International Human Rights Law and Aboriginal Girls in Canada:

Never the twain shall meet?[i]

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Introduction

International law is the primary means through which states express their commitment to protecting human rights. Since the end of the Second World War and the drafting of the *Universal Declaration on Human Rights*[1], the past sixty years have been marked by a proliferation of international human rights instruments.

One of the most long awaited documents to come into force was the *United Nations Declaration on the Rights Indigenous People*[2] (hereafter referred to as the "*Declaration*") which was finally adopted by a majority of 144 states in favour in 2007. This *Declaration* was decades in the making and represents a critical step toward recognising Indigenous people as a distinct group of people deserving of recognition of rights.

While it is well known that Canada has refused to sign the *Declaration*, the story does not end there. Since its adoption, the *Declaration* is said to represent customary international law, and this would mean Canada is still bound by its principles. In addition, commentators have noted that the refusal of the Canadian government is limited to the current government and that a change of government is likely to lead to signature of the *Declaration*.

Hence, as with every international law, it is important to consider the practical effects of the *Declaration* both because the success of any international human rights system should be evaluated in reference to human rights realities at the domestic level and because the ratification of the UN human rights treaties can be in itself a largely formal and empty gesture on the part of a state and thus ineffectual in protecting human rights.

In assessing the relevance and promise of the *Declaration*, this paper will focus on the human rights of Aboriginal[3] girls.[4] It will provide a background on the most prevalent and fundamental human rights

[1] The Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. http://www.un.org/Overview/rights.html.
[2] United Nations Declaration on the Rights of Indigenous Peoples. Adopted by the General Assembly 13 September 2007. http://www.un.org/esa/socdev/unpfii/en/declaration.html.
[3] Out of Canada's total population of about 30 million over 1.3 million, or 4.4 per cent, are Aboriginal people, defined as Indians, Inuit and Métis. They comprise 52 nations or cultural groups, including 614 First Nation (Indian) communities. (*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen. Mission to Canada. E/CN.4/2005/88/Add.3

violations experienced by Aboriginal girls—physical and sexual violence. It will assess Canada's accountability to protecting these rights through various international human rights mechanisms, and whether the recently promulgated *Declaration*, will contribute to an effective response to these unique and troubling violations against Aboriginal girls.

The Human Rights of Aboriginal Girls

A significant consequence of colonial government policies is the violence plaguing Aboriginal communities. Loss of cultural identity coupled with social and economic marginalization fuels violence and sexual assault.[5] As indicated in the Aboriginal Justice Enquiry in Manitoba, violence in Aboriginal communities has reached epidemic proportions.[6] "*Violence has invaded whole communities and cannot be considered a problem of a particular group or an individual household*."[7]

Aboriginal girls are disproportionately affected by this violence in both its physical and sexual forms and their victimisation represents the most egregious violations against girls in Canada.

In 2006, the UN Department of Economic and Social Affairs conducted a report on the elimination of all forms of discrimination and violence against girls. The report concluded that girls disproportionately experience the worst human rights abuses. "*Pervasive patriarchal social structures and the low value attributed to minors perpetuate this rights-denial. Further oppression and discrimination – such as homophobia, racism, colonization and poverty – exacerbate the disadvantage already experienced by girls as a result of their age and gender*".[8]

In Canada, levels of violence against Aboriginal girls are startling and Canadian statistics demonstrate that girls are disproportionately sexually and physically violated by men in their families and communities:

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2 December 2004). For the purposes of this paper the terms "Aboriginal" and "Indigenous" are used interchangeably to describe all three categorizations of Aboriginal people

[4] The term "girl" is used to define females under the age of 19, which is the age of majority in most provinces in Canada.

[5] M. M. Mann (2005). *Aboriginal Women: An Issues Backgrounder*. Ottawa: Status of Women Canada.

[6] A. Hamilton & C. Sinclair, (1991). *Report of the Aboriginal Justice Enquiry of Manitoba*. Winnipeg: Aboriginal Justice Enquiry of Manitoba.

[7] B. Jacobs, (2002). Native Women's Association of Canada's Submission to the United Nations Special Rapporteur Investigating the Violations of Indigenous Human Rights. Ottawa: Native Women's Association of Canada. Pg. 3.

[8] Division for the Advancement of Women, 'Elimination of All Forms of Discrimination and Violence against the Girl- Child' (2006), (Report of the Expert Group Meeting), EGM/Girl Child/2006/REPORT, Florence: Innocenti Research Centre.

- In 2002, girls represented 79% of the victims of family-related sexual assaults reported to a large subset of Canadian police departments. Rates of sexual offences are highest against girls between the ages of 11 and 14, with the highest rate at age 13.[9]

- Up to 75% of victims of sex crimes in Aboriginal communities are female and under 18 years of age. 50% of those are under 14, and almost 25% of those are younger than 7 years of age.[10]

- Young women under the age of 25 are at the highest risk of domestic male violence and to be murdered by a male spouse.[11]

- According to a 1999 survey, teenage girls were more likely to report being sexually assaulted than women in any other age category.[12]

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The prevalence of violence experienced by Aboriginal girls in their communities has in some cases lead to its troubling normalisation. Researchers have observed that many rural youth see violence as a normal, expected part of life and that a number of girls who experienced sexual assault, sexual abuse and physical violence on a regular basis throughout their lives said they would not report these incidents unless they felt their life was at risk. [14]

Where this violence has not been tacitly accepted by the girls, male violence in the form of sexual abuse and physical assault, pushes Canadian girls out of their family homes. As the Special Rapporteur on Adequate Housing, Miloon Kothari, recently noted "*Studies from both Canada and the United States identify sexual abuse in the family home as one major contributing reason for homelessness among girls*."[15] Research also cites sexual abuse in the family home as a major cause of homelessness amongst

[9] Canadian Center for Justice Statistics. *Family Violence in Canada: A Statistical Profile 2005*. Accessed online: http://www.statcan.ca/english/freepub/85-224-XIE/85-224-XIE2005000.pdf.
[10] FREDA Research Centre, *Violence Prevention and the Girl Child*. Accessed online: www.harbour.sfu.ca/freda/report/gc01.htm
[11] Canadian Center for Justice Statistics. *Family Violence in Canada: A Statistical Profile 2005*. http://www.statcan.ca/english/freepub/85-224-XIE/85-224-XIE2005000.pdf.
[12] Canadian Center for Justice Statistics Profile Series. Children & Youth in Canada (2001). Accessed online: http://www.statcan.ca/english/freepub/85F0033MIE/85F0033MIE2001005.pdf
[13] Canadian Center for Justice Statistics Profile Series. Children & Youth in Canada (2001). Accessed online: http://www.statcan.ca/english/freepub/85F0033MIE/85F0033MIE2001005.pdf
[14] Sarah Hunt, *Trafficking of Aboriginal girls and youth: risk factors and historical context*, June 27, 2008. Accessed Online: http://www.interfaithjustpeace.org/pdf/sara_hunt-human_trafficking/sara_hunt-human_trafficking.pdf.
[15] Miloon Kothari, *Economic, Social and Cultural Rights: Women and adequate housing*, Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination (2006), Page 20, Paragraph 77.

girls in Canada and the United States. In recent studies between 75-84% of homeless girls reported having experienced sexual abuse.[16]

Once homeless, girls continue to experience violence because of their gender.

