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Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights

Rauna Kuokkanen*

ABSTRACT

In spite of the fast-growing literature on indigenous peoples and self-determination, there is a striking absence of research into the gendered processes and effects of indigenous self-determination or, more generally, indigenous women and self-determination. This article examines the interconnections between indigenous self-determination and indigenous women's rights with a particular focus on the question of violence against women. It contends that for indigenous self-determination to be successful it must also address the question of violence against indigenous women. The article argues for a specific human rights framework that simultaneously accounts for indigenous self-determination and human rights violations of indigenous women.

I. INTRODUCTION

In the past several years, there has been an exponential growth of research on various aspects of indigenous peoples and self-determination, including

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the scope, implementation, capacity-building, and a range of self-government arrangements. However, very few studies examine these issues from a gendered perspective or apply a gender-based analysis. Instead, most studies present the project of indigenous self-determination as a phenomenon outside of gendered political structures and relations of power or processes of gendering in society in general. Conventional un-gendered research on indigenous self-determination conceals patriarchal structures and relations of power, which create hierarchical and differential access to resources, representation, political influence, and to being “heard” in indigenous societies.¹

Another shortcoming of the existing scholarship on indigenous self-determination is the lack of studies that consider whether and how the question of violence against women is related to self-determination and autonomy. Self-determination (both individual and collective) and gendered violence are among the most important and pressing issues for indigenous women worldwide. Existing indigenous self-governance arrangements have often failed to protect women from social and economic dispossession and from multilayered violence experienced in their own communities and in society at large. It has also become evident that current justice systems or existing structures do not adequately address violence against indigenous women.² Therefore, there is a need to extend the analysis from a legal framework to a political one, and to investigate the very self-determination processes that are to guarantee indigenous peoples more effective control of their own affairs.

This article focuses on exploring the interconnections between indigenous self-determination, human rights, and violence against women. It places both self-determination and violence against women within the international human rights framework and contends that indigenous self-determination cannot be achieved without taking into account pressing issues involving indigenous women’s social, economic, civil, and political rights. Further,

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1. The larger project of which this paper is a part examines how the project of indigenous self-determination and indigenous political institutions are gendered—i.e., the ways in which indigenous women and men are differently situated in relation to self-determination processes—in three circumpolar communities in Canada, Greenland, and the Nordic countries.
 2. See Angela Cameron, *R. v. Gladue: Sentencing and the Gendered Impacts of Colonialism*, in *MOVING TOWARD JUSTICE: LEGAL TRADITIONS AND ABORIGINAL JUSTICE* 170–75 (John D. Whyte ed., 2008); Mary Crnkovich, *The Role of the Victim in the Criminal Justice System—Circle Sentencing in Inuit Communities*, Canadian Association of Sexual Assault Centres (CASAC) (1995), available at www.casac.ca/content/role-victim-criminal-justice-system-circle-sentencing-inuit-communities-0; Jennifer Koshan, *Aboriginal Women, Justice and the Charter: Bridging the Divide?*, 32 U. BRIT. COLUM. L. REV. 23, 35–38 (1998); Peter H. Russell, *A Sustainable Justice System in Nunavut?* (2008) (unpublished paper presented at the VI International Congress of Arctic Social Sciences, Nuuk, Greenland); Ann-Claire Larsen & Alan Petersen, *Rethinking Responses to “Domestic Violence” in Australian Indigenous Communities*, 23 J. SOC. WELFARE & FAM. L. 121, 125–26 (2001).

the paper argues that the human rights framework is the most appropriate way of addressing violence against indigenous women because it avoids the victimization of women. The first section of the paper considers indigenous self-determination as a collective human right and criticizes the standard, narrow interpretations of self-determination as state sovereignty and independent statehood. The second section examines the question of indigenous women's rights as human rights and the commonly assumed tension between collective indigenous peoples' rights and individual rights. This article shows that the tension is spurious, as it appears to apply only to women's human rights (often regarded as sex or gender equality rights). Otherwise, collective and individual rights in indigenous communities are considered "mutually interactive" or belonging to a holistic continuum. Finally, the article links indigenous women's human rights to the question of violence against women and shows how indigenous self-determination is not achievable without taking account of the full scale of indigenous women's human rights and addressing their violations.

II. SELF-DETERMINATION AS A HUMAN RIGHT

In the past forty years, indigenous peoples' self-determination has become a significant global human rights issue both at national and international levels. Indigenous peoples' human rights have been recently recognized by the international community in the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.³ The declaration affirms indigenous peoples' civil, political, and cultural rights and emphasizes that these rights apply equally to men and women in indigenous communities.⁴

Indigenous rights advocates have been instrumental in redefining the concept of self-determination and advancing collective human rights in international law. Indigenous peoples' human rights are often regarded as part of the emerging third generation human rights, centering on collective rights and, in particular, the right to self-determination. The first generation human rights include civil and political rights, and the second generation human rights consist of rights related to equality. The third generation human rights consists of rights usually articulated in aspirational declarations of international law ("soft law") and are often hard to enforce. The adoption of the

3. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *adopted* 13 Sept. 2007, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 [hereinafter UNDRIP].

4. *Id.* art. 22.

UN Declaration on the Rights of Indigenous Peoples signified an agreement (however uneasy) by the international community that self-determination is the fundamental principle from which indigenous peoples' rights emanate and are based upon. This has been the core of the indigenous peoples' claims—that without the collective right to self-determination, indigenous peoples are not able to effectively exercise their other human rights and remain distinct peoples.⁵ Importantly, the significance of collective rights for indigenous peoples lies in the fact that “collective rights claims are not just about protecting cultural attachment; they are also about political voice and gaining access to the processes which affect the physical and economic conditions under which one lives.”⁶

Rather than considering self-determination a right of sovereign states, it has been argued that in order to arrive at a more correct interpretation of self-determination in international law, it needs to be regarded as a human right.⁷ James Anaya holds that the widely shared opposition by states to the recognition of self-determination as applying to all peoples stems from the misconception that, in its fullest sense, it implies a right to independent statehood—a misconception “often reinforced by reference to decolonization, which has involved the transformation of colonial territories into new states under the normative aegis of self-determination.”⁸ Anaya distinguishes between remedial (decolonization) and substantive aspects of self-determination, the latter of which forms the principles defining the standard (i.e., constitutional and ongoing aspects).

Anaya is particularly critical of narrow conceptions of self-determination and peoples based on a post-Westphalian vision of the world divided into mutually exclusive territorial communities. This conception, according to Anaya, “ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience.”⁹ Hence, a more appropriate conception of self-determination arises within the human rights framework of contemporary international law such as the two 1966 international human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which recognize that “all peoples

5. Dalee Sambo Dorough, *The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 264–66 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

6. Cindy L. Holder & Jeff J. Corn tassel, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, 24 *HUM. RTS. Q.* 126, 139 (2002).

7. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 45–47 (1996).

8. *Id.* at 80.

9. *Id.* at 78.

have the right to self-determination."¹⁰ Importantly, this is a collective right applying to peoples rather than individuals—a reminder that challenges the polarized views arguing that all human rights are inherently individualistic—which, in the past decade, has also been applied to indigenous peoples by the UN Human Rights Committee.¹¹

In the context of indigenous peoples' rights, one of the most controversial and debated issues has been the meaning of the concept of "peoples." Anaya contends that in order to grasp self-determination as a human right, it is necessary to question the limited perception of "peoples" as "identified by reference to certain objective criteria linked with ethnicity and attributes of historical sovereignty" or "with the aggregate population of a state" and instead, to understand the term "in a flexible manner, as encompassing all relevant spheres of community and identity."¹² He suggests:

Understood as a human right, the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly. . . . Under a human rights approach, attributes of statehood or sovereignty are, at most, instrumental to the realization of these values—they are not the essence of self-determination for peoples.¹³

Feminist political theorists and indigenous scholars view the recognition of the interdependence and overlapping character of human communities in the world as the foundation of theories and conceptions of relational self-determination. In her analysis of two conceptions of self-determination, Iris Marion Young argues that a relational interpretation of self-determination better reflects reality in general, and specifically indigenous peoples' claims for the right to self-determination. In her view, the dominant understanding of self-determination as non-interference, separation, and independence is misleading and also a dangerous fiction. Drawing on feminist political theory, she argues that the precept of non-interference "does not properly take account of social relationships and possibilities for domination."¹⁴ It also creates an illusion of independence that in fact is constituted by insti-

10. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976); International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art.1, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976).

