

The UN as Both Foe and Friend to Indigenous Peoples and Self-Determination

Written by Sheryl Lightfoot and David MacDonald

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SHERYL LIGHTFOOT AND DAVID MACDONALD, MAR 12 2020

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Since the advent of the United Nations (UN) system, Indigenous peoples have been poorly represented, their own self-determining rights and aspirations subsumed by assertions of absolute sovereignty by settler states such as Canada, the United States, Australia, and New Zealand. Settler state governments often perceive Indigenous rights as a threat to state sovereignty and thus seek to 'domesticate' Indigenous nations, preventing them from participating in the UN system as sovereign actors. While the UN has historically been a foe to Indigenous self-determination efforts, changes in recent decades suggest that the UN may be seen increasingly as a friend, providing a base for international coordination, advocacy, and policy change. This chapter is divided into three parts. The first part explores the challenges and opportunities afforded by the UN system to Indigenous peoples, paying close attention to their exclusion from its creation, and their denial of sovereignty during the 1960s as other colonies gained independence. The second part focuses on how Indigenous peoples have gained influence internationally through the work of the International Indian Treaty Council and other organisations. It also covers how they have attained better recognition of their right to self-determination with the UN Declaration on the Rights of Indigenous Peoples adopted in 2007. Representation, apart from settler states, also takes place at the UN through the Permanent Forum on Indigenous Issues (formed in 2000), the Special Rapporteur on the Rights of Indigenous Peoples (established in 2001), and the Expert Mechanism on the Rights of Indigenous Peoples (2007). The third part balances the potential of the UN for advancing Indigenous sovereignties, while also critiquing the state-centric nature of the system.

The United Nations and the Exclusion of Indigenous Peoples

According to data from the International Work Group for Indigenous Affairs (IWGIA), there are more than 300 million Indigenous peoples in the world, over 5000 distinct peoples living in 72 countries recognised by IWGIA as 'Indigenous'. A precise and objective definition of Indigenous peoples has been exceedingly difficult to achieve due to the vast diversity of Indigenous peoples. After years of heated debate, the UN developed a working definition, centred on three primary elements: 1) a pre-colonial presence in a particular territory, 2) a continuous cultural, linguistic and/or social distinctiveness from the surrounding population, and 3) a self-identification as 'Indigenous' and/or a recognition by other Indigenous groups as 'Indigenous' (Lightfoot 2016).

From its formation in 1945, the UN was, in a sense, a foe to the aspirations of Indigenous peoples for sovereignty because it privileged the sovereignty of many imperial and settler states. This marked a continuation from the former League of Nations, which also favoured Western state sovereignty at the expense of Indigenous peoples and other colonised peoples. A clear example can be seen in the League Mandates, which gave Western powers increased control over Germany's former colonies, without the input from and respect for the Indigenous peoples living there. The League also proved unwilling to help intervene when member states violated their treaties with Indigenous peoples (MacQueen 2018).

Indigenous representatives such as the Tahupōtiki Wiremu Rātana (Ngāti Apa and Ngā Wairiki) from Aotearoa New

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Zealand and Levi General or Deskaheh (Six Nations Haudenosaunee) whose lands are located in present-day Canada, both petitioned the League (Hauptman 2008) to compel the British crown to honour its treaties with Indigenous peoples, only to have the League more or less turn a blind eye (Lightfoot 2016).

After 1945, UN members adopted instruments which advanced their state-centric goals while removing protections for Indigenous peoples. For example, UN members passed the Genocide Convention in 1948, but removed references to cultural genocide which were in the 1947 draft (MacDonald 2019). This was done because many of the policies prohibited in this earlier draft including cultural genocide were actually being performed on Indigenous peoples by settler states. Forced assimilation in residential schools and through fostering and adoption outside of Indigenous communities are two such examples (MacDonald and Gillis 2017).

