Rights for Indigenous Peoples

The Struggle for Uniformity: the UN Declaration and Beyond

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The Declaration and its Origins. On 13 September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples, marking a historic moment in the advancement and protections of the rights of indigenous peoples.[1] Dr. Rodolpho Stavenhagen, UN Special Rapporteur for human rights and fundamental freedoms of indigenous people, quickly noted its significance within the international human rights system. He issued a statement soon after applauding the Declaration's adoption by the UN General Assembly: "The Declaration constitutes a fundamental landmark for indigenous peoples, and it represents their important contribution to the construction of the international human rights system."[2] Stavenhagen affirmed the unique role traditional lands play in defining the distinct political and collective nature of the rights of indigenous communities and their connection to cultural identity and the underlying spiritual values of indigenous peoples. He concluded, "The Declaration affirms this close relationship, in the framework of their right, as peoples, to self-determination in the framework of the States in which they live."[3]

The Declaration and the struggle for its adoption illustrate two critical aspects regarding the special place indigenous peoples have within the international human rights framework.

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First, the recognition of indigenous rights is anchored to a distinct cultural and political autonomy, both prior and subsequent to European contact. Second, their underlying cultural connection to traditional lands and resources is integral in shaping their political, cultural, and societal identities. Thus, as vital to their survival as distinct peoples, the international human rights system confers protections to this underlying cultural connection.

While the Declaration's adoption is a watershed achievement for the UN General Assembly, emphasizing the commitment to protect the rights of indigenous peoples, it is significant that four states both objected to and voted against the Declaration in lieu of issuing an abstention as eleven other states have done.[4] The status of indigenous peoples within these four objecting states offers important insights into the challenges the international human rights system faces in guaranteeing the protection of and defining the rights of indigenous peoples. Ironically, these countries—Australia, Canada, New Zealand, and the United States—share a common British colonial history and legal foundation, and may be referred to as the Colonial Bloc. As well, indigenous populations in each of these countries form a distinct minority against a backdrop of democratic governance by the majority, coupled with significant wealth accumulation over the development of traditional indigenous lands and resources. Professor Stephen Cornell's research, which covers comparative census data and governing systems in these countries, makes a similar observation, noting that these are "among the world's wealthiest nations" and yet indigenous populations "within their borders are in each case among their poorest."[5]

Indigenous Rights: Global Visions, Local Problems and Setbacks.

The Colonial Bloc rejected the Declaration's substantive content and corresponding duties, which are proclaimed in the preamble "as a standard of achievement to be pursued in a spirit of partnership and mutual respect." The Declaration's aspirations and principles are viewed as widely held expressions of customary international law that direct UN member states to take specific measures accordingly. Rejecting the Declaration—a nonbinding document of the UN General Assembly—demonstrates not only a cursory reliance on the states' respective laws but a resistance toward the growing body of international law on the rights of indigenous peoples. Moreover, the objections strongly suggest that the Colonial Bloc perceived the Declaration as a fetter to their abilities, under their respective laws, to acquire and exploit indigenous lands and connected natural resources. Indeed, the Colonial Bloc shares a history, characterized by findings from international human rights bodies, over their failure to meet international human rights standards in addressing the rights of indigenous peoples and indigenous communities within their territorial boundaries.[6]

This article will explore the two main factors that explain why the Colonial Bloc rejected the Declaration. First, the Declaration affects the way domestic legal systems define indigenous peoples, placing greater emphasis on their internal capacity to form a distinct collective entity. In contrast, domestic legal systems within the Colonial Bloc narrow the categories of recognized indigenous peoples and subsequently tie this recognition to specific bundles of rights. Secondly, the Declaration clarifies the positive duties of

states to deal fairly with indigenous peoples. These duties already exist within the international human rights system, but lack the clarity of purpose that is delineated in the Declaration. The institutions needed to oversee and protect these duties are generally non-existent in the Colonial Bloc. Thus, while each state varies in the degree to which it consults with indigenous peoples, the Colonial Bloc's standards and practices are not uniform with respect to the requirements of the international human rights system as set forth in the Declaration. Moreover, these duties—such as the duty to consult—are interpreted and administered differently throughout the Colonial Bloc and can fail to meet international human rights standards as a consequence. This article will argue that these duties need not create additional bureaucracy for relations among the state and indigenous peoples but can inform the goals toward which new institutions should aspire. Cooperation will improve the outcome of land and natural resource disputes by addressing issues of fairness and equity—foundational policies of the Declaration itself.