11. See Timo Koivurova, *From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination*, 15 INT'L J. MIN. & GROUP RTS. 1, 5 (2008).

12. S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in MAKING THE DECLARATION WORK, *supra* note 5, at 186.

13. *Id.* at 187–88.

14. IRIS MARION YOUNG, *GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE* 46 (2007).

tutional relations and a system of domination. A relational conception of self-determination, on the other hand, recognizes the power dynamics and interdependence while simultaneously respecting the autonomy of individuals as agents, rather than atomized individuals. For Young, non-interference is neither desirable nor possible in today's interconnected and interdependent world. She contends:

Insofar as outsiders are affected by the activities of a self-determining people, those others have a legitimate claim to have their interests and needs taken into account even though they are outside the government jurisdiction. Conversely, outsiders should recognize that when they themselves affect a people, the latter can legitimately claim that they should have their interests taken into account insofar as they may be adversely affected. Insofar as they affect one another, peoples are in relationships and ought to negotiate the terms and effects of the relationship.¹⁵

While arguing for relational approach and recognition of interdependence, Young makes an exception with regard to a people's "prima facie right to set its own governance procedures and make its own decisions about its activities, without interference from others."¹⁶ This understanding, which combines the group right to govern itself and to make decisions over its own affairs with the recognition of the relational nature of self-determination, is reflected in many indigenous women's views and understandings of self-determination. These views recognize the interdependence and reciprocity between all living beings and often are articulated in terms of responsibilities rather than rights. Carried out through every day practices as well as through ceremonies, self-determination is embedded and encoded in individual and collective responsibilities sometimes called the laws (or "customary law")¹⁷ that lay the foundation of indigenous societies.¹⁸ However, self-determination

15. *Id.* at 51.

16. *Id.*

17. The term "customary law" has been critiqued by many scholars. See, e.g., Chris Cunneen & Melanie Schwartz, *Background Paper 11: Customary Law, Human Rights and International Law: Some Conceptual Issues*, Law Reform Commission of Western Australia, 429, 431 (2005), available at <http://www.lrc.justice.wa.gov.au/094-bp.html>; Val Napoleon, *Simple Law for Simple Cultures* (2006) (unpublished paper presented at the 5th Critical Race Conference, Regina, Saskatchewan); TIM SCHOOLS, *SHIFTING BOUNDARIES: ABORIGINAL IDENTITY, PLURALIST THEORY, AND THE POLITICS OF SELF-GOVERNMENT* 131–32 (2003); Gordon R. Woodman, *Customary Law in Common Law Systems*, Institute of Development Studies' International Workshop on Rule of Law and Development 2 (June 2000), available at http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/woodman.pdf.

18. See Rauna Kuokkanen, *Self-determination and Indigenous Women—"Whose Voice Is It We Hear in the Sámi Parliament?"* 18 INT'L J. MINORITY & GROUP RTS. 39, 44 (2011); PATRICIA A. MONTURE-ANGUS, *JOURNEYING FORWARD: DREAMING FIRST NATIONS' INDEPENDENCE* 28, 36 (1999); Andrea Smith, *Native American Feminism, Sovereignty, and Social Change*, 31 FEMINIST STUD. 116, 129 (2005); Sharon H. Venne, *The Meaning of Sovereignty?*, 2 INDIGENOUS WOMAN 27 (1999); Ingrid Washinawatok, *Sovereignty Is More Than Just Power*, 2 INDIGENOUS WOMAN 23 (1999).

is not the only right that is relational. Feminist political theorists have argued for a relational approach to all rights and for the recognition of how rights structure relationships.¹⁹ Below, the article considers the relationship between collective and individual rights in the context of the right to self-determination and indigenous women's rights.

III. INDIGENOUS WOMEN'S RIGHTS

Women's rights have been formally codified as human rights in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁰ Indigenous peoples' human rights have been codified in the recently adopted UN Declaration on the Rights of Indigenous Peoples, which, unlike CEDAW, is not a binding treaty. The Declaration does not establish any new rights, but rather it creates an instrument that recognizes and takes account of the specificities of indigenous peoples' human rights (including collective human rights), thus creating a more effective framework for exercising and implementing those rights. In the same way as the global women's movement had argued earlier, the work leading to the Declaration was driven by the recognition that conventional or universal approaches to human rights had failed to adequately protect indigenous peoples.

In spite of the adoption of these two key international human rights instruments, indigenous women's rights remain a contentious and often neglected issue both at international and local levels.²¹ Laura Parisi and Jeff Corntassel note, "due to colonization and on-going imperial influences, both women's rights and Indigenous rights movements have been problematic spaces for Indigenous women's participation."²² The concern for indigenous women has long been the lack of recognition of the ways in which "Indigenous women commonly experience human rights violations at the crossroads of their individual and collective identities."²³ Environmental pollution and the destruction of ecosystems are good examples of such violations, as

19. Jennifer Nedelsky, *Reconceiving Rights and Constitutionalism*, J. Hum. Rts., July 2008, at 139, 141.

20. Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981).

21. Parisi and Corntassel note: "For example, early versions of the Draft Declaration on the Rights of Indigenous Peoples (UN 1993) did not include any gender specific language with regard to violence against Indigenous women." Laura Parisi & Jeff Corntassel, *In Pursuit of Self-Determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces*, 13 CANADIAN FOREIGN POL'Y 81, 87 (2007).

22. *Id.* at 81.

23. MAIRIN IWANKA RAYA: INDIGENOUS WOMEN STAND AGAINST VIOLENCE, A COMPANION REPORT TO THE UNITED NATIONS SECRETARY-GENERAL'S STUDY ON VIOLENCE AGAINST WOMEN 8 (2006).

they undermine indigenous peoples' control of and access to their lands and resources and often compromise women's ability to take care of their children and families due to health problems, contamination, displacement, and increased violence.

For the international women's movement, the key concern in the conventional human rights framework has been the dichotomy between the private and the public spheres. For indigenous women, the key issue is to pursue a human rights framework that not only simultaneously advances individual and collective rights, but also explicitly addresses gender-specific human rights violations of indigenous women in a way that does not disregard the continued practices and effects of colonialism. As indicated by indigenous women's criticism of the Beijing Platform for Action (1995), the tension between the two movements is located in the international women's movement's "overemphasis on gender discrimination and gender equality which depoliticizes issues confronting Indigenous women"²⁴ and does not recognize the special circumstances of indigenous women.²⁵ It has also been argued that a focus on gender discrimination tends to overemphasize individual equality and rights rather than explicating structural violence²⁶ and the interlocking systems of domination affecting indigenous women's lives.²⁷

The Declaration on Indigenous Peoples' Rights is considered to be an instrument that balances the individual and collective human rights of indigenous peoples and recognizes the full compatibility between the two.²⁸ Moreover, the Declaration emphasizes that it applies equally to "male and female indigenous individuals."²⁹ It also specifically mentions the obligation of both states and indigenous nations "to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."³⁰ Several other international documents have also recognized the significance of both individual and collective indigenous rights, many of which have been employed by indigenous people to advance their rights.³¹ Thus, it has been argued that "indigenous peoples

24. *Id.* at 10.