In the 1960s, UN policies favourable to decolonisation for Africa, Asia, and the Caribbean were deliberately withheld from Indigenous peoples (Anaya 2004). UN General Assembly Resolution 1514 (1960) contained an inherent contradiction: Article 1 asserted the right of all peoples to self-determination, while Article 6 prevented any disruption to 'the national unity and the territorial integrity' of member states. Indigenous peoples were not however considered 'peoples' for the purposes of self-determination and thus had a more difficult time accessing these rights (Anaya 2004). Indigenous peoples were specifically excluded from the UN decolonisation project by the 1960s 'saltwater' or 'blue water' thesis, which asserted that only overseas territories, non-contiguous to the colonial power, were eligible for decolonisation and independent, sovereign statehood (United Nations General Assembly 1960). Thus, as the UN decolonisation project proceeded over the next several decades, Indigenous peoples were left, as Chickasaw legal scholar James (Sa'ke'j) Youngblood Henderson (2008, 34) describes, as 'the unfinished business of decolonisation.'

Indigenous Organisation and International Institutions

While the UN has been largely beholden to state interests, Indigenous peoples have gained influence internationally through the development of networks outside and inside the UN system. Modern activism found its roots during the 1960s and 1970s. While other discriminated groups wanted equal rights, Indigenous peoples wanted both equality and collective recognition as nations, and to regain land stolen by government. The 1960s would herald changes – a sense of collective supratribal Indian identity was appearing as the Indian National Youth Council (established in 1961) grouped members of over 60 different tribes, issuing a Declaration of Indian Purpose (MacDonald 2008). They would eventually stage protest 'fish-ins' – fishing in traditional waters guaranteed by treaty where access was banned by government legislation. Vine Deloria Jr. was the first to use the term 'Red Power' at the 1966 convention of the National Congress of American Indians, which he defined as gaining 'the political and economic power, to run our own lives in our own way' (Quoted in MacDonald 2008). Together with the primarily urban-based American Indian Movement (AIM) (established in 1968) activism began in earnest as the National Indian Brotherhood in Canada was formed in 1968 to represent Status and Treaty Indians, the Inuit Tapirissat was founded in 1971 and organised Inuit in all provinces and territories, and the Grand Council of the Crees was established in 1974 (Lightfoot 2016; Josephy and Nagel 1999).

The 1970s heralded new opportunities for linking local, national, and international efforts through international Indigenous non-governmental organisations (NGOs), such as the International Indian Treaty Council (IITC) (established in 1974), the Inuit Circumpolar Conference (ICC) (established in 1977), and South American and Caribbean regional organisations. During the 1970s, Indigenous peoples came into a number of serious and spectacular conflicts with their respective states.

To name but a few of the most important: the Indian occupation of Alcatraz Island (1969–1971) by 'Indians of All Tribes' – a collective force which claimed 'right of discovery' over the island and offered to buy it for \$24 (Johnson, Nagel and Champagne 1997). This is often seen as a cathartic moment for many, a time of solidarity between very different peoples. In Australia, Aboriginal peoples raised their own tent embassy in front of the federal parliament in 1972 while Indigenous groups and police and military confronted one another at Wounded Knee in 1973. In Aotearoa New Zealand, the Brown Power movement formed around the same time, and the Māori also organised the famous 1972 Land March through the country to protest Crown land sales. Canada too saw concerted action against the 1969 White Paper introduced by the federal government to do away with the treaties and treaty rights (Cairns 2011).

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One of the early efforts in bringing Indigenous peoples from all parts of the world together seems to have originated with the president of the National Indian Brotherhood in Canada, Chief George Manuel. The first International Conference of Indigenous Peoples was then held in British Columbia, 1975, which resulted in the establishment of the World Council of Indigenous Peoples (WCIP). The WCIP was one of the first Indigenous organisations to pursue observer status in the United Nations, had a secretariat based in Canada, and represented over 60,000,000 Indigenous peoples worldwide; before dissolving in 1996, it was a powerful force for Indigenous peoples, giving its members a concrete experience in international politics (Lightfoot 2016).

