

Aboriginal Rights and Our Common Future: The Perils of Endorsing the UN Declaration on the Rights of Indigenous Peoples

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On September 13, 2007, the General Assembly of the United Nations adopted its Declaration on the Rights of Indigenous Peoples (“the Declaration”). At the time, the Declaration was widely supported as a landmark document for indigenous-non-indigenous relations.¹ The office of Ban Ki-moon, the Secretary-General of the United Nations, called it “a triumph for indigenous peoples around the world” and noted that it “mark[ed] a historic moment when UN Member States and indigenous peoples . . . reconciled with their painful histories and . . . resolved to move forward together on the path of human rights, justice and development for all.”² The document’s importance also has been recognized by the Canadian Political Science Association. In 2011, the “Race, Ethnicity, Indigenous Peoples and Politics” section of the Association’s conference organized two workshops on “The State, Indigenous Self-determination and the United Nations Declaration on the Rights of Indigenous Peoples”. These workshops were proposed so that association members could provide sustained consideration of “the importance of the document to the aspirations of Indigenous communities, as well as its potential role in changing the landscape for state policy-making on Indigenous issues”.³

But how will the Declaration lead us on “the path of human rights, justice and development for all” promoted by the United Nations? All positive reactions to the signing of the Declaration fail to consider the exclusive character of indigenous⁴ rights, and the negative consequences of affirming, recognizing, and acknowledging such legal entitlements. It will be shown that the Declaration, in fact, confuses indigenous rights with common human needs and aspirations, and this will be an obstacle to developing the consciousness that is needed to achieve the more cooperative and socially just world that the Declaration claims to support. Rights, which are not shared by all, are privileges, and therefore many of the indigenous political demands that are being celebrated by the Declaration would discriminate against all those who have not established their ancestral ties to a territory. These aristocratic sentiments are not conducive to eliminating social conflict since they serve to inhibit the development of harmonious relations between indigenous and non-indigenous people. The Declaration’s uncritical promotion of “difference” for its own sake also isolates indigenous peoples from wider social interaction, productive contribution and intellectual collaboration. “Changing the landscape” of policy-making on indigenous issues through implementing the Declaration, therefore, would justify the

¹ James (Sa’ke’j) Henderson, for example, notes that “this remarkable vote formally brought to an end the nation-states’ history of oppression of Indigenous peoples”. Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008), p. 9.

² Quoted in Christopher J. Fromherz, “Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-determination, and the United Nations Declaration on the Rights of Indigenous Peoples”, *University of Pennsylvania Law Review*, 156(1341), 2008.

³ <http://www.cpsa-acsp.ca/pdfs/2011Programme.pdf> [accessed March 2011].

⁴ The term “indigenous” is used in this paper to refer to the original inhabitants of lands when used in the international context. The term “aboriginal” is used when discussing indigenous peoples in Canada.

current marginalization of the indigenous population and exacerbate ethnic grievances, resentment and social conflict.

Adopting the United Nations Declaration

The United Nations Declaration on the Rights of Indigenous Peoples is a political document; unlike a convention, it is not a text that is considered to be binding upon its signatories.⁵ It contains 46 articles that make assertions about the proper relations between indigenous peoples and the states in which they inhabit. These assertions are meant to show how the recognition of indigenous rights can be equated with a country's respect for human rights,⁶ thereby encouraging "the codification of indigenous rights in national constitutions and legal systems".⁷

The indigenous rights specified in the Declaration are *sui generis*⁸ (legally unique) – a consequence of the attempt to apply the rights developed in other United Nations documents to the special historical circumstances of the global indigenous population. The Declaration maintains that "indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such".⁹ Attempting to protect both indigenous equality and indigenous difference means that two very divergent kinds of rights are specified - freedom from discrimination and the right to self-determination.¹⁰ The two kinds of human rights are seen as being related to one another, in that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State".¹¹ Indigenous rights, therefore, attempt to legitimate indigenous efforts to both participate in, and to isolate themselves from, the activities of the country in which they live.

⁵ Governments violating convention standards can be censured by the United Nations. Nancy Flowers (ed), "Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights", Appendix 3, <http://www1.umn.edu/humanrts/edumat/> [accessed March 2011].

Joanna Harrington notes the fact that Canada, Australia, New Zealand, Columbia, the United Kingdom, Bangladesh, Guyana, and Suriname, when voting on the Declaration, all noted that it was their understanding that the document was a political statement, not a legally binding text. Harrington points out these circumstances "since members of the bar have a professional and ethical obligation to avoid misleading a court (and by extension other interested persons) by omitting reference to the voting record and official explanations of vote and position (known "in the trade" as "EOVs" and "EOPs") relating to the adoption of a resolution text. Unfortunately, it is too often the case, that the political output of the UN is cited to a Canadian court as if a source of international law". Harrington, "Canada and the United Nations Human Rights Council: Dissent and Division", *UNBLJ* 60, 2009. The view that the Declaration is not binding is challenged by Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 82. Henderson maintains that the non-binding character of the Declaration is contradicted by the wording of the Declaration itself.

⁶ Kiri Rangi Toki, "What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples", *Te Mata Koi: Auckland University Law Review*, 16, 2010, pp. 244-245 and Lola Garcia-Alix and Robert K. Hitchcock, "A Report from the Field: The Declaration on the Rights of Indigenous Peoples – Implementation and Implications", *Genocide Studies and Prevention*, 4(1), April 2009, p. 106.

⁷ Alpa Shah, "The Dark Side of Indigeneity?: Indigenous People, Rights and Development in India", *History Compass*, 5(6), 2007, p. 1806.

⁸ Mauro Barelli, "The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime", *Human Rights Quarterly*, 32(4), November 2010.

⁹ United Nations General Assembly, "United Nations Declaration on the Rights of Indigenous Peoples", Agenda Item 68, September 7, 2007.

¹⁰ The Declaration maintains that "Indigenous peoples...have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity". Indigenous people also, however, "have the right to self-determination" and "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

¹¹ United Nations General Assembly, "United Nations Declaration on the Rights of Indigenous Peoples",

The unique character of indigenous rights was the result of various developments in other United Nations' documents. A number of United Nations forums have discussed the treatment of indigenous peoples. These discussions evolved from support for integration and non-discrimination to indigenous cultural preservation and autonomy. The conclusions of these discussions were that, in order to ensure consistency in United Nations human rights documents, indigenous groups should be perceived as having the right to self-determination.¹² As Xanthaki points out, the emerging view internationally is that "in essence, the extent of [indigenous peoples' right to self-determination] is no different from that of any other current beneficiary of the right. This is a major step forward: international law and practice have never before agreed to recognise the unqualified right of self-determination to sub-national groups".¹³

One of the most important developments in the United Nations' conceptualization of indigenous rights can be seen in the two conventions developed by the International Labour Organization (ILO).¹⁴ The Indigenous and Tribal Populations Convention, 1957 (no. 107), had integration as a goal; it referred to "indigenous populations" and assumed that they "were temporary societies destined to disappear". The ILO's 1989 Convention on Indigenous and Tribal Peoples in Independent Countries (no. 169), on the other hand, maintained that "national governments should allow indigenous peoples to participate in the making of decisions that affect them, that they should set their own development priorities, and that they should be given back lands that they traditionally occupied".¹⁵ It was perceived as replacing the "patronizing and assimilationist... approach" of the 1957 convention by "removing... integrationist undertones".¹⁶ Instead of integration, ILO Convention no. 169 promoted ethnic and cultural diversity, referred to "indigenous peoples" (not indigenous populations), and assumed that indigenous groups were permanent societies.¹⁷

This transformation in thinking was due, in part, to the formation of the United Nations Working Group on Indigenous Populations in 1982.¹⁸ The Working Group "represented the first visible sign of the new era"¹⁹ and "was charged with reviewing developments affecting the rights of indigenous peoples and with producing a set of human-rights standards relating to indigenous peoples".²⁰ It was the Working Group, in fact, that, with the unprecedented involvement of international indigenous groups, was the major United Nations body involved in the drafting of the Declaration over a twenty year period.²¹ It also urged the formation of the Permanent Forum on Indigenous Issues, which was created in April 2001. The Forum was formed to "serve as an

¹² Daes, "An overview of the history of indigenous peoples", pp. 24-25 and Magnarella, "The evolving right of self-determination of indigenous peoples", pp. 425-6.

¹³ Alexandra Xanthaki, "Indigenous Rights in International Law Over the Last 10 Years and Future Developments", *Melbourne Journal of International Law* 10, 2009.

¹⁴ Barelli, "The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime", p. 954 and Kiri Rangi Toki, "What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples", 246.

