

# **The Weakening of the UN Declaration on the Rights of Indigenous Peoples**

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The 20<sup>th</sup> Century was characterized by the end of empires and the liberation of the Third World; however, it remains an open question whether the 21<sup>st</sup> Century will see a similar decolonization of the Fourth World: the indigenous world. Ironically, while the last century was heralded for decolonization, many indigenous peoples have “only recently been subjected to outside domination” with the expansion of state systems following the Second World War.<sup>[1]</sup> By the late 20<sup>th</sup> Century there were 3000-5000 indigenous peoples, whose sovereignty had been erased, “subsumed within... fewer than 200” states.<sup>[2]</sup> In recent years, an international declaration has been sought, in an effort to elevate the status of indigenous peoples and ensure their continued survival. Ratified in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the final product of these efforts. This Declaration was described by many as a victory and a “milestone” in international indigenous struggles.<sup>[3]</sup> Unfortunately, this milestone is fraught with problems. UNDRIP is, at best, a devastating compromise for indigenous people, and at worst, it is an insidious attempt by state actors to maintain the structures of international injustice. To support this assertion a brief history on

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the drafting process will be outlined, highlighting the many compromises which indigenous negotiators were forced to concede. Then, the purpose of state suppression of indigenous claims will be examined, giving special attention to the project of settler-states. Finally, an indigenous critique of International Relations theory will provide a loose framework for future international declarations.

When examining the drafting process which lead to UNDRIP, three periods are of particular interest: (1) The period of post-war decolonization, which incited international fervour around liberation movements. This lead directly to the second period, in which, (2) the UN decided to support the preparation of a draft on the rights of indigenous peoples. Finally, the period following the tabling of the Draft Declaration was one in which (3) states actively attempted to weaken many of the draft provisions prior to ratification.

A large portion of the UN's agenda following the Second World War was consumed by the task of facilitating a peaceful transition from an age of empires to one of independent sovereign states. As such, support for the "self-determination of peoples" is embedded in the very first Article of the UN Charter.<sup>[4]</sup> Additionally, the Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted in late 1960, intended to enable a relatively smooth transition from colonial to local rule for many states in Africa, Asia and the Pacific.<sup>[5]</sup> However, independence was granted not to individually conquered peoples, but to the "inhabitants of territories" which had been colonized.<sup>[6]</sup> Often these territories bear little relevance to the "distinct linguistic and ethnic groups" who live within the arbitrary borders drawn by colonial rulers, cutting through "heartlands, and...hearts."<sup>[7]</sup> It was in this context, during the 1970s, that indigenous peoples began demanding a recognition of sovereignty, seeking independence from the states into which they were thrown by the processes of colonization and de-colonization.<sup>[8]</sup> The UN was faced with demands by indigenous peoples for equal treatment under international law. In response to indigenous movements, the UN Working Group on Indigenous Populations (WGIP) was established in 1982, mandated to monitor the "situation of Indigenous peoples globally" and devise standards by which to shape indigenous-state relationships.<sup>[9]</sup> It was the second half of their mandate which would be a perpetual stumbling block for the WGIP.

Initially, states paid little attention to the operations of WGIP prior to the tabling of the Sub-Commission Draft Declaration on the Rights of Indigenous Peoples in 1993. This lack of state influence meant that the Draft Declaration was almost entirely the "product of indigenous peoples' representatives" and reflects their interests most accurately.<sup>[10]</sup> While the Draft Declaration is certainly the best expression of indigenous peoples' demands, two important characteristics must be noted as limiting its moral authority. The first is that any state could block the inclusion in the drafting process of indigenous peoples living within its territory if it felt compelled to do so,<sup>[11]</sup> meaning that those indigenous peoples most subjugated by state authorities were likely to be prevented from partaking in the drafting processes. Once the WGIP had tabled the Draft Declaration, a Working Group on the Draft Declaration (WGDD) was established by the Human Rights Commission to prepare the document for the General Assembly. The second limiting characteristic arose once states began to take an interest in the formation of the WGDD, because of the legal and normative implications of the word 'peoples' being linked to 'indigenous', both terms were only referred to indirectly.<sup>[12]</sup> This resulted directly in an overly fluid definition of 'indigenous' in the adopted version of UNDRIP. This fluidity enables states to easily deny indigenous status to claimants who would prove problematic.