Since 1945, the UN has been involved in Indigenous issues through its overall human rights work. Indigenous direct involvement began in 1970 when the Sub-Commission on Prevention of Discrimination and Protection of Minorities (formed by the UN Commission on Human Rights) recommended a study of the problem of discrimination against Indigenous populations, which was carried out by the UN's Special Rapporteur Jose Cobo, who completed it in 1984 (Sanders 1989). The report addressed a wide range of human rights abuses and called on governments to formulate guidelines concerning Indigenous peoples on the basis of respect for their ethnic identity, rights, and freedoms (Sanders 1989).

UN organisations relevant to Indigenous peoples are the Security Council and the General Assembly (there is no hierarchy between these two main bodies), followed by the Economic and Social Council (ECOSOC), the UN Commission on Human Rights (UNCHR), and the Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission). In 1982, the Working Group on Indigenous Populations (WGIP) was created under the auspices of the Sub-Commission, which provided a new avenue for Indigenous peoples to be heard at the UN level. However, given the low status of working groups within the UN system, recommendations took some time and needed to ascend through many layers before they could be read at the General Assembly level (Charters and Stavenhagen 2009).

The WGIP was instrumental in drafting what later became the Declaration on the Rights of Indigenous Peoples, beginning this process in the early 1980s and producing the first draft in 1993 (Lightfoot 2016). In 2007, the same year that the Declaration was passed by the General Assembly, the structure of the WGIP transformed into the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). EMRIP is mandated to provide advice and expertise to the Human Rights Council, while also providing recommendations for ways in which the Declaration can be implemented. Seven independent experts, appointed by the Council, communicate regularly and hold an annual meeting on the rights of Indigenous peoples which are appointed by the Human Rights Council (Lightfoot 2016). EMRIP holds an annual meeting which gathers together representatives from Indigenous nations, organisations, state governments, NGOs, civil society organisations, academics, and many others (Assembly of First Nations n.d.; Office of the High Commissioner for Human Rights n.d.a).

Of central importance to Indigenous voices in the UN system is the Permanent Forum, which was established in 2000 as an advisory body to the ECOSOC. It has a mandate to discuss 'Indigenous issues related to economic and social development, culture, the environment, education, health and human rights' (UN Permanent Forum 2019). The Forum holds two-week sessions in New York once a year, usually in May, in which a range of groups participate, including Indigenous organisations, state representatives, UN bodies and organs, inter-governmental organisations and NGOs with ECOSOC consultative status. The first meeting was held in New York in 2002. Sixteen independent experts on Indigenous issues sit as members of the Forum; eight members are nominated by state governments, with election by ECOSOC, while the other eight members are appointed by the President of ECOSOC as regional representatives following wide ranging consultation with Indigenous peoples' organisations.

The Permanent Forum is useful for Indigenous peoples to share information about best practices, common concerns, and strategies to improve Indigenous rights. Much of the Forum's utility lies in its extensive Indigenous Caucus system, a matrix of consultative groups organised according to region or theme. The caucuses are open to all Indigenous delegates and constitute an important locus for meeting, sharing concerns, drafting and promoting joint statements and policy proposals, as well as trying to secure space for specific topics on the Forum agenda (Indigenous Peoples' Centre for Documentation, Research and Information 2012).

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In recent decades, the international community has given special attention to the human rights situations of Indigenous peoples. Beginning in 2001 the Commission on Human Rights appointed a Special Rapporteur on the Rights of Indigenous peoples (Charters and Stavenhagen 2009). The Special Rapporteur is tasked with 'promoting good practices, including new laws, government programs, and constructive agreements between Indigenous peoples and states, and to implement international standards' (Office of the High Commissioner for Human Rights n.d.b). They also deliver regular reports including focused country reports on how Indigenous peoples are being treated. The focus is on human rights, and the Special Rapporteur meets with Indigenous peoples and state representatives throughout the countries concerned, paying special attention to cases of human rights violations and abuses (Office of the High Commissioner for Human Rights n.d.b).

