



At the Intersections of Gender and Indigenusness: A Holistic Approach to Remediating Violence Against Indigenous Women in Canada

Ashley Paige Hobson-Garcia

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This article explores the issue of violence against Indigenous women in Canada by discussing it alongside the current legal framework and United Nations Declaration on the Rights of Indigenous Peoples. It explores how existing instruments may provide a remedy and considers approaches for solutions.

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Introduction: a human rights crisis

“Aboriginal women’s issues are always at the bottom of the totem pole”.¹

“When Canada is prepared to move from denial [...] to implementation of indigenous human rights, it will also move into a new era of [...] justice, with state protection of the human rights of all”.²

Helen Osborne was a 19-year-old Cree student. Growing up, she left her community and forcibly attended an Indian residential school.³ In 1971, she was abducted, “sexually assaulted and brutally killed”. A local inquiry determined that Canadian authorities had failed her, citing a subpar and “racially biased” investigation.⁴ They noted that police had known of white men sexually targeting Indigenous women [...], but “did not feel [...] it necessitated any particular vigilance”.⁵ The Aboriginal Justice Inquiry affirmed that her murder was a racist and

sexist act.⁶ Osborne’s case, however, is not an anomaly is one of the numerous cases of missing and murdered Indigenous women (MMIW) today. Indigenous women are disproportionately impacted by all forms of violence in Canada.⁷ They are assaulted, raped and killed in high numbers.⁸ Estimates suggest that more than 1,200 Indigenous women may be missing or murdered since 1980.⁹ Of the known cases, many remain unsolved.¹⁰

Former *Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples* (SRIP), James Anaya’s 2014 report on “The Situation of Indigenous Peoples within Canada”¹¹ identified a human rights (HR) “crisis” exacerbated by a “well-being gap” between Indigenous and non-Indigenous persons.¹² Additionally, referencing lamentable socio-economic conditions, Anaya stressed Indigenous women’s increased

¹ Sharon McIvor, Statement for Formal Meeting with United Nations Human Rights Committee (qtd Lovelace) (6 July 2015) <http://fafia-afai.org/en/sharon-mcivor-delivers-fafia-statement-in-the-un-human-rights-committee-july-6-2015/>

² Joyce Green (ed), *Indivisible: Indigenous Human Rights* (1st edn, Fernwood Books Ltd 2014) 37.

³ Amnesty International, *Stolen Sisters A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada* (2004) 1 <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf> accessed 7 June 2016.

⁴ *ibid* 1.

⁵ *ibid* 2.

⁶ *ibid*.

⁷ *ibid*.

⁸ John Burrows, ‘Aboriginal and Treaty Rights and Violence against Women’ (2013) 50(3) *Osgoode Hall Law Journal* 699.

⁹ Amnesty International, (2006) *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Aboriginal Women* (2006) 10 <http://www.amnesty.ca/our-work/campaigns/no-more-stolen-sisters> accessed 7 June 2016.

¹⁰ John Burrows (n 8).

¹¹ James Anaya, ‘Report of Special Rapporteur on the situation of Human Rights and fundamental freedoms of Indigenous Peoples, The Situation of Indigenous Peoples in Canada’ (December 2014) A/HRC/27/52/Add.2.

¹² ‘Indigenous’ refers to various Aboriginal groups within the United Nations (Kesler n.d) ‘Aboriginal’ refers to Canada’s first inhabitants which include the ‘First Nations, Inuit and Metis peoples’ outlined in the 1982 Canadian Constitution (Kesler n.d).

vulnerability to violence.¹³ Affirming these findings, subsequent treaty-body reports and non-governmental organizations (NGO's) have also raised concern, and problematized Canada's inadequate response to the violence against Indigenous women (VAIW): "it is difficult to reconcile Canada's well-developed legal framework and [...] prosperity, with the HR problems faced by Indigenous [...] women."¹⁴ Despite formally extending constitutional protection for Indigenous rights, challenges persist.¹⁵ This year, the newly elected *Liberals* pledged to fully implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), albeit this ambition is still nascent.¹⁶ With this commitment, and on the eve of a much-anticipated National Inquiry into MMIW, it is an opportune time to consider Indigenous women's rights, and Canada's international HR obligations. HR are presumed to safeguard women against violence and prescribe remedial action, nevertheless, this crisis persists. It is a complex matter rooted in the historic and continuous discrimination of Indigenous women. It is further complicated by the manifold implicated rights violations. This all begets some questions: How effectively have HR standards been deployed to ensure Indigenous women's rights? How is it best to move forward in protecting Indigenous women from violence? This dissertation will explore the issue of VAIW through a HR lens. To that end, it is divided into three chapters. Drawing on feminist critiques of International Law (IL), Chapter One will present the issue of VAIW within Canada. Chapter two discusses the legal framework; particularly the provisions of CEDAW and UNDRIP. Lastly, Chapter three examines how both of these instruments may provide remedy by assuming a holistic approach to combatting violence against indigenous women. This dissertation forwards the need for a truly indivisible approach to Indigenous women's HR. The issue of missing and murdered indigenous women must be conceived in a holistic manner wherein the intersecting rights violations are equally addressed. It concludes that through the undue violence against indigenous women, HR have unequally been realized for women in Canada. Remedial efforts require the full implementation of the rights outlined in both instruments, with special attention to the cross-cutting aspects of discrimination that Indigenous women face. Only a truly indivisible approach to human rights can provide immediate and long-term solutions.