"*Homelessness exposes women to an additional range of physical and emotional dangers. In order to obtain even temporary shelter, women are forced to provide sexual favors or work as sex workers/prostitutes. Homeless women, particularly young women are vulnerable to sexual exploitation, sexual trafficking and drug abuse. Homeless Indigenous women were also reported to be at higher risk of systematic murder/disappearance*".[17]

The failure of the State to adequately house and support teenage girls who are on their own often forces girls to live with men who are violent and exploitative.[18]

In addition to experiencing violence because of their gender, Aboriginal girls also experience violence because of racial discrimination. Bias, prejudice, and hate appear to be strong motivators for the commission of violence against Aboriginal girls. The marginalized status of Aboriginal girls and women was discussed in the report of the Aboriginal Justice Inquiry of Manitoba. A correlation was drawn between the contemporary image of Aboriginal women (and girls) and the violence perpetrated against them:

"*The demeaning image of Aboriginal women is rampant in North American culture. School textbooks have portrayed Aboriginal woman as ill-treated at the hands of Aboriginal men, almost a "beast of burden". These images are more than symbolic – they have helped to facilitate the physical and sexual abuse of Aboriginal women in contemporary society*."[19]

Similarly, a report on sexually exploited Aboriginal children and youth draws upon literature regarding Aboriginal women (and girls) and cites the following findings:

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[16] McCreary Centre Society. *No Place to Call Home: A Profile of street youth in BC.* (2001). accessed online: http://www.ihpr.ubc.ca/media/McCreary2001.pdf. . Study of 523 homeless youth found that 87% of the homeless girls had been physically and/or sexually abused.

[17] Miloon Kothari, *Economic, Social and Cultural Rights: Women and adequate housing*, Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination (2006), Page 20, Paragraph 77.

[18] Marge Reistma-Street, "Stories, Statistics, and Services on Youth and Housing in BC's capital Region" (2001), The Youth and Society Research Group University of Victoria, Victoria, BC

[19] Manitoba, Public Inquiry into the Administration of Aboriginal Justice and Aboriginal Peoples, report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal Peoples: Vol. 1 (Winnipeg, Manitoba: Queens Printer, 1991) at 479.

"In British Columbia, community consultations reveal that Aboriginal women (and girls) are disproportionately targets of assault. Racism appears to motivate these attacks; patterns of assaults in some areas suggest that victims are selected on the basis of race alone."[20]

Additionally, the Canadian Panel on Violence Against Women, noted:

"Racism is a major contributing factor in the continuing violence, oppression and systemic abuse that confronts Aboriginal women in Canadian society today…There are no available statistics on racially motivated assaults on Aboriginal women (read girls); however, recent cases demonstrate the magnitude of the problem."[21]

The high levels of violence, murder and disappearances of Aboriginal women and girls have been widely documented but with limited response from the authorities. The Native Women's Association of Canada estimates that 500 Aboriginal women are currently missing or murdered across Canada [22]and one detail that is frequently overlooked is that a number of the victims are girls, not women.

The following are some of the more high profile incidents that have garnered media and public attention and which confirm a number of the observations above.

1. Of the many victims of Robert Pickton, the serial killer convicted of the second-degree murders of six women and charged in the deaths of an additional twenty women, many prostitutes and drug users from Vancouver's Downtown Eastside, sixteen were Aboriginal women.

2. In two separate instances in 1994, 15 year old indigenous girls Roxana Thiara and Alishia Germaine were found murdered in Prince George, British Columbia (BC) and the body of a third 15 year old Aboriginal girl was found in Smithers BC in April 1995. Only in 2002 after the disappearance of a 26 year old Non Aboriginal woman Nicola Hoar while hitchhiking along the road that connects Prince George and Smithers did media attention focuses on the unsolved murders and other disappearances along what has been dubbed the "highway of tears".[23]

[20] Province of British Columbia and Justice Canada. 1995. Community Consultation on Prostitution in British Columbia. Victoria: Government of British Columbia. As cited in: C. Kingsley, M. Mark, Sacred Lives: *Canadian Aboriginal Children and Youth Speak out About Sexual Exploitation* (Save the Children, Canada: 2001).
[21] Canadian Panel on Violence Against Women, *Aboriginal Women: From the Final Report of the Canadian Panel on Violence Against Women.* (Ottawa: Ministry of Supply and Services Canada, 1996) at 159.
[22] Native Women's Association of Canada, Sisters in Spirit Campaign. http://www.sistersinspirit.ca/engremember.htm.
[23] The highway of tears is Highway 16 in northern British Columbia and is notorious as a stretch of road where a number of girls have gone missing. In 2007 the RCMP confirmed that there had been approximately 18 women go missing along the highway since 1969. All of the victims have been young and many of them have been Aboriginal. http://www.missingnativewomen.ca/native3.html;

3. In 1996, John Martin Crawford was convicted of murdering three indigenous women in Saskatoon Saskatchewan. Warren Goulding, one of the few journalists that covered the trial commented: "*I don't get the sense the general public case much about missing or murdered Aboriginal women. It's all part of this indifference to the lives of Aboriginal people. They don't seem to matter as much as white people.*"[24]

4. In June 2004, provincial court Judge William Ramsay who was based in Prince George BC was found guilty of one count of breach of trust, one count of sexual assault causing bodily harm and two counts of buying sex from a child. His victims were all Aboriginal girls between the ages of 12 and 17. On one occasion, he brutally attacked and raped a girl he had picked up for sex when she suggested he use a condom. She later attempted to regain custody of her son, and found that the judge hearing the case was Ramsay himself. In another case, a 13-year-old girl in the sex trade describes how an encounter with Ramsay turned violent, and that as she fled from him, he threatened to have her killed if she told anyone, saying "you don't know who I know." Another girl, 14, whose case was also being heard by Ramsay, was paid four to six times for a sexual act and promised a lighter sentence if she wouldn't tell.[25] During the investigation process, reports of abuse from RCMP officers and other high status members of the local community emerged, but no further charges were pressed.[26]

Aboriginal girls also experience violence through domestic trafficking.[27] Human trafficking has received growing attention in recent years, both in Canada and worldwide, but discussions on trafficking in Canada tend to be focussed on international elements and domestic trafficking, particularly of

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http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071012/highway_oftears_071012/20071012/. A list of some of the girls that have gone missing can be found at http://www.primetimecrime.com/Recent/Murder/Highway%20of%20tears.htm

[24] Amnesty International, *Stolen Sisters: Discrimination and violence against indigenous women in Canada. A summary of amnesty intenationals concerns*. (London: Amnesty international Secretariat, October 2004). Excerpted in John J. Burrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Ed. (Canada: LexisNexis, 2007) Pgs. 740-741.

[25] *R. v. Ramsay*, 2004 BCSC 756.

[26] Dave Milne, "Links between Judge Ramsay, RCMP and Child Predation in our Justice System" Canadian Press, Friday May 20, 2005. http://hazel8500.wordpress.com/2006/06/01/links-between-judge-ramsey-rcmp-and-child-predation-in-our-justice-system/.

