


1997

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Recommended Citation

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VIOLENCE AGAINST ABORIGINAL WOMEN IN AUSTRALIA: POSSIBILITIES FOR REDRESS WITHIN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

*Penelope Andrews**

It was a cold winter night in 1989 in a Central Australian Aboriginal community. Although late, muted sounds of fighting could still be heard coming from the camps. Suddenly the screams of a woman rent the air as she ran towards the nurses' quarters and hammered desperately on the locked gate. Blood poured down her face and her left arm hung limp and broken. In close pursuit was a man brandishing a star picket.

As the nurse struggled to open the gate to admit the woman, at the same time excluding her attacker, she noticed the woman's T-shirt. Emblazoned across the front was the statement: 'We have survived 40,000 years.' Yes, but will they survive the next 40, she wondered.¹

For Australia's indigenous population there is a desperate struggle for survival; cultural, physical, and economic. For Aboriginal² women, the struggle for physical survival has taken on a greater urgency. The violence to which Aboriginal women are subjected has reached epidemic proportions, and it has been argued that it constitutes a continuing violation of human rights.³

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¹ AUDREY BOLGER, *ABORIGINAL WOMEN AND VIOLENCE* 1 (1991).

² I use the term "Aboriginal" to describe all of Australia's indigenous population, including Torres Strait Islanders. It is also worth noting that Aboriginal people themselves refer to their communities in specific ways; for example, Aboriginal people in the state of Victoria refer to themselves as Kooris, in New South Wales, Murriss. Throughout the paper the terms "Aborigine", "Aboriginal people," and "indigenous people" are used interchangeably.

³ See Diane Bell, *Representing Aboriginal Women: Who Speaks for Whom?*, in *THE RIGHTS OF SUBORDINATED PEOPLES* 221 (Oliver Mendelsohn & Upendra Baxi eds., 1994).

The problem of violence against Aboriginal women incorporates an array of factors: race, gender, the after effects of colonialism, the minority status of Aboriginal people, the unequal access to societal resources, and consequent unequal development of Aboriginal communities. In addition, addressing this problem demands an appreciation of the differing roles and status of Aboriginal people, ranging from a separate or fringe community to an integrated part of Australian society. This great variety of factors complicates considerably the analysis of the issue of violence against Aboriginal women, because it involves an interplay of all these factors.

All social and economic indicators suggest that Aborigines are the most disadvantaged Australians.⁴ Within Aboriginal communities, women fare the worst.⁵ This is despite the fact that the role of Aboriginal women was significant in both the public and private spheres of Aboriginal society.⁶

Our knowledge of violence against Aboriginal women has until recently been quite precarious; this subject has been taboo for many reasons, some obvious. Aboriginal women have been reluctant to expose conflict within their communities to outside scrutiny which might not always be sympathetic. They have perceived that such exposure runs the risk of further denigration of their communities from the larger white society.⁷ White feminists have been reluctant

⁴ See Editorial, *THE AGE*, Sept. 13, 1985, quoted in PHYLLIS DAYLIGHT & MARY JOHNSTONE, *WOMEN'S BUSINESS: REPORT OF THE ABORIGINAL WOMEN'S TASK FORCE 22* (1986). The 1988-1989 Report of the Department of Aboriginal Affairs places the number of Aborigines and Torres Strait Islanders as 227,638 or 1.46% of the total Australian population. See H. MCRAE ET AL., *ABORIGINAL LEGAL ISSUES 33* (1991). The life expectancy of Aborigines is approximately 20 years less than that for all Australians. See *id.* at 34. The imprisonment rate of Aborigines is estimated to be 16 to 20 times that for the non-Aboriginal population. See *id.* at 33-35.

⁵ See DAYLIGHT & JOHNSTONE, *supra* note 4, at 135-37. For example, the rate of labor force participation for Aboriginal women is substantially lower than that among the total Australian population. See *id.* at 135. The 1981 census showed that 22.1% of Aboriginal females were unemployed, as compared to 6.8% of the total female population. See *id.* Only 1.8% of Aboriginal women, as compared to 7.5% of all Australian women, earned more than \$15,000 per annum. See *id.* at 137.

⁶ See Sharon Payne, *Aboriginal Women and the Law*, in *ABORIGINAL PERSPECTIVES ON CRIMINAL JUSTICE 31* (Chris Cuneen ed., 1992).

Traditionally, women in Aboriginal culture have a status comparable with and equal to men. They have their own ceremonies and sacred knowledge, as well as being custodians of family laws and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining marriage partners and the moiety (or tribal division) of the children.

Id.

⁷ See Heather Goodall & Jackie Huggins, *Aboriginal Women are Everywhere: Contemporary Struggles*, in *GENDER RELATIONS IN AUSTRALIA: DOMINATION AND NEGOTIATION 398, 415-21*

to engage this issue, for fear of accusations of prioritizing sexism over racism or for creating divisions within Aboriginal communities, and for fear of accusations of perpetuating the stereotype of the predatory and violent Aboriginal male.⁸ However, recent reports, which I shall refer to throughout this Article, suggest that the statistics of violence against Aboriginal women require urgent attention.⁹ They indicate that Aboriginal women are at far greater risk of being the victims of homicide, rape, and other assaults than non-Aboriginal women.¹⁰

A consequence of the limited knowledge of violence against Aboriginal women is the scant public attention or education directed to this issue.¹¹ Moreover, statistics concerning efforts by Aboriginal women to organize against violence is also quite sparse.¹² So too is a thorough assessment of whether the nature and extent of violence against Aboriginal women is increasing, decreasing or taking other forms.¹³

The issues discussed in this Article come with the caveat that there is no intention to portray Aboriginal women as hapless and pathetic victims who exert no agency over their lives. Katherine Burbank vividly describes the resistance of Aboriginal women to violence, and their refusal to submit to victimhood.¹⁴ The issues raised highlight the relentless violence that has been an integral part of the colonial experience, and the havoc it continues to wreak on the indigenous communities, and particularly indigenous women.

(Kay Saunders & Raymond Evans eds., 1992).

⁸ See Bell, *supra* note 3, at 225.

⁹ See AUSTRALIAN LAW REFORM COMMISSION, EQUALITY BEFORE THE LAW: JUSTICE FOR WOMEN (1994) [hereinafter 1994 REPORT]; HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, RACIST VIOLENCE, REPORT OF THE NATIONAL INQUIRY INTO RACIST VIOLENCE IN AUSTRALIA 67-115 (1991) [hereinafter RACIST VIOLENCE]; BOLGER, *supra* note 1, at 4; EDIE CARTER, ABORIGINAL WOMEN SPEAK OUT, REPORT OF AN ADELAIDE SURVEY: OCTOBER 1985-MAY 1986 (1987); DAYLIGHT AND JOHNSTONE, *supra* note 4.

¹⁰ See 1994 REPORT, *supra* note 9; BOLGER, *supra* note 1, at 35.

¹¹ See Bell, *supra* note 3, at 238.

¹² See *id.* at 240.

¹³ See BOLGER, *supra* note 1, at 22. In this regard, the point should be made that the concerns raised traverse a whole continent. This engenders a necessity to sweep with broad strokes, which at times leads to a certain level of superficiality, and intellectual slights of hand.

¹⁴ See generally VICTORIA KATHERINE BURBANK, FIGHTING WOMEN: ANGER AND AGGRESSION IN ABORIGINAL AUSTRALIA (1994).

INTRODUCTION

This Article addresses the issue of violence against Aboriginal women. Part I concerns the historical violence against Aboriginal people generally,¹⁵ and Part II concerns violence against Aboriginal women in particular.¹⁶ Part III considers how the priorities and perspectives of Aboriginal women and non-Aboriginal women differ in significant ways despite their congruence in others.¹⁷ In particular, the Article evaluates the awkward relationship between Aboriginal women and the largely white feminist movement in Australia as a consequence of these different priorities and perspectives, and suggests how political victories for white or non-Aboriginal women could be translated into gains for Aboriginal women.