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The Colonial Bloc Pursues its Own Agenda. The UN General Assembly's adoption of the Declaration was by no means a surprise to the Colonial Bloc given the lengthy drafting process. Beginning in 1983, the Draft Declaration on the Rights of Indigenous Peoples was a central mandate of the UN Working Group on Indigenous Populations. After nearly a decade of extensive participation by numerous representatives of indigenous peoples, governments, and experts, the Draft Declaration moved to the Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission subsequently sent the Draft Declaration to the UN Commission on Human Rights. Restructured in 2006, the Commission became the UN Human Rights Council, whose immediate focus was to seek final approval of the Declaration before the General Assembly.

The Declaration's broad approach to the definition of indigenous peoples and rights is directly derived from the UN Working Group's lengthy consultation process with states and indigenous groups. It conveys within the preamble a concern by the General Assembly "that indigenous peoples have suffered from historic injustices as a result of, among other things, the colonization and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests." The Declaration goes on to recognize the "urgent need to respect and promote the inherent rights of indigenous peoples, which derive from their political, economic, and social structures, and from their cultures, spiritual traditions, histories, and

philosophies, especially their rights to their lands, territories, and resources."

While the Declaration does not contain an express provision that defines an indigenous person, its approach relies upon a shared history of colonization and dispossession as defining attributes of indigenous identity. This approach is consistent with the broad parameters found within the international human rights system, and contrasts with the Colonial Bloc members' approach.[7] Following British custom, the United States, Canada, New Zealand, and Australia have consistently emphasized the supremacy of federal, or Crown, jurisdiction in defining and dealing with indigenous populations, lands, and resources.

The North American Perspective: the United States and Canada. British policy toward indigenous peoples in North America originated in the Royal Proclamation of 1763, wherein King George asserted the exclusive authority of the British Crown to deal with Indian lands and governments. Additionally, the Proclamation expressed the Crown's intention to be the exclusive arbiter in acquiring titles to indigenous lands. This role applied specifically to land that indigenous people held in reserve—lands that had not been purchased or subject to treaty. The Proclamation stated, in part, that the Crown required that no state or private person "presume to make any purchase from the said Indians of any Lands reserved to the said Indians." However, the Proclamation also stated, "If at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name."[8]

Following the British tradition, the U.S. Supreme Court affirmed federal jurisdiction over indigenous peoples and their lands and conferred the status of a "domestic dependent nation" upon tribal governments. Beginning in 1823, the Supreme Court's Marshall Trilogy affirmed federal control over Indian affairs and lands. These decisions gave Congress the unilateral authority over subsequent cases that addressed the scope and content of tribal sovereignty over Indian lands and resources.[9] Congress can unilaterally sever or terminate recognition of indigenous peoples and extinguish their rights to self-government, lands, and resources. Indeed, this was the express policy of Congress during the termination era that lasted from 1945 to 1961 wherein legislative acts specifically removed federal recognition of numerous tribal governments. Similarly, Congress's passage of the Alaska Native Claims Settlement Act in 1971 was held by the U.S. Supreme Court in the 1998 *Venetie* decision to have revoked federal superintendence over Alaskan native villages, thereby severing federal recognition and tribal relations.[10] U.S. legal treatment of indigenous peoples diverges from the norms stated in the Declaration.

