

## Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law<sup>†</sup>

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The interests of Native Americans have long been ignored, or worse. The history of misdealing and atrocities committed against Native Americans ever since Christopher Columbus found himself on a Caribbean island, miscalculated his location, and called his hosts “Indians” is well known. Much less widely known are the present day legacies of this sad history. The American myth of the “vanishing savage,” a myth created to embolden white settlement of the country, has only partially been embraced by reality. Although vastly reduced in numbers, and concentrated in pockets of relative geographic isolation called reservations, the country’s indigenous peoples are still here.

For the country’s indigenous peoples, historical acts of oppression are not just blemishes of the past but rather translate into current inequities. Like other indigenous peoples around the world, Native Americans have been deprived of vast landholdings and access to life-sustaining resources and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. According to every measure, Native Americans as a whole are at the lowest rung of the socio-economic ladder and they exist at the margins of political power.

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Nevertheless, in the face of tremendous adversity, indigenous peoples have long sought not just to survive physically but to flourish as distinct communities on their ancestral territories. They have endeavored to roll back the inequities that linger from the experiences of the past. This “blood struggle,” as Charles Wilkinson calls it, is one that draws its major source of strength from the remarkable resilience of Native Americans and the cultural and social patterns that bind them into communities.<sup>1</sup> Drawing on this strength, Native Americans have employed a number of strategies, including those that enlist the law and the legal process, as agents of change. The limitations of the United States’ legal order, however, have all too often become apparent. Within the architecture of the domestic legal order doctrines derived from colonial era practice continue to rear their heads and impede the reversal of the status quo left by the colonizing process.

Faced with legal and political barriers in the United States, Native Americans, like indigenous peoples elsewhere, have extended their legal advocacy into the international arena. Over the last three decades especially, they have been appealing to the international community and looking to international law to advance their claims. However, international law has its own set of limitations. International law is a body of transnational rules and procedures, linked to international institutions, in which states are the primary actors. Historically, international law can be seen as complicit in patterns of colonization, ultimately upholding the sovereignty asserted by colonizing states over indigenous peoples and their lands. But things change.

A good deal of scholarly energy has gone into examining the changing character of international law, especially in light of phenomena such as the creation of the United Nations (UN) to formalize a constitutional order of multilateralism and global cooperation, and the introduction of a normative foundation of peace and security for that order. Related to these phenomena, and contributing to among the most radical changes in the character of international law over the past century, is the development of an

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1. See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

international human rights regime. The growth of this regime takes international law beyond its traditional focus on the rights and duties of states, establishes an international legal competency over matters once deemed within the exclusive domain of states, and provides individuals and other non-state actors access, albeit limited, to avenues of international legal process.

The remarks that follow summarize how the claims of indigenous peoples have not only taken advantage of changes in the character of international law but have also contributed to those changes, particularly in the area of human rights. These changes are beneficial not just for indigenous peoples themselves but the humanity more broadly. Part I describes the nature of disparate international legal arguments employed by indigenous peoples and how those arguments have tended toward a human rights discourse. Part II discusses specific ways in which the indigenous human rights discourse has contributed to the evolution of international human rights law.

## I. TWO FRAMEWORKS OF ARGUMENT USED BY ADVOCATES

There have been significant advances in international law in favor of indigenous peoples over the last two to three decades. These advances are largely the result of indigenous peoples' own resilient efforts, both domestically and through international channels. Without the resilient efforts by indigenous peoples themselves—people from the grass roots, their leaders, and their elders—these advances would not have occurred. There are two principal frameworks of argument used by advocates in the effort to use international law in favor of indigenous peoples: the states rights framework and the human rights framework. Of these two the human rights framework is that which has yielded the most favorable results for indigenous peoples over the last several decades.