25. Mary Sillett, *Ensuring Indigenous Women's Voices Are Heard: The Beijing Declaration of Indigenous Women*, in *FIRST VOICES: AN ABORIGINAL WOMEN'S READER* 207–11 (Patricia A. Monture & Patricia D. McGuire eds., 2009).

26. V. Spike Peterson, *Whose Rights? A Critique of the "Givens" in Human Rights Discourse*, 15 *ALTERNATIVES* 303, 328–32 (1990).

27. Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, in *RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY* 125–31 (Sherene H. Razack ed., 2002).

28. Jérémie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 *INT'L J. MINORITY & GROUP RTS.* 207, 229 (2007).

29. UNDRIP, *supra* note 3, art. 44.

30. *Id.* art. 22, ¶ 2.

31. Gilbert, *supra* note 28, at 209–12.

generally recognize that collective and individual rights are *mutually interactive* rather than in competition."³² As an example, the Inuit Tapirisat of Canada "believe in individual and collective rights as complementary aspects of an holistic human rights regime."³³ M. Celeste McKay and Craig Benjamin also argue for the indivisibility of indigenous women's rights and demonstrate the interrelation of the Declaration's provisions on economic, social, and cultural rights on the one hand and its provision on violence and discrimination on the other. They maintain that violence against indigenous women is a good example of "the failings of a compartmentalized approach to human rights."³⁴ For McKay and Benjamin, it is imperative to find ways to understand how individual and collective rights "interact in the concrete experience of those whose rights are most frequently violated."³⁵ They do not accept the view that indigenous women's individual rights are distinct or at odds with indigenous peoples' collective rights of self-determination. Instead, they maintain that "[s]ystematic violations of the collective rights of Indigenous peoples put the rights of individual Indigenous women at risk."³⁶ The inverse is also true (although often harder to get recognized): systematic violations of indigenous women's rights put collective indigenous rights at risk, as discussed below.

It is obviously too early to assess whether the Declaration sufficiently protects indigenous women and their human rights. The reality in indigenous communities today is that the internalization of patriarchal colonial structures has resulted in circumstances where women often do not enjoy the same level of rights and protection as men. In Canada, indigenous women have been legally discriminated against for over a century. From the Indian Act of 1876 until the passage of Bill C-31 in 1985, women were deprived of their Indian status upon marriage to a non-Indian man while Indian men were entitled to bestow status on their non-Indian wives.³⁷ For Indian women, "marrying out" literally meant a reality of exile from their communities, and hence from their rights and ties to their families, cultures, and identities. Sharon McIvor explains:

32. Holder & Cornthassel, *supra* note 6, at 129.

33. *Information Received from Indigenous Peoples' and Non-governmental Organizations: The Inuit Tapirisat of Canada, A Comment on Article 3 of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Comm'n on Hum. Rts., ¶ 4, U.N. Doc. E/CN.4/Sub.2/AC.4/1994/4/Add/1 (1994).

34. M. Celeste McKay & Craig Benjamin, *A Vision for Fulfilling the Indivisible Rights of Indigenous Women*, in *REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, AND ACTION* 159 (Jackie Hartley et al. eds., 2010).

35. *Id.*

36. *Id.* at 160.

37. Native Women's Association of Canada [NWAC], *Aboriginal Women's Rights Are Human Rights* 8–11 (Can. Hum. Rts. Act Rev. Research Paper 1999), available at <http://action.web.ca/home/narcc/attach/AboriginalWomensRightsAreHumanRights.pdf>.

Aboriginal women in Canada do not enjoy rights equal to those shared by other Canadians. Since 1869, colonialist and patriarchal federal laws—most notably the Indian Act—have fostered patriarchy in Aboriginal communities and subjected Aboriginal women to loss of Indian status and the benefits of band membership, eviction from reserve home, and denial of an equal share of matrimonial property. Colonialism and patriarchy have also enabled cooperation between male Aboriginal leadership and Canadian governments to resist the inclusion of Aboriginal women in Aboriginal governance. These denials and exclusions perpetuate the exposure of Aboriginal women and their children to violence and consign many to extreme poverty.”³⁸

Inspired and influenced by the civil rights movement to challenge the dominance of male leadership and participation in Native organizations and band councils, Native women began to mobilize in the early 1970s, resulting in numerous local, reserve-based groups as well as national organizations such as the Native Women’s Association of Canada.³⁹ This movement also resulted in two landmark court cases on discrimination against indigenous women. The *Canada v. Lavell* and *Isaac v. Bedard* cases in the Supreme Court of Canada (1974), and the *Lovelace v. Canada* case before the United Nations’ Human Rights Committee (1977), argued that the Indian Act violated Canada’s Bill of Rights and its prohibition against discrimination on the basis of sex.⁴⁰ In addition, Sandra Lovelace argued in her case that the Indian Act violated the ICCPR, particularly Article 27, which stipulates the right not to be denied the enjoyment of one’s own culture and language.⁴¹ While the Supreme Court of Canada ruled against Lavell and Bedard, arguing that the Indian Act status provisions were exempt from the Bill of Rights, the UN Human Rights Committee found Canada in violation of the ICCPR and recommended amending the Indian Act in a way that addressed its discrimination of women.⁴² Reluctantly, the government representatives and male Native leadership came together with Native women’s organizations and groups to draft and finally pass Bill C-31 in 1985.⁴³ This amendment, however, did not fully address or eliminate gender discrimination in the

38. Sharon McIvor, *Aboriginal Women Unmasked: Using Equality Litigation to Advance Women’s Rights*, 16 CAN. J. WOMEN & L. 106, 107 (2004).

39. NWAC, *supra* note 37, at 3, 9.

40. *Canada v. Lavell & Isaac v. Bedard* [1974] S.C.R. 1349 (Can.); *Sandra Lovelace v. Canada*, Communication No. R.6/24, *adopted* 29 Dec. 1977, U.N. GAOR, Hum. Rts. Comm., at 166, U.N. Doc. A/36/40 (1981); BONITA LAWRENCE, “REAL” INDIANS AND OTHERS: MIXED-BLOOD URBAN NATIVE PEOPLES AND INDIGENOUS NATIONHOOD 56–58 (2004); NWAC, *supra* note 37, at 8–9.

41. See Anne F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CAN. Y.B. INT’L L. 244, 244–45 (1982); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 360–61 (2002).

42. JANET SILMAN, ENOUGH IS ENOUGH: ABORIGINAL WOMEN SPEAK OUT 13 (1987); NWAC, *supra* note 37, at 10.

43. NWAC, *supra* note 37, at 11.

Indian Act. While Bill C-31 reinstated status to women who had lost it by "marrying out," it also introduced the so-called "second-generation cut-off" clause, which denied those with reinstated status under Bill C-31 the ability to pass status on to their children.⁴⁴

As a response to a 2009 court decision, the Canadian government passed the Gender Equity in Indian Registration Act (Bill C-3) that came into force on 31 January 2011. In her case, Sharon McIvor argued that under the Canadian Charter, the Indian Act and Bill C-31 continue to discriminate against women on the basis of sex. McIvor won in the British Columbia Supreme Court in 2007 and the BC Court of Appeal in 2009 and, as a result, the Canadian government was required to amend the Indian Act.⁴⁵ However, the new bill still does not fully eliminate discrimination against indigenous women, but instead merely addresses the narrow issue of discrimination identified by the British Columbia Court of Appeal.⁴⁶