¹⁵ Adam Kuper, "The Return of the Native", *Current Anthropology* 44(3), June 2003, pp. 389-90; Paul J.

Magnarella, "The Evolving Rights of Self-Determination of Indigenous Peoples", *St Thomas Laws Review* 14, 2001.

¹⁶ Roderic Pitty, "Indigenous Peoples, Self-Determination and International Law", *The International Journal of Human Rights*, 5(4), Winter 2001; Biko Nagara, "The Long Path Towards Recognition", *UN Chronicle*, 4, 2003.

¹⁷ www.ilo.org [accessed March 2011].

¹⁸ See Henderson, *Indigenous Diplomacy and the Rights of Peoples*, pp. 41-54.

¹⁹ Barelli, "The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime", p. 954.

²⁰ Garcia-Alix and Hitchcock, "A Report from the Field", p. 101.

²¹ Erica-Irene A Daes, "An overview of the history of indigenous peoples", *Cambridge Review of International Affairs*, 21(1), March 2008

advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights”.²²

While the Declaration eventually recognized the right of indigenous peoples to self-determination, it also was anxious to affirm the sovereignty of those states in which indigenous populations were embedded. The last article of the document, for example, notes that “nothing in this Declaration may be interpreted... as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”.²³ The Declaration, therefore, is an odd document; indigenous self-determination is recognized but perceived as being “internal” (attempts to limit state intervention in indigenous affairs),²⁴ not “external” (asserting indigenous independence within the state system).²⁵

The Declaration’s concern with supporting the sovereignty of states with indigenous populations was the result of a political compromise that emerged out of twenty years of negotiations.²⁶ These negotiations were difficult and protracted because states were concerned about the implications of recognizing an indigenous right to self-determination.²⁷ In 2006, Australia, New Zealand and the United States maintained that the right of self-determination “could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States”.²⁸ It was maintained that recognition of a right to self-determination for indigenous peoples also could have a significant impact on a state’s prosperity because “if indigenous peoples constitute a ‘people’ for the purpose of self-determination, they may have the right to freely dispose of their natural wealth and resources. This could have far-reaching implications for the economic well-being of a state, especially where the group concerned is territorially cohesive, concentrated in an area rich in natural resources, and claiming the right to self-determination in order to secede from the state”.²⁹

A Tribal Right to Self-Determination?

According to Erica-Irene Daes, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations from 1984-2001, “the right of peoples and nations to self-determination is a fundamental human right... and a prerequisite to the fundamental enjoyment of

²² <http://www.un.org/esa/socdev/unpfii/> [accessed May 2011].

²³ General Assembly, “UN Declaration”, p. 12.

²⁴ “Internal sovereignty” is defined as “the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. United Nations General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples”.

²⁵ According to Daes, the indigenous right to self-determination “was used in its internal character, that is, short of any implications that might encourage the formation of independent states”. Daes, “An overview of the history of indigenous peoples”, p.18.

²⁶ Megan Davis, “Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples”, *Melbourne Journal of International Law*, 9, 2008.

²⁷ Harrington, “Canada and the United Nations Human Rights Council: Dissent and Division”, p. 107.

²⁸ Fromherz, “Indigenous Peoples’ Courts”; and Dean B. Suagee, “Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?”, *American Indian Law Review* 21(2), 1997. The election of the Conservative government in Canada also resulted in opposition to the Declaration, but the concerns expressed were somewhat different.

²⁹ Helen Quane, “The Rights of Indigenous Peoples and the Development Process”, *Human Rights Quarterly*, 27(2), May 2005.

all human rights”.³⁰ Self-determination is so fundamental, in fact, that it is perceived as being “the river in which all other rights swim”.³¹ Therefore, it was the increasing international recognition that indigenous groups were “peoples”, with the right to self-determination, which solidified the conceptualization of indigenous rights as human rights.

Discussions about the Declaration generally assume that “it is unquestionable that indigenous groups are ‘peoples’ with the right to self-determination”.³² This is asserted objectively by claiming that indigenous groups are similar to colonized nations that have the right to self-determination. It is explained that indigenous peoples “have a legal personality, territorial security, international responsibility” and are identified as “peoples” in “every social, cultural and ethnological meaning of this term. They have their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have so long lived”.³³ It is noted that, before contact, indigenous and non-indigenous populations had separate histories for millennia and that, after colonization, “they did not have an opportunity to participate in designing the modern constitution of the states in which they live, or to share, in any meaningful way, in national decision-making”.³⁴ This long history of separation and marginalization is used to justify indigenous claims to self-determination, and to show how their aspirations are similar to other anti-colonial struggles.

In addition to trying to achieve consistency in United Nations documents pertaining to the rights of colonized peoples, the recognition of the “indigenous conception of sovereignty” is supported subjectively by indigenous assumptions of pre-existing rights. It is maintained that indigenous rights to self-determination or self-government are “inherent” because “indigenous peoples also have rights deriving from the precolonial legal order” and “it could be assumed that a modern political and legal relationship between the indigenous peoples and the state is derived from those pre-existing rights”.³⁵

But the concept of inherency is at odds with the migrations and development of humanity. This is why attempting to understand the history of human migrations in the New World is one of the most contested areas of investigation in Native Studies programs; knowledge about migrations has the potential to threaten rights that are justified by the length of time residing in a territory. As the anthropologist Adam Kuper points out, “if [indigenous] ancestors were themselves immigrants, then perhaps the Cree might not after all be so very different from the Mayflower’s passengers or even the huddled masses that steamed across the Atlantic in the 1890s. To be sure, the great population movements from Siberia across the Bering Straits began a very long time ago, but it was still relatively late in the history of the colonization of the world by fully modern humans”. Kuper goes on to point out that “precisely whose ancestors came and when may also be problematic, and, of course, over the centuries communities migrated, merged, died out, or changed their languages and altered their allegiances...it cannot be doubted that some of the First Nations were not merely immigrants but actually colonizers”.³⁶

The right to autonomy based upon pre-existing customs and practices has not been recognized universally, as has been shown by many historical examples of displacement and expropriation

³⁰ Daes, “An overview of the history of indigenous peoples”, p. 7.

³¹ Michael Dodson, quoted in Craig Scott, “Indigenous Self-Determination and Decolonization of the International Imagination: A Plea”, *Human Rights Quarterly*, 18(4), 1996, p. 814.

³² Daes, “An overview of the history of indigenous peoples”, p. 13.

³³ Daes, “An overview of the history of indigenous peoples”, p. 24.

³⁴ Daes, “An overview of the history of indigenous peoples”, p. 13.

³⁵ Daes, “An overview of the history of indigenous peoples”, p. 8.

³⁶ Kuper, “The Return of the Native”, p. 392.

in Europe and elsewhere; therefore, indigenous “inherent rights” often must be justified with additional references to spiritual beliefs. In the case of Canada, for example, the National Indian Brotherhood’s “Declaration of First Nations” claimed that “we the Original Peoples of this Land know the Creator put us here”; “the Creator has given us the right to govern ourselves and the right to self-determination”; and “the rights and responsibilities given to us by the Creator cannot be altered or taken away any other Nation”.³⁷

In short, indigenous peoples are often perceived as having the right to self-determination because they claim that they do. Representatives of indigenous organizations have “argued that it was not for governments to determine who constituted a nation or a people, since peoples were entitled to decide for themselves”.³⁸ As Erica-Irene Daes has pointed out, “Indigenous representatives have gazed at ‘self-determination’, ‘autonomy’, ‘self-government’ and ‘sovereignty’ in both domestic and international fora for many decades. Indigenous peoples have also declared that the right to lands, territories and natural resources is the basis for their collective survival and thus inextricably linked to their right to self-determination”.³⁹ According to Maivân Clech Lãm,

the message indigenous peoples deliver is a simple one: their ability to survive as distinctive peoples is inextricably tied to their right to occupy their traditional territories and control their resources. Translating the rights language of the message into its political correlate, indigenous peoples are in fact claiming territoriality, an attribute normally associated with sovereign statehood or independence to which, paradoxically, only a few aspire.⁴⁰

“Cultural survival” is equated with the continued physical existence of indigenous populations, leading indigenous representatives to “insist that their rights to self-determination, and to control over territories and resources they traditionally occupied or used, be memorialized in instruments of international law”.⁴¹

Any questioning of the idea that indigenous groups are “peoples”, with rights to “self-determination” and “sovereignty”, in fact, is seen as directly challenging the aspirations of an oppressed group, and thus perceived to be a form of prejudice. It is noted that “Indigenous peoples are systematically opposing the assumption that they are not entitled to the same rights as other ‘peoples’, insisting that this is a racist policy and practice”.⁴² In the human rights literature, these perceived racially discriminatory attitudes are often referred to as the “salt water” or “blue water” theory.⁴³ In this “theory”, the United Nations “limited decolonization to overseas territories, as opposed to internal collectives or the enclave territories”. It is asserted that the latter were ignored because of the threat that they would pose to white settler interests.