Canada's approach to federal-indigenous dealings reflects a similar pattern to the United States in that it, too, followed the British colonial custom. Canada was confederated in 1867 pursuant to the British North America Act (BNA Act). Under the BNA Act, Canada's Parliament had exclusive authority over Indians and lands held in reserve for Indians. In 1982, Canada's Constitution was repatriated and included specific protections for aboriginal peoples, delineating three categories: Indian, Inuit, and Metis. Each category carries with it a dis-

tinct set of rights and a unique federal relationship. For instance, Indians are typically defined by their exclusive governance under the federal Indian Act, which includes a federally recognized Band Council and individual membership within an Indian Registry system. This definition requires a history of federal dealings based on treaty-making, establishing a reserve with a recognized Band Council, and membership within the Canadian Indian Registry. By contrast, the Declaration promotes self-identification by collective groups of indigenous peoples. In Canada, the constitutional protections for all three groups extend to rights and freedoms "that have been recognized by the Royal Proclamation of 7 October 1763" and include notable references to the Inuit of northern Canada and the Metis.[11] The Metis are a group typically associated with the pre-Confederation era and include distinct self-governing groups that emerged from the inter-mixing of European fur traders and indigenous populations.

The federal dealings approach carries an inherent inequity for indigenous peoples because their legal status depends on a requisite federal undertaking. In Canada, this has resulted in entrenched and systemic infringement on the rights of indigenous peoples who failed to federalize. Such was the case of the Lubicon Cree—a group of indigenous people located in the resource-rich province of Alberta who were initially overlooked and subsequently excluded from the early treaty-making process but continued to live on their traditional territory. Parliament failed to provide any measure of redress for the oil lease concessions granted on the Lubicon Cree's traditional lands. This inaction led the UN Human Rights Committee to determine in the 1990 *Omniyak* case that Canada's actions threatened "the way of life and culture of the Lubicon Cree" in violation of the International Covenant on Civil and Political Rights. In this regard, Canada's argument that the Lubicon Cree did not constitute a "peoples" for lack of federal recognition failed when the Committee determined that it was not valid under international law.[12]

New Zealand and the Fate of the Maori Community. In New Zealand, the rights of Maori peoples are recognized under the 1840 Treaty of Waitangi, which limits its scope to the treaty signatories.[13] While the Treaty recognized Maori self-government and lands, its provisions were often viewed as "paper rights," as the Treaty gave way to frequent and often violent incursions by settlers. In this particular Colonial Bloc state, Crown recognition was used as a device to exclude and assimilate well into the 1870s. Following the adoption of the New Zealand Constitution Act of 1852, which established a Parliament—an institution not privy to the Treaty—a divisive history began that saw enormous tracts of communally-held Maori lands sold off.[14] The New Zealand Settlements Act of 1863, which allowed for the sale of proclaimed or designated areas, exacerbated the exclusion and assimilation of the Maori.[15] This situation continues to exist in New Zealand today. Dr. Rodolpho Stavenhagen, the UN Special Rapporteur and expert on indigenous peoples' rights, views Parliament's inability to recognize customary Maori rights as a step backward. He notes that recent legislation ignores the Maori people's customary rights.[16] This continuation of British colonial policy toward indigenous peo-

ples further explains New Zealand's rejection of the Declaration.

Australia's Aboriginal Peoples. Australia has neither a treaty nor constitutional provision that recognizes or protects indigenous peoples. Australia was colonized by the British Crown under the common law doctrine of *terra nullus*, where the conqueror assumes that conquered land is unoccupied and is therefore the possession of the conquering power. Even after the presence of aboriginal peoples had become recognized as an established fact, the *terra nullus* doctrine was used to claim that all aboriginal titles had been extinguished. Following the recognition of the rights of aboriginal peoples to aboriginal title under the High Court's 1992 ruling in *Mabo v. Queensland*, Australia has implemented a system of adjudicating native title. In the decision, the Court acknowledged the prior existence of aboriginal peoples on Australian territory and recognized their residual land rights.[17] Cases and legislative amendments following Mabo, however, have dramatically limited the degree to which aboriginal identity can attach to native title. For example, in 1999 the UN Committee on the Elimination of Racial Discrimination (CERD) held that amendments to Australia's Native Title Act discriminated against indigenous peoples by extinguishing native title and restricting their right to negotiate. Moreover, CERD observed the lack of participation by indigenous peoples in the drafting of these restrictive legislative amendments.[18] This behavior, similar to that of other Colonial Bloc countries, violates the spirit of the Declaration and explains their opposition to the growing body of customary international law.