[27] Although the police and the general public are increasingly aware of these issues through the media surrounding the missing women from Vancouver's Downtown East Side, the Highway of Tears in the north, and the national Sisters In Spirit campaign being carried out by Native Women's Association of Canada (NWAC), there is still a lack of academic and community based research to support what is already known. Sarah Hunt, *Trafficking of Aboriginal girls and youth: risk factors and historical context*, June 27, 2008. Accessed Online: http://www.interfaithjustpeace.org/pdf/sara_hunt-human_trafficking/sara_hunt-human_trafficking.pdf.

Aboriginal girls, has been sidelined and framed as prostitution and sex work. The key differences between sex work and trafficking for sexual exploitation includes the use of threat, force, deception, fraud, abduction, use of authority and giving payment to achieve consent for the purpose of exploitation, including sexual exploitation.

According to a study conducted by Anupriya Sethi[28] domestic sex trafficking of Aboriginal girls can be family based, with girls being sexually exploited and initiated into prostitution by their male and female relatives[29] and this is frequently poverty driven and intergenerational resulting from the residual impact of colonisation and residential schools.

At the same time, domestic trafficking can also be organized and sophisticated in the form of escort services, massage parlours or dancers. Interviewees from Sethi's research have indicated that the movement of trafficked Aboriginal girls follows a pattern of city triangles across different provinces in Canada. For example, in Saskatoon, which is in close proximity to Edmonton and Calgary, girls are moved in triangles between these cities. [30]

An emerging trend also appears to be the increased trafficking of girls due the oil rig and mining businesses in Alberta. According to Sethi's research, significant numbers of men travel back and forth from Saskatchewan to northern Saskatchewan or Alberta for short periods of time to work in oil rigs or at uranium mines. In keeping with their movement, girls are increasingly being moved around and sexually exploited.[31]

Sethi also notes that violence against Aboriginal girls begins from their communities and continues into the trafficking process, with traffickers imposing various forms of violence to initiate girls into sex trafficking and maintain control over them. Girls are forced to go with johns, not use condoms, and live

[28] Anupriya Sethi, Domestic *Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications*. First Peoples Child & Family Review A Journal on Innovation and Best Practices in Aboriginal Child Welfare Administration, Research, Policy & Practice. Volume 3, Number 3, 2007, pp. 57-71.
[29] J. Lynne, (1998). *Colonialism and the Sexual Exploitation of Canada's First Nations Women*. Paper presented at the American Psychological Association 106th Annual Convention, San Francisco, California, August 17, 1998
[30] Anupriya Sethi, Domestic *Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications*. First Peoples Child & Family Review A Journal on Innovation and Best Practices in Aboriginal Child Welfare Administration, Research, Policy & Practice. Volume 3, Number 3, 2007, Page 60.
[31] Ibid Pg. 59.

in poor and unhygienic conditions. Traffickers often keep the earnings and the identification documents of girls to minimize their chances of escape. [32]

What this breadth of information serves to demonstrate is that the fundamental human rights of Aboriginal girls to be free from violence, discrimination, racism, and threats to their lives and physical security are violated at shocking rates. There are a number of means to prevent this situation including the rigorous application of domestic criminal law against physical and sexual abuse and prostitution with underage girls; provision of improved social services in the areas of health and education, provision of adequate housing and shelters for homeless girls and so on. However for the purposes of the remainder of this paper, the focus will be on how international law and the responsibilities of the Canadian government to implement this law can address violence against Aboriginal girls.

What are Canada's international human rights obligations to prevent violence against Aboriginal girls and how has Canada performed?

Before reviewing Canada's human rights obligations at international law, note should be made of unique relationship between the Federal government of Canada and Aboriginal people and the fiduciary duty that accompanies this.

According to Section 91(24) of the *Constitution Act*[33] *(Constitution)* the Federal government is responsible for Indians and lands reserved for Indians, and while the *Constitution* does not define what is meant by "Indians", Canadian Courts have nevertheless evolved the constitutional definition to include First Nations, Métis and Inuit people even though they are not recognized as such in the *Indian Act.*[34]

Concomitant to this constitutional duty toward First Nations, Inuit and Métis people is the notion that the Federal government also owes a particular fiduciary duty[35] to Aboriginal people. The fiduciary duty

[32] Ibid. Pg. 62.
[33] *Constitution Act, 1867*
[34] The *Indian Act* ("An Act respecting Indians"), R.S., 1985, c. I-5, is a statute that concerns registered Indians (which are defined as the First Nations peoples of Canada), their bands, and the system of Indian reserves. The *Indian Act* was enacted in 1876 by the Parliament of Canada under the provisions of Section 91(24) of the *Constitution Act*, *1867*, which provides the federal government exclusive authority to legislate in relation to "Indians and Lands Reserved for Indians".
[35] The fiduciary duty is a legal relationship of confidence or trust between two or more parties, most commonly a fiduciary or trustee and a principal or beneficiary. A fiduciary duty is an obligation on the fiduciary to act in the best interest of the

originated with the interaction between the Crown[36] and Aboriginal people in the immediate, post contact period. During this time, Crown-Native relations were based on mutual need, respect and trust. When this fiduciary character of these relations was formed through interactions such as treaty making, the participants conducted themselves on a nation to nation basis. Hence, the fiduciary duty is based on mutual recognition and respect between the Crown and Aboriginal peoples. The use of fiduciary doctrine is a valuable tool to ensure that the Crown performs the duties it owes to Aboriginal people which are twofold: first, the Crown owes a general overarching duty to Aboriginal peoples as a result of the historical relationship between the parties, and the Crown also owes specific fiduciaries to particular groups stemming from its relationships with those groups from specific treaties, agreements or alliances. [37]

The concept of a fiduciary was first characterised in the case of *Guerin v. The Queen* [1984] 2 S.C.R. 335[38]. In this case, the Supreme Court of Canada (SCC) first declared that the Crown has a fiduciary obligation to Aboriginal peoples to do what is in their best interest and that this relationship is legal rather than merely political or moral. Hence, in the relationship the interaction of the parties being governed by the fiduciary law is not the product of an acceptance of the legitimacy of colonialism in Canada, but, rather, the principles of fiduciary law which are appropriate to monitor the special needs of this unique situation between the government and Aboriginal people.[39]

These obligations are of particular importance to this discussion because the Federal government of Canada is the main signatory of international human rights documents. While it is expected that once the treaty has been domesticated into Canadian law the provinces are responsible for ensuring the

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beneficiary and exists whenever the relationship between the parties involves a special trust, confidence, and reliance on the fiduciary to exercise their discretion or expertise in acting for the beneficiary. http://definitions.uslegal.com/b/breach-of-fiduciary-duty Accessed: December 11 2008.

[36] The Crown in this case being the equivalent of the Federal Government at the time of colonisation when colonisers represented the monarchy of England.

[37] Leonard I. Rotman, "Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada" (Toronto: University of Toronto Press, 1996). Excerpted in John J. Burrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Ed. (Canada: LexisNexis, 2007) Pg. 444.

[38] The Court noted: "*Through the confirmation in s. 18(1) of the Indian Act of the Crown's historic responsibility to protect the interests of the Indians in transactions with third parties, Parliament has conferred upon the Crown discretion to decide for itself where the Indians' best interests lie. Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct*." Page 337.