The fourth part of the Article refers to the advantages or possibilities, on the one hand, and the limitations on the other, of the utilization of international human rights law and policy by Aboriginal women to confront these questions in a satisfactory manner.¹⁸

Part V of the Article peruses some local efforts by Aboriginal women to stem violence.¹⁹ Included is a brief reference to some approaches adopted by Black women in South Africa.²⁰

The Article's conclusion suggests that these local programs and projects, buttressed by a global human rights discourse that is more accessible than ever before, are far more likely to deal with the issue of violence comprehensively and satisfactorily.

In Australia the narratives of colonialism and racism take a peculiar shape, a distinctly Australian one encumbered by the tyranny of distance.²¹ For Aboriginal people, who are marginalized

¹⁵ See *infra* notes 27-47 and accompanying text.

¹⁶ See *infra* notes 48-83 and accompanying text. See also BOLGER, *supra* note 1, at 6 n.2. In considering the issue of violence against Aboriginal women, one must, as is the case of violence against Aboriginal people generally, take into account violence from outside (for example, within the criminal justice system) and from people acting individually. These issues are raised against a backdrop of the history of colonialism and racism.

¹⁷ See *infra* notes 84-101 and accompanying text.

¹⁸ See *infra* notes 102-37 and accompanying text.

¹⁹ See *infra* notes 138-50 and accompanying text.

²⁰ I first became aware of the problem of violence against Aboriginal women when I taught a course on Aborigines and the Law in Australia and had occasion to visit some remote Aboriginal communities. The evidence of violence disturbed me in light of my own experience of growing up in a "coloured" community in South Africa, where violence against women was, and continues to be, a serious problem.

²¹ See GEOFFREY BLAINNEY, TRIUMPH OF THE NOMADS 230-54 (1976).

in this geographically marginalized society, the struggle for land rights, recognition of cultural rights, self-management, or other permutations of sovereignty, involves an increasing engagement with the international human rights framework. This marginalization has many sources, a significant one being the demographic statistics. Aboriginal people make up less than two percent of the total Australian population.²² Their influence in the political process is extremely limited, and they are to a large measure dependent on the support of the larger Australian population. This support reached its zenith on two occasions in recent history. One occurred in 1967 when a national referendum empowered the Australian Commonwealth Government to legislate on all matters pertaining to the indigenous population.²³ The second occasion was a 1992 Australian High Court Land Rights decision, *Mabo v. State of Queensland*,²⁴ in which the doctrine of *terra nullius*, which had been sustained for over two hundred years, was finally jettisoned and the claims of the Murray Islanders to rights to their land were recognized.²⁵

But for the most part, the political fortunes of Aboriginal people oscillate between dependence on a benign government often politically stifled by mining interests and conservative groupings (as has been the case for the past two decades); and a government somewhat unsympathetic or outrightly hostile to Aboriginal interests. The latter scenario is the current situation.²⁶

I. HISTORICAL VIOLENCE AGAINST ABORIGINAL PEOPLE

It has been noted that Aboriginal occupation of Australia dates back to approximately 40,000 years ago, during which time Aborigines settled and continuously traversed the continent.²⁷ It has also been noted that the invasion of Australia and the brutal decimation of the Aboriginal population commenced just over 200

²² See MCRAE ET AL., *supra* note 4, at 33.

²³ See *id.* at 10.

²⁴ (1992) 175 C.L.R. 1 (Austl.).

²⁵ See *id.* at 484.

²⁶ This is evidenced by the current government's funding cutbacks to the Aboriginal and Torres Strait Islander Commission, the central statutory body that administers Aboriginal Affairs, as well as statements by the Minister for Aboriginal Affairs which evince not just ignorance of the Aboriginal condition, but a decided lack of interest in the predicament in which they find themselves. See Rosemary Neill, *Dialogue of the Deaf*, THE WEEKEND AUSTRALIAN, June 29-30, 1996, at 28.

²⁷ See GEOFFREY BLAINEY, A LAND HALF WON 62 (1980).

years ago.²⁸ The history of colonization and the subsequent dispossession of the indigenous population has been well documented.²⁹ Most of these texts bear testimony to, and suggest reasons for, the dire circumstances within which Aborigines find themselves. Contact with Europeans resulted in the near annihilation of Aboriginal communities, and it has been argued that what underpinned the activities of the settlers (both official and unofficial) was the idea that Aboriginal people would die out as a race.³⁰

The literature on the history of colonization points to substantial resistance on the part of Aboriginal people.³¹ However, this did not prevent drastic reductions of their numbers from disease.³² The denial of access to their land deprived them of food and resources, and interfered with the ceremonial religious practices which were part of their culture and identity. White intrusion on the land made it extremely difficult for Aboriginal people to protect their sacred sites.³³

The basis of Aboriginal society and the traditional systems of Aboriginal law—spirituality and kinship—were completely disrupted. The effect of the implementation of the British system of laws was to render Aboriginal people aliens in their own land. More sig-

²⁸ See C. D. ROWLEY, *THE DESTRUCTION OF ABORIGINAL SOCIETY* 28 (1970); see also RAYMOND EVANS ET AL., *EXCLUSION, EXPLOITATION AND EXTERMINATION* 33 (1975).

²⁹ See RICHARD BROOME, *ABORIGINAL AUSTRALIANS* 36 (1982); see generally HENRY REYNOLDS, *THE OTHER SIDE OF THE FRONTIER* (1982).

³⁰ See ROWLEY, *supra* note 28, at 6. See also Iris Clayton, *Anybody Could Afford Us*, in *BEING ABORIGINAL* 74 (Ross Bowden & Bill Bunbury eds., 1990). There is some controversy in the literature about the extent of official authorization (as opposed to condonation or ignorance) of displacement of Aboriginal communities and/or massacres. For example, some evidence suggests that the first occupiers carried strict instructions from the British Crown about their first contact with the local people:

You are likewise to observe the genius, temper, disposition and number of the natives, if there be any, and endeavor by all proper means to cultivate a friendship and alliance with them, . . . showing them every kind of civility and regard. . . . You are always, with the consent of the natives, to take possession of convenient situations in the country in the name of the King of Great Britain.

J.M. BENNET & A.C. CASTLES, *A SOURCE BOOK OF AUSTRALIAN LEGAL HISTORY* 253-54 (1979) (emphasis added).

However, there is every indication that no consent was either sought or obtained from the Aborigines before their land was seized. See BROOME, *supra* note 29, at 26; REYNOLDS, *supra* note 29, at 177.

³¹ See generally Sidney L. Harring, *The Killing Time: A History of Aboriginal Resistance in Colonial Australia*, 26 *OTTAWA L. REV.* 384 (1994); NEVILLE GREEN, *THE FORREST RIVER MASSACRES* 35 (1995).

³² See EVANS ET AL., *supra* note 28, at 83.

³³ See REYNOLDS, *supra* note 29, at 55.

nificantly, where they were once self-sufficient, nomadic and hunting peoples, who lived in spiritual as well as economic harmony with the land, this British feat left them without the independence and mobility which was their life-blood.³⁴

This forced immobility resulted in a dependency on European food and welfare rations for survival.³⁵ With their cultural integrity completely undermined, Aborigines become increasingly vulnerable to European influences, in particular alcohol.³⁶

For women, in addition to the ravages on their communities, colonization deprived them of their status and role within their respective communities.³⁷ Their status as women also made them more vulnerable to sexual exploitation from the settlers. Most importantly though, the imposition of a highly patriarchal European legal and value system ensured that Aboriginal women would be relegated to second class status within their communities.³⁸

The British colonial administration with its patriarchal attitudes largely rendered Aboriginal women invisible.³⁹ If traditional Aboriginal society harbored gender inequality, the imposition of the colonial policies cemented this inequality by ensuring that the Aboriginal male view was the dominant reflection and interpretation of Aboriginal society.⁴⁰ The situation has continued to the present, and in most of the areas of concern to Aboriginal communities, it is

³⁴ See *id.* at 114.