³⁷ Cited in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), appendix B, p. 359. I have discussed this basis of the “inherent” nature of indigenous rights in more detail elsewhere. See Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen’s University Press, 2008), p. 113.

³⁸ Daes, “An overview of the history of indigenous peoples”, p. 13.

³⁹ Daes, “An overview of the history of indigenous peoples”, p. 8.

⁴⁰ Maivân Clech Lãm, “Remembering the Country of their Birth: Indigenous Peoples and Territoriality”, *Journal of International Affairs*, Spring 2004, 57(2), Spring 2004, p. 130.

⁴¹ Lãm, “Remembering the Country of their Birth”, p. 131.

⁴² Daes, “An overview of the history of indigenous peoples”, p. 11.

⁴³ Chidi Oguamanam, “Indigenous Peoples and International Law: The Making of a Regime”, *Queen’s Law Journal*, 30, 2004.

Supporters of indigenous rights argue that this is why indigenous peoples were, for most of the 20th Century, “the forgotten people of international law”.⁴⁴

Equating indigenous rights with human rights has even resulted in arguments asserting that to deny indigenous rights is to deny that indigenous people are fully human. As Craig Scott, a law professor at the University of Toronto, puts it: “self-determination of peoples, as the UN has many times declared, is a *human* right... Yet, some peoples are still being viewed as benefiting from this right while others, including peoples who are also indigenous peoples, are not. Some are human; some are not. Harsh as it sounds, this is what it amounts to”.⁴⁵ James (Sa’ke’j) Youngblood Henderson even maintains that attempts to clarify the definition of indigenous peoples amounts to questioning their humanity.⁴⁶

But it is important to point out that a fundamental characteristic of the demands of indigenous groups is that they are not seeking secession – a fundamental aspect of non-indigenous struggles for self-determination. As Corntassel and Primeau point out, “essentially, the struggle between indigenous groups and state actors in the international system does not revolve around the extension of the right of self-determination to these groups as traditionally conceived under international law”. Instead, they are proposing “to wield greater control over matters such as natural resources, environmental preservation of their homelands, education, use of language, and bureaucratic administration...in order to ensure their group’s *cultural preservation and integrity*” [emphasis in original].⁴⁷

Therefore, just because indigenous rights activists say that “their right is no different from that of any other current beneficiary of the right”, doesn’t mean that this is the case. Saying that indigenous peoples “don’t aspire” to secession is a distortion, because it makes it appear that this is a choice, when there is actually a lack of capacity to secede. As Abdulgaffar Peang-Meth, a political science professor at the University of Guam, has pointed out, “self-determination is defined as the right to split from a national state, but in practice an aggrieved group has no hope to attain that right unless it is capable and prepared politically, economically, and militarily to fight for it”.⁴⁸ He goes on to note that

leaders of indigenous peoples know that their campaigns to remove themselves from what they termed "colonization" in the United States and Canada, or Australia and New Zealand, will not materialize. The time for "decolonization," in the sense of a Third World country's setting itself free and becoming independent of a foreign power, is essentially over for precolonial peoples.

This is because, according to Peang-Meth, “the proclamation of ‘self-determination’ within a larger state contradicts the concept of national sovereignty of states and is not self-determination”. Richard Mulgan, an Australian political scientist, puts forward a similar view when he argues that “almost by definition ... indigenous peoples cannot attain full independence but must find their future within a country where the descendants of the later arrivals are dominant”. Because of this, Mulgan maintains that “full self determination, in the sense of

⁴⁴ Roderic Pitty, “Indigenous Peoples, Self-Determination and International Law”, *The International Journal of Human Rights*, 5(4), Winter 2001.

⁴⁵ Scott, “Indigenous Self-Determination and Decolonization of the International Imagination”, p. 817. This view is also expressed by Wilton Littlechild. See Littlechild, “When Indigenous Peoples win, the whole world wins”, in Claire Charters and Rudolpho Stavenhagen (eds), *Making the Declaration Work*, pp. 372, 374.

⁴⁶ Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 42.

⁴⁷ Jeff J. Corntassel and Tomas Hopkins Primeau, “Indigenous ‘Sovereignty’ and International Law: Revised Strategies for pursuing ‘self-determination’”, *Human Rights Quarterly*, 17(2), 1995.

⁴⁸ Abdulgaffar Peang-Meth, “The Rights of Indigenous Peoples and Their Fight for Self-Determination”, *World Affairs*, 164(3), Winter 2002.

complete independence from the dominating people and government, is simply not possible”.⁴⁹ Asch and Samson, while supporting the Declaration, agree that majority rule cannot become a “tool of liberation” for indigenous peoples because they “constitute a small, relatively powerless segment of the population...”.⁵⁰ “Indigenous self-determination”, in fact, is really not self-determination at all. As Mulgan points out, “though we can talk readily of degrees of autonomy and devolution, there are no degrees of sovereign statehood. A people either has it or does not have it. Thus, the idea of ‘self-determination within a wider state’ or ‘self-determination under a wider law’ is in principle self-contradictory”.⁵¹

Furthermore, it is important to recognize that self-determination is an aspiration of nations, while indigenous groups are tribal in character. Quantitatively, there are vast differences in productivity, size and complexity between nations seeking independence and tribes. The qualitative difference pertains to the fact that indigenous groups are organized according to kinship, rather than property relations and territory. Because of their particular historical and material circumstances, indigenous peoples do not occupy a discrete territory,⁵² but are dispersed across the countries in which they are embedded. Indigenous peoples either live in urban centres, or are located on relatively small parcels of land, most of which are isolated from wider economic and social processes. These communities are characterized by a high level of welfare dependence in comparison to other groups, and with the exception of a few resource rich areas, little productive activity exists. Indigenous communities are dependent upon the state in which they are embedded for financial support and cannot sustain themselves independently in the international sense.⁵³ Indigenous groups, therefore, cannot be “part of the international community”, as some have asserted.⁵⁴

Indigenous rights, therefore, do not include aspirations to self-determination, and they cannot be considered human rights on this basis. Instead, indigenous rights are a special kind of collective right. The Declaration even refers to indigenous rights thusly, promoting them on the basis that they are “indispensable for [indigenous] existence, well-being and integral development as peoples”. This circumstance raises questions about the extent to which indigenous rights, as collective rights, are human rights. Human rights are rights that all people share. How can indigenous rights – a collective right that excludes non-indigenous people – be a *human* right?

Collective Human Rights?

The question of whether or not collective rights can be human rights was one that was debated for a number of years in the United Nations.⁵⁵ Before the Declaration was signed, there was a

⁴⁹ Richard Mulgan, “Should Indigenous Peoples have Special Rights?”, *Orbis*, Summer 1989.

⁵⁰ Michael Asch and Colin Samson, “More on the Return of the Native”, *Current Anthropology*, p. 146.

⁵¹ Mulgan, “Should Indigenous Peoples Have Special Rights”, p. 383.

⁵² The tribal character of indigenous societies explains why their territorial boundaries are fluid. As Kuper notes, “Canadian courts have found that it is difficult to establish the boundaries of lands hunted by former generations or to grasp how ancestral populations understood rights to resources and rights in land”. Kuper, “The Return of the Native”, p. 391. As Andrew Woolford points out, it is “imperfect” to designate indigenous peoples as ‘nations’, because, unlike European notions of nationhood that presuppose fixed national boundaries, Aboriginal understandings of territory tend to be more fluid. For example, neighboring Aboriginal groups often held ‘shared territories’ that allowed for multi-community usage of lands”. Andrew Woolford, “Ontological Destruction: Genocide and Canadian Aboriginal Peoples”, *Genocide Studies and Prevention* 4(1), April 2009, p. 88.

⁵³ I have discussed this point in detail elsewhere. For an elaboration see Widdowson and Howard, *Disrobing the Aboriginal Industry*, pp. 113-118.

⁵⁴ See, for example, Patrick Macklem and Ed Morgan, “Indigenous Rights in the Inter-American System”, *Human Rights Quarterly*, 2, May 2000, p. 572.

⁵⁵ Harrington, “Canada and the United Nations Human Rights Council”, p. 109.