Despite the near unanimity with which indigenous representatives supported the Draft, many state actors required what Wiessner has characterized as "a few slight accommodations" before ratifying the Declaration.<sup>[13]</sup> In actuality these accommodations were quite dramatic and came in three varieties: deletion of entire sections of the Draft, rewording of various provisions, and reinterpretation of international norms. Perhaps the most striking deletion which occurred between the Draft Declaration and the final UNDRIP was the removal of Draft Article 34. This Article would have empowered indigenous peoples to "determine the responsibilities of individuals to their communities", creating strong relationships of reciprocity.<sup>[14]</sup> At the insistence of states, individual rights trumped this Article, removing UNDRIP from the realm of defending community rights. Likewise, rewording key phrases in the Draft dramatically reduced the potential impact of UNDRIP. For example, the policy of free prior and informed consent (which is meant to underpin all indigenous-state relationships and agreements) is phrased in UNDRIP as to be interpretable as a duty only to consult.<sup>[15]</sup> With consultation replacing consent, the demands placed upon states when interacting with indigenous communities were substantially lowered. No longer requiring the approval of indigenous peoples, states need only to prove that they have consulted with them.

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Additionally, Wiessner's 'slight accommodations' require a reinterpretation of long-standing international norms. Amongst the most significant norms to change is self-determination, which had historically been understood as:

[E]stablishment of a sovereign and independent State, the free association or integration with an independent State, or the *emergence into any other political status* freely determined by a people...<sup>[16]</sup>

Throughout the processes of ratifying UNDRIP, this strong interpretation of self-determination was consistently weakened. Under the framework of UNDRIP, self-determination has been reconstituted, in the indigenous context, to mean "the right to autonomy or self-government in matters relating to their internal and local affairs."<sup>[17]</sup> Meaning that indigenous peoples are to be granted only certain administrative powers within their communities. Furthermore, Article 46(1) ensures that no forms of self-determination "external" to previously constituted state structures will be supported by UNDRIP's passage.<sup>[18]</sup> International ratification of UNDRIP was secured only by ensuring that the power to secede from existing states was denied to indigenous peoples, substantially narrowing the scope of how self-determination could be interpreted. Churchill describes this drastic reinterpretation of self-determination as a "radical disjuncture" with the precedence of international law.<sup>[19]</sup>

Despite these many reductions to the scope of UNDRIP, it still posed enough of a threat that, when the General Assembly of the UN voted on ratification, it was opposed by a block of several major states. The desire to further suppress this Declaration is understood best through three facets:

- (i) Through an examination of those states who initially voted against the Declaration.
- (ii) Through an examination of the logic of the settler-state project provides further insight into these votes.
- (iii) When UNDRIP could no longer be resisted, it was appropriated as a tool to further marginalize indigenous peoples, and so, through their inclusion in the international order as state wards.

When tabled before the General Assembly in 2007, 144 states were comfortable enough with UNDRIP to support its passage, but four states still felt threatened enough by the Declaration to vote against its adoption.<sup>[20]</sup> Canada, Australia, New Zealand and the United States (CANZUS), have each subsequently adopted the Declaration, but only after stating serious reservations. In particular, each state clarified that it views UNDRIP as an "aspirational document" which "has no legal effect" within the state, to the degree that it contravenes "democratic processes... legislation and... constitutional arrangements."<sup>[21]</sup> While UNDRIP had already been substantially weakened, and such concerns are unfounded, the fact that CANZUS felt the need to explicitly state these reservations speaks to their deep-seated fear of indigenous peoples' claim to sovereignty.

The fear so many states, especially the CANZUS block, have is that UNDRIP may have the power to legitimize indigenous peoples as international actors. This possibility caused an "existential crisis" in CANZUS, because it challenged their foundation as settler-states.<sup>[22]</sup> Each one of these states was built through a process of violent colonial expansion, which dispossessed indigenous peoples of their traditional territories and sovereignty. This expansion was not built upon either of the European doctrines legitimizing empire: *terra nullius* (unclaimed territory) or after *jus in bello* (a proper war). Instead, the creation of the CANZUS states was predicated on the notion that the existence of indigenous peoples is a "temporary" condition.<sup>[23]</sup> Settlers in these territories justified their expansion on the grounds that indigenous communities were an artifact of the past, a phase in human development and that eventually these peoples would civilize themselves just as Europeans had. Therefore, even UNDRIP's tepid recognition that indigenous peoples have the right to live in their traditional ways is a challenge to the foundational notion of legitimization for CANZUS states. Once the myth of stages of cultural development is discarded, the relationship of the CANZUS states with indigenous peoples is understood to be parasitic. The establishment and welfare of each of these states "comes at the expense" of indigenous peoples, resulting in their "containment or eradication."<sup>[24]</sup> Put differently, the strength of a CANZUS state is directly correlated to the weakness of the indigenous peoples living within its borders.

In the 21<sup>st</sup> Century the traditional tactics of state-sponsored ethnic cleansing and genocide are widely condemned.

