

Modern Challenges in International Law
and Indigenous Rights:
The United Nations Declaration on the Rights of
Indigenous Peoples, Indigenous Women's Activism,
and the Issue of Violence Against Indigenous Women

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Abstract: Historically, Indigenous women have been the target of violence at an alarming rate compared to the non-Indigenous population. This work explores how Indigenous women have used the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to call for the end of this abuse. The United States and Canada are two North American Federal governments with a strong presence of Indigenous Peoples. Even though Canada and the United States have signed UNDRIP, in North America as many as four in five Indigenous women experience violence in their lifetime. This work looks at how and why there is still such a significant rate of violence against Indigenous women in the U.S. and Canada. In addition, this article surveys the current extent of Indigenous women's participation in the policymaking process. It then explores what changes in law and policy should flow from Indigenous women's activism and in what ways Indigenous women can and should become more involved in the decision-making process. This work also aims to reflect on how the law and policies in the U.S., in Canada and at an international level could more efficiently address the issue. Indigenous women have historically been absent from the decision-making process and even when they are given a voice and their rights are emphasized, for instance with UNDRIP, countries are not complying with their responsibilities on the matter. Consequently, Indigenous women are de facto denied the possibility to participate in the debate, and their claims are left unheard. This article concludes that they should be empowered to advocate for enhanced accountability of the individual countries and the international community alike. In fact, increased participation of Indigenous women in the decision-making process increases the opportunity for Indigenous voices to be heard, in a quest to fight the widespread issue

of violence against Indigenous women.

Keywords: International Law; International Human Rights; Indigenous Rights; Feminist International Politics; Violence Against Indigenous Women.

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1. *Introduction: the issue of violence against indigenous women*

As a non-Indigenous woman living in the United States, I was surprised to notice that within the general population, and even in legal communities, there is little knowledge – and sometimes a lack of awareness – of Indigenous Peoples' issues and emerging discussions. Indigenous Peoples' societies in the United States and in the world share a pattern of commonalities and dysfunctions, even if geographically distant¹. Violence against women is one of such dysfunctions. The breakdown of traditional societal patterns caused by the colonization process, land loss and loss of identity seems to be connected with

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1. See J. Paul Seale, et al., *Alcohol Use and Cultural Change in an Indigenous Population: A Case Study from Venezuela*, 37 *Alcohol and Alcoholism* 603 (2002), available at <https://academic.oup.com/alcalc/article/37/6/603/205098> (last visited November 14, 2020).

this type of violence², as exemplified by the words of Winona LaDuke, Executive Director of Honor the Earth: "Violence against the land has always been violence against women"³. Starting by the premise that, historically, Indigenous women have been the target of violence at an alarming rate, compared to the non-Indigenous population⁴, this article examines how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) addresses the issue of violence against Indigenous women and facilitates a positive change, considering also how UNDRIP has been used by those subjects to call for the end of this violence. The analysis is conducted through two case studies: the United States and Canada. These countries have been chosen because they adopt a different legal approach in the treatment of Indigenous Peoples and at the same time share a similar common law framework and a federal type of government. This selection allows for an even ground for comparison. Canada and the United States have both signed UNDRIP, but still report high violence levels against women: in North America, as many as four in five Indigenous women have experienced violence in their lifetime⁵. This study proposes to analyse how and why there still is such a significant occurrence of violence against Indigenous women in their territory. Particular attention is posed in surveying the extent of Indigenous women's participation in the policymaking process. Finally, this research explores the ways Indigenous women can get more involved in the decision-making process and what changes in law and policy should flow from Indigenous

2. See Genevieve M. Le May, *The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PSU McNair Scholars Online Journal 1, 12 (2018), available at <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1177&context=mcnair> (last visited November 14, 2020).

3. See Thane Maxwell, *Coalition of Native American and Women's Organizations File Submission to United Nations Requesting Intervention in Epidemic of Sexual Violence* (Honor the Earth, May 11, 2015), available at http://www.honorearth.org/un_submission_may2015#:~:text=On%20April%2021%2C%202015%2C%20a,Lakes%20and%20Great%20Plains%20region (last visited November 22, 2020).

4. See generally Shannon Speed, *Incarcerated Stories: Indigenous Women Migrants and Violence in the Settler-Capitalist State* (University of North Carolina Press 1st ed. 2019).

5. See André B. Rosay, *Violence against American Indian and Alaska Native Women and Men*, 277 NIJ Journal 39, 41 (2016), available at <https://nij.ojp.gov/library/publications/nij-journal-issue-no-277> (last visited November 14, 2020).

women's activism. More specifically, this study aims to reflect on how the law and policies in the two countries could address the issue in a more efficient way and to what extent Indigenous women's activism would be conducive to this goal.

Indigenous women must be substantially more involved in the creation of law and policy in the United States and Canada, as well as in the international community. They have historically been absent from decision-making process and leadership roles⁶; moreover, even when they are given a voice, countries do not comply with the responsibilities stemming from being UNDRIP signatories. Consequently, Indigenous women are *de facto* denied the possibility to participate and their claims are left unheard⁷. Increased participation of Indigenous women in the decision-making process would dramatically improve the opportunity for Indigenous voices to be heard, in a quest to fight the widespread violence against Indigenous women. For this reason, they should be empowered to advocate for enhanced accountability of the individual countries and of the international community.

2. *Research questions and design*

This article aims to shed light on how empowering Indigenous women and Indigenous movements leads to positive change at the intersection between international law and public policy. The relevance

6. See Grazia Redolfi, Nikoletta Pikramenou and Rosario Grimà Algora, *Raising Indigenous Women's Voices for Equal Rights and Self-Determination*, 31 NEJPP 1,6 (2019), available at <https://scholarworks.umb.edu/nejpp/vol31/iss2/9/> (last visited November 14, 2020). Echoing the work of Kimberle Crenshaw, the authors remark that when addressing "participatory rights with regard to Indigenous women, it is important to analyze the various struggles they experience in the exercise of these rights. The structural obstacles to women's effective participation in decision making are multiplied when various identities intersect. Among many Indigenous women, for instance, the intersections of gender, race and poverty can amount to a triple discrimination". This may offer some context as to the challenges faced by Indigenous women in accessing decision-making and leadership roles.

7. See Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas* (April 17, 2017), available at <https://www.iwgia.org/images/documents/popular-publications/indigenous-women-americas.pdf> (last visited November 22, 2020).

of my questions lies in understanding potential improvements and new directions for action in the context of the international, American and Canadian legal framework⁸. Indigenous women have played an increasingly crucial role in advancing Indigenous Peoples' rights, for instance in the fight for the protection of Indigenous sacred sites⁹. This work analyzes how their leadership and action can extend to other areas and have a lasting impact on the current public policy and international legal debate. A careful look is taken at the extent to which the absence of their voice has impacted the perpetuation of the dysfunctions discussed in this analysis. Violence against Indigenous women is examined looking at how UNDRIP addresses the issue and provides tools to facilitate change.

