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Notes From the Field

‘Breathing Life’ Into the Declaration on the Rights of Indigenous Peoples

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Abstract
With the passage of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous movements are now armed with doctrine to protect their human rights. How is this impacting disputes with international governments, regional governing organizations, and state governments? I examine two cases at each of these levels of governance and find mixed results. In each context, one case is successful and one case is (thus far) a failure. This highlights the importance of the role of the Declaration on the Rights of Indigenous Peoples, but it also suggests there may be limits to the power it has to protect indigenous peoples.

Keywords
Indigenous Peoples, United Nations, Declaration on the Rights of Indigenous Peoples, the State

Indigenous activism in the international sphere has early roots. In 1922, Deskaheh traveled on a Haudenosaunee passport to petition the League of Nations on behalf of indigenous peoples (Cooper, 2003). Human rights doctrine explicitly protecting indigenous peoples rights are not new. The Declaration on the Rights of Indigenous Peoples (DRIP), however, which was adopted by the General Assembly in September 2007, is distinct in that it is co-authored by indigenous peoples and states. The drafting process—supported by the UN Working Group on Indigenous Peoples—was a twenty-year struggle. The passage of DRIP marks an important step towards sovereignty and human rights for the world’s indigenous peoples. Having completed the task of authoring the Declaration and securing its position in global governance, the global indigenous movement is now shifting its focus towards ‘breathing life’ into the DRIP. This quote comes from a statement made by an indigenous representative in 2008, discussing the next steps for the global indigenous movement.
The work of ‘breathing life’ into the DRIP is occurring within multiple contexts: in global governance, regional governing organizations, and states. Thus far, indigenous peoples have achieved some success in their work towards human rights, but barriers to their success are also emerging. In this note I will explore the ways that the DRIP is used to employ a human rights frame. I will assess the effectiveness of these campaigns within global governance, regional governing organizations, and states. I will begin by briefly discussing my method and the DRIP.

Method

Conducting preliminary analyses of the success of the DRIP as a mechanism for achieving human rights, I gathered data on conflicts involving indigenous peoples and international governing organizations, indigenous peoples and regional governing bodies, and indigenous peoples and states. Each event is a case, and as I gather data on more cases I will be able to develop more rigorous analysis and generate more reliable findings. Data sources include newspaper articles, blog posts, government press releases and other official documents, and interventions made at the 8th Session of the United Nations Permanent Forum on Indigenous Issues. Thus far, I have gathered information on six cases.

DRIP

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007. The Declaration was approved by 143 votes, there were eleven abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine) and only four states entered negative votes: Australia, Canada, New Zealand, and the United States. Columbia and Samoa have reversed their abstentions—both states now support the DRIP. Australia reversed its negative vote in 2009, and New Zealand, Canada, and the United States reversed their negative votes in 2010. Thus, the Declaration is now approved by 149 votes with only nine abstentions (United Nations Permanent Forum on Indigenous Issues, 2006a).

The DRIP is a holistic document encompassing civil, political, economic, social, and cultural rights for a particular population—
indigenous peoples. Protecting ‘what is minimally necessary to live one’s life as a human’ (Howard, 1995) for this population allows for the document to reflect values and norms that are common across indigenous peoples but not shared by the rest of the world. Indigenous peoples share a holistic perspective on life and a unique relationship to land: nature as family and not a resource, with religious practices based in the natural world. As Figure 1 and Table 1 show, rights protected in the DRIP can be categorized as: Civil and Political; Economic, Social, and Cultural; or Overlapping.

**Figure 1. Indigenous Rights As Conceived in the DRIP**

![Diagram showing the overlap between Civil & Political Rights and Economic, Social, & Cultural Rights]

**Table 1. Categories of Rights within the DRIP, by Article**

<table>
<thead>
<tr>
<th>Civil &amp; Political</th>
<th>Overlapping</th>
<th>Economic, Social, &amp; Cultural</th>
</tr>
</thead>
<tbody>
<tr>
<td>Articles 1-4, 6-8, 18-19, 22, 27, 30, 37-38, 40-46</td>
<td>Articles 5, 9, 15-17, 20-21, 36</td>
<td>Articles 10-14, 23-26, 28-29, 31-35, 3</td>
</tr>
</tbody>
</table>

The Declaration consists of forty-six articles which range in topic from the right of indigenous peoples to the full enjoyment of human rights and fundamental freedoms as recognized in international law and the UDHR, self-determination, nationality, freedom from
discrimination, the right to distinct institutions (political, legal, economic, social, and cultural), the right to belong to an indigenous community, the right to practice and revitalize customs, the right to spiritual and religious traditions, the right to establish and control their educational systems, the right to establish their own media in their own languages, the right to lands which they have traditionally owned, military activities shall not take place on lands or territories of indigenous peoples, the right to recognition and enforcement of treaties, and all rights are for male and female indigenous individuals (United Nations, 2008). The DRIP, although not a human rights document in name, is widely viewed as a human rights document within the indigenous community and also within the UN structure. In a sense, this instrument challenges dividing rights into different varieties.