This research is important as it considers the disjuncture between rhetorical rights protection, i.e. state obligation, and the experiences of Indigenous women. Championed as a 'global defender' of HR, it is easy to overlook Canada's negative record.¹⁷ Having ratified the core HR treaties, extensive HR protection is promised. However, gendered violence indicates otherwise. Notwithstanding the widespread disenfranchisement of Indigenous communities, Indigenous women are uniquely vulnerable as they face a 'double burden' marked by race and gender discrimination; they are one of the most disadvantaged minorities in Canada.¹⁸ For these reasons, this research, which centers on Indigenous women's continued susceptibility to flagrant HR violations, is critical. Equally significant are the ways in which vulnerable groups within 'developed' liberal democracies experience unequal HR protection. This study resonates within the contexts United States, Australia and New Zealand; all honing comparable colonial histories and significant Indigenous populations. 'Aboriginal' and 'Indigenous' are used interchangeably throughout this thesis. Both terms are "generic classifications", which ignore the diversity of the peoples classified accordingly.¹⁹ This is an interdisciplinary documentary analysis, studying international legal doctrines in order to assess Canada's HR obligations with respect to VAIW.²⁰ This method is used to interpret the limitations of legal sources.²¹ With HR rooted in IL, this method provides a means to collate and evaluate the developments to date. To appraise the literature, it will engage feminist and sociological theories. The 'phenomenon' of MMIW is foregrounded as an example of systemic discrimination and VAIW in Canada. As *women*, Indigenous women are guaranteed the rights contained in CEDAW (1979),²² and as *Indigenous*, they are assured the rights outlined in the UNDRIP.²³ Despite this, Indigenous women's rights in Canada are still neglected.²⁴ These HR instruments were chosen because they purport to address the HR of all women and Indigenous persons alike, and although CEDAW is legally-binding and UNDRIP is not, both instruments reaffirm and contextualize standards existing in other conventions.²⁵ Furthermore, UNDRIP arguably reflects customary International Law (IL) and would therefore be binding in Canada. However, its legality is still debated.²⁶ Additionally, Canada has ratified CEDAW and endorsed UNDRIP. In light of this, the UNDRIP is debatably more relevant today. Whilst the discussion remains largely

¹³ James Anaya (n 11).

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Jennifer Preston, 'Canada' *The Indigenous World* (2016) IWGIA 55.

¹⁷ Human Rights Watch, 'Human Rights Watch: World Report' (2015) 139 <https://www.hrw.org/world-report/2015> accessed 7 June 2016.

¹⁸ Erin Hanson, 'Marginalization of Aboriginal Women' (2009)

<http://indigenousfoundations.arts.ubc.ca/home/community-politics/marginalization-of-aboriginal-women.html> accessed 17 August 2016.

¹⁹ Brenda Gunn, 'Getting It Right: The Canadian Constitution and International Indigenous Rights' in Green J. (ed), *Indivisible: Indigenous Human Rights* (1st edn, Fernwood Books Ltd 2014) 213.

²⁰ Monageng Mogalakwe, 'The documentary research method – using documentary sources in social research' (2009) 25(1) *Eastern Africa Social Science Research Review* 43.

²¹ Geoff Payne and Judy Payne, *Key concepts in Social Research* (1st edn, SAGE Publications Ltd 2004) 62.

²² Rauna Koukanen, 'Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights' (2012) 34(1) *Human Rights Quarterly* 225.

²³ Rauna Koukanen, 'Indigenous Women's Rights and International Law: Challenges of the UN Declaration on the Rights of Indigenous Peoples' in Short D. and Lennox (eds), *Handbook of Indigenous Peoples Rights* (1st edn, Routledge 2016) 129.

²⁴ *ibid.*

²⁵ Elvira Pulitano, 'Indigenous Rights and International Law' in Pulitano E. (ed), *Indigenous Rights in the Age of the UN Declaration* (1st edn, Cambridge University Press 2012) 1.

²⁶ Paul Joffe, 'Canada's Opposition to the UN Declaration: Legitimate Concerns of Ideological Bias?' in Hartley, J. Joffe, P. and Preston, J. (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing Ltd 2010) 7.

theoretical, it concentrates on the HR standards to determine Canada's obligations, and how best to solve the problem. In some respects, the study is speculative. Nonetheless, it advances both instruments, particularly UNDRIP, as a useful tool for the complete realization of Indigenous women's HR. Lastly, this project acknowledges the Eurocentric foundations of HR and research.²⁷ Peter Kulchyski attests that it is critical to realize how, historically, HR have served colonial agendas and justified interventions in Indigenous livelihoods.²⁸ Problematizing western research's focus on 'indigenous problems', Indigenous Methodologies re-centre Indigenous interests, and experiences in academia.²⁹ Although limited by the type of study, this research prioritizes Indigenous women's concerns through the inclusion of women's NGO reports which contain primary accounts. Osborne's anecdote is referenced to exemplify the issue.

The full article and bibliography are available at the Leicester Student Law Review online.

²⁷ Makau Matua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights.' (2001) 42(1) Harvard International Law Journal 201; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (3rd edn, Otago University Press [u.a.] 1999).

²⁸ Peter Kulchyski, *Aboriginal rights are not human rights: In Defense of Indigenous Struggles* (Arbeiter Ring 2013).

²⁹ Jelena Porsanger, 'An Essay About Indigenous Methodology' (2004) 8(1) *Nordlit* 105; Lester-Irabinna Rigney, 'Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenous Research Methodology and its Principles' (1999) 14(2) *Wicazo Sa Review* 109.