The research questions develop on three levels. On the legislative level, this study analyzes how UNDRIP, if at all, addresses violence against Indigenous women. Specifically, it looks at how Indigenous women have used UNDRIP to call for the end of violence against women. At the policy level, this work looks at how and why there is such a significant occurrence of violence against women in Indigenous communities, despite the fact that both the United States and Canada signed UNDRIP. In particular, this study examines how the

8. This work strives to utilize two case studies that are suitable for comparison – the U.S. and Canada. See Gary King, Robert O. Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* at 19 (Princeton University Press 1st ed. 1994). The authors discuss case study selection, suggesting ways to approach case studies to produce useful causal inferences. Their advice is for the theoretical framework to be as concrete as possible to generate observable implications. King et al. show skepticism towards the use of case studies, but see Alexander George, Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* at 20 (Belfer Center Studies in International Security 1st ed. 2005). George and Bennett maintain that case studies are useful for theory development. This study builds on King et al. and George and Bennett's scholarship to ensure the inferences drawn are methodologically sound and informed of the possible risks in using case studies.

9. See Francesca Gottardi, *Sacred Sites Protection and Indigenous Women's Activism: Empowering Grassroots Social Movements to Influence Public Policy. A Look into the "Women of Standing Rock" and "Idle No More" Indigenous Movements*, 11 *Religions* 380 (2020), available at https://www.researchgate.net/publication/343177108_Sacred_Sites_Protection_and_Indigenous_Women%27s_Activism_Empowering_Grassroots_Social_Movements_to_Influence_Public_Policy_A_Look_into_the_Women_of_Standing_Rock_and_Idle_No_More_Indigenous_Movements (last visited November 22, 2020).

law and policies in the U.S. and Canada are tackling the question¹⁰. The third level of analysis subsumes the first two and seeks to examine what changes in law and policy should stem from Indigenous women's action. Precisely, what are the ways Indigenous women can become more involved. It is worth briefly noting that in the Indigenous field of research, scholars have long lamented a lack of literature in the realm of "gendered processes and effects of Indigenous [women] and self-determination"¹¹. The hope leading this work is to fill the gap, moving from an interdisciplinary use of the literature available.

3. *Violence against Indigenous women at the intersection between international law and political science*

Although violence against women is a universal phenomenon, it reaches alarmingly high rates amongst Indigenous Peoples: Native American women residing in Indian Country are victims of domestic violence and physical assault at rates 50 percent higher than women of other ethnicities¹². In North America as many as four in five Indigenous women have experienced violence in their lifetime¹³. Christopher Cunneen and other Indigenous scholars point out that this and other dysfunctions are a result of the historical trauma of colonization, which caused the disruption of Indigenous traditional culture and societies, both under a collective and an individual standpoint¹⁴. Also the international community has detected their vulnerability. ta. Indigenous women's increased exposure to violence was recognized

10. Given the predominantly common law framework of the U.S. and Canada, this work is widely informed by case law to trace the evolution of the policy approach adopted by the countries at issue.

11. See Rauna Kuokkanen, *Self-determination Women's Rights at Intersection of International Human Rights*, 34 *Human Rights Quarterly* 225, 231 (2012), available at <https://www.corteidh.or.cr/tablas/r28090.pdf> (last visited November 22, 2020).

12. See Rosay, *Violence against American Indian and Alaska Native Women and Men* (cited in note 5).

13. See *ibid.*

14. See Chris Cunneen, *Colonial Process, Indigenous Peoples, and Criminal Justice Systems*, 2013 UNSW Law Research Paper 386 (2014), available at <https://ssrn.com/abstract=2218865> (last visited November 22, 2020). See also Le May, *The Cycles of Violence against Native Women* (cited in note 2).

by the UN General Assembly in the Declaration on the Elimination of Violence Against Women (DEVAW)¹⁵: Article 1 of the Declaration defines violence against women as "gender-based violence", that causes "physical or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty"¹⁶. This definition includes various forms of violence, such as sexual violence, intimate partner aggression and family violence.

3.1. *Violence against Indigenous women: a constructivist, feminist, and decolonial approach*

This article is informed by Indigenous feminist and decolonial theories that investigate violence against women, including domestic and sexual assault. Specifically, this work relies on the theoretical framework of feminist Indigenous decolonial scholars like American Anishinaabeg theorist and activist Winona LaDuke, as well as Wilma Mankiller. From the Canadian perspective, the focus is on the ideological theories of Indigenous activist Sharon McIvor. These eminent decolonial theorists help support the participatory framework proposed in this research. Furthermore, they emphasize the need for Native people to engage with, dismantle and decolonize the settler state. They show how crucial participation is in fostering gender-sensitive decolonizing practices.

In her advocacy work, LaDuke identifies colonization as a significant factor in putting Indigenous women at an increased risk of violence¹⁷. She – along with other scholars, like Judith Aks – calls for female participation in decision-making processes according to UN-DRIP, supporting a system that adopts a bottom-up approach rather than a top-down one¹⁸. In this regard, the relationship between theory and practice is a very debated topic amongst feminists, which Amrita

15. See *Declaration on the Elimination of Violence Against Women*, UN General Assembly (December 20, 1993), UN Doc A/RES/48/104.

16. See *ibid.*

17. See Le May, *The Cycles of Violence against Native Women* at 14-19 (cited in note 2). See also Maxwell, *Coalition of Native American and Women's Organizations File Submission to United Nations* (cited in note 5).

18. See Judith H. Aks, *Women's Rights in Native North America: Legal Mobilization in the US and Canada, Law and Society* (LFB Scholarly Pub. 1st ed. 2004).

Basu explores deeply. Basu proposes to move from universal to particular and from the international level down to the local one, in order to build a multi-layered and inclusive type of governance¹⁹. Further, the literature highlights that violence against Indigenous women is rooted in the fact that Native women have been depicted as savages and below human, or even as non-human²⁰. It also traces those practical reasons that have forced them to live in remote and isolated communities, with lessened access to services and protection.

In addition, the research of Howard-Wagner, Bargh and Altamirano-Jiménez shows that the rise of neoliberalism contributes to exacerbate the problem of violence against Indigenous women²¹. This comes from the fact that neoliberal policies tend to transfer resources from the public to the private sector, limiting the government's role in providing social welfare programs and subsidies while vehemently defending individual freedoms²². In fact, in Western countries that have strongly embraced a neoliberalist approach—such as the U.S. and Canada—the impact of neoliberal governance on Indigenous Peoples has been enabling on the one hand and constraining on the other. For instance, this system allowed to foster the rejection of unwanted

19. See Amrita Basu, *Who Secures Women's Capabilities in Martha Nussbaum's Quest for Social Justice*, 19 CJGL (2010), available at <https://journals.library.columbia.edu/index.php/cjgl/article/view/2589> (last visited November 22, 2020).