³⁵ See COMMISSIONER ELLIOTT JOHNSTON, ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY 17-18 (1991).

³⁶ See C. D. ROWLEY, OUTCASTS IN WHITE AUSTRALIA 42, 51 (1972). The choices of survival for Aboriginal people were slim. See ROWLEY, *supra* note 28, at 31. The settlers wanted control of their land, not their labor, which was provided for by convicts. See BLADNEY, *supra* note 27, at 99. They were, therefore, of absolutely no economic value to the settlers. See Colin Bourke, *Economics: Independence or Welfare*, in ABORIGINAL AUSTRALIA 179 (Colin Bourke et al. eds., 1994). The ideology of racism, and the particularly obnoxious stereotype of Aborigines which prevailed then, meant that Aboriginal people were, at best, a source of irritation and, at worst, a scourge to be eliminated. See TONY AUSTIN, SIMPLY THE SURVIVAL OF THE FITTEST: ABORIGINAL ADMINISTRATION IN SOUTH AUSTRALIA'S NORTHERN TERRITORY 1863-1910, at 10 (1992).

³⁷ See DIANE BELL & PAMELA DITTON, LAW: THE OLD AND THE NEW: ABORIGINAL WOMEN IN CENTRAL AUSTRALIA SPEAK OUT 7 (1980).

³⁸ See *id.* "If one complaint about the interaction of the two laws (Aboriginal and European) was consistent, it was that in the past women had a voice, which was heeded and that today they were habitually denied that voice." *Id.* at 4.

³⁹ See JOCELYNNE A. SCUTT, WOMEN AND THE LAW 21 (1990).

⁴⁰ See Fay Gale, *Seeing Women in the Landscape: Alternative Views of the World Around Us*, in WOMEN, SOCIAL SCIENCE AND PUBLIC POLICY 56 (Jacqueline Goodnow & Carole Pateman eds., 1985).

the Aboriginal male perspective that is sought after and considered.⁴¹ In the area of land rights, this situation is most stark, and has resulted in profound injustice to Aboriginal women.⁴² In short, Aboriginal women in Australia must contend not only with the legacy of cultural destruction, but with the double bind of racism and sexism as well.⁴³

The situation of Aboriginal women in Australia today reflects a great diversity in geographic location, economic status, lifestyle, and age. General observations, therefore, need to be contextualized and nuanced to reflect this reality. Empirical observations are further complicated by the fact that it is unclear how many Aboriginal women continue to have large parts of their personal lives governed by aspects of traditional law, or whether they live a customary lifestyle.

Questions bearing on differential experiences and location, in particular with respect to access to traditional structures and systems of conflict resolution, are significant in appraising the validity of suggested mechanisms of dealing with violence against Aboriginal women. In the wider society, this traditional (spiritual) realm co-exists with the harsh economic and social realities of Aboriginal women's lives. This combination of somewhat contradictory factors provides a formidable challenge for Aboriginal women activists and their allies in the international human rights arena.⁴⁴

⁴¹ *See id.*

⁴² *See id.*

⁴³ The literature about Aboriginal people is voluminous. Indeed Aboriginal people have continually complained of being the most widely researched community in Australia, without the concomitant benefits of such endless inquiry. *See* DAYLIGHT & JOHNSTONE, *supra* note 4, at 1 (1986). However, most of the research has focused on Aboriginal society, from the perspectives of males within the communities, and very often at the pens of male anthropologists. *See* Jocelyne Scutt, *Invisible Women?: Projecting White Cultural Invisibility on Black Australian Women*, 2 ABORIGINAL L. BULL. No. 46, at 4 (1990).

However, a major breakthrough for Aboriginal women, in terms of getting their voices heard, was provided by the Report of the Aboriginal Women's Task Force under the auspices of the Prime Minister and Cabinet, Office of the Status of Women, which conducted lengthy interviews with, and surveys of, Aboriginal women throughout Australia, and which produced a comprehensive set of recommendations in relation to Aboriginal women in 1986. The recommendations covered a host of issues including children, employment, legal aid, land rights, culture, and community services. *See* DAYLIGHT & JOHNSTONE, *supra* note 4, at 11-19.

⁴⁴ Attempts to improve the lives of Aboriginal women are hampered to some extent by the federal system of government which exists in Australia. *See generally* ZELMAN COWEN & LESLIE HINES, *FEDERAL JURISDICTION IN AUSTRALIA* (2d ed. 1978). Even though the Federal government is legally responsible for the welfare of Aboriginal people, the different states in the Commonwealth with dissimilar ideologies have administered programs and projects for Aboriginal peoples. *See* Peter Hanks, *Aborigines and Government: the Developing Framework*,

A significant impediment for Aboriginal women in their quest for equality is the privileging of the male Aboriginal voice in all matters of concern to their communities. Until the mid-1980s,⁴⁵ it was uncommon for women to be consulted about their needs, preferences, or life choices. The many fact-finding missions which regularly visited Aboriginal communities simply ignored women's voices; their opinions appeared not to matter.⁴⁶ And yet, numerous programs and policies on health, housing, education, and other important community concerns were predicated on the findings of these missions.⁴⁷ In all of these programs, women's voices were simply absent.

II. VIOLENCE AGAINST ABORIGINAL WOMEN

A. *Violence from Outside the Aboriginal Community*

The Australian Law Reform Commission's 1994 Report⁴⁸ on equality and justice issues for women, has noted the over-representation of Aboriginal women in the Australian prison population.⁴⁹ The report referred to the 1992 National Prison Census which stated that 14.1% of male prisoners and 18% of female prisoners are Aboriginal.⁵⁰ Considering that Aboriginal people comprise less than 2% of the total Australian population, the number is disturbing.⁵¹

in ABORIGINES AND THE LAW 19 (Peter Hanks & Byran Keon-Cohen eds., 1984). This has a direct impact on the success or otherwise of various measures taken to improve the lives of Aborigines and it also results in uneven outcomes for different Aboriginal communities. See Clyde Holding, *National Policy and Sovereignty of Aborigines*, *in* INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 178 (Barbara Hocking ed., 1988).

⁴⁵ See *supra* note 4.

⁴⁶ As Bell and Ditton explain:

Research, which forms the basis of policy and general understanding of Aboriginal society, has focused on men for reasons other than the practical issue of discrete male and female domains. Deeply entrenched preconceptions of the role of women as insignificant in Aboriginal society constrains research and policy and as surely as does the predominance of men in the field. . . . In the course of our research we scanned the ethnographic literature for references to women, but found little of relevance, many inaccuracies and much sexism later in the reporting

BELL & DITTON, *supra* note 37, at 5.

⁴⁷ See *id.*

⁴⁸ 1994 REPORT, *supra* note 9.