### A. *The States Rights Framework*

One strain of argument has been within the classical state-centered framework of international law developed in Europe from the seventeenth century onward, along with the institution of the modern state. Within this frame of argument, indigenous peoples have been referred to as “nations” and identified as having attributes of

“sovereignty” that predate and, at least to some extent, should trump the sovereignty of states that now assert power over them. The rhetoric of nationhood is used to posit indigenous peoples as states, or something like states, within a post-Westphalian world of separate, mutually exclusive political communities. Advocates for indigenous peoples point to a history in which “original” sovereignty of indigenous communities over defined territories has been illegitimately taken from them or suppressed. The rules of international law that developed in the nineteenth century relating to the acquisition and transfer of territory by and among states are invoked to demonstrate the illegitimacy of the assault on indigenous sovereignty.

While appealing to many, this strain of argument must confront international law’s strong historical doctrinal tendency, precisely at its height in the nineteenth century, to view as unqualified for statehood non-European indigenous peoples and instead to favor the consolidation of power over them by the European states and their colonial offspring. This argument is also strongly resisted by contemporary international norms of state sovereignty, which have survived robustly from historical doctrine and through existing political configurations that favor the sovereignty of already widely recognized states to the exclusion of any competing sovereignty.

### *B. The Human Rights Framework*

The second strain of argument used by indigenous rights advocates over the last few decades centers around the international system’s embrace of human rights. Indigenous peoples have seized upon the institutional and normative regime of human rights that was brought within the fold of international law in the aftermath of World War II and the adoption of the UN Charter. Much like the moral discourse engaged in by pre-nineteenth-century theorists who are associated with the early development of international law and who questioned the legality of colonial patterns, the contemporary human rights discourse has the welfare of human beings as its subject and is concerned only secondarily, if at all, with the interests of sovereign entities. Within the human rights framework, indigenous peoples are groups of human beings with fundamental human rights concerns that

deserve attention. Historical events are indeed relevant, but that relevance is measured as the extent to which history accounts for the conditions of present day oppression and inequities that affect the lives of indigenous human beings and their communities.

Responding to indigenous peoples' demands is a human rights imperative that is now widely recognized within the international system. With this recognition has come a sustained level of international institutional activity focused upon indigenous peoples' concerns and a corresponding body of norms that build upon long-standing human rights precepts. This regime is in tension with notions of state sovereignty that continue as central to the international system and that generally blunt international concern over human rights; it also challenges the human rights system's traditional focus on the rights of individuals rather than on the collective rights of groups. Nonetheless, an indigenous rights regime has developed and it continues to evolve within international law's human rights program in ways that are in some measure favorable to indigenous peoples' demands.

## II. FOUR FRONTS OF CHANGE

Indigenous peoples are not just prompting changes in international law, in particular human rights law, that are focused on their demands; they are forging changes in fundamental aspects of the international legal system that apply more broadly. These changes can be seen along the following four fronts.

### *A. The Move Toward Collective Rights*

Indigenous peoples have helped forge new ground within the human rights regime of international law by moving it to embrace collective human rights. Until recently, the focus of the international human rights regime has been almost entirely on the rights of the individual against the state, without much attention to the collective and associational dimensions of human existence beyond the state. Bypassing the individual/state dichotomy of rights and duties, indigenous peoples have claimed and articulated their human rights in terms of group or collective rights. In multiple written and oral statements to international audiences, indigenous leaders and

representatives have provided lucid explanations and illustrations, detailing the convincing justifications for collective human rights that have seemingly eluded the academic elite. The international system is increasingly embracing the ideal of collective rights for indigenous peoples and not just the individual rights of members of indigenous communities. In doing so, the international system has acclimated itself to collective rights in a way that has potentially broad implications beyond simply the context of indigenous peoples.

Existing and proposed international written instruments have affirmed the collective rights of indigenous peoples. Already one international treaty, International Labor Organization (ILO) Convention Number 169 on Indigenous and Tribal Peoples (“the Convention”),<sup>2</sup> affirms an array of rights belonging to “indigenous peoples” and not just rights belonging to individuals who happen to be indigenous. In the Convention a savings clause is attached to the usage of the term “peoples” to avoid implications regarding self-determination, but that in no way undermines the collective nature of the rights affirmed.<sup>3</sup> The titleholders of rights within this convention are peoples; that means indigenous groups are deemed to have collective rights in relation to their lands, the maintenance and development of their cultures, their own institutions of self-governance, and their own laws and customs. This multilateral treaty is binding on nearly every country in the Western Hemisphere. (Among the exceptions are the United States and Canada, which have not ratified the treaty.) Likewise, collective human rights are articulated in both the draft of the UN declaration on the rights of indigenous peoples and the proposed Organization of American States’ (OAS) declaration on indigenous rights.<sup>4</sup> These proposed declarations affirm a series of rights of indigenous peoples, including the same kind of rights affirmed by the Convention, though in much