In addition to delineating the rights of indigenous peoples, the DRIP includes provisions for ‘breathing life’ into the document by establishing a mandate for promoting the rights enshrined in the Declaration. Two articles pertain to enforcement explicitly:

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration
(United Nations, 2008)

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration
(United Nations, 2008)

Articles 38 and 42 make the duties of the state explicit and require that the state will act in consultation with indigenous peoples. This affirms the sovereignty and freedom of indigenous peoples even as their human rights are protected. Article 42 relates directly to the United Nations bodies, which are similarly obligated to promote, implement, and evaluate the effectiveness of the DRIP.
Working for Human Rights in Multiple Spheres

As Articles 38 and 42 of the Declaration on the Rights of Indigenous Peoples imply, indigenous human rights require attention in multiple contexts: within international, regional, and state governance. Indigenous peoples movements are challenging the institutions in each of these contexts to apply the provisions of the DRIP with the participation of indigenous peoples. Since the passage of the DRIP in 2007, IGOs, regional governing bodies, and states are already working to carry out their duties. Where governing structures fail to act in accordance with the DRIP, indigenous peoples are engaging in civil society actions to promote compliance.

**Figure 2. Layers of Action for Social Justice**

- **Within International Governance**
  - CERD
  - UNFFI

- **Within Regional Governance**
  - Inter-American Commission
  - European Union

- **Within State Governance**
  - Denmark (Greenland)
  - Makah Tribe (Treaty Rights)
Within International Governance

The U.S. was recently sanctioned by the United Nations’ Committee on the Elimination of Racial Discrimination (CERD) for its actions on Western Shoshone lands. The Western Shoshone initially sought assistance from the United Nations because they were concerned about the way the U.S. government was handling its ownership of their lands (the federal government asserts that it owns ninety percent of Western Shoshone lands), including use of the land for military testing, open pit cyanide heap leach gold mines, and nuclear waste disposal (Western Shoshone National Council, 2006). The CERD responded to these concerns by issuing an Early Warning and Urgent Action Procedure Decision to the U.S. in March 2006. A report issued in February 2007 provides evidence that the U.S. has not taken action as prescribed by CERD and is continuing to engage in discriminatory action (Western Shoshone National Council et al, 2007). In this case, the CERD is engaging in actions that follow the requirements of Article 42 in the DRIP. They are also enforcing rights within Articles of the DRIP, including Article 18, which protects ‘the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures’ (United Nations, 2008). Another important Article in this case is Article 26: ‘Indigenous peoples have the right to the lands, territories and resource which they have traditionally owned, occupied, or otherwise used or acquired’ (United Nations, 2008). Other Articles that are violated by the US actions towards the Western Shoshone include: Article 29 (right to conservation of the environment, protection from disposal of hazardous waste on indigenous lands without free, prior, and informed consent (FPIC)), Article 30 (prohibiting military activities on indigenous territories), Article 32 (right to determine and develop strategies for use and development of lands), and Article 28 (right to redress for lands that have been occupied, used, or damaged without their consent). The Western Shoshone National Council has achieved some success using the human rights frame, as evidenced by the findings of the CERD. The US government’s lack of response to the CERD, however, means that human rights violations persist in this case.

The United Nations Permanent Forum on Indigenous Issues (UNPFII) and the DRIP are the result of decades of resistance and...
struggle on the part of indigenous peoples to gain a voice in global governance (Ewen and The Native American Council of New York City, 1993). The UNPFII was created in 2000 on the recommendation of the Commission on Human Rights and will report to the Economic and Social Council (ECOSOC). It advises ECOSOC on indigenous issues related to economic and social development, culture, the environment, education, health, and human rights (United Nations Permanent Forum on Indigenous Issues, 2006b). The Forum has three goals: to provide expert advice and recommendations on indigenous issues to the UN system, to raise awareness regarding indigenous issues within the UN system, and to prepare and disseminate information on indigenous issues (United Nations Permanent Forum on Indigenous Issues, 2006c). Members of the UNPFII consist of eight indigenous experts chosen by the indigenous communities and eight experts elected by the states. Members serve a three-year term and can renew their membership once (for a total of six years). The UNPFII hosts annual sessions of the Forum. States, UN bodies and organs, intergovernmental organizations with consultative status, and indigenous organizations can participate in the Forum as observers and registered organizations can address the Forum. The meetings of the Forum present a unique opportunity for indigenous peoples to participate in and influence the work of the United Nations.