⁴⁹ See *id.* at 119. There are 178 Aboriginal women compared to 9 non-Aboriginal women per 100,000 people imprisoned in Australia. See *id.*

⁵⁰ See *id.*

⁵¹ For an extended discussion on this issue see generally Marie Brooks, *Aboriginal and Torres Strait Islander Women in Custody*, *in* ABORIGINAL JUSTICE ISSUES II (Australian

A further disturbing fact is the harassment and abuse that Aboriginal women suffer while in police custody. An inquiry into violence in Australian society a few years back revealed evidence suggesting widespread sexual abuse of indigenous women at the hands of police officers.⁵² More disturbingly, this abuse was not confined to women in custody. Testimony was provided describing the police practice in one town of detaining young Aboriginal women patrons at a bar, and then offering them to white male patrons for sex.⁵³

In 1991, the Royal Commission into Aboriginal Deaths in Custody,⁵⁴ reporting on the disproportionate number of Aboriginal people who die in police custody, lamented the overwhelming lack of confidence that Aboriginal people have in the Australian legal system.⁵⁵ Even though the report included the death of twelve Aboriginal women in police custody, it paid scant attention to the needs of Aboriginal women in their interaction with the criminal justice system. Aboriginal activists have commented on the report's paucity of specific recommendations to deal with violence against women.⁵⁶

This lack of confidence or disillusionment that Aboriginal people exhibit towards the Australian legal system has its origins in a variety of sources, but an obvious one is the legacy of brutality and dispossession sanctioned by law during the colonial period.⁵⁷ Although the consequences of this wholesale legal disenfranchisement impacts enormously on most Aboriginal people, Aboriginal women are the "least well served by the legal system,"⁵⁸ a factor which correlates with the appalling conditions of social and economic disadvantage in which they find themselves. In this particular context, their race, class, and gender intersect in ways that ensure that the violence to which they are exposed receives scant attention. This is reflected in two major reports on violence in

Institute of Criminology ed., 1994).

⁵² See RACIST VIOLENCE, *supra* note 9, at 79-115.

⁵³ See *id.* at 88. Further evidence was submitted of the rape of very young girls at police stations; and the girls being too traumatized or too fearful to lodge complaints. See *id.* at 89.

⁵⁴ ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, *supra* note 35.

⁵⁵ See *id.* at 39-43. This sentiment was echoed in the Law Reform Commission Report. See 1994 REPORT, *supra* note 9, at 119. See also Greta Bird, *Access to the Racial Discrimination Act*, in RACIAL DISCRIMINATION ACT 1975: A REVIEW 287 (Race Discrimination Commission ed., 1995).

⁵⁶ See Payne, *supra* note 6, at 33.

⁵⁷ See ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, *supra* note 35, at 1-26.

⁵⁸ 1994 REPORT, *supra* note 9, at 118.

Australia and Aboriginal societies, in which the issue of violence against Aboriginal women in the criminal justice system were almost completely ignored.⁵⁹ The Royal Commission into Aboriginal Deaths in Custody investigated these matters between the periods January 1, 1980 to May 31, 1989. In the Northern Territory, where a large proportion of Aboriginal people live, the Commission reported nine deaths.⁶⁰ During the same period, in the Northern Territory, the police crime records reported thirty-nine homicides of Aboriginal women.⁶¹

B. Violence From Within the Aboriginal Community

The cultural devastation, as well as the resulting pathologies of alcoholism and violence, in many Aboriginal communities has been noted.⁶² Diane Bell has analyzed the involvement of Aboriginal women both as initiators and victims of physical attacks.⁶³ Katherine Burbank's observations about physical disputes in the Aboriginal communities subjected to her analysis, indicate that women are by no means passive victims of physical attacks, and, as the title of her book *Fighting Women* suggests, they engage in widespread aggression.⁶⁴

But these accounts also observe that although a woman might at times engage in aggressive behavior, for example, by hurling abuse or an object, her partner would often launch an immediate physical attack and she was more likely to suffer greater physical injury than her male partner. In fact, a study conducted in Victoria in the southeast of Australia in early 1996, indicated that 46.9% of all Aboriginal female victims of crime were violently assaulted, compared to 11.4% of non-Aboriginal women.⁶⁵ The study also showed that Aboriginal women were 3.6 times more likely to be

⁵⁹ See ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, *supra* note 35 (overwhelmingly concerned with the incarceration and deaths of Aboriginal males). See also NATIONAL COMMITTEE ON VIOLENCE, VIOLENCE: DIRECTIONS FOR AUSTRALIA (1990) (largely ignoring the violence against Aboriginal women).

⁶⁰ See 1994 REPORT, *supra* note 9, at 120.

⁶¹ See *id.*

⁶² See generally L. R. HIATT, KINSHIP AND CONFLICT (1965).

⁶³ See DIANE BELL, DAUGHTERS OF THE DREAMING 100, 172 (1983).

⁶⁴ See generally BURBANK, *supra* note 14, at 1, 21-33, 97-130.

⁶⁵ See Michael Mackay & Sonia Smallacombe, *Aboriginal Women as Offenders and Victims: The Case of Victoria*, 3 ABORIGINAL L. BULL. No. 80, at 17, 20 (1996).

victims of rape.⁶⁶ Earlier studies have highlighted the incidence of sexual abuse in the Aboriginal community and the silence surrounding this problem.⁶⁷

The causes of violence against indigenous women are complex and the research suggests a combination of factors. The first is the system of sexual subordination which exists in traditional Aboriginal society, and which is buttressed in the wider Australian society.⁶⁸ Although Aboriginal scholars and activists, and white anthropologists differ amongst themselves as to the role and status of Aboriginal women in traditional society, and to the extent of this sexual subordination, there appears to be a general consensus that a combination of colonial attitudes toward all Australian women, patriarchal values prevalent in Australian society, and the differing sex roles and status in indigenous society have resulted in the subordinate status of Aboriginal women.⁶⁹ Marcia Langton, a prominent Aboriginal anthropologist and activist refers to "the ability of men to use force in the final analysis, to preserve male dominance in ideology, in structures and relationships. This was so in traditional times and remains so, but in vastly changed circumstances."⁷⁰

The second factor is the breakdown of traditional social control due to the imposition of foreign influences and societal structures.⁷¹ For example, Bolger describes the inability of tribal elders to control younger men, who appear to have abandoned traditional values.⁷²

A third factor noted is the appalling socio-economic conditions within which many Aborigines find themselves,⁷³ and which have been mentioned earlier in this Article.⁷⁴

By far the most devastating factor highlighted is the abuse of alcohol in many communities.⁷⁵ Although the research is in-

⁶⁶ See *id.* at 20. For a further study on the incidence of sexual abuse of Aboriginal women see CARTER, *supra* note 9 (dealing with rape and child sexual abuse in the Aboriginal community).

⁶⁷ See CARTER, *supra* note 9, at 1.

⁶⁸ See Bell, *supra* note 3, at 45-46.

⁶⁹ See Patricia Grimshaw, *Aboriginal Women: A Study of Culture Contact*, in AUSTRALIAN WOMEN: FEMINIST PERSPECTIVES 86 (Norma Grieve & Patricia Grimshaw eds., 1981).

⁷⁰ Marcia Langton, *Feminism: What do Aboriginal Women Gain?*, Broadside National Foundation for Australian Women Newsletter 1989, quoted in BOLGER, *supra* note 1, at 53.

⁷¹ See BELL & DITTON, *supra* note 37, at 24-25.

⁷² See BOLGER, *supra* note 1, at 56.

⁷³ See ROYAL COMMISSION REPORT INTO ABORIGINAL DEATHS IN CUSTODY, *supra* note 35, at 377.

⁷⁴ See *supra* note 4 and accompanying text.