20. See Cherry Smiley, *A Long Road behind Us, a long Road Ahead: Towards an Indigenous Feminist National Inquiry*, 28 Canadian Journal of Women and the Law 308, 308 (2016), available at <https://www.utpjournals.press/doi/abs/10.3138/cjwl.28.2.308> (last visited November 21, 2020). See also Tracy Bos, *Native Americans in Literature*, 18 LAJM 71 (2002), available at <https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1310&context=lajm> (last visited November 22, 2020). See also *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823).

21. See Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez, *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* at 113-240 (The Australian National University 1st ed. 2018).

22. See Jeffrey A. Gardner and Patricia Richards, *Indigenous Rights and Neoliberalism in Latin America* in *The Palgrave Handbook of Ethnicity* at 859-865 (Ratuva S. eds, 2019); Annapurna Devi Pandey, *The Challenges of Neoliberal Policies and the Indigenous People's Resistance Movement in Odisha, India*, 28 e-cadernos CES 46 (2016), available at https://www.researchgate.net/publication/327113566_The_Challenges_of_Neoliberal_Policies_and_the_Indigenous_People%27s_Resistance_Movement_in_Odisha_India (last visited November 22, 2020).

State intervention in Indigenous affairs²³; however, it *de facto* limited the resources available to Indigenous Peoples and their access to essential services, such as healthcare and education²⁴. Such limits, in turn, arguably decrease social mobility and negatively affect Indigenous women, who usually come from a disadvantaged background²⁵. Therefore, scholars have suggested that the current "neoliberal globalization process produces a new patriarchal subordination of women [...] by the fact that apparently value-free economic priorities, namely commodification of everything and the maximization of profit, are made central goals of all societies"²⁶. Ultimately, this work is informed by the multi-faceted aspects that characterize violence against Indigenous women, which are part of complex historical, ideological and material reasons and synergies.

3.2. *Indigenous Peoples in the international legal framework*

At an international level, the leading organization responsible for protecting Indigenous rights is the United Nations (UN)²⁷: founded in 1945, it currently counts 193 member states²⁸. Its constitutional document – The Charter of the United Nations – sets the scope and

23. See Fiona MacDonald, *Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints*, 44 CJPS 257, 261 (2011), available at <https://www.jstor.org/stable/41300541?seq=1> (last visited November 22, 2020).

24. See *id.* at 266.

25. See Donna M. Klingspohn, *The Importance of Culture in Addressing Domestic Violence for First Nation's Women*, 9 Front. Psychol. (2018), available at <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.00872/full> (last visited November 21, 2020).

26. See Maria Mies and Veronika Bennoldt-Thomsen, *The Subsistence Perspective: Beyond the Globalised Economy* at 46 (Bloomsbury Publishing PLC 1st ed. 1999). See also Rauna Kuokkanen, *Globalization as Racialized, Sexualized Violence*, 10 International Feminist Journal of Politics 216, 216 (2008), available at <https://www.tandfonline.com/doi/abs/10.1080/14616740801957554> (last visited November 22, 2020).

27. See *Declaration on the Rights of Indigenous Peoples*, UN General Assembly (September 13, 2007), UN Doc A/RES/61/295. See also *Declaration on the Elimination of Violence Against Women*, UN General Assembly (December 20, 1993), UN Doc A/RES/48/104 and *Universal Declaration of Human Rights*, UN General Assembly (December 10, 1948).

28. The list of Member States of the United Nations is available at <https://www.un.org/en/member-states/> (last visited November 22, 2020).

guiding principles of the UN. Article 1.2 underscores the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"²⁹. In its Preamble it also highlights the importance of "fundamental human rights, [...] the dignity and worth of the human person, [and] the equal rights of men and women"³⁰. The UN action has guided the progressive strengthening of the international human rights' protection system, upon which the rising significance of the defence of Indigenous Peoples' rights is founded³¹.

The Permanent Forum on Indigenous Issues (UNPFII) is a fierce promoter of the UN effort to advance Indigenous rights³². UNPFII has played a pivotal role in advancing UNDRIP and its principles, which the U.S. formally adopted in 2010³³. In Canada, UNDRIP was first opposed in fear of an increase in land disputes³⁴, but the objector status to the declaration was finally withdrawn on May 10, 2016³⁵. Canada was also weary of UNDRIP's potential impact on natural resource development in light of the Declaration's clauses on Indigenous Peoples' right for informed consent³⁶. Similarly, the U.S. feared that, even if not legally binding, the Declaration could give rise to tribal nations'

29. See UN Charter art. 1 §2.

30. See *id.* at Preamble.

31. See Jens Woelk and Francesco Palermo, *Diritto costituzionale comparato dei gruppi e delle minoranze* at 31 (CEDAM 2nd ed. 2011). See also Laura Giraud, *La questione indigena in America Latina* at 39-61 (Carocci Editore 1st ed. 2009).

32. The Forum was established in July 2000 by the United Nations Economic and Social Council (UNESCO) as an advisory body specialized in Indigenous issues. The mandate of the UNPFII is to examine Indigenous issues in relation to social and economic development, human rights protection and culture safeguard. The Forum has sixteen members, who are leading experts in Indigenous Rights and issues. The Forum is held in high regards within the UN hierarchy as part of the UNESCO and as it reports directly to the General Assembly.

33. See Woelk and Palermo, *Diritto costituzionale comparato dei gruppi e delle minoranze* (cited in note 31).

34. William B. Henderson, *Indigenous Self-Government in Canada*, The Canadian Encyclopedia, (2018), available at <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-self-government> (last visited November 22, 2020).

35. See Tim Fontaine, *Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples*, CBC (2016), available at <https://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272> (last visited November 22, 2020).

36. See *ibid.*

claims to exercise their inherent sovereign powers beyond the limitations currently in place³⁷.

UNDRIP has been criticized for making only a few specific references to women³⁸. The term "violence against women" does not explicitly appear in the text of the Declaration. Nonetheless, in its wording, UNDRIP identifies challenges particular to Indigenous Peoples—including high rates of violence—and it also recognizes Indigenous women as a protected category.

Article 7 of UNDRIP assumes specific relevance in the context of violence against women in so far that it affirms that Indigenous Peoples "have the rights to life, physical and mental integrity, liberty and security of person. Indigenous Peoples [...] shall not be subjected to any act of violence"³⁹. Article 22 of the Declaration was written with particular attention to the rights of Indigenous women⁴⁰: Paragraph 2 posits that "States shall take measures, in conjunction with Indigenous Peoples, to ensure that Indigenous women [...] enjoy the full protection and guarantees against all forms of violence and discrimination"⁴¹, including effective and special measures to ensure continuing improvement of their economic and social conditions⁴². Article 22.2 may prove very useful when read in conjunction with Article 37, which affirms Indigenous Peoples' right to "the enforcement of treaties" and entails the fulfilment of those obligations that ensure safety on the reservations⁴³.