These are useful organisations in changing the culture of the UN and also in promoting different norms. Norms are key here, and if we see liberal institutionalism and constructivism as playing important roles in understanding IR, Indigenous mobilisation in the UN system can produce positive effects.

The UN Declaration and the Potential to Enhance Indigenous Sovereignities

As we noted above, the UN Declaration was adopted by the General Assembly in 2007 after several decades of joint drafting and negotiation with over 100 Indigenous organisations. It is a precedent setting document, and as one Indigenous organisation has noted, is: 'the most comprehensive statement of the rights of Indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in international human rights law' (Cree Nation Government 2015).

In the end, the Declaration passed the General Assembly with 144 votes in favour, 11 abstentions, and 4 against. The only 4 opposing votes came from Australia, New Zealand, Canada, and the United States, often known as the CANZUS states (i.e. Canada, Australia, New Zealand, US). The process was instructive: when states face collective pressure from Indigenous peoples asserting their decision-making capacity at the UN, it is hard for them to exclude Indigenous representatives from formal UN procedures. The fact that only four states opposed the Declaration showed it is possible to shame and pressure states as well as negotiate with them to support Indigenous self-determination at UN plenary meetings. In this context, states that support Indigenous rights are more likely to influence the positions of other states by amplifying the voices of Indigenous representatives. The fact that those four recalcitrant states changed position, and that all endorsed the Declaration by the end of 2010, was the result of much domestic lobbying and the operation of a regular procedure for the Special Rapporteur to monitor the plight of Indigenous peoples in particular countries (Lightfoot 2016).

It is no coincidence that the first two of those four countries to renounce their opposition to the Declaration, Australia and New Zealand, were among the first seven countries investigated by Anaya after he took over the role in 2008. Australia announced its support for the Declaration four months before Anaya's scheduled visit in August 2009, while New Zealand announced its support three months before Anaya visited that country in July 2010. For both countries, Anaya's reports (2010; 2011) were critical of entrenched discrimination against Indigenous peoples, though his criticism would have been much stronger if the governments had not changed their policy to support the Declaration.

Prior to the passage of the Declaration in 2007, international human rights law and discourse excluded the two elements that are critical to Indigenous peoples. First, the international human rights regime did not include collective rights to maintain such things as Indigenous culture, language, religion, identity, or their own educational systems in the face of assimilative pressures. Second, Indigenous peoples' self-determination and their collective right to maintain their lands were specifically excluded from the post-World War II UN decolonisation regime by the 'salt water' thesis. These were the 'hard rights' that states, especially settler colonial states, resisted most fiercely and still do. The UN decolonisation era interpretation of self-determination meant independent statehood; the Indigenous rights movement aimed to secure self-determination and land rights for Indigenous nations, with or without statehood, a shift that ultimately requires a global rethinking of how self-determination and land rights can be successfully decoupled from territorial sovereignty.

We can divide rights into 'hard' and 'soft' categories (Lightfoot 2016) to draw out state responses to them. Hard

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rights strike at some important fundamentals of the existing international system of states: land, territory, sovereignty, and self-determination. These are both difficult to achieve in negotiations and are also a perceived threat to the 'hard core' of the international system, that is, state territorial sovereignty. 'Soft' rights, such as rights to culture, language, education and religion, are collective rights extensions of existing human rights. While recognition and protection of soft rights involves some change to thinking about the inclusion of collective rights, the changes required by states and the UN system are not as fundamental and thus the majority of states accepted them much more readily (Lightfoot 2016).