[39] Leonard I Rotman, "Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada" (Toronto: University of Toronto Press, 1996). Excerpted in John J. Burrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Ed. (Canada: LexisNexis, 2007).

enforcement of those human rights obligations using the power delegated to them under the constitutional division of powers[40] , this has not always been the case. Instead, when responding to accusations of failures to uphold its human rights obligations, the Federal and Provincial governments undertake mutual finger pointing to place responsibility on the other failing to take the necessary measures.[41] So while the Constitutional division of powers means that responsibility for ensuring the realisation of the human rights of non Aboriginal Canadians is constitutionally shared between the Provincial and Federal government, Section 91(24) and the presence of the *Indian Act* place the responsibility for the human rights protection of Aboriginal people square in the responsibility of the Federal government. This responsibility is buttressed by the fact that by acceding to the human rights treaties themselves, they undertake the responsibility to ensure the provinces are taking the necessary steps to protect Aboriginal people, and not to attribute blame or abdicate its own accountability.

Having established the heightened responsibility of the Federal government toward the best interest and welfare of Aboriginal people, we turn next to Canada's international human rights obligations to ensure Aboriginal girls enjoy the right to be free from violence and to consider Canada's record in performing these obligations.

Girls are not currently recognised at international law despite the fact that they are a group of need of specifically attention given the uniqueness of their experiences and vulnerabilities.[42] The rights of girls and the specific conditions of oppression they encounter are frequently overlooked by the Canadian government and policy makers. Marginalized within the category of children as females and within the

[40] Canada adopts a dualist approach to the implementation of international conventions and treaties. These are not self-executing and international law is not presumed to be part of Canadian domestic law. To be binding, international obligations must be incorporated into domestic law through enabling or implementing legislation. Treaty-making is a power reserved for the executive branch of government, so it is the federal government negotiates international obligations and ratify (or accede to) international instruments on behalf of Canada. However, due to constitutional division of powers, it is the subject matter of the international instrument that will determine which level of government will be competent to pass implementing legislation. If, under the *Constitution Act*, the subject-matter falls under provincial jurisdiction, as is often the case with private international law instruments, it will be up to each province to pass implementing legislation.

[41] During the recent review of Canada by the Committee on the Elimination of Discrimination Against Women, the Committee's recommendations to Canada included the following: "*While reaffirming that the Government has the primary responsibility and is particularly accountable for the full implementation of the State party's obligations under the Convention, the Committee stresses that the Convention is binding on all branches of Government, and it invites the State party to encourage its federal, provincial and territorial parliaments, in line with its procedures, where appropriate, to take the necessary steps with regard to the implementation*..." Committee on the Elimination of Discrimination against Women. Concluding Observations: Canada. 7 November 2008. Para 10.

[42] Girls experience the world differently than women, men and boys. They have different struggles, concerns and vulnerabilities. "Girls confront problems unique to their sex: notably sexual abuse, sexual assault, dating and male violence, depression, unplanned pregnancy, and adolescent motherhood". Meda Chesney-Lind and Lisa Pasko, *The Female Offender: Girls, Women, and Crime.* Second Edition. (Thousand Oaks: Sage Publications, 2003).

category of women as minors, girls and the issues that affect them are often eclipsed by concerns general to youth or adult women.

The *Platform for Action on the Girl Child*, arising from the United Nations Fourth World Conference on Women, as well as the *World Programme of Action for Youth on Girls and Young Women* articulate numerous strategic objectives to eliminate violence and discrimination in the lives of girls and set out a framework for situating the girl-child within international human rights.[43] Despite these commitments, girls remain a low priority for many countries, including Canada. As a result, international human rights monitors often overlook breaches specific to girls. [44] Nevertheless, in assessing Canada's record in upholding its obligations, it is fair to assume that issues that relate to "children" as a non gender disaggregated group and "women" as a non age disaggregated group, also apply to girls.

As a member State of the United Nations, Canada has a duty to respect the purposes and principles of the *Charter of the United Nations.* This requires actions "promoting and encouraging respect" for human rights and not undermining them. The duty to promote respect for human rights is to be based on "respect for the principle of equal rights and self-determination of peoples".[45]

Second, as an elected member of the Human Rights Council until 2009, Canada has accepted the commitment to "uphold the highest standards in the promotion and protection of human rights … [and] fully cooperate with the Council."[46] This cooperation includes Canada supporting the Council in carrying out its responsibility "for promoting universal respect for the protection of all human rights … for all, without distinction of any kind and in a fair and equal manner."[47] A central purpose of the UN *Charter* is to "achieve international cooperation … in promoting and encouraging respect for human rights … for all."[48]

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[43] The United Nations Beijing Declaration and Platform for Action. Accessed online: http://www0.un.org/womenwatch/daw/beijing/platform/girl.htm; The World Programme of Action, Accessed online: http://www.un.org/esa/socdev/unyin/wpaygirls.htm.

[44] Justice for Girls and Justice for Girls International, Submission to UN Committee on the Elimination of All forms of Discrimination Against Women at its 7th periodic review of Canada Jointly Submitted by Justice for Girls & Justice for Girls International October 2008. Accessed online at www.justiceforgirls.org.

[45] The Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. http://www.un.org/Overview/rights.html.

[46] The Council was established in 2006. UN General Assembly, Human Rights Council, A/RES/60/251, 15 March 2006. Para. 9.

[47] UN General Assembly, Human Rights Council, A/RES/60/251, 15 March 2006. Para. 2.

[48] *UN Charter*, Art. 1(3). See also UN General Assembly, Respect for the purposes and principles contained in the Charter of the United Nations to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms and in solving international problems of a humanitarian character, A/RES/62/166, 18 December 2007,

Third, as a Council member, Canada must not use human rights for political ends. A key reason for creating the new Human Rights Council includes: "ensuring … objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization."[49]

In addition to these general obligations, Canada maintains a number of specific obligations under treaties it has signed and ratified. The following is a consideration of some, but certainly not all of these obligations that relate to the rights of Aboriginal girls to be free from violence.

Convention of the Elimination of Discrimination Against Women (CEDAW)

Canada was one of the first countries to ratify *CEDAW*[50] in 1981. *CEDAW* is an essential component of the human rights regime as it is the only Convention that brings together in a single treaty, human rights standards for women and girls in public and private life.

While *CEDAW* does not explicitly create obligations to prevent violence against women and girls, (a fact that has resulted in widespread criticism of the Convention), Canada's obligations nevertheless include the responsibility to ensure the full development and advancement of women , to guarantee their enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3); and to suppress all forms of traffic in women and exploitation of prostitution of women— another form of violence against girls (Article 6) .

Over the years, the Committee on the Elimination of Discrimination Against Women, which is the treaty monitoring body of *CEDAW*, has frequently expressed concern for Canada's failures to live up to its obligations on violence against women and girls.

For example, in considering Canada's fifth periodic report, the Committee noted with concern that violence against women and girls persists and urged the Canadian government to step up its efforts to

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Para. 1: "*Reiterates the solemn commitment of all States to enhance international cooperation in the field of human rights … in full compliance with the Charter of the United Nations*."