“lack of progress in protecting universal recognition of group rights”⁵⁶ – a problem that is rooted in the “individualistic nature of existing human rights discourse”.⁵⁷ The opposition was partially due to the fact that the autonomy demanded by holders of collective rights could “pose difficulties for the state, particularly when the state wants to exploit natural resources in an autonomous region where the indigenous people oppose such development”,⁵⁸ but it was also due to fears that collective rights might infringe upon the individual rights of indigenous and non-indigenous citizens. The United Kingdom, for example, noted that

with the exception of the right to self-determination, we...do not accept the concept of collective human rights in international law. Of course, certain individual human rights can often be exercised collectively, in community with others. Examples would include freedom of association, freedom of religion or a collective title to property. That remains a longstanding and well-established position of my Government. It is one we consider to be important in ensuring that individuals within groups are not left vulnerable or unprotected by allowing rights of the groups to supersede the human rights of the individual.⁵⁹

International discussions and negotiations over twenty years, however, have gradually led to the acceptance of collective rights as human rights. These rights are often perceived as “cultural rights”. As Boutros-Ghali has pointed out, “we are discovering the ‘new human rights,’ which include, first and foremost, cultural rights... We might even say that there can be no human rights unless cultural authenticity is preserved”.⁶⁰ Other commentators have pointed to “group preservation and integrity” and “cultural survival” that can be ensured by “existing human rights treaties and documents”.⁶¹ It is maintained that human rights concepts “have in fact been repackaged and expanded and in some cases now support the very interests that they once opposed”. Individual rights are perceived as “instruments of social control” rather than mechanisms for achieving social justice because indigenous peoples cannot “make use of these equal opportunities [guaranteed by individual rights] in the same way as others”.⁶²

But how can “cultural survival”, “group preservation and integrity” or “cultural authenticity” be perceived as a human right? Don’t cultures change, merge and conflict with one another, and disappear? If we look at the case of Europe over the last 500 years, for example, the Gauls have become French, the belief in witchcraft has disappeared, and writing systems have standardized and homogenized languages. Under what circumstances is cultural change seen as a violation of human rights?

Indigenous peoples are often singled out in discussions equating cultural change with human rights violations because of the tendency to tie indigenous culture to racial or biological characteristics. Cultural survival is seen as essential for indigenous survival; it is assumed that indigenous collective rights will exist eternally, and not just be a mechanism for overcoming temporary deprivation. Adam Kuper notes that there is a perception in indigenous rights discourse that “each local native group is the carrier of an ancient culture” that is “the natural

⁵⁶ Cindy L. Holder and Jeff J. Corntassel, “Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights”, *Human Rights Quarterly*, 24, 2002.

⁵⁷ Holder and Corntassel, “Indigenous Peoples and Multicultural Citizenship”.

⁵⁸ Helen Quane, “The Rights of Indigenous Peoples and the Development Process”, *Human Rights Quarterly*, 27(2), May 2005, p. 660.

⁵⁹ UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007) at 21 (United Kingdom), cited in Harrington, “Canada and the United Nations Human Rights Council”, p. 109

⁶⁰ Boutros Boutros-Ghali, “Foreword”, in *Voice of indigenous peoples* (Santa Fe: Native American Council of New York City, 1994), p. 13, cited in Kuper, “The Return of the Native”, p. 390.

⁶¹ Jeff J. Corntassel and Tomas Hopkins Primeau, “Indigenous ‘Sovereignty’ and International Law: Revised Strategies for pursuing ‘self-determination’”, *Human Rights Quarterly*, 17(2), 1995.

⁶² Ulf Dahre, “More on the Return of the Native”, pp. 147-8.

state of humanity”.⁶³ Even if the cultural practices have diminished, the tying of culture to race means that “the essence survives and can be nursed back to health if the resources are provided”.⁶⁴

The tying of indigenous culture to race is what the New Zealand academic Elizabeth Rata refers to as “culturalism”. According to Rata, culturalism is “the belief in an essential cultural being resulting from the individual’s ethnic or racial heritage,”⁶⁵ where cultural identity is tied to a “primordial ethnicity”. As Rata explains, “when culture is tied to ethnicity people remain fixed to a biologically defined social identity. The culture or way of life of these people is also unchanging, available only to those who share the same biological/ethnic origin”. This is different from perceiving culture as being separate from one’s ancestry. In the case of the latter, “it becomes possible for people of varying ethnic backgrounds to live in the same culture because their material and political realities are in fact the same. The values and practices from their respective cultural heritages that are considered to be compatible with the common modernist democratic culture can be accommodated”.⁶⁶

So significant is the belief that indigenous culture is determined by ancestry that it is maintained that there is such a thing as “ethnicised knowledge”. A number of indigenous peoples, including prominent educators like Marie Battiste,⁶⁷ argue that culture, knowledge, and spirituality are tied to their ancestry, and therefore unchangeable. Indigenous knowledge is believed to be the “original directions given specifically to our ancestors” and that colonization is resisted “by carrying that knowledge into the present”.⁶⁸ It is maintained that the “relationship with Creation and its beings was meant to be maintained and enhanced and the knowledge that would ensure this was passed on for generations over thousands of years”.⁶⁹ These assumptions, in fact, explain why some aboriginal peoples are opposed to the “spread of white-minded thinking” within the native population.⁷⁰ These kinds of notions of ancestrally based “knowledge” are used to justify political demands for the teaching of creationism as “native science” – demands that would be challenged if they were put forward by non-indigenous political interests.⁷¹

Attempts to tie culture and ancestry in indigenous rights demands has found its most extreme expression in the idea of “cultural genocide”. While the term genocide was historically used to refer to the physical destruction of a group (the killing of a gene, eradicating it from the pool), “cultural genocide” is equated with extermination because “we can envision the possibility that the loss of the so-called cultural components of group life might be as damaging to the group’s

⁶³ Kuper, “The Return of the Native”, p. 390.

⁶⁴ Kuper, “The Return of the Native”, p. 390.

⁶⁵ Elizabeth Rata, *Ingenio*, Autumn 2007.

⁶⁶ Rata, “Rethinking Biculturalism”, *Anthropological Theory*, 5(3), 2005.

⁶⁷ See, for example, Marie Battiste, “Enabling the Autumn Seed: Toward a Decolonized Approach to Aboriginal Knowledge, Language, and Education”, *Canadian Journal of Native Education* 22(1), 1998, p. 17.

⁶⁸ Waziyatawin Angela Wilson, “Introduction: Indigenous Knowledge Recovery is Indigenous Empowerment”, *The American Indian Quarterly*, 28(3&4), 2004, p. 361.

⁶⁹ Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, Environment, and Our Future”, *The American Indian Quarterly*, 28(3&4), 2004; See also R. Cruz Begay, “Changes in Childbirth Knowledge”, *The American Indian Quarterly*, 28(3&4), 2004.

⁷⁰ Wendy Hart-Ross and Deborah Simmons, “Wasáse FAQs”, *New Socialist*, 59, November-December 2006.

⁷¹ For a discussion of this circumstances see John Barker, “Creationism in Canada”, in Simon Coleman and Leslie Carlin (eds), *The Cultures of Creationism: Anti-Evolutionism in English Speaking Countries* (Berlington: Ashgate, 2004), pp. 85-108. I have also examined this situation in detail in “Native Studies and Canadian Political Science: The Implications of ‘Decolonizing the Discipline’”, paper presented at the Annual Meeting of the Canadian Political Science Association, University of British Columbia, June 4-6, 2008.

sustainability as the killing of its members”.⁷² Overcoming this problem requires that states “recognize the legitimacy of Aboriginal lifeworlds”, preventing them from “replac[ing] these lifeworlds with the cultural patterns of the colonizers”. Cultural survival, according to this view, is important not only for indigenous people themselves; it is also maintained that “the destruction of indigenous societies represents a major threat to the contemporary world’s rich inventory of cultures” and that “Indigenous peoples need protected enclaves if they are to survive the homogenizing powers of modern states, with their compulsions toward integration and centralization”.⁷³ This “loss of culture” is perceived in a number of United Nations documents as being similar to the declining biodiversity in the world.⁷⁴ But, as I have pointed out elsewhere, cultural diversity is not synonymous with biological diversity, and equating the two is a false analogy. This is because culture “can be dramatically transformed even within a single generation” and so “it is not necessary to maintain a variety of cultural characteristics ‘on hand’ so that they can be selected to aid survival” (as is the case with different strains of rice, for example).⁷⁵

Arguments about preventing “cultural genocide” are supported further by romantic ideas about indigenous peoples and their tribal societies and subsistence economies – ideas that are often given credence by fabrications such as Chief Seattle’s speech.⁷⁶ It is thought that there would be a great loss if indigenous groups became integrated into the states in which they live because “hunters are in tune with nature in a way that the exploitative and greedy farmers are not”.⁷⁷ Indigenous philosophies also are perceived as morally superior since “the indigenous view of the world, generally speaking, is the antithesis to the Western paradigm: communitarian, not individual, focused on sharing rather than shielding things, respect for land and all living things as sacred rather than as objects ripe for exploitation and consumption”.⁷⁸ As Alpa Shah points out,

Indigenous people have been increasingly seen as natural partners to produce a global eco-community because of – not in spite of – their cultural difference. The argument is that the West has much to learn from them – including indigenous notions of alternative medicine, spirituality, shamanism – which are all sold in various forms in Western markets. The general perception is that poor, marginalised, colonised, exploited, indigenous populations must be protected, their cultures must be preserved, and their rights must be enshrined in UN Human Rights legislation.⁷⁹

This means that indigenous rights are different from other minority rights, such as the right to be educated in one’s mother tongue. While minority language rights are a collective right, these

⁷² Woolford, “Ontological Destruction”.