A brochure describing the UNPFII documents the role of this new body: ‘indigenous peoples were [now] able to speak for themselves in a new way, to present their views as full-fledged members of a United Nations body’ (United Nations Department of Public Information, 2007). This is a powerful realization within an organization comprised of member states. Within the UNPFII the voices of indigenous peoples are not mediated by the state. It urges the inclusion of indigenous peoples in the creation and implementation of poverty reduction policies, supports the writing of policy to improve indigenous lives, encourages bilingual instruction and the teaching of indigenous culture and traditional knowledge, seeks to protect the environment, promotes human rights and the welfare of women and children, and applies the Millennium Development Goals in indigenous communities (United Nations Permanent Forum on Indigenous Issues, 2006b). Participation in the UNPFII is an act of self-determination in global governance. The UNPFII has duties estab-
lished by the DRIP, particularly Article 42. In compliance with the Declaration, the UNPFII now reviews its work every other year. Agenda items also allow indigenous peoples to talk about the DRIP—within their regions and as it relates to thematic topics (such as self-determination and development, or climate change and biodiversity).

Within Regional Governance

The Inuit Circumpolar Conference (ICC) composed a petition in 2005, documenting the violation of human rights due to global warming caused by the U.S. The ICC petition includes a list of sixty-three signatories, individuals whose ‘property, physical well-being and cultural life are being adversely affected by acts and omissions described in this petition’ (Watt-Cloutier and Inuit Circumpolar Conference, 2005, p. 10). The petition details the damages wrought by global warming in the Inuit society: its impact on hunting and fishing, the economy, social and cultural life, the land and climate. It also documents the U.S. contribution to CO₂ emissions to provide evidence of the results of its actions and inaction in contributing to global warming and the violation of the human rights of Inuit people (Watt-Cloutier and Inuit Circumpolar Conference, 2005). In addition to extensive scientific data, the petition includes information submitted by each of the petitioners to provide evidence that the climate is changing due to human activity. They note profound changes that are impacting their local communities: land slumping due to melting permafrost, shorter cold season, changes in animal populations, thinner ice, drier soil is causing a decrease in the quality of edible roots, meat is spoiling before it dries, loss of land due to erosion, narrower beaches, polar bears are too thin to eat, and people are starting to experience sunburns (Watt-Cloutier and Inuit Circumpolar Conference, 2005). In the event that this lawsuit forces the US to decrease emissions, it would protect many rights in the DRIP: particularly Articles 11 and 31, which protect the right to culture and traditions, Article 26, the right to lands, territories, and resources they have traditionally owned, occupied, or otherwise used, and Article 29, which gives indigenous peoples the right to protect the environment.

In May of 2009, the European Union (EU) banned the trade and sale of seal products within the EU. The ban is a response to what the EU views as cruel hunting methods of seals. This ban was
controversial among indigenous peoples who harvest seals in a humane manner; their economies are heavily reliant upon the seal trade. The EU has agreed to make an exception for seal products that are composed of seals harvested by indigenous peoples: ‘Trade in seal products will be allowed for seal products derived from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence’ (Europa, 2009). This action by the EU to permit traditional hunting of seals for subsistence also protects Articles 11 and 31, and several articles which protect the right to development that is culturally relevant: Articles 3, 20, 21.

Within State Governance

Since 1721 Denmark has ruled Greenland. In June 2009, Denmark began to implement steps for Greenland’s self-government (‘Draft Act on Greenland Self-Government’ and Government of Greenland). The initial changes are symbolic, including the official language (now Kalaallisut) and name (now Naalakkersuisut). The Danish government is providing significant funding to subsidize the new government, but this will gradually diminish (‘Draft Act on Greenland Self-Government’). A new prime minister looks forward to this opportunity for self-determination for the Inuit people of Greenland (‘Speech by Premier Kupik Kleist…’, 2009). The Danish government’s movements towards self-rule are very important steps towards realized rights of self-determination (Article 3) and the right to create their own distinct institutions—political, legal, economic, social, and cultural (Article 5).

Members of the Makah tribe are engaged in a civil society action against the United States government. The Makah tribe, located on the northernmost point of the Olympic Peninsula in Washington State, is the only tribe with the treaty right to whale (Makah Tribal Council and Makah Whaling Commission, 2005). When the gray whale’s population began to rebound in the 1990s, the Makah sought to resume their treaty right to hunt gray whales (Makah Tribal Council and Makah Whaling Commission, 2005). The International Whaling Commission and the United States government initially granted permission for the Makah tribe to hunt whales. The IWC limited the number of whales the tribe could harvest—from 2003-2007 only twenty whales could be killed, with a maximum of five whales per
year. The tribe would issue the permits to hunt whales only when there is unmet subsistence need or cultural need. Hunts occurred in 1999 and 2000, with only one whale harvested (Makah Tribal Council and Makah Whaling Commission 2005). When the Makah tribe applied for its waiver to the Marine Mammal Protection act in 2005—required for the tribe to hunt after a court ruling in 2003—the United States refused to provide a waiver (Makah Cultural and Research Center, the Makah Tribe and the Washington State Historical Society, ND, National Oceanic and Atmospheric Administration, Northwest Regional Office, 2010a).