[49] UN General Assembly, Human Rights Council, note 12, supra, preamble. See also UN General Assembly, Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity, A/62/165, 18 December 2007, Para. 5: "*Reaffirms that the promotion, protection and full realization of all human rights and fundamental freedoms, as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends …*"

[50] Convention on the Elimination of Discrimination Against Women, New York, 18 December 1979. http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

combat violence against women and girls and increase its funding for women's crisis centres and shelters in order to address the needs of women victims of violence under all governments.[51] In that same report, the Committee recognized the efforts made by Canada in addressing the issue of trafficking in women and girls but encouraged the government to assist victims of trafficking through counselling and reintegration.[52]

During the recent review of Canada's sixth and seventh reports which took place on the 22nd October 2008, the Committee also recommended that Canada enact legislation specifically addressing domestic violence against women,(which is currently glaringly absent) making it a criminal offence and ensuring that women who are victims of domestic violence have access to immediate means of redress and protection and that perpetrators are prosecuted and adequately punished, and that it put in place "primary aggressor" policies. The Committee also recommended that adequate shelters and appropriate support services be provided for women and adolescent girls who are victims of violence, and that the shelter and services needs of Aboriginal women, trafficked women and rural and northern women (among others) be addressed.[53]

The observations of the Committee during this same session were particularly hard-hitting on the issue of violence against women and they were exceptionally critical of Canada's failure to respond the violence and murder of Aboriginal women in Canada.[54]

On the one hand the Committee applauded initiatives at all levels of government to address violence against women, and initiatives such as the Sisters in Spirit Initiative and the Aboriginal People's Programme, which specifically address violence against aboriginal women. However, it noted its concern at the high levels of violence against adolescent girls and the hundreds of cases involving Aboriginal women who have gone missing or been murdered in the past two decades. Their concern also included

[51] Committee on the Elimination of Discrimination against Women. Concluding Observations of the Committee: Canada (A/58/38) Fifth periodic report Canada 23 January 2003 (see CEDAW/C/SR.603 and 604). Para 370.
[52] Committee on the Elimination of Discrimination against Women. Concluding Observations of the Committee: Canada (A/58/38) Fifth periodic report Canada 23 January 2003 (see CEDAW/C/SR.603 and 604). Para 368
[53] Committee on the Elimination of Discrimination against Women. Concluding Observations: Canada. 7 November 2008. Para 30.
[54] The observations of the Committee at this session were an unprecedented and strong statement on Canada's failures to respond to violence against Aboriginal movement and has added fuel to the ongoing community and feminist pressure to respond to these violations.

the fact that this has neither been fully investigated nor attracted priority attention, with the perpetrators remaining unpunished.[55]

The Committee recommended Canada examine the reasons for the failure to investigate and to take the necessary steps to remedy the deficiencies in the system. It called upon Canada to urgently carry out thorough investigations of the cases of Aboriginal women who have gone missing or been murdered and to carry out an analysis of those cases in order to determine whether there is a racialised pattern to the disappearances and take measures to address the problem if that is the case. As noted above, many of the missing women include girls under the age of 19. In addition to this notably strong language, Canada is required as part of the recommendations to report back to the Committee within a year. [56]

As a more generalised recommendation for eliminating the particular adversity faced by Aboriginal women and girls, the Committee also recommended that Canada develop a specific plan for addressing the particular conditions affecting Aboriginal women, both on and off reserves, including poverty, poor health, inadequate housing, low school-completion rates, low employment rates, low income and high rates of violence, and that it take effective and proactive measures, including awareness-raising programmes, to sensitize Aboriginal communities about women's human rights and to combat patriarchal attitudes and practices and the stereotyping of roles.[57]

In addition to its obligations to prevent trafficking under *CEDAW*, Canada has further formalised commitment to fighting the trafficking of women and girls by ratifying the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Transnational Organized Crime* [58]and has amended the *Criminal Code* to create indictable offences which specifically address trafficking in persons.[59] Given that this mechanism does not include a treaty monitoring body, it is difficult to determine how well Canada is doing in implementing its obligations under this *Protocol.* However, since it is explicitly connected to transnational crime, and given the continued prevalence of domestic trafficking of Aboriginal girls and that the focus of the

[55] Committee on the Elimination of Discrimination against Women. Concluding Observations: Canada. 7 November 2008. Para 31.
[56] Ibid. Paras 29-32, 53
[57] Committee on the Elimination of Discrimination against Women. Concluding Observations: Canada. 7 November 2008. Para 44.
[58] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Transnational Organized Crime,* 2000.
[59] *Bill C-49: An Act to Amend the Criminal Code (Trafficking in Persons)*. Accessed Online: http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C49.

Canadian government has been on the international aspects of trafficking to the neglect of domestic trafficking, its performance in this regard is likely to be unimpressive. It could be that the *Protocol* itself may simply not provide the necessary means to preventing the domestic trafficking of Aboriginal girls and the violence that accompanies it.

Convention on the Rights of the Child (CRC)

Compared to *CEDAW*, the *CRC*[60] provides some of the most comprehensive human rights protections for violence against girls, including an overt recognition that children have a right not to experience violence and not to be trafficked.

The *CRC* defines a child as every human being under the age of eighteen years (Article 1) and requires all state parties to protect the child from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. (Article 19). It also requires states to protect the child from all forms of sexual exploitation and sexual abuse. In particular, they are required to take all measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices;(Article 34); and the abduction, sale or traffic in children for any purpose or in any form. (Article 35).

The CRC also contains an *Optional Protocol on the sale of children, child prostitution and child pornography*[61] which Canada ratified in September of 2005. The *Optional Protocol* entered into force in January 2002 and aims to protect children from sexual exploitation. In this agreement, states agree to prohibit child prostitution, the sale of children, and child pornography.

As with *CEDAW*, the *CRC* also has a treaty monitoring body- the Committee on the Rights of the Child- that conducts periodic reviews of state compliance with the *CRC*. In its concluding observations on the review of Canada's first report, the Committee noted its concern for the existence of child abuse and

[60] *Convention on the Rights of the Child*. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

[61] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. Entered into force on 18 January 2002.

violence within the family and the insufficient protection afforded by the existing legislation in that regard.[62]

During its review of Canada's second report, it acknowledged positive steps Canada took in promoting awareness of sexual exploitation and working towards its reduction, including adopting amendments to the *Criminal Code* in 1997 (Bill C-27) and the introduction in 2002 of Bill C-15A, facilitating the apprehension and prosecution of persons seeking the services of child victims of sexual exploitation and allowing for the prosecution in Canada of all acts of child sexual exploitation committed by Canadians abroad.[63]

However, the Committee expressed its concerns for the vulnerability of Canadian street children and, in particular, Aboriginal children who, in disproportionate numbers, end up in the sex trade as a means of survival. The Committee recommended that Canada further increase the protection and assistance provided to victims of sexual exploitation and trafficking, including prevention measures, social reintegration, access to health care and psychological assistance, in a culturally appropriate and coordinated manner, including by enhancing cooperation with non-governmental organizations and the countries of origin. The Committee also urged Canada to pursue its efforts to address the gap in life chances between Aboriginal and non-Aboriginal children. [64]

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Under *CERD*[65] Canada is obligated to protect the rights of racialised and minority groups, such as Aboriginal girls, against discrimination. State parties are required to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, to guarantee them the full and equal enjoyment of human rights and fundamental freedoms (Article 2(2)). States also required to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, particularly in the enjoyment of the right to security of person and protection against violence or bodily harm. (Article 5)

[62] Committee on the Rights of the Child. Concluding Observations: Canada CRC/C/15/Add.37. 20 June 1995. Para. 14.
[63] Committee on the Rights of the Child. Concluding Observations: Canada. CRC/C/15/Add.215
27 October 2003. Para 52.
[64] Ibid.
[65] *International Convention on the Elimination of All Forms of Racial Discrimination*. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969.