The mobilization of indigenous women in Canada to advance their human, civil, and political rights and to end gender discrimination and violence in their communities was not well received by indigenous male leadership and male-dominated indigenous organizations such as the National Indian Brotherhood. Native women's organizations and groups supporting Lavell, Bedard, and Lovelace were harshly criticized for being anti-Indian and accused of betraying the self-determination struggles and of cooptation into colonial, Western discourses of individualism.⁴⁷ During the constitutional discussions on Aboriginal self-determination in the late 1980s and early 1990s, which followed the patriation of the Canadian Constitution and the passage of the Canadian Charter of Rights in 1982, the issue reemerged as to whether the Charter applies to Indian bands and the question of Aboriginal

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44. See Sally Weaver, *First Nations Women and Government Policy, 1970–92: Discrimination and Conflict*, in *CHANGING PATTERNS: WOMEN IN CANADA* 116–18 (Sandra Burt et al. eds., 1993); KATHLEEN JAMIESON, *INDIAN WOMEN AND THE LAW IN CANADA: CITIZENS MINUS* (1978); McIvor *supra* note 38, at 117–18; Patricia A. Monture, *The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?*, in *ADVANCING ABORIGINAL CLAIMS: VISIONS, STRATEGIES, DIRECTIONS* (Kerry Wilkins ed., 2004); SILMAN, *supra* note 42, at 12; NWAC, *supra* note 37, at 3.
 45. McIvor v. Canada (Registrar of Indian and Northern Affairs) 2007 CarswellBC 1327 (Can. B.C.S.C.) (WL); McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 CarswellBC 843 (Can. B.C.C.A.) (WL).
 46. Mary Eberts, *Case Comment: McIvor: Justice Delayed—Again*, 8 *INDIGENOUS L.J.* 15, 41–44 (2010).
 47. See Joan Holmes, *Bill C-31: Equality or Disparity? The Effects of the New Indian Act on Native Women* (1987); LILIANNE ERNESTINE KROSENBRINK-GELISSEN, *SEXUAL EQUALITY AS AN ABORIGINAL RIGHT: THE NATIVE WOMEN'S ASSOCIATION OF CANADA AND THE CONSTITUTIONAL PROCESS ON ABORIGINAL MATTERS, 1982–1987*, at 90, 132–33 (1991); Teresa Nahanee, *Dancing with a Gorilla: Aboriginal Women, Justice, and the Charter*, in *ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM: REPORT OF THE NATIONAL ROUND TABLE ON ABORIGINAL JUSTICE ISSUES* 359, 366 (1993); HAROLD CARDINAL, *THE REBIRTH OF CANADA'S INDIANS* 110–12 (1977).

self-determination.⁴⁸ The position of many Aboriginal women's organizations and groups has been: "No self-government without the *Charter*."⁴⁹ As Mclvor puts it, "[a]fter 135 years of sex discrimination by Canada, we were afraid of self-government. Why would neo-colonial Aboriginal governments, born and bred in patriarchy, be different from Canadian governments?"⁵⁰

These tensions, perceived and real, between indigenous and women's rights are by no means limited to the Canadian context, although "[s]ex discrimination in the operation of the Indian Act has become the symbol of conflict between collective Aboriginal rights and individual human rights in Canada."⁵¹ In the quest for indigenous self-determination, women's rights often have been considered divisive and disruptive. Indigenous women advocating their rights have been repeatedly accused of being disloyal to their communities, corrupted by "Western feminists," and of introducing alien concepts and thinking to indigenous communities and practices. If not entirely disregarded, women's rights, concerns, and priorities are commonly put on the back burner to be addressed "later," once collective self-determination has been achieved.⁵² Indigenous women have increasingly confronted these views and attitudes by contending that securing indigenous women's rights is inextricable from securing the rights of their peoples as a whole.⁵³ It has also been argued that without individual self-determination,

48. See Margaret A. Jackson, *Aboriginal Women and Self-Government*, in *ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES* 183–85 (John H. Hylton ed., 1994); Koshan, *supra* note 2, at 25; PATRICIA MONTURE-ANGUS, *THUNDER IN MY SOUL: A MOHAWK WOMAN SPEAKS* 157–58 (1995); Teresa Nahanee, *Indian Women, Sex Equality, and the Charter*, in *WOMEN AND THE CANADIAN STATE* 100–02 (Caroline Andrew & Sanda Rodgers eds., 1997); NWAC, *Aboriginal Women, Self Government & the Canadian Charter of Rights and Freedoms* 4–6 (Can. Hum. Rts. Act Rev. 1991); NWAC, *First Nations/Metis Human Rights Law: The History of NWAC's Position & Options for Future Action* 3–5 (Can. Hum. Rts. Act Rev. 1988); NWAC, *Native Women & the Charter* 3, 8–9 (Can. Hum. Rts. Act Rev. 2000).

49. Mclvor, *supra* note 38, at 128.

50. *Id.* But see JACKSON, *supra* note 48, at 180–98.

51. Wendy Moss, *Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights*, 15 *QUEEN'S L.J.* 279, 299 (1990).

52. See Joyce Green, *Taking Account of Aboriginal Feminism*, in *MAKING SPACE FOR INDIGENOUS FEMINISM* 24–28 (Joyce Green ed., 2007); Kerensa Johnston, *Māori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices*, 4 *INDIGENOUS L.J.* 19, 41–47 (2005); Irma Otzoy, *Indigenous Law and Gender Dialogues*, in *HUMAN RIGHTS IN THE MAYA REGION: GLOBAL POLITICS, CULTURAL CONTENTIONS, AND MORAL ENGAGEMENTS* 171, 181–82 (Pedro Pitarch et al. eds., 2008); Liesbeth van der Hoogte & Koos Kingma, *Promoting Cultural Diversity and the Rights of Women: The Dilemmas of "Intersectionality" for Development Organisations*, 12 *GENDER & DEV.* 47, 48–49 (2004); see also Smith, *supra* note 18, at 121.

53. Margarita Gutiérrez & Nellys Palomo, *A Woman's Eye View of Autonomy*, in *INDIGENOUS AUTONOMY IN MEXICO* 53, 77–79 (Aracely Burguete Cal y Mayor ed., 2000); see also Smith, *supra* note 18, at 129–30.

meaningful and viable collective self-determination of indigenous peoples is simply not possible.

The aboriginal political discourse regarding self-determination would be more useful to communities if it incorporated an understanding of the individual as relational, autonomous, and self-determining. That is, a developed perspective of individual self-determination is necessary to move collective self-determination beyond rhetoric to a meaningful and practical political project that engages aboriginal peoples and is deliberately inclusive of aboriginal women.⁵⁴

If it is indeed the case that indigenous rights are widely regarded as both individual and collective, the issue in the continued opposition to or neglect of indigenous women's rights is something other than the assumed irreconcilability between the two categories of human rights. Considering the lack of adequate, sustained attention to the endemic levels of violence against indigenous women in many countries⁵⁵ by the indigenous self-determination movement, indigenous organizations, and leadership, one can only conclude that it is prevailing and persistent gender injustice in both indigenous and mainstream societies that lies at the heart of the problem of indigenous women's human rights, not the conflict between individual and collective (or between universal and local) rights.