The Colonial Bloc's rejection of the Declaration comes at a time when they each must navigate the contours of cultural difference in a global world.

Conclusion. The Declaration unquestionably forms a significant building block within the international human rights system, affirming norms and principles that ultimately shape the course of customary international law. Yet, it is not a legally binding instrument within the UN General Assembly system. Rather, as human rights scholars S. James Anaya and Siegfried Wiessner observe, the long-term implication of the Declaration is its "reflective or generative" nature.[19] That the Declaration can inform both customary and domestic law is readily apparent in the landmark decision by Abdulai Conteh, Chief Justice of the Supreme Court of Belize. On 18 October 2007, the Court held that the Government of Belize was obligated to protect the customary property rights and traditional practices of the Mayan villages of Conejo and Santa Cruz in a manner consistent with domestic constitutional and customary international law as expressed in the Declaration.[20] This type of outcome is what Colonial Bloc states had hoped to avoid by rejecting the Declaration.

The Declaration makes two important

additions to the domestic legal status of indigenous peoples within the Colonial Bloc. First, it casts a broader definition of indigenous peoples—looking more toward the common history of colonialism—compared to the narrower definition domestic law may prescribe. This aspect allows for self-identification by indigenous groups in a contemporary legal environment that may not otherwise allow for this recognition. Furthermore, it requires states to adopt positive laws that respond to the concerns of indigenous peoples as distinct, autonomous, and self-governing entities.

The foregoing analysis by no means encompasses the entirety of considerations given by Colonial Bloc countries in rejecting the Declaration; a risk inherent to any comparative analysis is the generalization of a single act. And yet, the analysis illustrates tensions common to all Colonial Bloc countries. Moreover, aside from substantive issues concerning legislative conformity, the spectre of national politics played a significant role. For instance, despite Canada's active and long-term engagement in the development of the Declaration within the Working Group setting, a recently elected Conservative minority government with transparent policies limiting indigenous rights played a significant role in its decision to reject the Declaration. This decision that did not escape direct criticism and profound disappointment by fellow Canadian Lousie Arbor, the UN High Commissioner for Human Rights and former Justice of the Supreme Court of Canada: "I am very worried that this very romantic view that we have of ourselves is not being sufficiently nourished and preserved to allow us to continue to occupy a place much larger than the one that our single voice among 192 member states of the UN would otherwise allow for."[21] The estimate of the global benefits of full GM cotton adoption for developing countries is eight times larger than the above estimate of the global economic welfare gain from complete removal of all cotton subsidies and tariffs

The Colonial Bloc's rejection of the Declaration comes at a time when they each must navigate the contours of cultural difference in a global world. The United States, in particular, should have noted that the recognition of indigenous peoples has both national and international ramifications and that cultural differences of indigenous populations influence regional governments and affect foreign policy. For states that have failed to adhere to international human rights standards thus far, it is quite likely that they view the Declaration as an additional layer of compliance inconsistent with their own inherent powers, which have been derived through conquest and colonization.

NOTES

1 UN Declaration on the Rights of Indigenous Peoples, 13 September 2007, available at http://www.ohchr.org/english/issues/indigenous/declaration.htm.

2 UN Press Release, The Office of the High Commissioner for Human Rights-Media Unit, "Adoption of Declaration on Rights of Indigenous Peoples a historic moment for human rights, UN Expert says" [Available online] Geneva, 14 September 2007 [cited September 14, 2007]; Available from http://www.unhchr.ch/huricane/huricane.nsf/view01/2F9532F220D85BD1C125735600493F0B?opendocument.