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Instead, states must rely on their power to further marginalize indigenous voices. As such, all attempts are made to bring indigenous people into the state-centric framework of international law. It is by this process of inclusion that states want to “erase [indigenous] difference,”<sup>[25]</sup> making them appear as a part of the international order rather than its antithesis. UNDRIP is the ultimate expression of this desire to incorporate indigenous voices. Exemplified by the repeated derogation of the Draft Declaration during the ascension processes of UNDRIP, the final Declaration is “more concerned with the broad human rights” of indigenous peoples than with their survival “as distinct peoples.”<sup>[26]</sup> This aversion to the preservation of a distinct people is because such a status demands the peoples’ right to full self-determination; such a recognition would raise the specter of indigenous secessionist movements. As such, a Declaration defending basic human rights is “less threatening” to the international state system than one which supports a strong interpretation of distinct indigenous peoples.<sup>[27]</sup> Therefore, UNDRIP must be seen primarily as a tool for further stabilizing the state-centric international order, while providing minimal protection for indigenous individuals, ignoring indigenous peoples.

In addition to focusing on human rights at the expense of rights as distinct peoples, UNDRIP effectively positions indigenous peoples as secondary actors in international law. Evidenced by its rejection of indigenous secession, UNDRIP is a Declaration which conceives of the international system as being comprised primarily of states. This is clear even in the text of UNDRIP, which refers to “States”, capitalizing the word as a denotation of their “dominance” over the international order.<sup>[28]</sup> Indigenous peoples, when they are recognized at all, are deemed to be “a special object of international law.”<sup>[29]</sup> Meaning indigenous peoples are seen as a special interest, who are to be managed and protected by their respective states as frail dependents.

As the first major Declaration on indigenous peoples from the General Assembly, and one which has received wide acclaim, UNDRIP has the systemic legitimacy to “shape our *perception*” of justice in global politics.<sup>[30]</sup> The rights contained in the Declaration appear natural and immutable, but anything which is beyond the scope of the Declaration is alien or threatening. This is, undoubtedly, the primary benefit for states of having watered-down the Draft Declaration prior to ratification of UNDRIP; conceiving of indigenous peoples as international agents becomes an impossibility within the existing legal framework.

However, the current international order is not immutable, a fundamental re-imagining must occur if indigenous peoples are ever to attain justice. This must encompass a two-part process. The first is a deconstruction of International Relations theory, with special attention paid to the faults of liberal theory. Additionally, an alternative, indigenous framework must be provided. To illustrate this the example of treaties will be examined from an indigenist perspective.

The initial position is to reject the discourse of human rights, as inappropriate in the context of indigenous peoples. Watson has asserted that the human rights paradigm “arises out of imperialism”, rights are a necessity created by the “destructive power and violence” of the colonial project.<sup>[31]</sup> In addition to being a reaction to colonialism, the human rights discourse has been appropriated by states to facilitate further colonization. This occurs through the “assimilationist tendencies” of the discourse,<sup>[32]</sup> which focus on preserving the common at the expense of what makes communities unique. If colonialism is truly to end, the homogenizing mission of human rights must be abandoned. This can only be accomplished with the recognition that International Relations theory is, at best, a “parochial” form of knowledge, contingent upon a particular (Eurocentric) conception of history, which is now being employed as a tool of normalization globally.<sup>[33]</sup> As such, these theories (which currently structure state action) are no more natural than anything which would be proposed by indigenous theorists. The only difference is that this Eurocentric knowledge “works violence” on indigenous knowledge by presenting itself as definitive while everything else is Othered.<sup>[34]</sup> However, the violence and Othering which states bring against indigenous peoples is not wholly discursive. In a 1987 study it was noted that of the 120 armed conflicts in the world, eighty-six were “being waged by states against” indigenous peoples.<sup>[35]</sup> The overwhelming balance of violence in favour of states demands that all those concerned with international justice listen carefully to the voices of the victimized and marginalized indigenous peoples of the world.

Treaties which exist between settler-states and indigenous peoples were once viewed to have the status of international law, and have been eroded from that status only in the past several decades.<sup>[36]</sup> The treaties which

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established many modern states have been relegated by International Relations theory to the status of inter-national law; meaning laws which exist between nations subject to the same sovereign authority. A critical indigenous perspective demands first and foremost that treaties be returned to the status of international law. Such an interpretation was once the norm in international affairs, and it is widely understood that “once bestowed” recognition ought to be “irrevocable.”<sup>[37]</sup>

Therefore, what indigenous people demand is not unfeasible; rather, it is outside the realm of the liberal paradigm of International Relations theory. When confronting the situation of indigenous peoples, in order to maintain internal consistency, liberal theories of rights and justice must function “ahistorically.”<sup>[38]</sup> While it is possible for liberal theories to understand that certain indigenous peoples are self-governing, it cannot recognize the special rights which apply to all indigenous peoples as independent, sovereign nations. This recognition is only possible through a critical indigenous perspective, and it is only through this understanding that true justice can ever be achieved for indigenous peoples. Dale Turner has made clear that the first step towards breaking the hegemony of International Relations theory is by “listening to... the voices of [indigenous] peoples” around the globe.<sup>[39]</sup> A multiplicity of critical indigenous perspectives on international relations exist wherever indigenous peoples survive colonialism, it is simply a matter of ensuring that they can be heard.