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2. International Labor Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, *available at* <http://www.uhchr.ch/html/menu3/b/62.htm> (entered into force Sept. 5, 1990).

3. *Id.* art. 1, § 3.

4. Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 1333d Sess., OEA/Ser.L/V/II.95, doc. 7 rev. (1997).

more sweeping terms. It is therefore likely that these declarations, once approved, will provide greater recognition for indigenous peoples' collective rights than the Convention.

Also relevant is the practice of important international human rights bodies, including the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination (CERD), and the Inter-American Commission on Human Rights, each of which has referred to indigenous "peoples" as holders or beneficiaries of rights. Although many states have resisted usage of the term "peoples" without the kind of qualifier that appears in the Convention, that resistance generally indicates opposition toward a recognition of indigenous collective rights. The trend that can be seen among states participating in international discussions about indigenous rights is to accord legal entitlements to indigenous peoples as collective entities. This international practice is also consistent with the trend in the domestic laws of virtually every state that admits to having indigenous groups within its borders, including virtually all of the American states.

Important with regard to collective rights are recent decisions of the inter-American human rights institutions in the cases concerning the Awas Tingni community in Nicaragua, the Western Shoshone people in the United States, and the Maya people in Belize.<sup>5</sup> These decisions each explicitly affirm the collective rights of indigenous peoples over their lands and resources on the basis of international legal instruments that only recognize individual rights. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights interpreted individual rights, such as the right to property, in the context of indigenous peoples' claims. These institutions held that property rights arise not just within state legal systems, but also within the traditional land-tenure systems of indigenous peoples. These rights arise from the collective interaction

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5. See Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2002 Inter-Am. Ct. H.R. (ser. C), No. 79 (Aug. 31, 2001); Mary and Carrie Dann, Case 11.140, Inter-Am C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); Case of Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004).

of indigenous communities and their members, and are therefore collective rights.

These and other developments in international law indicate a move toward the recognition of the collective rights of indigenous peoples within the human rights framework of international law. This important development in the structure of international human rights law has relevance beyond simply the context of indigenous peoples because it moves the international human rights system beyond the individual/state dichotomy that has framed dominant understandings about rights and duties under international law.

### *B. The Softening of State Sovereignty*

A second, related way in which indigenous peoples have helped change international law has to do with state sovereignty, which is considered one of the bedrock doctrines of international law. The doctrine of sovereignty traditionally has shielded states from scrutiny over matters that are deemed to be within the realm of their domestic concern. A good deal of scholarly commentary has been devoted to identifying and explaining a weakening of the sovereignty shield over the last several decades. This weakening is attributed substantially to the international human rights regime that has developed since the adoption of the UN Charter and that imposes, typically in favor of the individual, external limitations on the exercise of state authority in the domestic realm. Indigenous peoples' demands, which have been deployed through the human rights regime, are resulting in a more radical altering of the state sovereignty norm than the alteration brought about by the internationalization of individual rights.

The assertion of such group rights challenges the primacy and sphere of state governing authority in a much more fundamental sense than classical individual rights. International norms have developed and are further evolving to uphold the asserted group rights manifested in the Convention and the drafts of the UN's and OAS's declarations on indigenous rights. The weakening of the state sovereignty shield in this regard is dramatically evident in recent proceedings before the Inter-American Commission on Human Rights, the UN Human Rights Committee, and CERD in which states have been called upon to answer for their promotion of natural



resource development or land administration schemes regarding lands claimed by indigenous peoples. These cases involve the assertion of claims of indigenous peoples over natural resources on their traditional lands.