37. See N. Bruce Duthu, *Compliance or Evasion? An Assessment of Tribal Sovereignty in the United States on the 10th anniversary of the UN Declaration on the Rights of Indigenous Peoples*, 1 Sorbonne Student Law Review 127, 131 (2018), available at https://www.pantheonsorbonne.fr/fileadmin/EDS/newsletter-EDS/numero_8/SSLR-RJES_Vol._1_n._1_2018.pdf (last visited November 22, 2020).

38. See generally Aimée Craft, et al., *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws*, Center for International Governance and Innovation, (2018), available at <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Fall%202018%20lowres.pdf> (last visited November 22, 2020).

39. See *ibid.*

40. See *Declaration on the Rights of Indigenous Peoples*, UN General Assembly (cited in note 27).

41. See *ibid.*

42. See *ibid.*

43. See Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women*, available at <https://indianlaw.org/content/>

Lastly, Articles 18, 19 and 38 underscore the importance of Indigenous Peoples' free, prior and informed consent, along with good faith consultation and cooperation, with regard to causes "that would affect their rights"⁴⁴. This clause particularly refers to those legislative measures taken in pursuance of the goals of the Declaration. The articles should be read in conjunction with UNDRIP Articles 3, 4 and 5, which assert the right of Indian nations to self-determination. At the core of such rights is Indigenous Peoples' ability to preserve their institutional structures (i.e., judicial and law enforcement systems), which foster public safety and violence deterrence in Indigenous communities⁴⁵. In this respect, Article 35 plays a pivotal role in underscoring that "Indigenous Peoples have the right to determine the responsibilities of individuals to their communities". UNDRIP, through this article, promotes the advancement of tribal authority. This includes competence to deter and respond to violence against women in the community, regardless of whether it was committed by an Indigenous person or not⁴⁶.

In light of the international Indigenous rights framework outlined above, it is clear that, although UNDRIP does not expressly address violence against women, it is an essential tool to protect Indigenous women's interests.

3.3. *Indigenous Peoples in the U.S. domestic legal framework*

At the U.S. domestic level, Native Americans have a unique status which impacts the management of the violence against Indigenous women's crisis. With 6.7 million peoples that identify as Native Americans or Alaska Natives, accounting for 2 percent of the population, Indigenous Peoples are a sizeable component of the U.S. population⁴⁷. Native Americans are legally framed as "domestic dependent

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44. See Craft, et al., *UNDRIP Implementation* (cited in note 38).

45. See Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women* (cited in note 43).

46. See *ibid.*

47. The data describes the total number of individuals who identify as Native Americans of Alaska Natives either alone, or in combination with another ethnic

nations⁴⁸, a notion referring to the European idea of feudatory states, where small nations attach themselves to larger nations for self-preservation purposes⁴⁹. This unique treatment is often misunderstood as a surrender of sovereignty on the part of Native Americans. However, it was initially conceived as an alliance between two sovereign nations, in which the Native Americans would receive protection from the U.S. Government⁵⁰. The U.S. Constitution recognizes this framework in Article I, Section 8, Clause 3 – also known as the "Commerce Clause". According to the Commerce Clause, Congress is authorized "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"⁵¹.

By this provision, Native American tribes are acknowledged as (semi) sovereign and separate political entities with treaty-making power⁵². Therefore, the U.S. Constitution recognizes Indian tribes' unique status in the U.S. legal system. Through this clause the Congress could begin formal relations with Indian tribes⁵³. In addition, Native Americans born in the U.S. territory have been conferred U.S. citizenship under the Indian Citizenship Act (ICA), passed by Congress in 1924.

The unique status of Indigenous Peoples in the U.S. is especially relevant in taking action to address the problem of violence against

identity. About 2.9 million people (0.9% of the U.S. population), identify solely as American Indian or Alaska Native. See US Census Bureau, *American Indian and Alaska Native Heritage Month: November 2017* (Oct 6, 2017), available at <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> (last visited November 22, 2020). See also Joyce M. Wolburg, *The Demise of Native American Mascots: It's Time to Do the Right Thing*, 23 *Journal of Consumer Marketing* 4 (2006), available at https://www.researchgate.net/publication/242235935_The_demise_of_Native_American_mascots_It%27s_time_to_do_the_right_thing (last visited November 22, 2020).

48. See *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 8 L. Ed. 25 (1831). See also N. Bruce Duthu, *American Indians and the Law* (Penguin books 1st ed.2008).

49. See *Cherokee Nation. v. State of Ga.* (cited in note 48).

50. See Duthu, *American Indians and the Law* at 69-74 (cited in note 48). See also N. Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* at 74-128 (Oxford University Press 1st ed. 2013).

51. US Const Art I.

52. See Duthu, *Compliance or Evasion?* (cited in note 37).

53. Kevin Washburn et al., *American Indian Law: Native Nations and the Federal System Cases and Materials* (UNM Law 1st. ed. 2010).

women. In light of their legal status, and treaty-making power, Native Americans should be granted more autonomy and more participatory devices in the decision-making process that concerns the furtherance of policies to address the issue.

3.4. *Indigenous Peoples in the Canadian domestic legal framework*

In considering how violence against Indigenous women can be addressed, the Canadian federal framework also plays a relevant role. According to the 2016 national census, there were 1,673,785 Indigenous Peoples in Canada, accounting for 4.9 percent of the total population⁵⁴. In 1876, the Canadian Federal Government dismantled the traditional Aboriginal Peoples' system with the Indian Act, which *de facto* imposed a Federal Government extensive control on Indigenous matters by establishing the Department of Indian Affairs⁵⁵. The rise of Indigenous movements in the 1970s, with their revival in the 2000s, led to the Constitutional acknowledgment of the right to self-government of Indigenous Peoples in Canada, through the Constitution Act of 1982. Notably, the latter recognized "existing Aboriginal and treaty rights"⁵⁶.

Today, Aboriginal Peoples in Canada do not hold a unique status of "Domestic Dependent Nations" as it is in the United States⁵⁷. Instead, individual communities have achieved differing levels of self-governance through modern-day treaties between Indigenous Peoples and the Canadian federal government: the Comprehensive Land Claims⁵⁸. Pursuant to such land claims, Aboriginal Peoples in Canada have the right to traditional use and occupancy of their land. Further, these claims gave rise to various forms of acknowledgment of

54. See *Aboriginal Peoples in Canada: Key Results from the 2016 Census*, Statistics Canada (The Daily, October 25, 2017), available at <https://www150.statcan.gc.ca/nl/daily-quotidien/171025/dq171025a-eng.pdf> (last visited November 22, 2020).

55. See *An Act to Amend and Consolidate the Laws Respecting Indians*, SC 1876 Ch. 18 §2, available at <https://www.aadnc-aandc.gc.ca/eng/1100100010252/1100100010254> (last visited November 22, 2020).

56. See Government of Canada, *Reclaiming power and place: the final report of the national inquiry into missing and murdered indigenous women and girls*, 1a, 211 (2019).