In other words, not unlike governments around the world, the international indigenous rights movement tends to turn a blind eye to the issue of

54. Val Napoleon, *Aboriginal Self Determination: Individual Self and Collective Selves*, 29 *ATLANTIS* 31, 31 (2005).

55. See generally Amnesty Int'l [AI], *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (2004), available at <http://www.amnesty.ca/stolensisters/amr2000304.pdf>; AI, *Mexico: Killings and Abductions of Women in Ciudad Juarez and the City of Chihuahua: The Struggle for Justice Goes On* (2006), available at <http://www.amnesty.ca/stoptheviolence/news/view.php?load=arcview&article=3281&c=Women%20News>; AI, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007), available at <http://www.amnesty.org/en/library/info/AMR51/035/2007>; AI, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (2009), available at http://www.amnesty.ca/campaigns/sisters_overview.php; International Indigenous Women's Forum, *supra* note 23, at 27–32; NWAC, *VOICES OF OUR SISTERS IN SPIRIT: A REPORT TO FAMILIES AND COMMUNITIES* (2009), available at http://www.nwac.ca/sites/default/files/imce/NWAC_Voices%20of%20Our%20Sisters%20In%20Spirit_2nd%20Edition_March%202009.pdf; SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE (Sarah Deer et al. eds., 2008); Bo Wagner Sørensen, "Men in Transition": *The Representation of Men's Violence Against Women in Greenland*, 7 *VIOLENCE AGAINST WOMEN* 826 (2001); HUM. RTS. & EQUAL OPPORTUNITY COMM., *RACIST VIOLENCE: REPORT OF THE NATIONAL INQUIRY INTO RACIST VIOLENCE IN AUSTRALIA* (1991); Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (1994); AUDREY BOLGER, *ABORIGINAL WOMEN AND VIOLENCE: A REPORT FOR THE CRIMINOLOGY RESEARCH COUNCIL AND THE NORTHERN TERRITORY COMMISSIONER OF POLICE* (1991).

indigenous women's human rights. Consider the Inuit as an example: on the one hand, they advocate an interconnected human rights framework that equally values individual and collective rights. On the other hand, there is a very high occurrence of violence in Inuit communities, particularly against Inuit women, which has led Pauktuutit, the Inuit Women's Association of Canada, to identify violence as its key priority area.⁵⁶ Hence, it appears that for the indigenous self-determination movement, violence against women is considered neither an indigenous rights issue nor a human rights issue.

IV. VIOLENCE AGAINST INDIGENOUS WOMEN

Globally, gender violence is increasingly considered a serious human rights violation.⁵⁷ While direct physical and sexual violence are the most severe manifestations of the oppression of women, they cannot be fully understood if not analyzed as part of the larger framework and ideologies of domination. Catharine MacKinnon's definition of violence against women incorporates these two dimensions effectively:

By violence against women, I mean aggression against and exploitation of women because we are women, systemically and systematically. Systemic, meaning socially patterned, including sexual harassment, rape, battering of women by intimates, sexual abuse of children, and woman-killing in the context of poverty, imperialism, colonialism, and racism. Systematic, meaning intentionally organized, including prostitution, pornography, sex tours, ritual torture, and official custodial torture in which women are exploited and violated for sex, politics, and profit in a context of, and in intricate collaboration with, poverty, imperialism, colonialism, and racism.⁵⁸

Indigenous women and their organizations have criticized mainstream approaches to violence against women for being too restricted or for not taking indigenous peoples' realities and specific circumstances into account. For example, categories such as family, community, and state may carry different meanings and relationships to indigenous peoples than what is implied in standard research or in strategies addressing violence against women. These studies and strategies also fail to take account of the specific ways indigenous women are targeted by various forms of violence—some of which may not

56. Martha Flaherty, *Inuit Women and Violence*, in *WOMEN AND THE CANADIAN STATE*, *supra* note 48, at 180; Pauktuutit Inuit Women of Canada, *National Strategy to Prevent Abuse in Inuit Communities and Sharing Knowledge, Sharing Wisdom: A Guide to the National Strategy* (2006), available at http://www.pauktuutit.ca/pdf/publications/abuse/InuitStrategy_e.pdf.

57. See, e.g., CATHERINE MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 1–3 (2006); Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 *LAW & Soc'y Rev.* 39, 39 (2001).

58. MACKINNON, *supra* note 57, at 29.

apply to non-indigenous women (e.g., cross-border violence, ecological violence, spiritual violence).⁵⁹

In spite of the endemic levels of violence against indigenous women in many countries, discourses on indigenous self-determination and self-governance arrangements have thus far not paid adequate, sustained attention to the violation of fundamental human rights taking place in indigenous communities. In its recent report, the International Indigenous Women's Forum (FIMI) seeks to develop an indigenous conception of violence against women in order to generate concrete and effective strategies to address the widespread problem.⁶⁰ The report considers six broad categories of manifestations of violence against indigenous women: neoliberalism and development aggression, violence in the name of tradition, state and domestic violence, militarization and armed conflict, migration and displacement, and HIV/AIDS. Under its category of violence in the name of tradition, the report challenges the arguably inherent tension between universal human rights standards and local cultural practices, maintaining that "it is not 'culture' that lies at the root of violence against women, but practices and norms that deny women gender equity, education, resources, and political and social power."⁶¹ This echoes the criticism by indigenous feminist scholars who have pointed out that traditions (including those respecting women) do not necessarily protect women's individual rights or advance women's leadership, but instead have been employed to re-inscribe domination and patriarchal structures.⁶²

In a more close examination of the various manifestations of violence against indigenous women, however, it is possible to detect a potential weakness in the framework for understanding violence against indigenous women advanced by the FIMI report. Many of the manifestations of violence discussed by FIMI are not gender-specific in the sense that women are not specifically targeted by these forms of violence. However, women may (and usually do) carry the disproportionate burden of the effects of these forms of violence due to their reproductive capacity and roles as primary caretakers of the children and families. In other words, the analysis conflates gendered

59. RAYA, *supra* note 23, at 27–32.

60. *Id.*

61. *Id.* at 30.

62. See Jennifer Nez Denetdale, *Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition*, 21 WICAZO SA REV. 9 (2006); Joyce Green, *Canaries in the Mines of Citizenship: Indian Women in Canada*, 34 CAN. J. POL. SCI. 715, 726–28 (2001); Emma LaRocque, *Re-Examining Culturally Appropriate Models in Criminal Justice Applications*, in ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY AND RESPECT FOR DIFFERENCE 75–77 (Michael Asch ed., 1997); Dawn Martin-Hill, *She No Speaks and Other Colonial Constructs Of "The Traditional Woman,"* in STRONG WOMEN STORIES: NATIVE VISION AND COMMUNITY SURVIVAL 107–14 (Kim Anderson & Bonita Lawrence eds., 2003); Nahanee, *supra* note 48, at 95–100.

forms of violence with gendered *effects* of more general forms of violence that target indigenous communities in general rather than indigenous women specifically. This distinction (gendered forms vs. gendered effects of violence) is critical if we are to produce effective strategies to address *gender-specific forms of violence* against indigenous women.

Moreover, if we conflate the forms with effects, we lose the focus of self-determination as an indigenous women's issue and a gender justice issue. If indigenous self-determination is primarily a question of survival as distinct peoples, this survival must necessarily include women. In her work of anti-violence organizing, Andrea Smith notes how she is often told that indigenous communities cannot worry about domestic violence; that "we must worry about survival issues first."⁶³ She disagrees, arguing, "since Native women are the women most likely to be killed by domestic violence, they are clearly not surviving. So when we talk about survival of our nations, who are we including?"⁶⁴

In response, this article makes the following two, related arguments: first, gender justice cannot be omitted from any discussion or project of indigenous self-determination, and second, when it comes to violence against indigenous women, we must focus first and foremost on gendered *forms* of violence. This does not mean that those manifestations of violence against indigenous peoples that disproportionately affect women in indigenous communities (such as those discussed by the FIMI report) are not an issue. Rather, excessive emphasis on cultural differences diverts attention away from some of the most pressing concerns and frustrates efforts toward gender justice in indigenous communities. While recognizing the obvious differences between conceptions and constructions of gender in different societies, it is also necessary to note that claims for the specificity of gendered identities have contributed to a situation where "women's human rights are proclaimed, yet again, as private, cultural, domestic affairs."⁶⁵ This has serious negative consequences for all women, including indigenous women both as individuals and as a group.