3 Ibid.

4 UN Press Release, Department of Public Information, News and Media Division, New York, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward'Towards Human Rights for All says President," and "By a vote of 143 in favor to 4 against (Australia, Canada, New Zealand, and the United States), with 11 abstentions, the Assembly adopted the UN Declaration on the

Rights of Indigenous Peoples, which sets out the individual and collective rights of the world's 370 million native peoples, calls for the maintenance and strengthening of their cultural identities, and emphasizes their right to pursue development in keeping with their own needs and aspirations." [Available online] 13 September 2007 [cited 14 September 2007]; Available from http://www.un.org/News-/Press/docs/2007/ga10612.doc.htm.

5 Stephen Cornell, "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States," *Joint Occasional Paper on Native Affairs* 02 (2006): 1.

6 Julie Ann Fishel, "Symposium: Lands: Liberties and Legacies: Indigenous Peoples and International Law: Application of International Law to the Problems of Indigenous Peoples: United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level," *American Indian Law Review* 31 (2007): 619; and see also, SLorie M. Graham, "Resolving Indigenous Claims to Self-Determination," *ILSA Int'l & Comp L* 10 (2004): 385.

7 S. James Anaya, *Indigenous Peoples in International Law* (2d ed. 2004)

8 *Royal Proclamation*, 7 October 1763, reprinted in Canadian federal statutes at R.S.C. 1985, App. II, No. 1 [Available online] The Avalon Project Yale Law School; Available from http://www.yale.edu-/lawweb/avalon/proc1763.htm.

9 *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

10 *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)

11 *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Section 35 (1) states: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

12 *Omniyak v. Canada*, UN GAOR, 45th Sess., Supp. No. 40, Annex 9, at 27, UN Doc. A/45/40 (1990).

13 Signed February 6, 1840; see The Governor General of New Zealand – New Zealand's Founding Documents; The Treaty of Waitangi; Available from http://www.gg.govt.nz/aboutnz/treaty.htm. See also, Stephen Kingsbury, "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 UTLJ 101.

14 *The New Zealand Constitution Act 1852* (15 & 16 Vict. c. 72).

15 This statute was followed by the New Zealand Settlements Act Amendment Act 1864, the New Zealand Settlements Amendment and Continuance Act 1865, the New Zealand Settlements Amendment Act 1866, the Friendly Natives' Contracts Enforcement Act 1867 and the Confiscated Lands Act 1867. See R.P. Boast, "Recognizing Multi-Textualism: Rethinking New Zealand's Legal History", 37 VUWLR 547 (2006): n 24.

16 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: MISSION TO NEW ZEALAND, 13 March 2006, E/CN.4/2006/78/Add.3, [Available online]; Available from http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/36/PDF/G0611836.pdf?OpenElement.

17 *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). For subsequent legislation on native title see , *Native Title Act 1993* (Cth), amended by *Native Title Amendment Act 1998* (Cth).

18 CERD, *Findings on the Native Title Amendment* Act 1998 (*Cth*), UN Doc ERD/C/54/Misc.40/ Rev.2 (18 March 1999) [7].

19 S. James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment" [Available online] 3 October 2007, Jurist: Legal News & Research, The University of Pittsburgh School of Law [cited October 2007]; Available from http://jurist.law.pitt.edu-/forumy/2007/10/un-declaration-on-rights-of-indigenous.php.

20 *Maya Villages of Santa Cruz and Conejo v. The Attorney General of Belize and The Minister of Natural Resources and Environment*, (claims No. 171 and No. 172) (The Supreme Court of Belize, Abdulai Conteh, C.J.C., released 18 October 2007) [Available online]; Available from http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf

21 David Ljunggren, "Canada's commitment slipping, U.N. Rights Boss Says", *The Boston Globe*, 22 October 2007, Canada section.