57. See *Cherokee Nation v. State of Ga.* (cited in note 48).

58. See Fontaine, *Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples* (cited in note 35).

Canadian Indigenous Peoples' rights – i.e., settlements, establishment of local governments, participatory rights and land rights.

4. *UNDRIP to Call for the End of Violence Against Indigenous Women: A Look at the U.S. and Canada*

One of the questions this work explores is how Indigenous women have used UNDRIP to call for the end of violence against women, although it is still relatively early to give a definitive answer on the Declaration's effectiveness on this matter⁵⁹: even though thirteen years have passed since the adoption of the Declaration, it is still a challenge to analyse how UNDRIP has been implemented – let alone to investigate whether Indigenous women have been successful in using it to prevent violence against them⁶⁰. However, some preliminary observations can be drawn.

As of September 2020, 144 nations have adopted UNDRIP. Given the scope of this work, the analysis will focus on the U.S. and Canada.

An important point to clarify is that UNDRIP is a declaration and, as such, is not legally binding as a treaty would be. Therefore, the Declaration does not create new rights: it serves as a tool, instead. It raises awareness of the specificities of Indigenous Peoples' human rights and brings them to the attention of the international community. In other words, the Declaration provides a clear framework to promote the implementation of Indigenous rights in the international arena, but it is not binding for the States⁶¹. Nonetheless, eminent Indigenous scholars, such as James Anaya, have argued that, even if not formally binding, UNDRIP has received such overwhelming support, and its principles are so foundational that it ought to be regarded as

59. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

60. See Rauna Kuokkanen, *Indigenous Women's Rights and International Law: Challenges of the UN Declaration in the Rights of Indigenous Peoples*, Routledge Handbook of Indigenous Peoples' Rights. Eds. C. Lennox and D. Short. Routledge (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414293 (last visited November 22, 2020).

61. See *ibid.*

customary international law⁶². Therefore, it should be applied by international and state tribunals⁶³.

In the U.S. UNDRIP is the base upon which Indigenous women have been advocating for their rights. Winona LaDuke and Wilma Mankiller provide the most striking example of UNDRIP-based feminist advocacy in the United States. LaDuke is the woman behind the website HonorEarth.org, for which she serves as an executive director, advocating for the advancement of Indigenous women's rights through participation⁶⁴. Mankiller, before her passing in 2010, had strongly advocated for the need to enhance Indigenous women's participation in policy making and leadership roles, and for the need of the U.S. to adopt UNDRIP to facilitate this endeavor⁶⁵. The two scholars invoke Indigenous women's participatory rights under Articles 18, 19 and 38; they underscore the importance of consulting and cooperating with Indigenous women in causes that would affect their rights.

In Canada, the flagship example of feminist decolonial UNDRIP-based advocacy is delivered by indigenous activist Sharon Donna McIvor. In 2011, McIvor referred to UNDRIP in arguing for gender discrimination in Bill C 31, which established the so-called "second generation cut-off", providing that Indigenous women who married a non-Indian man would not be able to transmit to their children the

62. See James Anaya, *International Human Rights and Indigenous Peoples* at 79–82, 124, 151 (Wolters Kluwer 1st ed.2009).

63. The literature of James Anaya and Bruce Duthu provides insights on the legal framework by exploring the power relations between Indigenous Peoples and the settler state governments under whose jurisdictions they reside and in conceptualizing the power relations between them. They also look at the significance of treaty-making history in developing the Indigenous-to-federal-government power structures. Anaya and Duthu then analyze modern trends that see Indigenous Peoples at the forefront for claiming their rights and aspiration to control their destiny. See generally James Anaya, *Indigenous Peoples in International Law*, (Oxford University Press, 2nd ed. 2004). See also Duthu, *American Indians and the Law* (cited in note 48).

64. Information about Winona LaDuke are available at http://www.honorearth.org/meet_the_team (last visited November 22, 2020).

65. See Indian Law Resource Center, *Mankiller in Indian Country Today – Obama's Opportunity: Add America's Name to Declaration* (2009), available at <https://indianlaw.org/node/396> (last visited November 22, 2020). See also National Congress of American Indians, *Internships/Fellowships: The Wilma Mankiller Fellowship Program*, available at <http://www.ncai.org/about-ncai/internships-fellowships> (last visited November 22, 2020).

status of Canadian Aboriginals⁶⁶. McIvor won in the British Columbia Supreme Court in 2007 and she also subsequently won the appeal in 2009⁶⁷. As a consequence, the Canadian Government amended the Indian Act accordingly. In this case the relevance of UNDRIP was challenged, since it was not yet adopted in Canada when the dispute occurred; still, it provided an important soft law point of reference⁶⁸. McIvor also relied on the international regime of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Universal Declaration of Human Rights⁶⁹. Although Bill C-31 does not directly refer to violence against women, it is intimately related to it. A critical factor in violence against Indigenous women is their vulnerability: by reinstating agency, autonomy and ultimately connections with their community and identity, Indigenous women become more independent and less vulnerable, which lessens the risk for them to become targets of violence.

4.1. Case Study No.1: *The United States and Violence Against Indigenous Women*

In the U.S., data show that violence against Indigenous women is widespread: Native American and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than other women⁷⁰.

66. See Sharon Donna McIvor, *Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights*, 16 Canadian Journal of Women and the Law 106, 107 (2004), available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cajwoll6&div=14&id=&page=> (last visited November 22, 2020).

67. See *McIvor v. Canada (Registrar Indian and Northern Affairs)*, BCCA 153 (2009).

68. See Pamela D. Palmater, *Presentation to the Parliamentary Standing Committee on Indigenous and Northern Affairs Re: Bill S-3 – An Act to Amend the Indian Act (Elimination of Sex-based Inequities in Registration)* (5 Dec. 2016), available at https://sencanada.ca/content/sen/committee/421/APPA/Briefs/PamelaPalmater_2016-12-05e.pdf (last visited November 22, 2020).

69. See *McIvor v. Canada (Registrar Indian and Northern Affairs)*, BCSC 827, §277 (2007).

70. See *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*, Amnesty International USA at 30, (2007), available at <https://www.amnestyusa.org/wp-content/uploads/2017/05/mazeofinjustice.pdf> (last visited November 22, 2020). See also Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women* (cited in note 43).