Global Indigenous politics exerts a particular pressure on the international system to accept a new, non-state-centric interpretation of self-determination, and it therefore is leading a shift in the meaning of self-determination so that it can also be 'interpreted as the right of ...peoples to negotiate freely their political status and representation in the states in which they live' (Daes 1993). The earliest norms literature aimed to show that ideational factors do matter in international politics. Norms, which are understood to mean the behaviour that is appropriate for actors with a certain identity, have been examined in multiple ways. The first studies examined the structure of norms, aiming to counter dominant rationalist understandings of strategic, self-interested international behaviour, show that 'norms matter' (Adler 1997; Kratochwil 1989; Katzenstein 1996; March and Olsen 1998) and demonstrate that states often act in ways that follow a logic of appropriateness (Wendt 1999) based upon inter-subjectively shared norms (Risse 2003; Rues-Smit 1997), rather than maximising their individual benefit. Norms were argued to be constitutive, shaping the interests and identities of state actors (Kowert and Legro 1996; Checkel 1998) yet also regulative and limiting the range of legitimate action (Barkin and Cronin 1994).

Substantial research has been conducted on norm emergence, diffusion, and change, including the 'boomerang effect' of transnational advocacy network campaigns on state behaviour (Keck and Sikkink 1998), the 'spiral model' of human rights norm socialisation (Risse, Ropp and Sikkink 1999), and the study of scope conditions impacting a move from commitment to compliance (Risse, Ropp and Sikkink 2013).

Regarding norms, the nature of global Indigenous rights and politics is dual, operating on the one hand within the existing international order. On the other hand, such rights also serve as a transformational norm vector, helping to move global politics from one norm space to another. The second category of more difficult and problematic Indigenous rights norms and the new ways of doing global politics presented by global Indigenous politics together present challenges to the existing international order. In this the Declaration plays a key role.

Lightfoot's work on the Declaration process (2016) demonstrates several important points about how the final text largely lives up to its original intent, which also represents several important global shifts. It's important to note that the Declaration was always intended to be a set of guidelines for state implementation of Indigenous rights, providing a framework for new Indigenous-state relationships grounded in mutual respect, not state domination. It was also intended to be a persuasive tool, a set of international standards that would be utilised morally and politically in Indigenous rights struggles around the world and, like all human rights declarations, was never intended to be a legally enforceable or legally binding document. As a United Nations declaration and not a convention, it is a political document that became part of the international human rights consensus and its principles are, in some sense, morally binding on all state conduct whether or not an individual state voted for it. Further, the Declaration was always seen as a document of global consensus, not just among UN member states, but also including the active participation of Indigenous peoples in the consensus building process. It is therefore important to understand that this was necessarily a compromise document, ultimately accepted by both states and the Global Indigenous Caucus. As such, Indigenous peoples' right to self-determination (Article 3) sits alongside the right of states to their sovereignty and territorial integrity (Article 46).

The guiding framework of the Declaration therefore expects states to recognise, negotiate and protect a variety of possible self-government or autonomy arrangements for Indigenous peoples, dealing with them as 'peoples', even if not as states. At the same time, it expects Indigenous peoples to negotiate the same with states and not seek secession from or dismemberment of them. However, the UN decolonisation framework remains available for Indigenous peoples who wish to pursue a statehood claim.

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The global Indigenous rights regime has forged a set of global changes, with wider implications. First, it seeks the inclusion of a broad set of collective rights into the human rights regime, alongside individual rights, for the first time in history, which Rhiannon Morgan (2011, 2) has described as a radical 'bridging of a paradigmatic gulf' between individual and collective rights. From its earliest beginnings, the Indigenous rights movement has asserted that an exclusively individual rights focus of human rights was insufficient to protect Indigenous peoples. Indigenous peoples also needed protections as collectives, to protect their cultures, societies, and existence as distinct peoples.

Passage of the Declaration by an overwhelming majority of UN member states indicates a fundamental global shift in the human rights regime towards the acceptance of collective rights, although how collective rights will be protected alongside and without disrupting individual rights is not yet entirely clear.