⁷⁵ See BOLGER, *supra* note 1, at 45.

conclusive on the role of alcohol in the incidence of violence, there appears to be a general recognition of the association of excessive alcohol consumption and violence.⁷⁶ It is significant that a substantial number of Aboriginal women interviewed for different research purposes all identify their abuser's consumption of alcohol with the violence.⁷⁷ It is also worth noting that Aboriginal women have been active in local campaigns to designate their communities alcohol-free zones.⁷⁸

Audrey Bolger, in her comprehensive study of violence against Aboriginal women, found that Aboriginal people prefer the term "family fighting" to "domestic violence."⁷⁹ It has been poignantly noted that "[t]he relatively suburban term 'domestic violence' does not come close to adequately describing the levels of violence perpetrated on Aboriginal women - typically by male perpetrators (not only the spouse), over a longer period, more commonly with weapons and more frequently resulting in severe injury."⁸⁰ Bolger has demonstrated that the nature of the injuries inflicted upon Aboriginal women is much more egregious because of the use of weapons and the range of individuals who appear to take license to attack them.⁸¹ Bolger cites a litany of the most horrendous incidents of weapon-inflicted violence, involving hammers, knives, sticks, stones, and pickets, which results in a frightening number of homicides of Aboriginal women.⁸² Other research has documented the number of young Aboriginal females who are subjected to rape, incest, and other forms of sexual abuse by a variety of male family members.⁸³

III. THE RELATIONSHIP OF ABORIGINAL WOMEN TO THE FEMINIST MOVEMENT IN AUSTRALIA

Much of the writings by Aboriginal female scholars and activists suggest a significant wariness by Aboriginal women of the feminist movement.⁸⁴ Some of this wariness can be traced to the history of

⁷⁶ See RACIST VIOLENCE, *supra* note 9, at 86.

⁷⁷ See BOLGER, *supra* note 1, at 44-48.

⁷⁸ See *id.* at 47.

⁷⁹ See *id.* at 6.

⁸⁰ 1994 REPORT, *supra* note 9, at 119.

⁸¹ See BOLGER, *supra* note 1, at 14.

⁸² See *id.* at 16.

⁸³ See generally CARTER, *supra* note 9.

⁸⁴ See Larissa Behrendt, *Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse*, 1 AUSTRALIAN FEMINIST L.J. 27 (1993).

colonialism and racism, and the resultant different worlds occupied by Aborigine and other communities.

Hester Eisenstein has documented the significant gains that Australian feminists (particularly those located in the public sector, the so-called femocrats, and those within the tertiary education system) have achieved in Australia in the last fifteen years.⁸⁵ The various pieces of legislation: the Sex Discrimination Act,⁸⁶ the Affirmative Action for Women Act,⁸⁷ the legislative incursions into violence against women,⁸⁸ and pay equity,⁸⁹ all bear testimony to these achievements. But these gains for non-Aboriginal women have not necessarily translated into gains for Aboriginal women.

The focus of the feminist movement has generally been on reproductive rights, sexuality, equity in employment, sufficient child-care, and freedom from sexual harassment and violence. For Aboriginal women, these struggles have often been seen as irrelevant, and sometimes antithetical to their needs.⁹⁰ They have merely highlighted for Aboriginal women the glaring contradictions of experience and reality.⁹¹ Reproductive rights and child-care issues represent for Aboriginal women vivid memories of struggles to end forced sterilization and a not too distant reminder of children being removed from mothers in an almost genocidal fervor.⁹²

See also Melissa Lucashenko, *No Other Truth: Aboriginal Women and Australian Feminism*, 2 SOCIAL ALTERNATIVES 21 (1994); Elizabeth Williams, *Aboriginal First, Woman Second, in DIFFERENT LIVES: REFLECTIONS ON THE WOMEN'S MOVEMENT AND VISIONS OF ITS FUTURE* 66 (Jocelynn A. Scutt ed., 1987).

⁸⁵ See generally HESTER EISENSTEIN, *INSIDE AGITATORS: AUSTRALIAN FEMOCRATS AND THE STATE* (1996).

⁸⁶ Sex Discrimination Act, 1984 (Austl.).

⁸⁷ Affirmative Action Act (Equal Employment Opportunity Act for Women), 1986 (Austl.).

⁸⁸ See Family Law Act, 1975 (Austl.).

⁸⁹ See Affirmative Action Act (Equal Employment Opportunity for Women), 1986 (Austl.).

⁹⁰ See Pat O'Shane, *Is There Any Relevance in the Women's Movement for Aboriginal Women?*, REFRACTORY GIRL, Sept. 1976, at 31.

⁹¹ Increasingly though, Aboriginal women activists are incorporating feminist analyses in their struggles for land rights, and in other areas of concern which do not only impact on women. See EISENSTEIN, *supra* note 85, at 122-23 (interview with Pat O'Shane & Pat Turner). "Through the mid to late eighties, there is this segment . . . of Aboriginal women who are very much making the feminist movement their movement because they do see the issues of racism and sexism are very much two sides of the one coin." *Id.* at 122 (Interview with O'Shane). "I think there's an increasing number that say 'I have always been prepared to work for the struggle as a whole, but I'm not going to be put into second place because I'm a woman.' Its going to be right up there too." *Id.* (Interview with Turner).

⁹² See MARGARET TUCKER, *IF EVERYONE CARED* 91-96 (1977). See also R. MERKEL, *A PAPER ON LEGAL OPTIONS FOR ABORIGINES 'TAKEN' FROM THEIR FAMILIES AND THEIR PEOPLE* (1994) (on file with author from *The Going Home Conference*, Oct. 3-6, 1994 in Darwin, Australia).

Employment equity and freedom from sexual harassment are hollow victories when statistics suggest a disproportionate number of Aboriginal women do not have the means to enter the workforce due to insufficient education.⁹³ The much-heralded legislative inroads into family violence, after persistent deflation of the public/private distinction, are arguably an ominous sign to Aboriginal women that the state once more has the power to invade that private space only recently regained after the zealous pursuit of protectionism and assimilation. The public/private distinction for Aboriginal women has been ephemeral; the state has persistently been an invasive and intrusive presence.⁹⁴

Feminist analyses and praxis in Australia have inadequately addressed the racialized nature of violence against women.⁹⁵ This has resulted in a serious lapse in addressing not only the racial or cultural context of the kinds of violence perpetuated against Aboriginal women, but has also vitiated against a comprehensive inquiry of the causes of violence, and strategies of intervention aimed at stemming such violence.⁹⁶

Recent developments within Aboriginal women's organizations, and writings by Aboriginal activists suggest that Aboriginal women are becoming amenable to the incorporation of feminist analyses in their broader struggles.⁹⁷ Conversely there appears to be an increasing recognition of the multiple political and personal goals of Aboriginal women by white feminists.⁹⁸

⁹³ See DAYLIGHT & JOHNSTONE, *supra* note 4, at 135.

⁹⁴ See Jan Pettman, *Gendered Knowledge: Aboriginal Women and the Politics of Feminism*, in POWER, KNOWLEDGE AND ABORIGINES 120 (Bain Attwood & John Arnold eds., 1992).

Aboriginal people have experienced the State in ways quite different from other Australians. As well as playing a key role in dispossessing Aborigines, it has defined their legal status, and been instrumental in institutionalizing them and in repeatedly intruding in their lives through its various policing and 'welfare' functions. While the nature, scope and rationale of these interventions have changed over time, they continue in unique form as the state tries to manage the Aboriginal problem.

Id. at 126.

⁹⁵ See Payne, *supra* note 6, at 39.

⁹⁶ See Bobbi Sykes, *Black Women in Australia: A History*, in THE OTHER HALF 119 (Jan Mercer ed., 1975). However, these problems are increasingly being recognized by feminists and were subjected to a thorough analysis in the Australian Law Reform Commission Report. See 1994 REPORT, *supra* note 9, at 122-23.

⁹⁷ See EISENSTEIN, *supra* note 85, at 122-23.

