of the draft American Declaration see M. Celeste McKay, "A Comparative Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the Organization of American States Draft American Declaration on the Rights of Indigenous Peoples" (2006, unpublished, on file with author).

⁶ 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, 11th Sess., UN Doc. CEDAW/C/1992/L.1/Add.15 (1992).

⁷ See: *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Advanced Unedited Version: Canada*, UN Human Rights Committee, 85th 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 marginalisation of Aboriginal women, and ensure their effective access to the justice

In devising matrimonial property schemes, provision needs to be made to address the socio-economic problems affecting Indigenous women, including solutions to the current high level of violations to their right to live free from violence. All proposed legislative and policy solutions should specifically articulate the measures that will be taken by the relevant authority (Canadian or Indigenous) to ensure the levels of violence facing Indigenous women are reduced or eliminated.

This right can be found in the following instruments:

Article 22 of the DRIP

Article 5 (b) of the CERD

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belém do Pará”

The UN Declaration on the Elimination of Violence against Women

Resolution 1325 of the UN Security Council on Women, Peace and Security

4. 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.

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.⁸ Similar to the right to live free from

system. The State party should also ensure that prompt and adequate response is provided by the police in such cases, through training and regulations.”

⁸ 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, 61st 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, 36th 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, 85th 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.

violence, the right to an adequate standard of living calls for legislative and policy reforms that ensure the underlying socio-economic conditions are addressed through effective measures. One suggestion is that legislative provisions requiring the relevant government authority to “take effective measures” to redress discrimination facing Aboriginal women in the relevant areas and/or “to provide financial and other types of support to ensure full implementation of this right for all members of the society (or community)”. As we have learned, the legislation must provide for holistic solutions, leading to a policy framework in which underlying socio-economic conditions, such as adequate, affordable housing, are raised to an acceptable standard.

This right is contained within the following instruments:

Article 25 of the UDHR

Article 11 of the ICESCR

5. The Right to Culture

The right to culture is important for Indigenous women’s equality rights, such as in asserting the rights of Indigenous women to equal access to matrimonial property upon marital breakdown. It is also important in asserting the right to solutions which promote one’s culture and are consistent within principles of self-determination. This right was successfully used by Sandra Lovelace to claim her right to live in her community when she was excluded under the infamous section 12(1) (b) of the *Indian Act*.

The challenge facing all relevant parties in policy and legislative reforms aimed at improving the lives of Indigenous women is to avoid the pitfalls of past reforms, such as Bill C-31 whereby the most direct inequalities were removed from the *Indian Act*, but new inequalities were created and residual inequalities remained. Furthermore, there was no provision within the legislative scheme to ensure that proactive non-legislative measures would be taken in the implementation of the reforms. Promotion of the right to culture must be done in a way that recognizes all members of the culture to the exercise of rights on an equal, non-discriminatory basis. Framing the right in such a manner precludes archaic notions of self-determination that do not respect peremptory norms such as equality and non-discrimination.

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 (the CRC)

6. Free, Prior and Informed Consent (FPIC)

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 legal recognition under international law.⁹ In international fora, the government of Canada has resisted acceptance of this as a legal principle fully applicable, contending, rather, that it is only a guideline that is applicable in certain circumstances only.¹⁰ This is a principle that must inform

⁹ See *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Permanent Forum on Indigenous Issues, 4th 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*).

¹⁰ See Canada, “Statement by the Observer Delegation of Canada on Agenda Item 5: Examples of applications of the principle of FPIC at the national and international level”, online: INAC <http://www.ainc-inac.gc.ca/nr/spch/unp/05/fpi/eap_e.html> at para. 5 where Canada notes that, “Instead [of taking a one size fits all approach], in Canada’s experience the meaningful involvement of indigenous peoples and the development of processes that support the fair and equitable balancing of interests have been far more important than focusing on consent *per se*.” and at para. 23 where Canada states that, “Free (sic) prior and informed consent is one mechanism to ensure the views of indigenous peoples are taken into account, but it is not the only, nor is it necessarily the most effective way to ensure that the interests of indigenous citizens are accommodated, and that indigenous people can shape their futures.” [Emphasis in the original.] The inclusion of FPIC in the UN Declaration is reportedly one of the reasons that the Canadian government did

any legislative framework. Without adequate recognition of legal rights over lands, resources and territories of Indigenous Peoples, the right to self-determination will remain unfulfilled in a meaningful way.