⁷³ Magnarella, “The evolving right of self-determination of indigenous peoples”.

⁷⁴ See, for example, “Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity”, International Symposium “Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes”, Tokyo, May 30-June 2, 2005.

⁷⁵ Widdowson and Howard, *Disrobing the Aboriginal Industry*, p. 212.

⁷⁶ Mãivan Clech Lâm, in discussing “indigenous peoples and territoriality”, for example, provides a segment of Chief Seattle’s speech at the beginning of his article to show how indigenous peoples have a different conception of the land than the “white man”. “Remembering the Country of their Birth”, p. 129. But this “speech” is known to have been written 30 years after the fact by a non-aboriginal person. For a discussion of the speech see Daniel Francis, *The Imaginary Indian* (Vancouver: Arsenal Pulp Press, 1992), p. 141.

⁷⁷ Kuper, “The Return of the Native”, p. 390.

⁷⁸ Siegfried Wiessner, “Defending Indigenous Peoples’ Heritage: An Introduction”, *St Thomas Law Review* 14(2), 2001. This leads Wiessner to question whether or not the “individual intellectual property regimes” supported by the United Nations will enhance indigenous rights.

⁷⁹ Alpa Shah, “The Dark Side of Indigeneity?: Indigenous People, Rights and Development in India”, *History Compass* 5(6), 2007, p. 1807.

rights are not the same as indigenous rights, as some have asserted.⁸⁰ Minority language rights in Canada, for example, are not “francophone rights” that can only be accessed by people whose parents landed in Quebec 400 years ago. All people can access French education services if they want their children to learn this language. Indigenous rights, on the other hand, are only available to those who are deemed to be indigenous – usually on the basis of descent. This principle, which is aristocratic in nature, poses certain problems for indigenous-non-indigenous relations. First, it increases social conflict on the basis of ethnicity; second, it justifies the eternal separation and marginalization of the indigenous population.

Enabling Aristocracy

Chiefs Stewart Phillip, Robert Shintah, and Mike Retasket, in their criticism of the Canadian Conservative government’s initial reluctance to endorse the Declaration, assert that “no State, including Canada, should seek to institutionalize lower human rights standards for over 370 million Indigenous people worldwide”.⁸¹ It is often maintained that the marginal status of indigenous peoples is “usually accompanied by denials of rights enjoyed by the rest of the national population...”.⁸²

But this is not an accurate interpretation of indigenous circumstances in many countries in the industrialized world. Indigenous people in countries like Canada do not have “lower human rights standards” in comparison to other citizens. They, in fact, have more legal entitlements. Aboriginal peoples have rights of citizenship like all other Canadians and there are explicit protections in Canadian law preventing aboriginal peoples from being discriminated against on the basis of ethnicity, but they also have “aboriginal and treaty rights”. This means that Canadian aboriginal peoples are exempted from hunting regulations and the payment of taxes (when living and working on reserves), but they also have the right to freely participate in Canadian life.

The “lower human rights standards” referred to rely on the erroneous assumption, articulated in the Declaration, that indigenous tribes are “peoples”/“nations” being denied the right to self-determination. As Richard Mulgan points out, “...representatives of precolonial minorities [urge] the use of concepts such as ‘self-determination,’ ‘nation,’ and ‘treaty’” so as to “imply political independence” even though such a goal is not possible because indigenous peoples are outnumbered by settlers who have no homeland to go back to.⁸³ This language of self-determination is used to justify *more* legal rights for the indigenous population in comparison to non-indigenous citizens. As Preath-Meth, maintains, “leaders of indigenous groups believe that because their ancestors lived on the land before it was taken over by colonialist/imperialist settlers or populated by immigrant descendants of the colonialist/imperialist settlers, the indigenous peoples should have special prerogatives or more rights on their lands than nonindigenous peoples”.⁸⁴ But what does this mean for people who do not have any ancestral claim to the land? Is it assumed that they should live in a perpetual state of “citizens minus” because their historical circumstances necessitated that they leave their original homelands?

Although the continuous migration and cultural change of humanity makes it difficult to accept the aristocratic logic of notions of indigenous rights, one could still support arguments for

⁸⁰ Phil Fontaine, “Canadian vote left stain on country’s reputation”, *Toronto Star*, September 26, 2007, p. A8.

⁸¹ Stewart Phillip et al., “PM’s support is called for”, *Daily News*, September 7, 2007, p. 4.

⁸² Terry Turner, “On the Return of the Native”, *Current Anthropology*, 45(2), April 2004.

⁸³ Mulgan, “Should Indigenous Peoples Have Special Rights?”, pp. 384-387.

⁸⁴ Peang-Meth, “The Rights of Indigenous Peoples and their Fight for Self-Determination”,

indigenous autonomy if it were shown that this would enhance aboriginal-non-aboriginal relations. The Declaration, for example, maintains that it is “*convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith [emphasis in original]”.⁸⁵ It also argues that “treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership”. According to one indigenous leader, the Canadian government’s endorsement of the Declaration is seen as accepting “those principles that are essential to the relationship we are striving to maintain with the government and all Canadians - reconciliation, partnership and fulfillment of rights and obligation”.⁸⁶

But ancestrally determined rights are fundamentally exclusive, and there has been no attempt to show how exclusivity paves the way for “harmony”, “cooperative relations” and “non-discrimination”. Indigenous rights are based on the premise that “descendants of the original inhabitants of a country should have privileged rights, perhaps even exclusive rights, to its resources. Conversely, immigrants are simply guests and should behave accordingly”.⁸⁷ This characteristic of indigenous rights is recognized by the Canadian philosopher Charles Taylor. According to Taylor, an important characteristic of the indigenous right to self-government is that “certain powers ... will be given to a group that is defined by descent; that is, a group that others can’t join at will.”⁸⁸

With the exception of the current fascination with the Royal Wedding in Britain – an extravagance that is attacked by a significant anti-monarchist element - the acceptance of ancestrally determined entitlements would not be accepted for any other group in Canada.⁸⁹ Even more disturbing is the fact that right-wing groups in Europe use similar arguments to indigenous rights advocates in justifying their own ethnonationalist conceptualization as “blood” and “soil” being the true basis of citizenship.⁹⁰ As Kuper explains, “a drift to racism may be inevitable where so-called cultural identity becomes the basis for rights, since any cultural test (knowledge of a language, for example) will exclude some who might lay claim to an identity on grounds of descent. In the indigenous-peoples movement, descent is tacitly assumed to represent the bedrock of collective identity”.⁹¹ He goes on to point out that “wherever special land and hunting rights have been extended to so-called indigenous peoples, local ethnic frictions have been exacerbated. These grants also foster appeals to uncomfortably racist criteria for favouring or excluding individuals or communities”. This observation about indigenous rights also has been noted by Keichii Omura, who argues that it is based upon “an essentialist ideology that creates and amplifies the differences among ethnic groups and thus exacerbates ethnic frictions”.⁹²

Those, like Adam Kuper, who have drawn a correlation between the arguments that are made to support indigenous rights and ethnonationalism, fascism and apartheid have been criticized for

⁸⁵ United Nations General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples”,

⁸⁶ Phil Fontaine, “Canadian vote left stain on country’s reputation”.

⁸⁷ Kuper, “The Return of the Native”, p. 390. This idea of descent means that indigenous peoples “use and enjoyment of its ancestral lands” should be “guaranteed”. Patrick Macklem and Ed Morgan, “Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awas Tingni v. Republic of Nicaragua*”, *Human Rights Quarterly*, 22(2), May 2000.

⁸⁸ Charles Taylor, “On the Nisga’a Treaty,” *BC Studies* 120, winter 1998/99, p. 37.

⁸⁹ See Kuper, “The Return of the Native”, p. 391 for a discussion of this point.

⁹⁰ Kuper, “The Return of the Native”, p. 395 and André Béteille, “The Idea of Indigenous people”, *Current Anthropology*, 39(2), April 1998.

⁹¹ Kuper, “The Return of the Native”, p. 392.