⁹⁸ I do not wish to suggest persistent neglect of Aboriginal issues on the part of Australian feminists. The need for an anti-essentialist paradigm, broadly defined, which recognizes the layered sources of oppression, and a feminist practice which responds to such reality, has been articulated. For a thoughtful analysis of these issues, see Rosemary Hunter, *Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice*, 6 THE

But the feminist paradigm raises for Aboriginal women profound questions about Aboriginal identity, that is, broader communitarian concerns on the one hand, and the pressing issue of the violence to which they are subjected as women on the other. Although certain Aboriginal women are sympathetic, or see the need, to embrace the full panoply of feminist issues dealing with the problem of violence, they also regard the issue of violence as connected to a more general set of issues relating to the role of Aboriginal women in their society, as well as outside their society.⁹⁹ Unlike the situation of other women, and particularly white women in the wider Australian society, the focus of combatting violence against Aboriginal women involves stemming violence from outsiders as well.¹⁰⁰

This poses somewhat of a challenge for Australian feminists. For although the priorities and strategies of Aboriginal women and white feminists have overlapped only rarely, there is room for some convergence of strategies to overcome violence against all women.¹⁰¹ Such a challenge might require some deference and understanding by white feminists, but in the process might allow the organizational space for Aboriginal women to set the agenda and determine strategies that have the likelihood of the most beneficial outcomes.

IV. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND ITS RELEVANCE

The international human rights framework provides an empowering point of reference for human rights activists within the local setting. Aboriginal people have utilized this human rights environment to internationalize their struggle and garner strategic victories.¹⁰² Specifically, the United Nations Working Group on Indigenous Populations has served as an important international forum to pursue political and legal strategies alongside indigenous peoples from around the globe.¹⁰³

AUSTRALIAN FEMINIST L.J. 135 (1996).

⁹⁹ See EISENSTEIN, *supra* note 85, at 122.

¹⁰⁰ See BOLGER, *supra* note 1, at 93-100.

¹⁰¹ Although the causes and manifestations differ, domestic violence is a serious problem in Australian society. See generally JOCELYNNE A. SCUTT, *EVEN IN THE BEST OF HOMES* (1983).

¹⁰² See LORNA LIPPMANN, *GENERATIONS OF THE RESISTANCE: THE ABORIGINAL STRUGGLE FOR JUSTICE* 207-10 (1981).

¹⁰³ See Tony Simpson, *On the Track to Geneva*, in *VOICES OF ABORIGINAL AUSTRALIA* 170 (Irene Moore ed., 1995).

Aboriginal women have been actively involved in these campaigns, but their efforts have targeted the transformation of their communities as a whole.¹⁰⁴ There has thus far been no concerted effort by Aboriginal women to address the question of public and private violence against Aboriginal women within the international human rights context.¹⁰⁵ Despite this, the recent incursions in international law by feminist scholars and activists provide both a symbolic and substantive backdrop. Women's rights have shifted from the margins to the center of discourse in international law.¹⁰⁶ This changing universe is marked by significant signposts: the United Nations Decade for Women, the Vienna Declaration on Violence Against Women and the Fourth World Conference on Women in Beijing, to mention a few.¹⁰⁷ These events manifest the need to place the realities and experiences of women's lives in the center of human rights practice.¹⁰⁸

But the utilization of international law poses some significant challenges for women activists.¹⁰⁹ These challenges are represented by two major underpinnings of international law, and specifically international human rights law and practice. The first is the quest for universality,¹¹⁰ and the second is a certain for-

¹⁰⁴ See Helen Corbett, *International Efforts*, in VOICES FROM THE LAND 76 (Mandawuy Yunupingu et al. eds., 1994).

¹⁰⁵ In relation to intra-communal violence, until fairly recently, this subject was taboo. See *supra* note 7 and accompanying text.

¹⁰⁶ The seminal article in this regard is Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

¹⁰⁷ See Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201 (1994).

¹⁰⁸ These developments raise similar questions highlighted in the previous section regarding the relationship between Aboriginal women and white feminists in Australia. See *supra* notes 84-101 and accompanying text.

¹⁰⁹ My frame of reference here is the two United Nations documents which incorporate rights for women. I recognize specifically the Convention to Eliminate Discrimination Against Women, adopted Dec. 18, 1979, entered into force Sept. 3, 1981; G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980) [hereinafter CEDAW]; and the Vienna Declaration on the Elimination of Violence Against Women, adopted Dec. 20, 1993; G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 111, 1993 U.N.Y.B. 1046 [hereinafter Vienna Declaration] provide the framework within which certain rights may be pursued by Aboriginal women. The purpose of this Article is not to tabulate these instruments and the rights they enshrine, but to focus on the possibilities of utilizing them in light of the scrutiny to which they have been subjected by critical legal scholars, and particularly feminist legal theorists. However, these international documents remain the subtext throughout.

¹¹⁰ The notion of universality and the quest to globalize rights is both necessary and inevitable in a world becoming increasingly globalized economically and culturally. See Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L.

malism which typifies the substance and procedures of international law and United Nations system.¹¹¹

A. *Challenges or Limitations of the International Law Framework*

In the international law arena, the feminist project burst onto the scene with the pioneering writings of Hilary Charlesworth and others¹¹² who posed a significant challenge to the structures, institutions and procedures, and the essentially male cast of international law. These writings coincided with emerging struggles for democracies in which women increasingly demanded a central place in the transformation project.¹¹³ But the ascendancy of these feminist analyses soon became subjected to a thorough critique, centered on their essentialist focus and their failure to incorporate the economic, ethnic, racial, religious, and cultural factors which impinge on women's identity, and their consequent engagement in political struggle.¹¹⁴

The voices of women in Africa, Asia, South America and in the Islamic world, have raised questions concerning the universality of rights and remedies.¹¹⁵ They have located theoretical discrepancies in feminist analyses relating to the cultural determination of rights, as well as socio-economic and political imperatives.¹¹⁶

& POL'Y 861 (Winter 1995). The question raised, however, is the philosophy of what "the universal" represents, and the strategies to reach that ideal. See Upendra Baxi, *The Unreason of Globalization and the Reason of Human Rights*, First A.R. Desai Memorial Lecture delivered at the University of Bombay (Feb. 7, 1996) (transcript on file with author).

¹¹¹ The purpose of this point is not to debunk the idea of formal procedures—they are a vital component of substantive rights. The question is raised to highlight the dissonance between the arcane world of legal rights and the harsh socio-economic and political realities of most women's lives. See Peter Vale, *Engaging the World's Marginalized and Promoting Global Change: Challenges for the United Nations at Fifty*, 36 HARV. INT'L L.J. 283 (1995).

¹¹² See Rebecca Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 587 (1992).

¹¹³ An excellent example is South African women's participation in the struggle against apartheid, and their concomitant demands for a place at the negotiation tables for a new constitution. See generally PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991); THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE (Sandra Liebenberg ed., 1995).

¹¹⁴ See generally THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM (Chandra Talpade Mohanty et al. eds., 1991).

¹¹⁵ See Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights: Toward a Communitarian Revision*, 25 CUMB. L. REV. 651 (1994-1995).

¹¹⁶ See Adetoun O. Ilumoka, *African Women's Economic, Social, and Cultural Rights—Towards a Relevant Theory and Practice*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 307 (Rebecca Cook ed., 1994).