The Committee on the Elimination of Racial Discrimination, the treaty monitory body for *CERD*, has expressed a number of concerns over Canada's implementation of its obligations under this Convention.

During its review of Canada's seventeenth and eighteenth reports, the Committee acknowledged positive measures taken by Canada to address discrimination, including support extended to the Sisters in Spirit Initiative of the Native Women's Association of Canada (NWAC).[66] Nevertheless, it criticised the serious acts of violence against Aboriginal women, who constitute a disproportionate number of victims of violent death, rape and domestic violence and noted its concern that services for victims of gender-based violence are not always readily available or accessible, particularly in remote areas.[67]

The Committee recommended that Canada strengthen and expand existing services, including shelters and counselling, for victims of gender-based violence, to ensure their accessibility. It recommended that Canada take effective measures to provide culturally-sensitive training for all law enforcement officers, taking into consideration the specific vulnerability of Aboriginal women and women belonging to racial/ethnic minority groups to gender-based violence.[68]

International Covenant on Economic, Social and Cultural Rights (ICESR)

The *ICESR*[69] is one of the longest standing international human rights treaties. It includes articles on the rights of children to protection and assistance without discrimination (Article 10(3)), the right to education that promotes understanding, tolerance and friendship among all racial, ethnic or religious groups (Article 13), and the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12).

The implementation of the *ICESR* is monitored by the Committee on Economic, Social and Cultural rights, and in its most recent review of Canada's fourth and fifth periodic reports, it referred to a number of Canada's failures to uphold its obligations under the treaty. The issues of concern correlated directly to the circumstances that lead to violence against Aboriginal girls.

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[66] The main objective of the Sisters in Spirit initiative is to address violence against Aboriginal (First Nations Inuit and Métis) women, particularly racialised and/or sexualized violence, that is, violence perpetrated against Aboriginal women because of their gender and Aboriginal identity. http://www.nwac-hq.org/en/background.html

[67] Committee on the Elimination of Racial Discrimination. Concluding Observations: Canada. CERD/C/CAN/CO/18 25 May 2007. Para 20.

[68] Ibid.

[69] *International Covenant on Economic, Social and Cultural Rights*. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976

For example, the Committee noted the disparities that still persist between Aboriginal peoples and the rest of the Canadian population in the enjoyment of rights under the *ICESCR.*[70] It noted with particular concern that poverty rates remain very high among disadvantaged and marginalized individuals and groups such as Aboriginal peoples and youth.[71] The Committee also expressed regret that domestic violence as a specific offence has not been included in the *Criminal Code* [72]and that women are prevented from leaving abusive relationships due to the lack of affordable housing and inadequate assistance.[73]

Based on these observations the Committee recommended Canada give special attention to the difficulties faced by homeless girls, who are more vulnerable to health risks and social and economic deprivation, and that it take all necessary measures to provide them with adequate housing and social and health services.[74]. It also recommended that Canada include domestic violence as a specific offence in the *Criminal Code*[75] and that it ensure low-income women and women trying to leave abusive relationships can access housing options and appropriate support services in keeping with the right to an adequate standard of living.[76]

Special Rapporteur on Indigenous People

The United Nations has recognised that Indigenous peoples across the world experience the consequences of historical colonization or conquest, and face discrimination because of their distinct cultures, identities and traditional ways of life. On this basis, the Commission on Human Rights decided to appoint in 2001 a Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people. In the fulfillment of their mandate, the Special Rapporteur presents annual reports on particular topics or situations of special importance regarding the promotion and protection of the rights of Indigenous peoples; undertakes country visits; exchanges information with Governments

[70] Committee on Economic, Social and Cultural Rights. Concluding observations: Canada. E/C.12/CAN/CO/4 E/C.12/CAN/CO/5. 22 May 2006. Para. 11 (d)
[71] Committee on Economic, Social and Cultural Rights. Concluding observations: Canada. E/C.12/CAN/CO/4 E/C.12/CAN/CO/5. 22 May 2006. Para 15.
[72] Ibid. Para 25.
[73] Ibid. Para 26.
[74]Ibid. Para 57.
[75] Ibid. Para 58
[76] Ibid. Para 59.

concerning alleged violations of the rights of Indigenous peoples; and undertakes activities to follow-up on the recommendations included in his reports.[77]

The Rapporteur conducted a mission to Canada from 21 May to 4 June 2004. In the final report of his mission he recognised that intra-family abuse and violence are serious problems that began to form when Aboriginal communities lost their independent self-determining powers and Aboriginal families lost authority and influence over their children. While he recognised that promising approaches have been taken in the form of setting up of community healing lodges and healing centres, he recognised that suicide rates, prostitution and child welfare issues are of particular concern among urban Aboriginals as well as on reserves. He noted that special attention needs to be paid to the nexus between the Residential Schools restitution process, the trans-generational loss of culture and social problems such as adolescent suicide rates and family disorganization and that particular attention be paid by specialized institutions to the abuse and violence of Aboriginal women and girls, particularly in the urban environment.[78]

While the preceding review of Canada's obligations and performance under international law is not exhaustive, it nevertheless reveals part of the reality that the while the Canadian government has undertaken a large number of obligations to prevent violence against Aboriginal girls and to realise their human rights in this regard, its record in doing so is inadequate.

The next issue to consider is what the UN Declaration on Indigenous People would add to these responsibilities if Canada were to sign.

What does the UN Declaration on Indigenous People add to the International Human Rights Framework?

On September 13, 2007, the United Nations General Assembly held a historic vote to adopt the United Nations Declaration on the Rights of Indigenous Peoples. The *Declaration* represents an important step towards addressing the widespread and persistent human rights violations against Indigenous peoples

[77] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people website. http://www2.ohchr.org/english/issues/indigenous/rapporteur/.
[78] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Special rapporteur report on Canada. E/CN.4/2005/88/Add.3 2 December 2004. http://daccessdds.un.org/doc/UNDOC/GEN/G05/100/26/PDF/G0510026.pdf?OpenElement

worldwide. It is the most comprehensive and universal international human rights instrument explicitly addressing the rights of Indigenous peoples.

> "*In Indigenous communities, denials of Indigenous peoples' collective human rights, including self-determination, are root causes and major contributors to deep-seated health and other socio-economic problems. Land and resource dispossessions entail highly serious and far-reaching human rights abuses. They endanger the survival and well-being of distinct Indigenous peoples and cultures. Both peoples and individuals are impacted. Therefore, eradicating this poverty is in essential ways "a human rights challenge" that would be aided by the UN Declaration*."[79]

The *Declaration* affirms a wide range of political, economic, social, cultural, spiritual and environmental rights and elaborates international human rights standards for the "survival, dignity and well-being of the world's Indigenous peoples."[80] As distinct peoples, there is now a normative international legal framework that affirms their human rights.