⁹² Keiichi Omura, “Comments”, *Current Anthropology*, 44(3), June 2003, p. 395.

“miss[ing] the differential nature of the power relations involved and the position of structural inequality and marginalization of indigenous peoples”.⁹³ Kenrick and Lewis, for example, argue that “Kuper’s polemic is misleading in a number of ways, and would perhaps be better ignored” but, because his arguments could “reinforce discourse that serves to conceal discrimination against [indigenous peoples]”, they “must be taken seriously”.⁹⁴ A number of academics are similarly dismissive of Kuper’s perspective. Jens Dahl, for example, notes that Kuper’s criticisms are “based upon a surprisingly low level of knowledge and accuracy” and that his “writing does not really make much sense”.⁹⁵ Dahl provides no evidence to support this assertion, cites only anthropologists who agree with his views,⁹⁶ and does not acknowledge Kuper’s response to his critics.

Although the opposition to indigenous rights is critiqued on a number of grounds, the most significant point of contention concerns whether or not indigenous peoples are defined on the basis of descent. Terry Turner argues that the indigenous “identity is established not simply by descent, but by direct participation in indigenous communities or cultural enclaves involving a variety of kinship, affinal and adoptive relations”.⁹⁷ Kenrick and Lewis also maintain that indigenous “ownership is not primarily about excluding others but about including those who establish ‘good relationships’ based on participation in particular egalitarian social and economic practices”.⁹⁸ Asch and Samson refer to a comment of the Treaty Seven Elders to support the idea that indigenous peoples do not regard immigrants as “simply guests”, but as “newcomers” that are “here to stay”.⁹⁹

Asch and Samson maintain that the focus on descent has occurred not because it is a fundamental aspect of indigenous identity, but because of the legal requirements of colonial powers. Indigenous rights, according to Asch and Samson, “arise as a consequence of the recognition that people lived in societies prior to European settlement and the acknowledgement that certain rights flow from this fact.” They note that the definition of group belonging and the regulation of social relations in indigenous communities is “markedly different from ‘Nuremberg principles’ and blood quantum”;¹⁰⁰ it is only because the legal system of colonial regimes focus on descent that it has become “reified” as the basis of indigenous group identity.¹⁰¹

⁹³ Paul Oldham and Miriam Anne Frank, “‘We the peoples...’: The United Nations Declaration on the Rights of Indigenous Peoples”, *Anthropology Today*, 24(2), April 2008; Alcida Rita Ramos, “Comments”, *Current Anthropology*, 44(3), June 2003, pp. 397-8; Justin Kenrick and Jerome Lewis, “Indigenous peoples’ rights and the politics of the term ‘indigenous’”, *Anthropology Today*, 20(2), 2004, pp. 4-9.

⁹⁴ Justin Kenrick and Jerome Lewis, “Indigenous peoples’ rights and the politics of the term ‘indigenous’”, *Anthropology Today*, 20(2), April 2002, p. 4.

⁹⁵ Jens Dahl, *IWGIA: a history* (Copenhagen: IWGIA, 2009).

⁹⁶ Kuper, “Reply: More on the Return of the Native”, p. 148.

⁹⁷ Terry Turner, “On the Return of the Native”, p. 265.

⁹⁸ Kenrick and Lewis, “On the Return of the Native”, *Current Anthropology*.

⁹⁹ Asch and Samson, “On the Return of the Native”, *Current Anthropology*, p. 261.

¹⁰⁰ Asch and Samson also should read the works of Taiaiake Alfred before making such a statement. According to Alfred, “respecting the right of communities to determine membership for themselves would promote reconstruction of indigenous nations as groups of related people, descended from historic tribal communities, who meet commonly defined cultural and racial characteristics for inclusion. No doubt, this would exclude from the nations’ circles many thousands of people who self-identify or people with minimal blood connections who have been told by the state that they are indigenous. ...Native communities should not be expected to clean up the mess created by white society and to further undermine their nationhood in order to accommodate people whose only connection to Native communities is a legal status ascribed to them by the state”. Taiaiake Alfred, *Peace, Power and Righteousness* (Toronto: Oxford University Press, 2009), p. 110.

¹⁰¹ Asch and Samson, “More on the Return of the Native”, *Current Anthropology*, p. 146.

In addition to arguing that indigenous rights are more inclusive than is acknowledged by critics, these advocates imply, somewhat contradictorily, that indigenous rights are indeed exclusive, but that this exclusivity is similar to certain practices in nation states that “themselves employ the legal calculus of descent in their laws concerning citizenship, property and inheritance”, and that this exclusivity is not considered to be racist. It is maintained that “when resisting dispossession, indigenous peoples... make reference to ancestral occupation in order to claim an often collective proprietary right to the land, just as other private landowners claim rights based on inheritance. If this is acceptable for private landowners, then to deny this right to [indigenous peoples] just because they use land less intensively or ‘own’ it collectively is serious discrimination”.¹⁰²

But this response fails to consider how “direct participation in indigenous communities” is possible for non-indigenous citizens within a state. These citizens can only participate if indigenous communities agree to it, and descent and intermarriage are the key factors that determine one’s rightful access to community resources. Kenrick and Lewis also note that “priority in time, with respect to the occupation and use of a specific territory” is a fundamental aspect of “any definition of indigenous peoples” – a circumstance that only becomes possible because of descent.¹⁰³ Non-aboriginal Canadian citizens can be excluded from participating in aboriginal political institutions.¹⁰⁴ This is very different from the “laws concerning citizenship, property and inheritance” to which Kenrick and Lewis refer. Canadian laws concerning these matters are applied to all citizens equally – they are *individual* rights; judges do not grant these rights to some and not others on the basis of ancestry.

With respect to the fact that other characteristics besides descent are used in determining indigenous rights, Kuper replies that he “was simply observing that when it comes to determining membership of vaguely defined if not imaginary communities, cultural tests turn out to be indecisive or inconvenient and are usually quickly abandoned in favour of tests of descent”.¹⁰⁵ He goes on to state that a number of questions are avoided by his critics. These include: “What lands belonged ancestrally to which current population? When? Who can claim membership in one of these “aboriginal” communities, and on what criteria?”. He asserts that the criterion of “voluntary perpetuation of cultural distinctiveness” promoted by the UN is bypassed in most discussions of indigenous rights because “some so-called squatters are excluded despite living a largely hunting life and speaking native Canadian languages, while other individuals are granted indigenous status although they do not live on the land or speak a native language”.¹⁰⁶

One of the consequences of indigenous collective rights, which cannot be denied, is that it creates different classes of citizens within the same geographical area. This makes the existence of hereditary rights inconsistent with the principles of a democratic society. It has not been shown how promoting entitlements based on ancestry will be a bridge for achieving more cooperative relations between indigenous and non-indigenous people, or why this would be more socially just than ensuring that all citizens have equal rights.¹⁰⁷ Adam Kuper, for example,

¹⁰² Justin Kenrick and Jerome Lewis, “On the Return of the Native”, *Current Anthropology*, 45(2), April 2004, p. 263.

¹⁰³ Kenrick and Lewis, “Indigenous peoples’ rights and the politics of the term ‘indigenous’”, p. 5.

¹⁰⁴ Serious problems have occurred in British Columbia and Quebec concerning non-aboriginal people being excluded from political decision making and suffering discrimination as a result. For a discussion see “Musqueam Band Endorses Massive Rent Increases”, *Canadian Press Newswire*, November 9, 2000 and Joseph Quesnel, “Human rights must apply on reserves too”, *Red Deer Advocate*, March 12, 2010.

¹⁰⁵ Kuper, “More on the Return of the Native”, p.148.

¹⁰⁶ Kuper, “On the Return of the Native”, *Current Anthropology*, p.266.