In order to develop concrete and effective strategies to address violence against indigenous women, there is a need to recognize that while women's experiences and conceptions of gender can be very different from one another in different cultures and societies (but also *within* their own communities), women also have a lot in common globally. The discussions of the international women's movement, women's NGOs, and regional

63. Andrea Smith, *Indigenous Feminism Without Apology*, 58 NEW SOCIALIST 16, 16 (2006).

64. *Id.*

65. Siobhán Mullally, *The UN, Minority Rights and Gender Equality: Setting Limits to Collective Claims*, 14 INT'L J. MINORITY & GROUP RTS. 263, 265 (2007).

women's groups preceding and during the 1993 UN Vienna Conference on Human Rights demonstrate the widespread recognition of "important general truths that affected the lives of many women around the globe,"⁶⁶ such as discrimination against women, patterns of gender-based violence, the sexual and economic exploitation of women and girls, and laws and customs dealing "with sexuality, marriage, divorce, child custody, and family life" in general.⁶⁷ Susan Moller Okin explains:

[Representatives of women's organizations and groups] recognized that women and girls are much more likely to be rendered sexually vulnerable than men and boys—far more likely to be sexually abused or exploited, and far more directly and drastically affected by their fertility than men, unless given the means and the power to control it. Third, they recognized that women and women's work tend to be valued considerably less highly than men and men's work—regardless of how productive or essential the actual work may be.⁶⁸

Recognizing the greater likelihood of women being rendered vulnerable to abuse and exploitation does not imply restoring the notion of a universal women's identity based on universal interests and goals.⁶⁹ Nor does it mean considering violence against indigenous women solely through a gender lens.⁷⁰ While the concept of gender equality rights in itself is not a problem, the way in which gender equality rights often are constructed as belonging only to specific "interest groups" is problematic, lending itself to arguments and explanations of cultural differences rather than human rights.

Changing the discourse from gender equality rights to human rights does not entail rejecting the urgency of gender inequality. Rather, prioritizing the human rights framework allows us to place gender inequality firmly in the broader context of rights and the violation of rights. In other words, the significance of a human rights framework lies in its ability to engage both oppression and privilege. Rather than "survivors," it constructs "victims" as

66. Susan Moller Okin, *Feminism, Women's Human Rights, and Cultural Differences*, in *DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, AND FEMINIST WORLD* 39 (Uma Narayan & Sandra Harding eds., 2000).

67. *Id.*

68. *Id.* See also Charlotte Bunch, *Strengthening Human Rights of Women*, in *WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA, JUNE 1993: THE CONTRIBUTION OF NGOs REPORTS AND DOCUMENTS* 32, 37–38 (Manfred Nowak ed., 1994); Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 20–21 (Julie Peters & Andrea Wolper eds., 1995).

69. See Allison Weir, *Global Feminism and Transformative Identity Politics*, 23 *HYPATIA* 110, 113 (2008); Alison M. Jaggar, *Transnational Cycles of Gendered Vulnerability: A Prologue to a Theory of Global Gender Injustice*, 37 *PHIL. TOPICS* 33 (2009).

70. See Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native Peoples*, 18 *HYPATIA* 70, 70–71 (2003).

"citizens" with multiple identities and interests.⁷¹ Citizenship and membership are a key concern also for indigenous women, as the discussion of the Indian Act above indicates. In the context of violence against women, a human rights framework shifts attention from gender equality rights to women's fundamental human rights: "By including what violates women under civil and human rights law, the meaning of 'citizen' and 'human' begins to have a woman's face."⁷² As noted by Philip Alston, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, gender inequality is "the single biggest challenge to the international human rights system at every level."⁷³

Yet the human rights framework and rights-based discourses are not without their critics. Inherently anti-relativist in its attempt to formulate fundamental moral and ethical norms for human behavior and interaction, the human rights framework has long been criticized for its tendency to overlook cultural and regional differences and for representing a form of cultural imperialism in its attempt to universalize the Western, liberal, individualistic rights framework. Feminist human rights scholars have also been critical of human rights' focus on male priorities, behavior, and interests while ignoring women's responsibilities and circumstances. However, the purpose of the UN Charter never was to replace national laws nor impose homogeneity. There are numerous human rights bodies and instruments to recognize and accommodate group-specific and regional differences. The recognition of cultural diversity was also the starting point for the Declaration, the ultimate objective of which was to create an instrument and framework for the realization of indigenous peoples' human rights, including "a number of collective human rights specific to indigenous peoples."⁷⁴

Rights-based discourses on indigenous self-determination have been criticized for being too state-centric to be able to deliver viable indigenous self-determination premised on community involvement and citizen participation.⁷⁵ Corntassel contends: "Strategies that invoke existing human rights norms and that solely seek political and legal recognition of indigenous

71. See Laura H. Roskos & Andrea L. Humphrey, *From the Center to the Margins: The Radicalization of Human Rights in the United States*, 4 MERIDIANS: FEMINISM, RACE, TRANSNAT'LISM 129, 130 (2004).

72. MacKinnon, *supra* note 57, at 48.

73. Press Release, United Nations, Human Rights Council Holds Annual Full-Day Discussion on Women's Human Rights (4 June 2009).

74. Dorough, *supra* note 5, at 265.

75. See TAIAIAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 53–54 (1999); Jeff Corntassel, *Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade (1995–2004)*, 29 HUM. RTS. Q. 137, 150–51 (2007); Glen S. Coulthard, *Subjects of Empire: Indigenous Peoples and the "Politics of Recognition" in Canada*, 6 CONTEMP. POL. THEORY 437, 438–39 (2007).

self-determination will not lead to a self-determination process that is sustainable for the survival of future generations of indigenous peoples.”⁷⁶ For Corn tassel, sustainable self-determination is a process that ensures “that evolving indigenous livelihoods, food security, community governance, relationships to homelands and the natural world, and ceremonial life can be practiced today locally and regionally, thus enabling the transmission of these traditions and practices to future generations.”⁷⁷

Corn tassel is right to point out that appeals to human rights or calls for political and legal recognition of indigenous self-determination either by states or intergovernmental organizations such as the UN will not deliver self-determination or even more limited forms of autonomy or self-government in indigenous communities. Meaningful and sustainable forms of self-determination must be worked out and realized by indigenous peoples themselves at the local level in their own communities through and by active community involvement and citizen participation, not by indigenous representatives attending national or international meetings.⁷⁸

However, the role of international human rights discourse and indigenous international advocacy in this process is important, as it can—and already has, in the form of the UN Declaration, for example—expand conceptions and understandings of the scope and contents of indigenous self-determination, not as non-interference and independent statehood as perceived by state-centric discourses, but as an internationally recognized and existing human right that belongs to all peoples, not only to nation-states. Historically, the exercise of self-determination has rarely taken place without negotiations and some kind of an agreement with the state or states within which the group or people has resided.⁷⁹ In today’s interconnected and interdependent world, it would be unrealistic to assume significant or sustainable achievements without some form of a dialogue or mediation. Also, considering how indigenous peoples have transformed from being historical victims of international law into active participants and political actors in shaping international law (including the concept of self-determination), indigenous peoples’ active participation in rights-based discourses not only seems appropriate, but necessary in realizing their very right to self-determination.

76. Jeff Corn tassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, 33 *ALTERNATIVES* 105, 108 (2008).

77. *Id.* at 119.

78. For criticism on current self-determination endeavors as state-centric to the detriment of local processes and engagement, see, e.g., Rauna Kuokkanen, *Achievements of Indigenous Self-Determination: The Case of the Sámi Parliaments in Finland and Norway*, in *INDIGENOUS DIPLOMACIES* 107–09 (J. Marshall Beier ed., 2009).