Furthermore, statistics reveal that offenses against American Indian women are overwhelmingly interracial: 96 percent of the crimes are committed by non-Indian perpetrators⁷¹. Moreover, Indian tribes did not have jurisdiction to prosecute non-Indian offenders, as the Supreme Court, in *Oliphant v. Suquamish Indian Tribe* (1978), held that tribes do not have the full sovereignty of a state or the Federal Government in non-Indian citizens' affairs⁷². The combination of a high amount of violence taking place on Indian lands, complex rules that operate in Indian Country and the limited resources provided by the Federal Government resulted in a high percentage of cases being declined.⁷³ As much as 52 percent of the violent crime prosecution claims were dropped for lack of federal resources, 67 percent of those were crimes involving sexual abuse and related matters⁷⁴. Not holding perpetrators accountable causes them to feel immune and that they can continue their acts of violence with impunity⁷⁵. From this

71. See *Ending Violence Against Native Women*, Indian Law Resource Center, available at <https://indianlaw.org/issue/ending-violence-against-native-women> (last visited November 22, 2020). See also *Violence against Women Reauthorization Act of 2019*, H.R. 1585 § 901. See also Rosay, *Violence against American Indian and Alaska Native Women and Men* at 2 (cited in note 5). More on the issue in Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (University of Minnesota 2015).

72. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

73. See N. Bruce Duthu, *Broken Justice in Indian Country*, *The New York Times* (August 10, 2008), available at <https://www.nytimes.com/2008/08/11/opinion/11duthu.html> (last visited November 22, 2020).

74. See Tribal Law and Policy Institute, *Enhanced Sovereignty: The Tribal Law and Order Act and the Violence against Women Act*, National Harbor, MD, USA (2013), available at <https://www.tribal-institute.org/download/NADCP/2013/NA-DPCP2013EnhancedSovereignty.pdf> (last visited November 22, 2020). See also *Department of Justice Declinations of Indian Country Criminal Matters*, United States Government Accountability Office, GAO-11-167R U.S. (December 13, 2010), available at <https://www.gao.gov/assets/100/97229.pdf> (last visited November 22, 2020).

However, the issue is more complex than it might seem on the surface. The lack of resources of federal and state prosecutors compounds to the lack of resources needed to train tribal police on how to best secure the site to preserve the evidence. This, in turn, leads to the inability to reach the heightened "beyond a reasonable doubt" standard needed for an effective prosecution of the crime". See Duthu, *Compliance or Evasion?* (cited in note 37).

75. See Tribal Law and Policy Institute, *Using the Declaration to End Violence Against Native Women* (cited in note 43). See also United Nations Human Rights, *Impunity for Violence Against Women is a Global Concern* (UNHR, August 14, 2012) and

situation also constitutionality concerns arise due to the fact that a class of U.S. citizens (Indigenous Peoples) is conceivably treated and protected differently from another (the non-Indigenous population) on the basis of race or ethnicity of the accused⁷⁶. This could arguably clash with the principles of due process and equal protection of the law under the Fifth Amendment of the U.S. Constitution⁷⁷.

The response of the U.S. Congress to the problem was twofold. First, in 2010 President Obama signed the Tribal Law and Order Act (TLOA): its goal was to improve law enforcement and justice in Indian Country by increasing funding for Tribal Justice Systems, enhancing the punitive abilities of tribal courts and their sentencing authority and ameliorating Federal and tribal cooperation⁷⁸. Then, Congress passed the Violence against Women Reauthorization Act (VAWA) in 2013, followed by a second reauthorization in 2019. VAWA 2013 was a pivotal achievement for Native American women in the U.S. The Act was ground-breaking in Federal Indian Law because it introduced the concept of special domestic violence criminal jurisdiction for the tribes despite the defendant's status – Indian or non-Indian. Special jurisdiction in this context means that tribes have jurisdiction because of their inherent tribal sovereignty: VAWA 2013 challenged the legal framework established in *Oliphant v. Suquamish Indian Tribe*⁷⁹.

The revolutionary role of VAWA 2013 was underscored by the work of Native American scholar Winona LaDuke, who also was vocal about its limitations. LaDuke pointed out how VAWA 2013 was limited by the defendant and the victim's personal attributes: at least one of the defendants had to be an "Indian" and have ties with

Executive Director's Blog Series: No Impunity for Violence Against Indigenous Women (Un Women, November 27, 2017).

76. See Amnesty International USA, *Maze of Injustice* at 30 (cited in note 70).

77. US Const Amend V. The fifth Amendment reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

78. The Tribal Law and Order Act, Pub. L. No. 111–211, 124 Stat. 2258 (2010).

79. See *Oliphant v. Suquamish Indian Tribe* (cited in note 72).

the prosecuting tribe. VAWA 2013 was also territorially limited, as it solely found application in Indian Country⁸⁰, meaning those areas of the U.S. where Indian tribes exercise their power of self-government. The main implications of land ascribing to be Indian Country are jurisdictional as tribal norms and regulations apply. When they do not, federal jurisdiction applies in lieu of state law⁸¹.

Amidst criticism from the Trump administration, VAWA was reauthorized in 2019, with enhanced Native American Women protection. Many of the restraints discussed under VAWA 2013 persist today, but VAWA 2019 encourages developments. One of the main limitations of VAWA 2013 was the subject matter of jurisdiction, as the Act merely covered dating violence, domestic violence and violations of restrictive orders⁸², while it did not cover rape or other assaults perpetrated by people unknown to the victim⁸³. VAWA 2019 went past this limitation: it reaffirmed tribal criminal jurisdiction over non-Indian perpetrators for the crimes envisioned by VAWA 2013, expanding it to cover additional crimes, namely sexual assault, stalking and trafficking for all federally recognized Indian tribes. The Bill further improved the tribes' capacity to respond to sexual violence on their lands fully. Most notably, it created a tribal sex offender and protection order registry⁸⁴.

4.2. *Case Study No.2: Canada and Violence Against Indigenous Women*

Despite that Canada is now officially part of the UNDRIP framework, it still reports high levels of violence against women. Statistics record that Indigenous women are twelve times more likely to be

80. See Winona LaDuke, *Why the Violence Against Women Act is Crucial for Native American Women* (Honor the Earth, 2013).

81. See Durthu, *American Indians and the Law* (cited in note 48).

82. See LaDuke, *Why the Violence Against Women Act is Crucial for Native American Women* (cited in note 80).

83. See 25 USC §1304 (a)(7).

84. See Chairman Jerrold Nadler, *The Violence against Women Reauthorization Act of 2019* (House of Committee on the Judiciary, April 3, 2019), available at https://debbiedingell.house.gov/uploadedfiles/1903_vawafactsheet.pdf (last visited November 22, 2020). See also Adam Walsh Child Protection and Safety Act, Pub. Law No. 109-248, 120 Stat 587 (2006).

subject to violence than any other woman in Canada⁸⁵. From 2001 to 2015, the homicide rate for Indigenous women in Canada was six times higher than for non-Indigenous women⁸⁶.

Indigenous women in Canada have a history of targeted discrimination by the Government. For instance, the 1876 Indian Act deprived aboriginal women of their Indian status upon marriage with a non-Indian man⁸⁷. For more than a century, for an Indigenous woman marrying a non-Indian meant to renounce her ties with her community, culture and, ultimately, identity. Meanwhile, this did not hold true for their male counterparts. The loss of Indian status carried a loss of property rights, *de facto* depriving Aboriginal women of their identity and their autonomy⁸⁸. The situation was only rectified in 1985, through the C-31 Bill⁸⁹.