For example, in the cases concerning the Mayas in Belize, the Awas Tingni community in Nicaragua, and the Western Shoshone in the United States, the main defense of the states concerned was that the administration of lands and natural resources are matters that fall within the sovereign discretion of the state. Belize, Nicaragua, and the United States either explicitly or tacitly argued that it is up to the state to decide how to distribute land, how to manage land, and how to manage the natural resources. However, in the Awas Tingni case the Inter-American Commission on Human Rights, joined by the Inter-American Court in the Awas Tingni case, disagreed with that position and saw that these questions were legitimate subjects of international concern. The Commission affirmed the collective rights of indigenous peoples over their lands and resources and held that the United States, Belize and Nicaragua should adjust their laws and policies regarding the administration of these lands and resources. These cases illustrate how the international human rights system's embrace of indigenous rights is pushing toward a softening of the doctrine of state sovereignty.

### *C. Evolution of the Norm of Self-Determination*

A third, and again related, area of change has to do with the concept of self-determination. Self-determination is affirmed as a principle in the UN Charter and as a right of "all peoples" in the international human rights covenants. Much scholarly effort has gone into trying to explain the meaning of the right of all peoples to self-determination as a *human* right in the context of an international legal order that presumptively upholds the sovereignty, territorial integrity and political unity of states. Typically, self-determination has been understood to mean, in its fullest sense, a right to independent statehood. Hence the central focus of inquiry has been on identifying the necessarily limited universe of groups that are entitled to become independent states if they so chose. A premise underlying this approach is that the state is the highest form of self-determination for

cultural or national communities. This premise is of course subject to question, if only because of accelerating developments over the last several decades by which the importance of the state has diminished in light of the growth of both local and transnational spheres of community and authority.

In pressing their demands internationally, indigenous peoples have pointedly undermined the premise of the state as the highest and most liberating form of human association. Indigenous peoples are seen, and for the most part see themselves, as different from but not inferior to states. The model that is emerging from the interplay of indigenous demands and the authoritative responses to those demands is one that sees indigenous peoples as simultaneously distinct from, and yet parts of, the states within which they live, as well as part of other units of social and political interaction that might include indigenous federations or transnational associations. Within this model, self-determination is achieved not by independent statehood, but by the consensual development of context-specific arrangements that uphold for indigenous peoples both spheres of autonomy commensurate with relevant cultural patterns and rights of participation in the political processes of the states in which they live. Professor Erica-Irene Daes, the previous, long-time chair of the UN Working Group on Indigenous Populations, has observed:

This [process] might best be described as a kind of “belated State-building,” through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean that assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.<sup>6</sup>

A new conception of self-determination is emerging around indigenous peoples’ claim to self-determination that applies to

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6. Erica-Irene A. Daes, *Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, at para. 26 (1993), available at <http://www.ohchr.org/english> (follow “Search” hyperlink; type “Erica-Irene A. Daes” and “19 July 1993” in the search engine).

claimants of self-determination across the globe beyond the specific context of indigenous peoples. This new conception of self-determination, reflected in the preamble of the UN Draft Declaration on the Rights of Indigenous Peoples, makes clear that the right affirmed is not the right of indigenous peoples to secede from the states within which they live. Rather, the new conception of self-determination recognizes the freedom of individuals and groups to form associations and to collectively pursue their own destinies under conditions of equality within the framework of the states within which they live.

The kind of particular arrangements needed to allow for this conception self-determination will necessarily vary from case to case and adapt to the specific context of individual indigenous groups. For example, the Yanomami of the Amazon region of Brazil and the Navajo people of southwestern United States exist under very different economic, political, and geographic situations; therefore, these groups will necessarily develop different kinds of structures to accommodate their right of self-determination. Nevertheless, the underlying norm reflecting the fundamental right of these groups is the same: it is the right of each one to be in control of its own destiny. This conception of self-determination assumes a more nuanced character by taking into account the interdependencies that exist among and between indigenous communities and the larger societies within which they live. This substantial innovation in the doctrine of self-determination moves beyond the classic understanding of self-determination as wedded to a right of independent statehood, and has implications far beyond the context of indigenous peoples.