79. Caroline E. Foster, *Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples*, 12 *EUR. J. INT’L L.* 141, 143, 150 (2001).

Indigenous rights advocates have deployed international human rights instruments for claims of self-determination and, more fundamentally, to be recognized as peoples as defined in Article 1(1) of the 1966 Human Rights Covenants.⁸⁰ Although indigenous rights advocates have acknowledged that international human rights discourse can be conceptually limiting and politically problematic at times, this discourse also has potential as one tool among several others, including a range of local, community-based processes rooted in culturally specific contexts and discourses. Moreover, the strategy of bypassing the states and going to international forums such as the United Nations indicates a preference for employing international human rights instruments rather than the human rights mechanisms of nation-states, and in this way, avoiding subordination to the state and to its national legislation. As some have argued, the Declaration in particular “reflects unified views of international human rights law that embrace cultural diversity and allow for a multiplicity of cultural contexts,” and that the human rights standards of the Declaration “provide the necessary framework for a human-rights based approach and for a new conceptualization of indigenous and state relations.”⁸¹

In reconceptualizing indigenous and state relations, however, we need to bear in mind the inherent and unequal structures and relations of power and domination. Examples of states employing human rights discourses to circumscribe and intervene in indigenous peoples’ attempts to exercise their local autonomy demonstrate the ever-present potential for the politicization and misuse of human rights discourse. At the same time, such examples attest to the relative success of indigenous peoples’ struggles for greater self-determination, as governments view it as necessary to interfere and manipulate rights discourses in order to curb the influence of indigenous institutions and community leaders, which are seen as threatening the state power and authority.⁸² Part of this success can be credited to indigenous peoples’ efforts at redefining and making international human rights relevant and useful for their needs and purposes, often while being fully aware of the foreign origins of the discourse and, at times, its inconsistency with indigenous concepts and social norms. Indigenous actors involved in reconfiguring and redeploying human rights discourses to challenge existing power structures can be found in both local community struggles and international forums such as the United Nations.⁸³ Thus, it would be incorrect to interpret indigenous

80. ICCPR, *supra* note 10, art. 1(1); ICESCR, *supra* note 10, art. 1(1).

81. Dorrough, *supra* note 5, at 266.

82. See, e.g., Shannon Speed & Jane F. Collier, *Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government's Use of Human Rights*, 22 HUM. RTS. Q. 877, 901–02 (2000); Charles R. Hale, *Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala*, 34 J. LATIN AM. STUD. 485, 489–90 (2002).

83. Hale, *supra* note 82, at 496.

human rights-based discourses of self-determination as merely state-centric. Instead, the active engagement at the local and international planes can and should be seen as the very exercise of autonomy and self-determination.⁸⁴ The emergence of various human rights discourses—some of which, in some contexts, seek to restrict the other—also indicates that they are constantly evolving and not necessarily “products of the imposition of Western ideas [or] of specifically indigenous or local concepts.”⁸⁵

In Canada, for example, Amnesty International has employed a human rights framework for its campaign on violence against Aboriginal women, in order to contribute to a fuller understanding of an issue that is often considered either a criminal or social concern. Its 2004 report notes that violence against indigenous women in particular is rarely understood as a human rights issue. Research conducted by Amnesty International, however, demonstrates that violence experienced by Indigenous women gives rise to human rights concerns in two central ways: “First is the violence itself and the official response to that violence. When indigenous women are targeted for racist, sexist attacks by private individuals and are not assured the necessary levels of protection in the face of that violence, a range of their fundamental human rights are at stake.”⁸⁶ Second, there are a number of factors placing aboriginal women at an increased risk of violence, including various policies and practices stemming from the Indian Act, as discussed above.⁸⁷

The possibilities for employing the international human rights framework to address violence against indigenous women have also been considered in the Australian context. Penelope Andrews suggests that, combined with local programs and initiatives, the global human rights discourse can create an effective framework to deal with violence against indigenous women. However, in order to do so, there are several serious obstacles that must be overcome, such as complicated and distant enforcement mechanisms, lack of accessibility, and a general unfamiliarity with the formal, legalistic paradigm of the international human rights framework. Andrews writes: “Although the pursuit of human rights through United Nations or regionally mandated procedures are theoretically possible, and symbolically positive, the enforcement procedures provided in various human rights instruments are constrained by lengthy time periods between initial reporting and final

84. Cf. Claire Charters, *A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making*, 17 INT'L J. MINORITY & GROUP RTS. 215, 218–21 (2010).

85. Shannon Speed & Xochitl Leyva Solano, *Global Discourses on the Local Terrain: Human Rights in Chiapas*, in HUMAN RIGHTS IN THE MAYA REGION, *supra* note 52, at 227.

86. *Id.*, *Stolen Sisters*, *supra* note 55, at 4.

87. *Id.* at 6.

outcome.”⁸⁸ In spite of these challenges, she maintains that the human rights instruments and programs have a potentially transformative capacity to eliminate violence against indigenous women. In order to have that potential, however, there is a need for a human rights discourse that has the capacity to recognize and encompass specific circumstances, multiple identities and multiple agendas, and to develop a nuanced articulation of rights.⁸⁹

While not specifically considering violence against indigenous women, Kerensa Johnston’s analysis of employing CEDAW to end discrimination of Māori women in New Zealand also sheds light on the question of the relevance of international human rights instruments to indigenous women. She distinguishes two categories of discrimination, internal and external. Internal discrimination stems from and is experienced in customary Māori contexts and external discrimination refers to discrimination caused by sexist and colonial laws and practices. In the article, Johnston examines particularly the effectiveness of filing a discrimination complaint under the Optional Protocol of the Convention, noting that it can be “potentially very valuable for Māori women seeking to . . . eliminate discrimination against women in political and public life.”⁹⁰ However, there are also potential drawbacks in pursuing an external discrimination complaint:

[T]here is no guarantee the New Zealand government will accept the recommendations [of the Women’s Committee] in the current political climate. The government has a poor record of recognizing and protecting Māori rights and interests generally. In light of this, it is unlikely to be motivated to take steps to protect Māori women in particular from state-imposed discrimination, even though adverse attention from the Women’s Committee is likely to cause embarrassment.⁹¹

When it comes to internal discrimination in Māori customary contexts, Johnston argues against pursuing a complaint under international human rights instruments, for they “are not the right places to remedy discriminatory cultural practices that are arguably sourced in tikanga Māori [i.e., customary law].”⁹² The more appropriate place for solving internal disputes is the marae or the Māori meeting place. However, Johnston also recognizes the problem of leaving disputes unresolved, especially in internal discrimination cases involving Māori women who might feel silenced or alienated in their own communities and, as a result, withdraw from participating in marae affairs.

88. Penelope Andrews, *Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework*, 60 ALB. L. REV. 917, 935 (1997).

89. *Id.* at 937.

90. Johnston, *supra* note 52, at 56.

91. *Id.* at 57.

92. *Id.* at 20.

While Johnston recognizes how Māori women, like many other indigenous women and women of color, are too often faced with the “your culture or your rights” ultimatum between aspirations for self-determination and women’s rights, she appears to prioritize Māori self-determination:

Although recourse to external bodies may be desirable in the short term because it provides an immediate solution to a pressing problem, the long-term benefits are not as clear. This is because the role of external bodies, and particularly the courts, is not to provide long-term, robust solutions for Māori communities that promote and develop Māori self-determination.⁹³

This, however, appears to be a false dilemma. Immediate, short-term solutions to the pressing problem of discrimination against Māori women will allow and enable Māori women to more effectively participate in developing and promoting the collective project of Māori self-determination in the multiple ways discussed by Johnston in her article. Thus the short-term solution to ending discrimination of women also has significant long-term benefits to Māori communities and aspirations.