This federal legal framework was defined by Sharon McIvor as colonialist and patriarchal. In her scholarship, McIvor also points out how in Canada there was a peculiar phenomenon: white colonialism and patriarchy had enabled unhealthy cooperation between the Canadian Federal Government and male aboriginal leadership to prevent the inclusion of Indigenous women in governance and in the decision-making process⁹⁰. This framework contributed to render aboriginal women especially vulnerable, dependent and, ultimately, easy targets to gendered violence.

The turning point for acknowledging the scourge of violence against women in Canada was the publication of the report "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls". This primary source is invaluable in providing insights into the root cause behind the shocking rates of violence against Indigenous women in Canada. The Report was funded and supported by the Canadian Government, which made a strong statement in its commitment to tackling the issue head on. What came somewhat as a surprise is that the Government,

85. See Government of Canada, *Reclaiming power and place* at 7 (cited in note 56).

86. See *ibid*.

87. See *An Act to amend and consolidate the laws respecting Indians, Statutes of Canada* (cited in note 55).

88. See McIvor, *Aboriginal Women Unmasked* (cited in note 66).

89. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

90. See McIvor, *Aboriginal Women Unmasked Rights* at 107 (cited in note 66).

through the Report, concluded that "violence against Indigenous women and girls is a crisis centuries in the making. The process of colonization has created the conditions for the crisis of missing and murdered Indigenous women, girls and Indigenous people that we are confronting today"⁹¹. The Report also underscored that, while colonization had a significant impact on all Indigenous Peoples, it had an even more dramatic one on Indigenous women and girls⁹².

Ultimately, the Report highlights how ignoring the agency and expertise of Indigenous women has been a consistent pattern in the formal—and to some extent in the informal—political structures that are in charge of Indigenous affairs. Such a pattern is informed by the underlying patriarchy and misogyny that perpetuates to date, and that needs to be addressed⁹³. After admitting to Canada's shortcomings, the Report provides several recommendations to address the issue: providing enhanced family services and support for Indigenous women and improving the communications amongst state to federal level of governance⁹⁴.

From this compared analysis, it emerges that, on the one hand, the U.S. Federal Government is very much concerned in resolving the plague of violence against women through a decided law-making and law enforcement policy. On the other hand, the Canadian Federal Government seems to tend to face the matter through a research-oriented approach and abstract preventative plans.

4.3. New frontiers to fight violence against Indigenous women through public policy and the law

There are changes in the law and policy that can – and should – flow from Indigenous women's action to foster their increased involvement in both the policy and the law-making processes.

A first change is encouraging the incorporation of Multi-Level Governance (MLG) structures at the federal level. MLG is here intended as "a process of political decision making in which governments

91. See Government of Canada, *Reclaiming power and place* at 229-320 (cited in note 56).

92. See *id.* at 117.

93. See *id.* at 324.

94. See *id.* at 350.

engage with a broad range of actors embedded in different territorial scales to pursue collaborative solutions to complex problems⁹⁵. MLG allows for the possibility to enrich the legal and political discussion by incorporating a wider variety of voices and points of view⁹⁶; it also fosters better relationships within and among Indigenous communities, as well as between Indigenous communities and the Federal Government.

MLG can help addressing the issue of violence against women in various ways. One venue could be to incorporate tribal boards with ample Indigenous female representation in the broader decision-making process, to monitor the actions of the local and national government. Another way would be to implement a framework of self-government agreements that gives Indigenous Peoples political and legal powers similar to those of provinces and municipalities⁹⁷. This would not only foster participation as intended by UNDRIP Articles 18 and 19, but it would also enrich the democratic process. A bottom-up approach would suit better to detect the needs of a given Indigenous community and to more effectively deal with violence against women in a manner that better accounts for the cultural framework of interaction⁹⁸.

As discussed above, one of the limitations of UNDRIP is the nature of Declaration. As already said, it is not binding and it is considered "soft-law"⁹⁹. One of the ways this article proposes to increase the efficiency of UNDRIP at the enforcement level is to combine it with other binding international instruments, such as treaties or conventions. For instance, the CEDAW, paired with UNDRIP, has the potential to be a strong instrument in fostering Indigenous women's leadership

95. See Christopher Alcantara and Jen Nelles, *Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance*, 44 *Publius The Journal of Federalism* 183, 185 (2014), available at https://www.researchgate.net/publication/262484894_Indigenous_Peoples_and_the_State_in_Settler_Societies_Toward_a_More_Robust_Definition_of_Multilevel_Governance (last visited November 22, 2020).

96. See Basu, *Who Secures Women's Capabilities* (cited in note 19).

97. See Alcantara and Nelles, *Indigenous Peoples and the State in Settler Societies* (cited in note 95).

98. See Basu, *Who Secures Women's Capabilities* (cited in note 19). See also Aks, *Women's Rights in Native North America* (cited in note 18).

99. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

and activism. CEDAW supported the international women's movements by providing common goals, a shared language and a joint set of demands – all with (limited but important) legal implications¹⁰⁰. One such demand is to require women's participation on equal terms with men, as women's contribution is crucial for the development of countries and for the promotion of global peace¹⁰¹.

The role that these legal documents play in political and social movements, according to Nussbaum's practical approach, determines the effectiveness of international human rights law¹⁰².

Article 5 of UNDRIP states the right of Indigenous Peoples to "conserve and reinforce their own political, judicial, economic, social, and cultural institutions [and to maintain] their right to fully participate [...] in the political, economic, social, and cultural life of the State"¹⁰³. Such a concept is reiterated in Articles 18 and 19, which underscore the importance of Indigenous Peoples' prior and informed consent discussed in section 3.2¹⁰⁴.

Article 7(c) of CEDAW explicitly recognizes women's right to "participate in non-governmental organizations and associations concerned with the public and political life of the country"¹⁰⁵. Further, Article 8 affirms that "States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations"¹⁰⁶. The U.S. signed CEDAW in 1980, under Jimmy Carter's presidency, but has yet to ratify it¹⁰⁷. In the 80s, President

100. See Martha Nussbaum, *Women's Progress and Women's Human Rights*, 38 *Human Rights Quarterly* 589 (2016), available at <https://muse.jhu.edu/article/627628/pdf> (last visited November 22, 2020).

101. See *Convention on the Elimination of All Forms of Discrimination Against Women*, UN General Assembly (December 18, 1979) UN Doc Res. 34/180.

102. See Nussbaum, *Women's Progress and Women's Human Rights* (cited in note 100).

103. See Craft, et al., *UNDRIP Implementation* (cited in note 38).

104. See *ibid.*

105. See UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (cited in note 101).

106. See *ibid.*

107. See Lisa Baldez, *Why Hasn't the US Ratified the UN Women's Rights Convention?*, APSA 2011 Annual Meeting Paper (August 31, 2011), available at <https://ssrn.com>.