As noted by Victoria Tauli-Corpuz, Chair, UN Permanent Forum on Indigenous Issues in her Statement to the UN General Assembly, New York, September 13, 2007

> *"We see this is as a strong Declaration which embodies the most important rights we and our ancestors have long fought for; our right of self-determination, our right to own and control our lands, territories and resources, our right to free, prior and informed consent, among others. Each and every article of this Declaration is a response to the cries and complaints brought by indigenous peoples ... This is a Declaration which makes the opening phrase of the UN Charter, "We the Peoples…" meaningful for 370 million indigenous persons all over the world."*[81]

In what ways though, does this *Declaration* respond to violence against Aboriginal girls any differently than any other international law?

A number of the articles in the *Declaration* reiterate rights that already existed at international law but with an explicit recognition that they particularly apply to Indigenous people. For example Articles 1 and 2 of the of the *Declaration* reaffirm that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the United

[79] Paul Joffe, UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context. Aboriginal Law Conference—2008. Paper 2.2. (Vancouver: Canadian Legal Education Society of British Columbia, June 2008). Page 2.2.15.
[80] *Universal Declaration on Human Rights*. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Article 43.
[81] Paul Joffe, UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context. Aboriginal Law Conference—2008. Paper 2.2. (Vancouver: Canadian Legal Education Society of British Columbia, June 2008). Page 2.2.2.

Nations *Charter*[82] and the *Universal Declaration of Human Rights (UDHR)*[83], are free and equal to all other peoples and have the right to be free from any kind of discrimination based on their Indigenous origin or identity, in the exercise of their rights. Article 7 states that Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person, and Article 21 notes that Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. In this way, the *Declaration* reaffirms many of the human rights obligations contained in other international law instruments such as *CEDAW*, *CERD*, *UDHR* and *ICESCR*.

However, the *Declaration* introduces something very unique and progressive in application to violence against girls in international law. Article 22 (2) requires all states to take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

There is no other international legal instrument which contains such an explicit statement on the need to protect Indigenous women and children as a distinct group, from violence and discrimination. This represents a major step in itself because there is finally recognition at the international level that Indigenous women and children disproportionately experience violence and that Indigenous communities need to work within themselves and to take responsibility for combating violence.

The positive potential of this Article is not only to hold states accountable for working with Indigenous communities to end the conditions that lead to violence against Aboriginal girls, but in a broader sense, it may serve to restore the importance and the role of women and girls in Aboriginal communities that has been eroded by colonisation since the time of contact.

Women traditionally played a central role within many Aboriginal families, Aboriginal government and in spiritual ceremonies and were never considered inferior until contact with the colonisers. From contact to modern times, the colonial powers, through discriminatory and destructive policies such as the

[82] *Charter of the United Nations*. The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.
[83] *Universal Declaration on Human Rights*. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

residential school system and *Indian Act*, conducted widespread discrimination against Aboriginal women. Cultural changes that resulted from colonisation had the greatest impact on the role of Aboriginal women. Over time and because of their own experiences with colonisation, many Aboriginal men adopted the denigrating attitude toward women espoused by the colonial powers and this resulted in the family breakdown, violence and abuse which continues to pervade many Aboriginal communities today.[84] If this *Declaration* can be used in a truly instrumental way, it may finally achieve recognition and accountability for ending violence against women and girls and to start the process toward reinstating the central role of women and girls in Aboriginal communities.

Another unique aspect of the *Declaration* is that many of the articles recognise collective rights – the rights of "indigenous peoples". [85] Some of these rights may be exercised by individuals on the basis of their membership of an Indigenous group that benefits from these rights, such as the right to live in freedom, peace and security. Others are intended to protect and maintain the whole group, which implies that this group has a distinct quality as a collective that cannot be reduced to its individual members.[86] These rights include protection of a group's culture, language and religion. The nature of these collective rights reflects the world view of many Aboriginal communities that they reflect and promote the totality of the community. This perspective is particularly unique to Aboriginal peoples and the *Declaration* elaborates these collective rights to a degree unprecedented in international human rights law.

When one considers that violence against Aboriginal girls often arises from within their own communities, there may be strong reasons to doubt how much the *Declaration* is going to provide accountability for protection of their human rights. A legitimate concern may be that the *Declaration* and the collective rights that it seeks to maintain are more about the broader 'political' rights such as self determination, self governance, economic justice, access to natural resources and treaty making and these will undermine the individual experiences of rights of individual Aboriginal people such as girls. The *Declaration'*s emphasis on collective rights may also mean that the human rights "agenda" of the community will be the "agenda" of the most powerful majority and this will undoubtedly exclude girls who are the least powerful members of society.

[84] A.C. Hamilton and C.M. Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1 (Winnipeg: Queen's Printer, 1991) at 437-87.
[85] See articles 5, 14, 18, 26, 29, 31 for example.
[86] Office of the High Commissioner for Human Rights (2001), Leaflet No. 10: Indigenous Peoples and the Environment, United Nations, Geneva.

On the other hand, the usefulness of human rights frameworks in general, is that the individual should receive the highest level of protection, even in the face of collective rights and, in the case of children, their rights cannot be neglected or violated to safeguard the best interests of the group. In addition, individual and collective rights may be seen to be mutually reinforcing if one assumes that the rights and well-being of the group leads to the realisation of the rights of its individual members and that the rights of Aboriginal girls are central enough to Aboriginal communities and culture to be recognised as part of the broader collective rights achievement.

To conclude, there is no doubt that the *Declaration* represents an important recognition of the destructive effects of human and environmental colonialism and constitutes a powerful statement on the rights to self determination, cultural identity, social and economic justice and security and freedom to live as a distinct people for Aboriginal people. Whether it will be a more effective tool than other international human rights instruments in protecting the rights of Aboriginal girls to be free from physical and sexual violence is yet to be tested, but caution must be exercised in accepting wholeheartedly that the *Declaration* represents a marked achievement for recognising the totality of rights for all Aboriginal people.

Can international law and the UN Declaration effectively address violence against Aboriginal girls?

Based on the preceding discussions, the final question that remains is whether international human rights law, including the *Declaration*, is an adequate way to respond to violence against Aboriginal girls at all.

One of the first limitations on the efficacy of international human rights law is that a state party must sign the treaty before it is bound by its provisions. Although there are certain human rights that are considered customary international law[87] or jus cogens[88], such as the right not to be tortured or subject

[87] Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. It follows that customary international law can be discerned by a "widespread repetition by States of similar international acts over time (State practice); Acts must occur out of sense of obligation (opinio juris); Acts must be taken by a significant number of States and not be rejected by a significant number of States." A marker of customary international law is consensus among states exhibited both by widespread conduct and a discernible sense of obligation. S. Rosenne, *Practice and Methods of International Law* (New York: Oceana, 1984).

to genocide, states are nevertheless resistant to acknowledging they are bound by human rights norms unless they have signed treaties. This limitation is clearly evidenced by the Canadian government's refusal to sign the *Declaration*. Their reasons for not signing are many and the discussion too lengthy for the purposes of this paper, but it is sufficient to note that it tends to be more about political will (or lack thereof) than a legitimate legal conflict between Canadian law and the *Declaration* and because of this political reluctance, they are refusing to recognise that the principles in the *Declaration* may constitute binding customary law.[89]

A second limitation of international law as it particularly applies to Canada, is the tendency of the Federal and Provincial governments to blame one another or to abdicate their own responsibility for realising its obligations under international human rights law. As long as these levels of government continue to wrangle over jurisdiction, the obligations under international law will never be fulfilled. This limitation is not a reflection of a flaw in the structure of international human rights law itself, but is rather a failure of the Canadian government to take seriously the power and obligations of treaty and customary law.