¹⁰⁷ Kuper, “On the Return of the Native”.

cannot see why “there are grounds for making a distinction between the human rights of Inuit and ‘Settlers’ in Labrador, African Americans and Iroquois in New York State, or even, for that matter, old and recent citizens of Sweden”.¹⁰⁸ Preath-Meth agrees with this sentiment, asserting that for “those who accept the democratic tradition there can be no doubts: they must accept that the past is done. Some compensation for past wrongs may be necessary and desirable, but it is the present and the future that count, and the guiding principles for the present and the future must be justice and equality for all citizens”.¹⁰⁹ Richard Mulgan makes the point that although indigenous peoples might reject such notions of democracy as “western”, this would prevent them from “criticiz[ing] colonial settlement from the perspective of human rights or to claim the right to protection as members of disadvantaged minorities, for these rights make sense only within the democratic tradition. Outside that tradition, there are few, if any, principles of national legitimation that differing peoples and cultures commonly recognize, save the application of superior force”.¹¹⁰

In liberal democracies, the mediation between diverse interests and values has been made possible by the development of individualism. Although individualism is often dismissed in discussions of indigenous rights because it is argued that indigenous peoples “possess an irreducible core” that is threatened by the promotion of individual autonomy,¹¹¹ this argument obscures the progressive character of individual rights. Individualism, in fact, makes the notion of human rights possible because it recognizes that all people (individuals) are entitled to respect on the basis of their common humanity. As Elizabeth Rata explains, the “idea of the individual as someone who can be simultaneously attached and separated from the group makes possible the concept of a common universal humanity. This enables people to belong to and identify with non-kin groups as well as with members of their kin or ethnic group”. She goes on to point out that “however closely involved the individual is in the private world of family and friends, in the public sphere the individual has rights because of his or her status as a citizen, whose political rights are derived not from kinship or ethnic group rights, but from universal human rights. These political rights are available to all individuals”.¹¹²

Indigenous Marginalization and Social Conflict

Although the arguments for hereditary indigenous rights contain a number of flaws, including the potential to increase social conflict between ethnic groups, one could still support the Declaration if there was evidence that the principles that it embraces would address the terrible social conditions plaguing indigenous communities. It is correctly pointed out that demands for indigenous rights differ from ethnonationalist claims in South Africa and Europe because indigenous peoples are in a position of subordination not dominance. Ulf Dahre notes that “discrimination is still an everyday experience for many natives”, and that this shows that “there is a need for group rights”.¹¹³ Dahre goes on to state that collective rights are more progressive than individual rights, and are therefore necessary for achieving equality and social justice for the indigenous population.

¹⁰⁸ Kuper, “More on the Return of the Native”, p. 148.

¹⁰⁹ Preath-Meth, “The Rights of Indigenous Peoples and their Fight for Self-Determination”,

¹¹⁰ Richard Mulgan, “Should Indigenous Peoples Have Special Rights?”, p. 388.

¹¹¹ Tim Schouls et al., “The Basic Dilemma: Sovereignty or Assimilation”, in D. Engelstad and J. Bird (eds), *Nation to Nation* (Concord: Anansi, 1992), p. 17.

¹¹² Rata, “Rethinking Biculturalism”, pp. 272-3.

¹¹³ Ulf Dahre, “More on the Return of the Native”, p. 147.

Many commentators agree with Dahre and support the Declaration on the basis that it will address indigenous marginalization. Barbara Hall, Chief Commissioner of the Ontario Human Rights Commission, for example, points to the terrible conditions in aboriginal communities, and implies that this has been caused by “prejudice, discrimination, and violations of human rights that threaten their cultural survival”.¹¹⁴ When Phil Fontaine, the former Grand Chief of the Assembly of First Nations, hears criticisms of the Declaration on the grounds that it gives privileges on the basis of descent, he points out that indigenous people rank 63rd in terms of their quality of life, in comparison to the 9th ranking of Canadians in general.¹¹⁵ It is noted that “of the world’s contemporary peoples, those groups defined by themselves or others as indigenous tend to be overrepresented among those lacking basic human rights, living below the poverty line, and working under exploitative or unjust conditions”.¹¹⁶ Mentioning this in the context of discussions of the Declaration assumes that recognizing indigenous rights internationally will somehow address these problems.

Magnarella even notes that the process of drafting the Declaration has already “had a positive impact on the lives of indigenous peoples around the world”.¹¹⁷ Although Magnarella does not provide any evidence of this claim, one of the three examples of “autonomous arrangements” mentioned in the article is the case of “the Nunavut territory in Canada”.¹¹⁸ Although it is true that the Inuit of Nunavut have signed a land claim and have formed a new territory that is attempting to incorporate “Inuit knowledge” in policy making, the region is plagued by serious social problems, which have not improved since these “autonomous arrangements” were put in place. A recent series on Nunavut in *The Globe and Mail*, for example, notes that “crime has doubled in Nunavut since the territory was founded 12 years ago...amid high hopes of restoring Inuit people’s control over their destiny. It now has Canada’s highest rates of homicide, suicide and substance abuse, and its worst health, housing and education”.¹¹⁹ In addition, Nunavut’s economic dependence on federal transfers has increased, despite the cash infusions from the land claim.¹²⁰

And it is not only the case of Nunavut where one sees these worsening conditions in the face of the recognition of “indigenous rights”. Extensive dependency and social problems also have been documented in the aftermath of the signing of the James Bay and Northern Quebec and Northeastern Quebec Agreements and the Inuvialuit Final Agreement. Although it was maintained by the Royal Commission on Aboriginal Peoples that these agreements “put the means for sustained, diversified economic development in Aboriginal hands”,¹²¹ such diversification has not occurred. The geographical isolation, low educational levels and severe

¹¹⁴ Barbara Hall, “UN vote needs Canada’s support”, *Toronto Star*, September 13, 2007, p. A6.

¹¹⁵ Phil Fontaine, “Canadian vote left stain on country’s reputation”, *Toronto Star*, September 26, 2007.

¹¹⁶ Lola García-Alix and Robert K. Hitchcock, “A Report from the Field: The Declaration on the Rights of Indigenous Peoples – Implementation and Implications”, *Genocide Studies and Prevention*, 4(1), April 2009.

¹¹⁷ Magnarella, “The Evolving Right of Self-Determination of Indigenous Peoples”.

¹¹⁸ Magnarella, “The Evolving Right of Self-Determination of Indigenous Peoples”, pp. 442-3. Nunavut is also mentioned as a positive social outcome of the recognition of indigenous rights by Jeremie Gilbert in his book *Indigenous Peoples’ Land Rights Under International Law: From Victims to Actors* (Ardsey: Transnational Publishers, 2006).

¹¹⁹ Patrick White, “Death at the 64th Parallel”, *The Globe and Mail*, April 2, 2011, p. A1. The state of emergency conditions in Nunavut are also documented in this same paper on April 4 and April 6, 2011.

¹²⁰ I have discussed these economic circumstances of Nunavut elsewhere. See Frances Widdowson, “The Political Economy of Nunavut: Internal Colony or Rentier Territory?”, Paper presented at the Annual Meeting of the Canadian Political Science Association, University of Western Ontario, June 2-4, 2005.

¹²¹ Final Report of the Royal Commission on Aboriginal Peoples, 2(2), (Ottawa: Supply and Services, 1996), p. 822.

social problems mean that “aboriginal people living in these areas [continue] to remain impoverished and dependent upon government transfers for sustenance”.¹²²

But why would one presume otherwise? With a few exceptions,¹²³ there has not been much questioning of the capacity of rights recognition to address indigenous marginalization and deprivation. Indigenous peoples often live in remote locations, like the Arctic, that have little productive economic activity. They also suffer from a wide range of governance problems due to fact that indigenous politics are often dominated by powerful families. Tribalism is a major problem in many native communities, with government funds being siphoned off by the few, while the many suffer.¹²⁴ Income polarization, in fact, has been documented in many cases where marginalized groups are granted special rights.¹²⁵ Poor health, low educational levels and high rates of violence are all common in these isolated communities, and it is not clear how internationally recognizing “indigenous rights” will do anything to address these serious problems. In fact, because indigenous rights promotion often involves proposals for preserving cultural features such as unproductive economic practices, tribal political systems and animistic spiritual beliefs, taking the Declaration seriously has the potential to marginalize and isolate indigenous peoples further.

Even some supporters of the Declaration doubt its efficacy. For example, Henderson argues that while the Declaration has created a consciousness that “displaces the familiar discriminatory models of imperialism and colonialism”, it “leaves the poverty and vulnerability of Indigenous peoples intact”.¹²⁶ Shaun Atleo, the current Grand Chief of the Assembly of First Nations, while commending the Conservative government for endorsing the Declaration, argues that this alone “would not change much in the everyday lives of this country's aboriginal populace, many of whom live in Third World conditions”. He maintains, however, that “now that it has finally arrived we can get on with an agenda for change in our communities”.¹²⁷ This raises the question as to why Atleo’s proposed “agenda for change” couldn’t have been pursued without spending 20 years and significant resources on internationally orchestrated bureaucratic processes, legal wrangling, and wishful thinking.

The Declaration is wishful thinking because it encourages isolation rather than integration. Its recognition of “the right of all peoples to be different, to consider themselves different, and to be respected as such” fails to analyze what this “difference” consists of, and how it will be beneficial for both indigenous people and indigenous-non-indigenous relations. The indigenous “difference” promoted by the Declaration is those traditional cultural features that existed at the time of European contact.¹²⁸ While these practices and organizational forms were essential to

¹²² Frances Widdowson, *The Political Economy of Aboriginal Dependency: A Critique of the Royal Commission on Aboriginal Peoples*, Unpublished Ph.D. Dissertation, York University, 2006. The case of the James Bay, Inuvialuit and Nunavut land claims agreement were discussed in detail in chapter nine – “The False Promise of Aboriginal Economies”, pp. 503-585.