Carter lacked the political leverage to obtain ratification from the Senate. The Senate has debated the ratification of CEDAW several times, namely in 1988, 1990, 1994, 2000 and 2010¹⁰⁸. Still, it has received significant push back, primarily from the conservative wing, which cited opposition to the U.S. subjection to an international organization and CEDAW's advocacy for reproductive rights¹⁰⁹. However, the Convention still holds a significant persuasive and soft power¹¹⁰. Canada ratified CEDAW on December 10, 1981. Therefore, in Canada CEDAW has the force of law, which grants higher protection compared to the United States. This calls the attention to the importance of fostering advocacy to create a fertile environment in the U.S. to ratify CEDAW, which would enhance the protection of Indigenous women's rights.

In light of what has been discussed above, the argument outlined in this article is that through the international legal instruments available, there is a potential to increase Indigenous women's agency. This result can be achieved through capacity-building programs that revolve around Indigenous women's education, training and assistance in order to enable them to be politically involved in the decision-making processes that so closely concern them¹¹¹. These programs represent one important opportunity for Indigenous women to be key actors in achieving the 2030 Agenda for Sustainable Development, as envisioned by the United Nations¹¹². Indigenous Peoples' human rights and many of the related international policies and legislation projects here examined are often regarded as part of the emerging third generation of human rights¹¹³. The issue at stake is that this emerging wave is carried out by aspirational documents that do not account for

com/abstract=1900265 (last visited November 22, 2020).

108. See *ibid.*

109. See Linda Lowen, *Why Won't the U.S. Ratify the CEDAW Human Rights Treaty?* (ThoughtCo., Jan 3, 2020).

110. See Lisa Baldez, *What Impact Would CEDAW have in the US?*, APSA 2012 Annual Meeting (August 31, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106667 (last visited November 22, 2020).

111. UN Women *Indigenous Women: Key Actors in Achieving the 2030 Agenda (Implementing SDG 5)*, (Draft concept Note Mar 15, 2018), available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/03/CSW62-CN-March-15.pdf> (last visited November 22, 2020).

112. See *ibid.*

113. See Kuokkanen, *Self-determination Women's Rights* at 227 (cited in note 11).

practical ways to achieve the rights they advocate for¹¹⁴. In fact, I have already outlined that UNDRIP is a non-legally binding, aspirational and principle-driven document, a declaration considered "soft law" (a quasi-legal instrument)¹¹⁵. Indigenous women's activism has played a crucial role in filling this gap by providing tangible ways to implement the UNDRIP principles. The Wilma Mankiller Fellowship Program for Tribal Policy and Governance offers a prime example of empowering women's agency through education. The Fellowship provides an opportunity for rising U.S. and Canadian female Indigenous leaders to learn the intricacies of public policy, advocacy and applied research. These teachings develop the skills and base-knowledge Indigenous women need to be actors in various policy and research areas and become tomorrow's leaders across the public and private sectors¹¹⁶.

5. Conclusion

Indigenous women today are fighting to get their voices heard by advocating for enhanced accountability of the individual countries and of the international community alike. Still, as Laura Parisi and Jeff Corntassel remarked in their work, "due to colonization and ongoing imperial influences, both women's rights and Indigenous rights movements have been problematic spaces for Indigenous women's participation"¹¹⁷. Indigenous Peoples – and Indigenous women in particular – still face significant challenges every day, including gender equality, the empowerment of women and compound to the issue of

114. See *ibid.*

115. See *id.* at 225, 227. See also Center for International Governance and Innovation, *UNDRIP Implementation: Braiding of International, Domestic and Indigenous Laws*, 3 (May 31, 2017), available at <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf> (last visited November 22, 2020).

116. See Indian Law Resource Center, *Mankiller in Indian Country Today – Obama's Opportunity* (cited in note 65). See also National Congress of American Indians, *Internships/Fellowships* (cited in note 65).

117. See Laura Parisi and Jeff Corntassel, *In Pursuit of Self-determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces*, 13 *Canadian Foreign Policy Journal* 81, 87 (2007), available at <https://www.tandfonline.com/doi/abs/10.1080/11926422.2007.9673444> (last visited November 22, 2020).

violence against Indigenous women¹¹⁸. This article reflected on possible ways to overcome them, adopting an international and comparative approach.

According to this study, violence against Indigenous women has been exacerbated by political displacement and structural violence. Therefore, increased and intentional involvement of Indigenous women in the political decisions related to their community life and their land is essential to include their perspective in matters that so intimately relate to them. The so far implemented participatory practices that entrusted Indigenous communities with increased responsibility and autonomy have brought encouraging results to counteract violence against Indigenous women. Participatory practices foster a sense of empowerment amongst Indigenous communities. Thus, there appears to be a need for a holistic approach where Indigenous Peoples, particularly Indigenous women, are informed and active participants of the matters that affect them¹¹⁹. The need of increasing Indigenous women's involvement particularly stands out in light of UNDRIP, which strongly advocates for Indigenous Peoples participation under Articles 18 and 19.

Art. 18: "Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions".

Art. 19: "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior

118. See Tim Parke-Sutherland, *Ecofeminist Activism and the Greening of Native America*, 50 *American Studies in Scandinavia* 123 (2018), available at <https://core.ac.uk/download/pdf/230382759.pdf> (last visited November 22, 2020).

119. See Alexandra Tomaselli, *The Right to Political Participation of Indigenous Peoples: A Holistic Approach*, 24 *International Journal on Minority and Group Rights* 390 (2017), available at <https://academic.oup.com/yielaw/article-abstract/doi/10.1093/yiel/yvx042/4781548> (last visited November 22, 2020).

and informed consent before adopting and implementing legislative or administrative measures that may affect them".

Indigenous women have historically been absent from the decision-making process; and countries are not complying with the responsibilities stemming from being UNDRIP and CEDAW signatories. Consequently, Indigenous women are *de facto* negated the possibility to participate and their claims are left unheard.

This article focuses on the North American framework. However, there is still much room for exploring violence against women in other Indigenous communities – namely in Australia and South America. Expanding the scope of this research would provide different outlooks and new perspectives on how much diffused the phenomenon is and how Indigenous women differently address it in distinct geopolitical areas and framework of reference.

Enhanced women's participation could be an efficient remedy to the tendency towards the "tyranny of the majority", either with regards to the Federal Government or even to their male counterparts. In addition, Indigenous women's participation—i.e., through Multi-Level Governance—increases legal effectiveness, as laws and policies imposed top-down are likely to be rejected by those to whom they are addressed: they tend to construct walls rather than bridges¹²⁰. Participation should not only be taken as an antidote for Indigenous women's rights advancement, but also as a generally promising practice to promote the integration of Indigenous Peoples and other minorities within the broader society, in order to pursue a "law of diversity and inclusion" where Indigenous Peoples represent one essential component.

120. See Aks, *Women's Rights in Native North America* (cited in note 18).