#### *D. The Role of Non-State Actors*

Finally, another development promoted by the emergence of indigenous peoples within the contemporary international legal system has to do with the role of non-state actors. Actors other than states have increasing influence within the international legal system, particularly its human rights regime. Individuals themselves are rights holders and have some access to the international system in order to claim those rights. Non-governmental organizations (NGOs) like Amnesty International influence the development of international

law through advocacy efforts and consultative status with the UN's Economic and Social Council (ECOSOC) and its subsidiary bodies. Labor unions also have significant access to the international human rights system, especially through the ILO. Private corporations are increasingly scrutinized by international agencies and NGOs, and are thus subjects of international concern. Therefore, the classic understanding of the subjects of international law is breaking down. Contemporary international legal discourse does not only involve the examination of the rights of states and the duties of states. Rather, there are multiple actors and an increasing number of rights holders in the modern international system.

Indigenous peoples are among the numerous non-state actors that have managed to take advantage of openings in the international system and forge new ones in order to participate in and influence decision-making processes that extend into the international arena. For over two decades, representatives of indigenous peoples have been appearing before UN human rights bodies in increasing numbers and with increasing frequency. Indigenous peoples have enhanced their access to these bodies as several organizations representative of indigenous groups have achieved official consultative status with the ECOSOC. In response to indigenous peoples' efforts in particular, new institutions and programs have developed that are providing them unique avenues of access to the international system. Most notably among these are the UN's Working Group on Indigenous Populations, the Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous Peoples, and the Permanent Forum on Indigenous Issues. Indigenous peoples and their organizations have direct access to these agencies, and they appear before them in their public sessions to make written or oral submissions. Additionally, eight of the sixteen members of the Permanent Forum are named by the ECOSOC President in consultation with indigenous peoples, and this has resulted in those eight being from indigenous constituencies.

The increasing access of indigenous peoples to the international system is especially noteworthy in at least two respects. First, without any political influence to speak of, indigenous peoples have been successful in using the language and methods of human rights to advance their demands. Grounding their demands in generally

applicable human rights principles, they have used their access to the international system to articulate a vision of themselves different from that previously advanced and acted upon by dominant sectors, and they have greatly influenced the international agenda of activities that has proceeded in response to those demands. In a relatively short time they have managed to shift prevailing attitudes away from a norm of assimilation toward one of respect for indigenous cultures and group identity. Even though this shift has not progressed sufficiently to entirely satisfy most indigenous groups, and its implementation on the ground has been slow to follow, the shift is nonetheless clearly perceptible in the collective and individual utterances by states and other actors, and in newly developed or still developing written instruments.

Second, indigenous peoples appear to be gaining recognition as having a unique or *sui generis* status among non-state actors within the international arena. Associated with this unique status is an enhanced level of participation. Indigenous peoples are unlike ordinary nongovernmental organizations in that indigenous peoples are not simply groups organized around particular interests. Rather, indigenous peoples are by definition longstanding communities with historically rooted cultures and distinct political and social institutions. They seek to have a presence in their own right as peoples in the international arena and not just as representatives of a segment of so-called civil society. As already noted, within the UN and other international institutions various extraordinary mechanisms have been devised to allow representatives of indigenous peoples to express their concerns and participate in discussions that affect them.

Indigenous peoples are unique among non-state actors. By gaining a foothold in the international system, they are a significant force in making that system less state-centered and more centered on human beings in their multiple relevant configurations, a phenomenon with broader implications.

#### CONCLUSION

Developments generated by indigenous peoples through a discourse of human rights are having identifiable impacts on international law, particularly human rights law, with implications for

the larger international community. These developments are breaking new ground on issues concerning collective rights, state sovereignty, self-determination, and the role of non-state actors, with a central feature being a challenge to the state as the sole or primary means of locating power and community. Having asserted themselves in the international arena, indigenous peoples have pursued a vision of a normative universe that stands against forces of the kind that have wreaked havoc on indigenous societies throughout history. In doing so, indigenous communities are helping to bring about change in the international legal order. This change just might help bring about a more just and humane world, not only for indigenous peoples but for all of humanity.