Further, while international human rights instruments might not be appropriate places to remedy discriminatory cultural practices as Johnston argues, there is a need for caution when using culture as justification for certain sets of rights (and not others). Cultural practices and customary contexts are also contested sites—as Johnston also notes—especially in contemporary settings, characterized by systems of power relations and internal hierarchies of gender and status, among others.⁹⁴ As pointed out by Richard Wilson, “[d]educing the consequences for politics from the inner logic of cultural or religious discourse is problematical given the heterogeneity of actual beliefs and practices within and among [indigenous] communities.”⁹⁵ He argues that without examining various systems of hierarchy and contestation within indigenous communities, “analyses can run the risk of an idealized cultural determinism, especially if they focus exclusively on the semantics of cultural translation and provide wholly cultural answers to what are fundamentally political questions.”⁹⁶

For many indigenous women, self-determination is crucial both at individual and collective levels, and neither should be compromised in the name of the other. Individual self-determination is considered a condition for sustainable and strong collective self-determination. Survival, for indigenous women, is both an individual and collective matter. If women are not surviving as individuals in their communities due to physical or

93. *Id.* at 60.

94. Johnston, *supra* note 52, at 52–53.

95. Richard Ashby Wilson, *Making Rights Meaningful for Mayas: Reflections on Culture, Rights, and Power*, in *HUMAN RIGHTS IN THE MAYA REGION*, *supra* note 52, at 309.

96. *Id.* at 310.

structural violence, collective survival as a people is also inevitably called into question. Self-determination is thus regarded as relational—not only is there a close relationship between individual and collective levels, but relationality also recognizes the interdependence and interconnectedness of individuals, groups, and, as emphasized by indigenous people, the human and non-human worlds.

Many indigenous peoples have long shown a willingness to turn to international human rights forums to seek redress for various forms of external oppression and human rights violations. At least since the establishment of the UN Working Group on Indigenous Populations in 1982, representatives of indigenous peoples around the globe have deployed human rights discourse to legitimate their claims and advance their objectives. This global indigenous rights advocacy movement has resulted in reconsidering key concepts such as self-determination, and has expanded the scope of international law to include collective rights.⁹⁷ Increasingly, human rights have become the political language of choice for many indigenous peoples around the globe pursuing their claims in the axis of social, political, cultural, and economic rights. As a result, “the concept of human rights at the end of the twentieth century is intimately bound up with questions of indigenous rights and indigenous rights movements.”⁹⁸

The international human rights discourse, especially the specific framework articulated in the Declaration to safeguard and guarantee indigenous peoples’ rights, allows us to grasp these rights both individually and collectively and as applying equally to men and women. The Declaration also firmly foregrounds self-determination as a human right that enables a reinterpretation of the concept in a way that reflects better not only indigenous peoples’ understandings and perceptions, but also reality in general, as argued by Young. The right to self-determination is not a static right⁹⁹ and many indigenous peoples have long engaged—among themselves and in collaboration with others—in negotiating the appropriate understanding of this right. In the same way, there is a need to negotiate an understanding and practice of human rights that is appropriate both in terms of local context and social, economic, political, and cultural needs.

97. See Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, *supra* note 7, at 42; S. James Anaya, *The Influence of Indigenous Peoples on the Development of International Law*, in *INDIGENOUS HUMAN RIGHTS* 110–12 (Sam Garkawe et al. eds., 2001); see generally *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* (Joshua Castellino & Niamh Walsh eds., 2005); Asbjørn Eide, *Rights of Indigenous Peoples: Achievements in International Law During the Last Quarter of a Century*, 37 *NETH. Y.B. INT’L L.* 155, 157–65, 203 (2006); RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 29–52 (2003).

98. Shannon Speed & Xochitl Leyva Solano, *Introduction: Human Rights and the Maya Region*, in *HUMAN RIGHTS IN THE MAYA REGION*, *supra* note 52, at 7.

99. Joshua Castellino & Jérémie Gilbert, *Self-Determination, Indigenous Peoples and Minorities*, 3 *MACQUARIE L.J.* 155, 172 (2003).

Finally, the conception of indigenous peoples' rights as human rights on the one hand, and as both individual and collective rights on the other, exposes the double-standard in the domestic politicized rhetoric that opposes indigenous women's rights as individualistic and hence, in conflict with collective rights. If we conceive both indigenous peoples' rights and indigenous women's rights as human rights which exist in a continuum—rather than separating them into different categories such as sex or gender equality rights—it is also possible to develop a framework to address violence against women. This framework does not regard violence against women as only a criminal or social concern, nor does it separate the issue from the question of indigenous self-determination. In this context, indigenous women's human rights and their violations are broadly conceived. Indigenous women face violations of their civil and political rights when they are marginalized or excluded from their communities and when their membership is denied. They encounter abuses of their economic and social rights in the intersections of racism, sexism, poverty, and discrimination, which lead to a lack of employment opportunities, and access to health care and social services. They are confronted with violations of their personal integrity and human dignity in the form of sometimes extreme physical and sexual violence. Failure to recognize that indigenous women's rights are violated not only as indigenous people but also as women ultimately leads to a failure in promoting and protecting indigenous rights in general.

V. CONCLUSION

This article has considered the question of violence against indigenous women as an issue inseparable from the project of indigenous self-determination. It argues for an intersectional human rights framework for examining the relationship between indigenous self-determination and violence against women. In this regard, the article makes the following related arguments: (1) both self-determination and violence against women must be seen and examined first and foremost as human rights issues; (2) violence against indigenous women is a key issue for indigenous self-determination; and (3) the human rights framework is the only framework that allows us to see the connections between self-determination and violence against women and that enables their effective intersectional analysis.

The article has also demonstrated that the tension between collective and individual indigenous rights is illusory and that those who argue against individual rights do so only when women's rights are in question. Put differently, those indigenous individuals who object to women's sex or gender equality rights do not seem to oppose individual rights in general. It is then not individual rights per se that are being disputed, but rather gender justice

and women's rights. The fact that both existing indigenous self-governance arrangements and the international indigenous self-determination movement have, thus far, paid inadequate attention to the question of indigenous women's human rights in general, and violence against indigenous women specifically, is also indicative of this.

Finally, the paper argues that there is a need to distinguish between gendered forms of violence against indigenous women and gendered effects of violence that targets indigenous communities as a whole. Only by making this distinction is it possible to develop successful strategies and mechanisms to address this pervasive problem. To say indigenous women experience violence as women is not to suggest they do not face other forms of discrimination or oppression on the basis of their indigeneity (or race, class, etc.). Therefore, to focus on gender justice and violence against women in indigenous communities is not a matter of creating or subscribing to totalizing theories that universalize women and their different circumstances and experiences. Considering the endemic violence against indigenous women in many countries (including Canada and the United States), we need to privilege gender. Privileging gender enables us to address gender justice more explicitly and therefore, more effectively.

Without addressing the disadvantaged social and economic conditions of Aboriginal women that make them vulnerable to violence and often unable to escape from it, indigenous self-determination or self-governance will simply not be possible. Societies and communities afflicted by endemic levels of poverty, violence, and ill-health are not in a position to take control of their own affairs. Although impoverishment and violence affect entire communities, they are particularly issues of women's human rights (broadly conceived including civil, political, social, economic, and cultural rights) and of gender justice. Individual autonomy and agency strengthen indigenous claims for self-determination by linking strong collective human rights (self-determination) to strong individual human rights. As "mutually interactive" sets of human rights, they contribute to the relational approach to indigenous self-determination, which is reflected in many indigenous women's views and perceptions of self-determination.