The process by which the international community arrived at UNDRIP was long and demanded enormous concessions from indigenous advocates. These concessions, while necessary for passage of the Declaration, came as a result of states defending their privilege in the international system. This state repression is especially prevalent in the context of the CANZUS block, which are historically constituted as settler-states. In contrast to these tendencies, the critical indigenous perspective offers a powerful critique of the liberal theories which underpin International Relations theory and by extension inform UNDRIP. Ultimately, UNDRIP must be understood to be of little relevance to indigenous peoples in their struggle for survival as distinct sovereign communities. The Declaration’s overly individualistic and state-centric provisions leave it impotent in the face of the collective identity problems facing indigenous communities. Unfortunately, labeling UNDRIP a failure is an act of dishonesty, as it achieves exactly what its state-centric authors desire: the defusing of indigenous authority.

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<sup>[1]</sup> Franke Wilmer, "Where You Stand Depends on Where You Sit," in *Indigenous Diplomacies*, ed. J. Marshall Beier (New York: Palgrave MacMillan, 2009), 189.

<sup>[2]</sup> Ward Churchill, "A Travesty of a Mockery of a Sham: Colonialism as 'Self-Determination' in the UN Declaration on the Rights of Indigenous Peoples," *Griffith Law Review* 20, no. 3 (2011): 528, <http://proquest.com/> (accessed March 24, 2013).

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<sup>[5]</sup> Churchill, 532.

<sup>[6]</sup> Wiessner, "Indigenous Sovereignty," 1150.

<sup>[7]</sup> *Ibid.*

<sup>[8]</sup> Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights," *The European Journal of International Law* 22, no. 1 (2011): 143, <http://www.proquest.com/> (accessed March 23, 2013).

<sup>[9]</sup> Churchill, 538.

<sup>[10]</sup> Mauro Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead," *The International Journal of Human Rights* 16, no. 1 (2012): 10,

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<sup>[12]</sup> Ibid., 97.

<sup>[13]</sup> Wiessner, "Indigenous Sovereignty," 1142.

<sup>[14]</sup> Engle, 149.

<sup>[15]</sup> Lorie M. Graham and Siegfried Wiessner, "Indigenous Sovereignty, Culture, International Human Rights Law," *The South Atlantic Quarterly* 110: no. 2 (Spring 2011): 412, <http://proquest.com/> (accessed March 22, 2013).

<sup>[16]</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, in Churchill, 534. (emphasis mine).

<sup>[17]</sup> Engle, 145.

<sup>[18]</sup> Ibid., 147.

<sup>[19]</sup> Churchill, 526.

<sup>[20]</sup> Aileen Moreton-Robinson, "Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples," *Griffith Law Review* 20: no. 3 (2011): 643, <http://proquest.com/> (accessed March 24, 2013).

<sup>[21]</sup> Ibid., 649.

<sup>[22]</sup> Ibid., 647.

<sup>[23]</sup> Steven T. Newcomb, "The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination," *Griffith Law Review* 20, no. 3 (2011): 589, <http://proquest.com/> (accessed March 23, 2013).

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<sup>[25]</sup> Ibid., 632.

<sup>[26]</sup> Irene Watson, "The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where to From Here?" *Griffith Law Review* 20, no. 3 (2011): 507, <http://proquest.com/> (accessed March 23, 2013).

<sup>[27]</sup> Engle, 161.

<sup>[28]</sup> Newcomb, 581.

<sup>[29]</sup> Watson, "Aboriginal(ising)," 631.

<sup>[30]</sup> Newcomb, 602.

<sup>[31]</sup> Watson, "Aboriginal(ising)," 625

<sup>[32]</sup>

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Engle, 151.

<sup>[33]</sup> J. Marshall Beier, "Forgetting, Remembering, and Finding Indigenous Peoples in International Relations," in *Indigenous Diplomacies*, ed. J. Marshall Beier (New York: Palgrave MacMillan, 2009), 25.

<sup>[34]</sup> Ibid., 12.

<sup>[35]</sup> Churchill, 530.

<sup>[36]</sup> Watson, "The 2007 Declaration," 510.

<sup>[37]</sup> Churchill, 542.

<sup>[38]</sup> Turner, 67.

<sup>[39]</sup> Dale Turner, *This Is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006), 59.

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