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 lead 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 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 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 principle 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

7. Right to participate in decision-making

The right of Indigenous peoples 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 policy and legislative levels related to all policy and legislative developments. Under international law, the principle of the right to participate in decision-making is recognized in implementing economic, social and cultural rights.¹¹ This is also a principle contained within national legislation, including section 15 of the *Charter* and section 35(4) of the *Canadian Constitution*.¹²

The right to participate in decision-making processes is critical to the development, implementation and evaluation of any and all matrimonial property

not support its adoption. See "Canada's Position on the UN Draft (sic) Declaration on the Rights of Indigenous Peoples: June 29, 2006," online: INAC < http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html>.

¹¹ See for example, *Women and Health (Article 12) (General Recommendation No. 24)*, UN Committee on the Elimination of Discrimination against Women, 20th Sess., UN Doc. A/54/38 (1999) 5 at para. 31 (a).

¹² See Patricia Monture, "" See NWAC's CAPR Discussion Paper for the Negotiations Roundtable.

regimes that may be brought about by the reforms presently contemplated. Any new system must rectify decades of a system that cultivated inequalities and lack of full and effective participation in decision-making processes by Aboriginal women. Thus, remedial measures aimed at improving this situation must be instituted.

This right is contained within the following instruments:

Articles 18 and 22 of the DRIP.

Article 7 of the CEDAW

8. 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.

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

Status of Ratification of International Instruments

United Nations Documents

Declarations

Under international law, a declaration is an aspirational, non-binding document that can be characterized as being “a statement of principles, with moral force, but lacking legal force” which contrasts with conventions, covenants and treaties which are legally enforceable. (Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text & Materials, Second Edition* (Oxford: Oxford University Press, 2000) at 142. As such, Declarations are not ratified by individual States. However, Declarations constitute unwritten international norms that become binding over time based on a general and consistent practice of states in conjunction with *opinion juris*. (Oscar Schachter, “International Law in Theory and Practice” in Steiner and Alston at 227-229.)

Universal Declaration of Human Rights (UDHR) – 1948

Declaration on the Rights of Indigenous Peoples (DRIP) – 2006 – adopted by the UN Human Rights Council, pending adoption by the UN General Assembly.

Declaration on the Elimination of Violence against Women - 1993

Treaties

International Covenant on Economic, Social and Cultural Rights (the ICESCR) – 1966 – ratified by Canada

International Covenant on Civil and Political Rights (the ICCPR) - 1966 – ratified by Canada [Note: There are also two optional protocols to the ICCPR which provide for enforcement mechanisms of the ICCPR. Canada is a party to these.]

Convention on Biological Diversity – 1992 – ratified by Canada

Convention on the Elimination of All Forms of Discrimination against Women - 1979 – ratified by Canada [There is an optional protocol to the CERD to which Canada is a party.]

Convention on the Elimination of All Forms of Racial Discrimination – 1966 – ratified by Canada

Convention on the Rights of the Child (the CRC) - 1995 – ratified by Canada [There are two option protocols to the CRC to which Canada is a party.]

International Labor Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169) – 1989 - not ratified by Canada

Resolutions

Resolution 1325, (2000), UN Security Council Res. 2000/1325, 4213th meeting, UN Document No. S/RES/1325, (2000) – passed in 2000 with full support of Canada.

Organization of American States (OAS) Documents

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belém do Pará” – 1994 – not ratified by Canada

OAS draft American Declaration on the Rights of Indigenous Peoples – not yet finalized