¹²³ See, for example, Oguamanam, “Indigenous Peoples and International Law”.

¹²⁴ In the Alberta context, this has recently be documented by John Reilly, *Bad Medicine: A Judge's Struggle for Justice in a First Nations Community* (Calgary: Rocky Mountain Books, 2010). I have discussed this elsewhere in “The Inherent Right of Unethical Governance”, Presentation at the Annual Meeting of the Canadian Political Science Association, York University, June 1-3, 2006.

¹²⁵ See, for example, Rata, “Rethinking Biculturalism”; and Thomas Sowell, *Preferential Policies: An International Perspective* (New York: William Morrow, 1990).

¹²⁶ Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 10.

¹²⁷ Brett Popplewell, “Canada endorses indigenous rights”, *Toronto Star*, November 13, 2010, p. A12.

¹²⁸ Richard Mulgan refers to this as “freezing time” where “the term ‘indigenous,’ as used, “has its beginnings in the European colonial enterprise...anything that [Europeans] found *in situ* was indigenous; what they introduced was foreign, exotic”. Mulgan, “Why Should Indigenous Peoples Have Special Rights?”, p. 380.

indigenous life 500 years ago, they are not sufficient to enable indigenous populations to thrive in the modern world. In fact, they are creating obstacles to indigenous peoples' participation in global economic, political and intellectual development.¹²⁹

Why Imagine a Vain Thing?

In his examination of the problems with indigenous rights claims, Adam Kuper points out that “policies based on false analysis distract attention from real local issues. They are unlikely to promote the common good, and they will certainly create new problems”.¹³⁰ This is one of the key points with respect to analyzing the UN Declaration on the Rights of Indigenous Peoples; by distorting the definition of self-determination in response to the demands of international indigenous political organizations, false hopes have been created. This wishful thinking has been “channeled” into support for the Declaration,¹³¹ since it is merely an “aspirational document” that will never have to be implemented. This is presumably why the Conservative government in Canada reversed its position on the Declaration – from opposition to support – without providing any rationale for this change in policy direction.¹³² It could affirm the Declaration as a public relations exercise, while ignoring its content in practice.

But why are indigenous organizations expending so much time and effort on an exercise with no substance? The economic, political and social problems of indigenous peoples are real, and desperately cry out for actual policy solutions. Wouldn't the resources of indigenous organizations be better spent on measures that have the potential for actually improving indigenous circumstances?

The development of the UN Declaration on the Rights of Indigenous Peoples, in fact, has very little to do with indigenous welfare and very much to do with the emergence of an international Aboriginal Industry. Although this circumstance has been discussed elsewhere with respect to Canada,¹³³ not much attention has been given to its international dimension – the Indigenous Industry.¹³⁴

¹²⁹ This can be seen in the promotion of indigenous Creation myths as a form of “knowledge” in indigenous education. How will indigenous people be able to become archaeologists, biologists or paleontologists if they are not taught the theory of evolution like all other ethnic groups?

¹³⁰ Kuper, “The Return of the Native”, p. 395.

¹³¹ Jeff Corntassel uses this word to describe one of the effects of participating in UN forums. According to Corntassel, “channeling effects occur when members of Indigenous groups, having accepted representation via global forums, confine their activities solely within these official structures and cease other forms of political mobilization outside of the UN system”. Jeff Corntassel, “Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade (1995-2004)”, *Human Rights Quarterly*, 29(1), February 2007.

¹³² Cuthand recognizes the possibility of this cynical tactic. See Cuthand, “Lukewarm sign-on to declaration bodes ill”, p. A13.

¹³³ Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry* (Montreal: McGill-Queen's University Press, 2008); Brett Popplewell, “An Indian Industry has emerged amid the wreckage of many Canadian reserves”, *Toronto Star*, October 30, 2010; Melvin H. Smith, *Our Home or Native Land?* (Victoria: Crown Western, 1995); “Aboriginal Law Becomes Big Business,” *Financial Post*, 4 July 1995; “Drive to Native Self-Sufficiency Spawns New Industry of Self-Government Consultants,” *CP Newswire*, 29 December 1995; Douglas Fisher, “Two Solitudes? Make That Three,” *Toronto Sun*, 28 April 1999; Alison Blackduck, “Indigenous Landscape Is Looking Very Bleak,” *Toronto Star*, 12 June 2001; Jeffrey Simpson, “Burnt Church Report Cuts to the Chase,” *Globe and Mail*, 26 April 2002; Jean Allard, “Big Bear's Treaty,” *Inroads* 11 (June 2002): 131, 137; “Is There an Aboriginal Misery Industry?” *Contact*, Aboriginal Peoples Television Network, 21 March 2003; Calvin Helin, *Dances with Dependency: Indigenous Success through Self-Reliance* (Vancouver: Orca, 2006), 160–1; “Misery Money,” *CBC Sunday*, 14 January 2007; Tom Flanagan, “Land Claims Shouldn't Be

Over the last 30 years there has been a huge growth in the number of organizations advocating for indigenous rights internationally, resulting in pressure to develop forums for indigenous peoples in the United Nations.¹³⁵ As a result, the United Nations Working Group on Indigenous Populations and the Permanent Forum were instituted. Most of the long and drawn out discussions concerning these forums have focused on their position within the UN hierarchy (indigenous organizations want them instituted at the highest level), as well as the bureaucratic and legalistic processes required to establish membership, the relationship to other UN bodies, and their mandates. There is a need for these forums, we are told, because “indigenous peoples gain little attention and receive few resources in the United Nations system compared to other disadvantaged sectors”.¹³⁶ It is with this statement that one can begin to understand the Indigenous Industry’s interests in the United Nations. The United Nations has significant resources at its disposal, both to hire staff and to provide funding for various research and development initiatives.¹³⁷ As a result, numerous anthropologists, consultants and lawyers can be employed in the many areas of the United Nations that have an “indigenous component”, or they can receive contracts to study issues pertaining to indigenous rights.¹³⁸

Members of the Indigenous Industry have little material interest in actually addressing aboriginal problems because NGOs like Survival International are able to fundraise on the premise that the preservation of culture will address aboriginal problems. What they are actually proposing, however, is the poison as the antidote. Promoting the preservation of tribal societies in the modern context will not enable aboriginal peoples to improve their health and educational levels. But this will then provide the justification for more funds to be dispersed.

Historically, the term “separate but equal” was seen for what it was; a semantic ploy to justify the oppressive character of segregation. Today, however, we are accepting this logic, but replacing the word separate with “different”. Indigenous peoples are “different” to the extent to which they are not able to participate in the states in which they live. Preserving this “difference”, as is promoted by the Declaration, will maintain inequality and social conflict, preventing us from aspiring to a cooperative and peaceful “common future” envisioned by the United Nations.

an Immortal Industry,” *Globe and Mail*, 4 June 2007; and Gordon Gibson, “Is integration the Better Option for Indians?,” *Globe and Mail*, 22 August 2007.

¹³⁴ The United Nations’ funding of an Indigenous Industry began when Canadian aboriginal leader George Manuel and his legal advisor Douglas Sanders started the World Council of Indigenous Peoples in 1975. For a discussion of this history see Lola García-Alix (ed), *The Permanent Forum for Indigenous Peoples: The Struggle for a New Partnership* (Copenhagen: IWGIA,1999), p. 56.

¹³⁵ James (Sa’ke’j Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 74

¹³⁶ Lola García-Alix (ed), *The Permanent Forum for Indigenous Peoples: The Struggle for a New Partnership* (Copenhagen: IWGIA,1999), p. 56.

¹³⁷ Henderson, for example, notes that “the Declaration affirms that the organs and specialized agencies of the UN system and other intergovernmental organizations shall contribute to the full realization of the provisions through the mobilization, *inter alia*, of financial co-operation and technical assistance. The UN system is required to establish ways and means of ensuring the participation of Indigenous peoples on issues affecting them”. Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 81.

¹³⁸ For a discussion of the influence of lawyers and consultants on UN organizations see Cuthand, “Lukewarm sign-on to declaration bodes ill”, *Star-Phoenix*, November 26, 2010, p. A13; Kuper, “Return of the Native”, p. 395; Steven Robins, “NGOs, ‘Bushmen’ and Double Vision: The =/ khomani San Land Claim and the Cultural Politics of ‘Community’ and ‘Development’ in the Kalahari”, *Journal of Southern African Studies*, 27(4), 2001, pp. 833-53; and Henderson, *Indigenous Diplomacy and the Rights of Peoples*, p. 62.