The response, a feminist critique which recognizes and incorporates these issues of intersectionality, is now more apparent.¹¹⁷ But recognition and incorporation does not necessarily mean an engagement with other beacons of identity.¹¹⁸ The paradigm still remains the quest for a universalism, with the "other" constituting an additional analytical component.¹¹⁹

The second challenge, the arcane world of international law, represents a perennial preoccupation. For Aboriginal women, the symbolism and substance of human rights provides a useful backdrop for buttressing these issues locally. But serious engagement as a form of legal redress necessitates overcoming formidable obstacles; cumbersome enforcement mechanisms locked in a truly distant world.¹²⁰ Although the pursuit of human rights through United Nations or regionally mandated procedures are theoretically possible, and symbolically positive, the enforcement procedures provided in various human rights instruments are constrained by lengthy time periods between initial reporting and final outcome.¹²¹ The paradigm designed to ensure a thorough investigation of all the relevant facts, and local exhaustion of remedial procedures, renders swifter conclusion of the complaints procedure almost impossible.¹²² Moreover, the process demands access by individuals who are schooled in, or at least familiar with, this formal, legalistic paradigm. The inability to acquire such access provides a formidable obstacle for many women trapped in dire economic and social circumstances and who conduct their lives in a foreign language.¹²³

¹¹⁷ See Hilary Charlesworth, *Feminist Critics of International Law and Their Critics*, in *THIRD WORLD LEGAL STUDIES: WOMEN'S RIGHTS AND TRADITIONAL LAW: A CONFLICT?* 1 (Penelope E. Andrews ed., 1994-1995).

¹¹⁸ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 13 *U. CHI. LEGAL F.* 139, 166-67 (1989).

¹¹⁹ See Mridula Udayagiri, *Challenging Modernisation: Gender and Development, Postmodern Feminism and Activism in FEMINISM/POSTMODERNISM/DEVELOPMENT* 159 (Marianne H. Marchand & Jane L. Parpart eds., 1995).

¹²⁰ It is generally accepted that Aboriginal people have a distrust of and regard the Australian legal system as alien and indifferent. See 1994 REPORT, *supra* note 9, at 119. It would not require too much of a leap in logic to believe that skepticism can be applied to an even more foreign legal system, even one that encapsulates shared global aspirations.

¹²¹ See Sandra Coliver, *United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights are Being Violated?*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 25 (Ellen Lutz et al. eds., 1989).

¹²² See Andrew Byrnes, *Enforcement Through International Law and Procedures*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 189 (Rebecca Cook ed., 1994).

¹²³ See Tom J. Farer, *The United Nations and Human Rights: More Than a Whimper Less Than a Roar*, 9 *HUM. RTS. Q.* 550 (1987). See also Tokel Opsahl, *Instruments of Implemen-*

This dissonance between the universe of formal law and rights and the material reality of marginalized peoples are stark in the Australian context. For reasons mentioned earlier in this Article,¹²⁴ Aboriginal women display little faith in the criminal justice system.¹²⁵ They constantly face both the dilemma of negotiating the daily exigencies of violence, and the need for some form of protection, with a skepticism of official (police) interference in their communities.¹²⁶

B. Possibilities of International Law

What perspectives might be brought to bear on international legal discourse that will enable Aboriginal women to utilize the substance and symbolism in a more empowering manner? Put another way, are there alternative approaches or strategies in light of the foregoing critiques?¹²⁷

Women engaged in feminist struggles must move beyond the quagmire of the universalist aspirations of feminism and its human rights vision, versus the continuing recognition of cultural difference, now incorporated in post-modern discourse.¹²⁸ This bi-polar

tation of Human Rights, 10 HUM. RTS. L.J. 13 (1989).

¹²⁴ See *supra* note 55 and accompanying text.

¹²⁵ See Marina Paxman, *Women and Children First!*, 18 ALTERNATIVE L.J. 153 (Aug. 1993). "If a white woman gets bashed or raped here, the police do something. When its us they just laugh. The fellow keeps walking around, everybody knows but nothing is done." *Id.* at 154 (comment from an Aboriginal woman interviewed).

¹²⁶ See *id.* This dilemma is most pronounced in the operation of statutes aimed at stemming violence, and particularly family violence, where Aboriginal women are reluctant to seek protection from the police, based on their fear of abuse of Aboriginal males within the criminal justice system. "How can we call the police in? They come with their guns drawn and an innocent person gets killed." See *id.*

¹²⁷ The following approach is proffered not in the prescriptive sense of offering solutions, nor is it exhaustive; it is an attempt to influence the discourse and practice of human rights law so that Aboriginal women, and indeed all female victims of violence, may benefit from that legal and aspirational framework. See Marysia Zalewski, *Feminist Standpoint Theory Meets International Relations Theory: A Feminist Version of David and Goliath?*, 17 FLETCHER FORUM OF WORLD AFFAIRS, Summer 1993, at 13.

The standpoint of the oppressed gives rise not only to a *different* epistemological position, but to one that is *advantageous*. It provides the basis for an arguably more impartial view of reality that comes closer to representing the interests of society as a whole. Alternatively, whereas the standpoint of the dominant group reflects the needs of only one sector of the population.

Id. at 21.

¹²⁸ The cultural relativism versus universalism debate is a hackneyed one, and continues to polarize theorists and activists. See generally WOMEN RIGHTS AND TRADITIONAL LAW: A CONFLICT? (Penelope E. Andrews ed., 1994-1995). See also Dianne Otto, *Holding Up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women*, 6

paradigm increasingly distorts the discourse and thwarts significant programs that have a potentially transformative capacity to improve women's lives.¹²⁹ We must engage in human rights discourse that does not shun the notion of the particular (products of divergent cultural, racial, economic conditions), and one that will recognize at times the requirement to engage in what Gayatri Spivak refers to as "strategic essentialism."¹³⁰

We have to promote and engage in a human rights discourse that recognizes multiple identities and multiple agendas; that an Aboriginal woman can utilize an international agenda to end violence in her community, while simultaneously demanding some semblance of self-determination for her people. Tentative steps toward this ideal are slowly permeating human rights practice as evidenced by developments leading to the World Conference on Human Rights in Vienna and the Fourth World Conference on Women in Beijing.¹³¹ Of particular significance was the lobbying efforts of women from developing and Islamic countries.¹³²

Feminism needs to embrace a discourse that envelopes a nuanced sense of the articulation of rights. This approach incorporates the compounded layers of oppression and confronts totally the "compartmentalized selves,"¹³³ of which critical theory reminds us, which more comprehensively articulates women's lives,¹³⁴ and which has enormous implications for the international political and legal agenda.¹³⁵ In essence we need to engage in a different kind

THE AUSTRALIAN FEMINIST L.J. 7 (1996).

¹²⁹ Feminists are not the only culprits of this conflict. So-called differences in culture are often utilized by opportunistic politicians to continue oppressing women. See Otto, *supra* note 128, at 19.

¹³⁰ See Gayatri Chakravorty Spivak, Address at the Center for Humanities, Wesleyan University (Spring 1985), cited in Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189, 203 (1993).

¹³¹ For a analysis of these international organizational efforts see Mertus & Goldberg, *supra* note 107, at 204. See also BELJING CONFERENCE REPORT: 1994 COUNTRY REPORT ON THE STATUS OF SOUTH AFRICAN WOMEN (1994) (on file with author).

¹³² See BELJING CONFERENCE REPORT, *supra* note 131, at 5-10.

¹³³ See Celina Romany, *Themes for a Conversation on Race and Gender in International Human Rights Law*, 9 YALE J.L. & FEMINISM (forthcoming Spring 1997).

¹³⁴ See Angele P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

¹³⁵ In addition, certain feminists have demanded a broader definition of the term "violence" to include culture and economics. See generally Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Reconceptualization of Violence for the Twenty-first Century*, 60 ALB. L. REV. 607 (1997).

of discourse even while we aspire to an agreed universalism; one that builds from the particular.

Commencing with the particular necessitates a theoretical reorientation of the starting point of women's struggle; an involvement at overcoming racism, economic exploitation, patriarchy, religious and cultural prejudice. Thus far, the feminist input into international law has mediated the imperative to overcome the male centered universe of international law, while accommodating the demands of "other" voices to incorporate issues of race, class, ethnicity, culture and religion.¹³⁶ But the very act of incorporation still perpetuates the theoretical marginalization of those variables, and the standard still remains the universalist assumptions located within Western feminist discourse. In short, the elimination of patriarchy is placed at the center of feminist human rights discourse, tempered by voices of the "other" at the margins.¹³⁷

A reconstituted human rights discourse will locate the "other" at the center, with the elimination of patriarchy and sexism as part of the overall agenda. In other words, one could imagine the metaphorical narrative of women's struggle as a sprawling tree, with different branches representing the confluence of theoretical influences. In such a construction, the elimination of patriarchy is a powerful branch, as powerful as the branch for the elimination of poverty, or the branch for the recognition of cultural rights.