Second, understandings of decolonisation and self-determination have also fundamentally shifted with the passage of the Declaration towards new future constructions. Old colonial doctrines, such as the Doctrine of Discovery and *terra nullius*, have been delegitimised. The Doctrine of Discovery held that European countries who 'discovered' lands inhabited by Indigenous peoples could claim them as part of their own territories and administer and rule over those territories. Indigenous ownership was not recognised in colonial law, and Indigenous peoples were not seen to have rights over their own traditional lands (Miller et al. 2012). *Terra nullius* is a Latin term signifying land without human habitation, meaning that Indigenous peoples were not recognised as humans capable of owning land. This allowed European colonisers to acquire title to the land simply by planting a flag or occupying territory (O'Malley 2014). With the UN Declaration, however, Indigenous peoples' exclusion from the UN decolonisation project has been technically corrected, and Indigenous peoples are now officially included as agents of decolonisation since Indigenous peoples are now specified as enjoying the rights of self-determination equal to all other peoples.

However, the terms and meaning of decolonisation are not as clear as they were in the 1960s era of UN decolonisation, since decolonisation for Indigenous peoples will not, most often, be as independent sovereign states, as Article 46 of the Declaration states:

Nothing in this declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The new challenge, therefore, is to imagine and create means of Indigenous self-determination that do not revolve around or rely on state structures. This necessarily involves a decoupling of sovereignty from self-determination, which will eventually impact not only Indigenous peoples, but also all peoples. The wider implication is that self-determination can now mean something other than independent, territorial, sovereign statehood, although the formidable challenge is to create a new meaning that does not result in a diminished, second-class self-determination for Indigenous peoples. The meaning of both self-determination and decolonisation are therefore evolving on the global level and Indigenous rights have an important role to play in the global conversation surrounding that evolution. Due to the intervention of global Indigenous politics, a future imaging of self-determination will likely involve sovereignties that may be plural and multiple, and political relations that are grounded in mutual respect and ongoing negotiated power relations (Lightfoot 2016).

Tracing back to the intellectual tradition of Vine Deloria, Jr. (1979), who argued that the inherent right of self-determination, unbounded by state law and institutions, is a preferable starting point for asserting Indigenous nationhood, political theorist Kevin Bruyneel (2007, 218) promotes an understanding of a 'third space of sovereignty'. Under this conception, Indigenous nations operate neither fully inside nor outside of state structures, which is distinct from both assimilation and secession, and thus offers 'a location of Indigenous postcolonial autonomy that refuses the choices set out by colonial society' (Bruyneel 2007.) Likewise, Audra Simpson (2014) sees the potential for new and better state forms, arguing that various sovereign political orders can be nestled within and between states, although she readily recognises that such an undertaking will involve significant change and problem-solving by all parties.

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Third, Indigenous global politics demonstrates that new forms of political relations are possible on the global level. Indigenous global diplomacies have shown that transnational relations can successfully conform to Indigenous ontologies of mutual respect, consensus decision making, non-hierarchical relations, sustainability, and ongoing negotiations. In other words, these 'new' and alternative forms of political practice are actually rooted in very old forms of Indigenous political relations.

Conclusions

As we have sought to demonstrate here, while the UN was originally created to uphold the sovereign power of existing states, and to the detriment of Indigenous peoples, developments since the 1970s point to the UN as a vehicle for Indigenous peoples to organise collectively in favour of their rights. This has included the creation of organisations within the UN system, as well as the passage of the UN Declaration, which is spreading new norms and the potential for what Lightfoot has termed a 'subtle revolution' in how we think about sovereignty, self-determination, and the rights of Indigenous peoples. This cluster of changes in both the structure and practice of global politics is fundamental enough that Indigenous global politics can be argued to serve as a transformational norm vector, a subtle revolution in global politics. For, if implemented, Indigenous rights involve significant global change not only for Indigenous peoples but change that would alter IR not only in theory, but in practice, thereby pointing the way toward a future beyond the current Westphalian international system, a liberal construction of human rights, and state-centric diplomacies.

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