Another common criticism of international law as a mechanism for the protection of human rights of women and girls is that international law tends to disempower and marginalise women and this is more so in the case of Aboriginal girls who are already some of the most marginalised people in society. Despite the importance of *CEDAW* and other international human rights instruments in defining discrimination against women, international law has not overtly addressed gender based violence until Article 22 of the *Declaration*. Over the past two decades women's organisations have worked hard both internationally and nationally to promote the rights of women and girls but today, women and girls still face inequality, discrimination and violence on a global scale.

Arguably, the guarantee of the rights of Aboriginal women and girls takes more than adopting a new instrument like the *Declaration,* or including a single article as a nod to their gendered rights concerns. Instead, realising the rights of girls to be free from violence may require challenging the structural inequalities and power imbalances that make continued violence against Aboriginal girls inevitable and

[88] Also termed peremptory norms, jus cogens is a fundamental principle of international law, which the international community accepts as a norm that bars derogation.

[89] A thorough and highly comprehensive discussion on these issues can be found in: Paul Joffe, UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context. Aboriginal Law Conference—2008. Paper 2.2. (Vancouver: Canadian Legal Education Society of British Columbia, June 2008).

it may simply be that international law is not the most effective way to do this. Though the *Declaration* is innovative for adding an article that explicitly recognises violence against Aboriginal women and children, it is relatively uncontroversial and obvious observation on the realities of the lives of these groups. Unless the responsibility to protect woman and children from abuse is specifically allocated and effective monitoring mechanisms are put in place, simply including violence against women and girls as a right can lead to justifying inaction or marginalising their rights.[90]

The inclusion of violence against women and children in international law regimes like the *Declaration* does not change the structures and assumptions that perpetuate violence against Aboriginal girls. The continued and widespread violence against Aboriginal girls, shows that the human rights law and other legal norms that Canada is obliged to uphold has not altered behaviour within Canadian society. Instead what may be needed is the development of a human rights culture within Canadian society and of a mindset that rejects physical and sexual violence against Aboriginal girls.[91]

One final critique of the efficacy of international human rights law and the *Declaration* is the continued failure to recognise girls as a distinct group of rights holders. This has led to the marginalisation of girls who, as argued above, maintain unique rights concerns that impact them intersectionally on the basis of age, gender and race.

Until girls are recognised as a group in need of human rights protection unique to their age and gender, their problems may remain unheeded and subsumed under the rubric of women and children in international law. Aboriginal girls have not always received the distinct consideration they deserve and their particular situation may be obscured by other issues of broader concern to Indigenous peoples, including land rights, self governance and political representation. Such concerns are, of course, fundamental to Aboriginal communities, but it is nonetheless crucial that targeted action to safeguard the distinct identity of Aboriginal girls and to promote the realization of their human rights is taken. It is possible that given the nature of the *Declaration* as a means to recognise Aboriginal people as a people and a group or collective with distinctive rights, the human rights of Aboriginal girls will continue to be marginalised at international law.

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[90] Christine Chinkin, Shelly Wright and Hilary Charlesworth, "Feminist Approaches to International Law: Reflections from Another Century" in Doris Buss and Ambreena Manji eds. *International Law: Modern Feminist Approaches*. (Portland: Hart Publishing, 2005). Pg. 28.
[91] Ibid.

Conclusion

To conclude on a more positive note, the role of international law in responding to violence against Aboriginal girls is not completely void. Even without the "teeth" that exist in domestic law, in the form of criminal and civil law remedies, international law serves an important norm building function that can be used by communities to advocate for themselves and to put pressure on the Canadian government to realise their rights. One of the most positive examples of this, mentioned above, is the amount of press and public pressure that has arisen from the recommendations of the Committee on the Elimination of Discrimination against Women that Canada take immediate action on more than 500 missing Aboriginal women. This has done a great deal to shed light on the travesty and to "name and shame" the Canadian government into action in the absence of its political will and domestic pressure to do so. There is no doubt that like other international instruments, the *Declaration* could serve a similar purpose, especially because it explicitly recognises violence against Aboriginal girls in its text.

Paul Joffe has proposed a number of ways in which the *Declaration*, despite not being ratified by the Canadian government, can be used as an instrument of education, advocacy and norm building to promote the rights of Aboriginal people and his suggestions on the Declaration can be used to raise awareness and build norms around the rights of Aboriginal girls to be free from violence and abuse.

For example, he suggests that to increase awareness, mutual respect and understanding, the *Declaration* should be integrated into the school curriculum at different grade levels. National and regional conferences and workshops should be organised to foster increased understanding and insight in relation to the UN Declaration and international human rights law and scholars, lawyers, law students, judges, legislators and government officials both Indigenous and non-Indigenous will need further human rights education. He also suggests the Declaration should be used in litigation in Canadian courts because domestic courts and international bodies are more likely to substantively consider the Declaration, when it is invoked by advocates in an effective way.92

Perhaps if Canadian society adopted a stronger stance on the unacceptability of continued violence and discrimination against Aboriginal girls and created the public pressure needed to force the Canadian government to sign the *Declaration*, it would provide an opportunity for violence against Aboriginal girls

[92] Paul Joffe, *UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context*. Aboriginal Law Conference—2008. Paper 2.2. (Vancouver: Canadian Legal Education Society of British Columbia, June 2008).

to be recognised and create a rallying point around which the fight for the rights of Aboriginal girls at international law could occur and they could start to overcome their current marginalisation in international human rights law.

"Indigenous women and girls deserve the protection of Canadian authorities and Canadian society. The failure to provide that protection is a personal tragedy for their families who have lost sisters, daughters and mothers to racist and sexist violence. It is also a human rights tragedy"[93]

[93] Amnesty International, *Stolen Sisters: Discrimination and violence against indigenous women in Canada. A summary of Amnesty International's Concerns*. (London: Amnesty international Secretariat, October 2004). Excerpted in John J. Burrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Ed. (Canada: LexisNexis, 2007). Pgs. 740-741.

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[i] The common interpretation of this famous phrase is "Two things which are so different as to have no opportunity to unite." But the origins of the phrase add an interesting element to the relationship between the liberal ideology of human rights law and the distinct experience of Aboriginal girls as a minority, racialised, colonised and culturally distinct group.
The phrase never the twain shall meet was used by Rudyard Kipling, in his Barrack-room ballads, 1892:

"Oh, East is East, and West is West, and never the twain shall meet."

There, Kipling is lamenting the gulf of understanding between the British and the inhabitants of the Indian subcontinent.