Such an approach should not be interpreted as an erosion of the feminist project; rather, it is a bold assertion of a feminism centered on the particular, which utilizes strategic essentialism at necessary points of intervention.

V. THE TROPE OF LOCAL STRUGGLE

How might these perspectives be enriched and infused with a fresh relevance for Aboriginal women? How might this alternative, localized and more nuanced approach to international human rights

¹³⁶ See *supra* notes 116-18 and accompanying text.

¹³⁷ See generally *COMPARATIVE PERSPECTIVES OF THIRD WORLD WOMEN: THE IMPACT OF RACE, SEX, AND CLASS* (Beverly Lindsay ed., 1980) (providing theoretical perspectives which place the concerns of "third world" women and minority women in the United States at the center of the discourse and focusing on issues of economic exploitation, development, race, and gender, which provides a more comprehensive picture of the situation of the women concerned and possible steps to redress these issues).

discourse and practice be of assistance to Aboriginal women?¹³⁸ More soberly, how can this be translated into political activity in Aboriginal communities?¹³⁹ Aboriginal women face the imperative to harness their energies in the struggle against violence to which they are exposed as women, but they are also acutely involved in the struggle for the survival of their communities.

A response to the questions raised above may be found in the approach to some local projects in Aboriginal communities in Australia, and also in Black communities in South Africa. Although the South African experience is not universal, it does provide some valuable lessons, which may be worth noting in this context.

The projects in Black South Africa and Aboriginal Australia are aimed specifically at redressing violence against women. They are premised on the recognition that the issue of violence against women in the family and elsewhere require a holistic interrogation. They represent a conscious move from the traditional adversarial legal model in these settings, to one that draws on the communitarian tendencies of traditional Aboriginal and African society.¹⁴⁰ In South Africa the programs involve men, children, the churches, trade unions, and local civic associations.¹⁴¹ One relatively successful program in Cape Town educates local communities about CEDAW and the Vienna Declaration through workshops in which song, poetry and play acting are the dominant mechanisms for instruction which allow for audience participation.¹⁴²

¹³⁸ The human rights framework and particularly the discourse adapted to local conditions proved invaluable both as an inspirational source, and as a practical source from which to draw specific policy and law, to South African women. See THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE, *supra* note 113 and accompanying text.

¹³⁹ These questions are on the face of it trite, and even crude. But very often they are at best taken for granted, and at worst, ignored. In the lofty levels of policy making, or academic critique, we are frequently not mindful of the *local purpose* of human rights documents and discourse. Our need to engage with the generalities often obscures our appreciation of the specificities. For a thoughtful perspective on these issues see Sharon K. Hom, *Commentary: Re-positioning Human Rights Discourse on 'Asian' Perspectives*, 3 BUFF. HUM. RTS. L. REV (forthcoming 1997).

¹⁴⁰ Obviously the historical and social contexts of these two societies differ substantially, and clearly the problems, and the communities' response, are not indistinguishable or even interchangeable. The point is a broader one about existing cultural resources within both Aboriginal and African communities.

¹⁴¹ Patricia Horn, *The Way Forward Towards the Emancipation of Women*, AGENDA No. 10 at 53 (1991).

¹⁴² The author visited the project, Ilitha Labantu, in Guguletu, Cape Town, in 1995 and also had occasion to host the director, Mandisa Monakali, at City University of New York (CUNY) Law School in the Spring of 1996.

In Australia these local programs represent continuing efforts by Aboriginal women to locate culturally appropriate methods of redressing violence often within the context of unrelenting poverty and desperation.¹⁴³ They take a variety of forms, such as women's refuges,¹⁴⁴ community policing initiatives, including night patrols run and staffed by women,¹⁴⁵ and women's councils.¹⁴⁶

These projects draw inspiration from, and are modelled on, traditional indigenous structures, where separate spheres provide the context for cultural expression for men and women.¹⁴⁷ For the purposes of maintaining ritual secrecy, these gendered separate spheres were mandated, and severe penalties visited those who abrogated such division.¹⁴⁸ Women's projects in Aboriginal society therefore have a cultural foundation on which to build, and which may serve purposes far beyond their aim of redressing violence against women.¹⁴⁹

The significance of these local initiatives is their contextualizing of violence against women within the broader framework of economic and political struggle, and the location of such violence as a central concern of the affected community.

In all these ventures, the discourse of human rights is the sub-text. But their articulation and reception at the local level, their nomenclature and their translation into the vernacular translates into a form of ownership by the women. The language and the concepts are familiar, belong to them, and fit into their discourse.¹⁵⁰

CONCLUSION

The local initiatives referred to above represent a nascent but growing determination by Aboriginal women to confront the violence

¹⁴³ See *supra* notes 4-5 and accompanying text.

¹⁴⁴ See Esther Alvares, *A Women's Refuge for Bourke--A Community Initiative*, in *ABORIGINAL JUSTICE ISSUES 1* (Australian Institute of Criminology ed., 1992).

¹⁴⁵ See 1994 REPORT, *supra* note 9, at 124.

¹⁴⁶ See *id.*

¹⁴⁷ See BELL, *supra* note 63, at 41-110, 229-54.

¹⁴⁸ See *id.* at 42-43.

¹⁴⁹ Those programs fit into an overall strategy by Aboriginal people to revive aspects of their cultural traditions, and particularly customary law. See James Crawford, *Legal Pluralism and the Indigenous Peoples of Australia*, in *THE RIGHTS OF SUBORDINATED PEOPLES 178* (Oliver Mendelsohn & Upendra Baxi eds., 1994).

¹⁵⁰ See Judy Atkinson, *Violence Against Aboriginal Women: Reconstitution of Community Law--the Way Forward*, 2 *ABORIGINAL L. BULL.* No. 46, at 6 (1990).

to which they are exposed, both from within their communities, and the criminal justice system. In these endeavors Aboriginal women can draw on international human rights laws, procedures and structures to bolster their struggles. In concrete terms, the Australian government's ratification of a plethora of human rights instruments relevant to Aboriginal women suggests that the legal groundwork has been laid, and that an official human rights atmosphere amenable to local initiatives has been provided.¹⁵¹

For Aboriginal women, as indeed for all women on the margins,¹⁵² the process should be a circuitous one; extrapolating from both indigenous or local methods and an expanding global human rights framework, and simultaneously influencing the content, enforcement mechanisms, and indeed the tone of the human rights infrastructure.¹⁵³ The purpose of the presentation of these issues in this Article is a plea for such a possibility.

Aboriginal people as marginal members of Australian society constantly have to struggle against the majoritarian political instinct to submerge indigenous interests. For Aboriginal women, their quest is one of full membership of the Australian polity; not at sufferance, but as entitlement and in celebration. At the aspirational level, and indeed in substance, the international human rights framework provides the prism for local articulation of such possibility.

¹⁵¹ For a comprehensive list of human rights instruments relevant to, and ratified by, Australia see NICK O'NEILL AND ROBIN HANDLEY, *RETREAT INTO INJUSTICE: HUMAN RIGHTS IN AUSTRALIAN LAW* 112 (1994).

¹⁵² I use the term to indicate geographical, political, and economic marginality, as well as the resultant theoretical marginality.

¹⁵³ See Zalewski, *supra* note 127, at 21.