Citing the Marine Mammal Protection Act, the US government stated that it was necessary to study the potential effect of hunting whales on the population of gray whales. While still waiting for the Environmental Impact Statement, a group of hunters took to the Pacific Ocean in September 2007 in an attempt to hunt a whale. In the course of the hunt, the Coast Guard intervened and a whale was injured and died at sea. The hunters were prosecuted in American and tribal courts. In May 2008, NOAA published a draft of the EIS (National Oceanic and Atmospheric Administration, Northwest Regional Office, 2010). This draft statement is not yet finalized. As of the last status update, it appears that the public commenting period had been extended to August 2008. This date has obviously passed, but a final draft of the EIS is yet to be published. Thus members of the Makah tribe are still prohibited from whaling. In April 2011, NOAA updated their website to note that new data on the “stock structure” would be important as they continue to assess the impact of whaling on the whale population (National Oceanic and Atmospheric Administration, Northwest Regional Office, 2011). Without the right to whale, the cultural rights of the Makah tribe are being denied (Articles 11 and 31), and their treaty rights are also being denied (Article 37).

Limits of the Human Rights Frame

As members of a global community that respects humanity and life, we expect that human rights are powerful words that are a call to action. Looking at how the world responds empirically, however, it is possible to find cries for human rights that yield no response from IGOs, regional governing bodies, and states. Inaction in re-
response to the human rights framing suggests that serious limitations may exist.

Indigenous activists have identified a source of weakness in the human rights frame. As a speaker at the 2009 Session of the UNPFII notes, ‘violations occur within states.’ Human rights violations—committed by agents of states or other actors—occur within state boundaries. This means that in most cases there are state laws, and possibly international laws, which can be enforced to stop the human rights violations. Sometimes civil society actions bring public attention to violations, resulting in actions by states or IGOs to stop them. IGOs, regional governing bodies, and states determine the process of filing complaints and responding to complaints. Actions are permitted or not permitted by these institutions. In this equation, the power rests in the hands of the state.

The DRIP, created by both state and non-state entities, may not be capable of reconfiguring the role of governing bodies. Indigenous peoples can point out violations of the DRIP and engage in civil society actions to bring greater attention to the violations, but they lack authority to stop the violation or seek remediation for the violation. Instead, states, which might be complicit in the violation, are the enforcement bodies. At the international governing organization level, at the regional level, and at the state level the state-centric enforcement mechanism is a limit of the DRIP. By extension, this is a limitation of the human rights frame employed by indigenous peoples to protect their rights. Articles 38 and 42 might create some opportunity for legal action against states that fail to complete their duties. The potential for legal redress will be revealed in the future when these Articles are tested in international litigations.

The continued violation of human rights might be a structural limit to the human rights frame more broadly—not simply in the case of human rights of indigenous peoples. It might also be a failing of governance, rather than a failing of the human rights frame, particularly in the case of weak states. Inaction is not necessarily a sign of a failing of the human right frame, but it might be a sign that the governing body—IGO, regional, or state—possesses the intent to protect human rights but not the means to stop violations. The continued human rights violations indicate some degree of limitation of the human
rights frame. The limitation might be overcome with solidarity across movements for human rights.

Conclusion

Looking at six human rights campaigns of indigenous peoples, which refer to rights protected under the Declaration on the Rights of Indigenous Peoples, the results are mixed. In the context of international governance, one case is successful and one is (thus far) a failure. In the context of regional governance, one case is successful and one is a failure (thus far). In the context of state governance, one case is successful and one case is (thus far) failures. This suggests the importance of the role of the state, and perhaps citizens, to counter the limits of the human rights frame.

References


Keri E. Iyall Smith’s research explores the intersections between human rights doctrine, the state, and indigenous peoples in the context of a globalizing society. In this research, she is beginning to explore the study of indigenous peoples as public sociology. She has published articles on hybridity and world society, human rights, indigenous peoples and teaching sociology. She is the author of States and Indigenous Movements (Routledge), co-editor with Judith R. Blau of Public Sociologies Reader (Rowman & Littlefield), co-editor with Patricia Leavy of Hybrid Identities: Theoretical and Empirical Examinations (Brill and Haymarket), and co-editor with David Brunsma and Brian Gran of Handbook of Sociology and Human Rights (under contract with Paradigm). She is an assistant professor of Sociology at Suffolk University in Boston, MA where she teaches courses on globalization, sociological theory, Native Americans, and introductory sociology. She holds a BA in Sociology from the University of Washington and an MA and PhD in Sociology from the University of North Carolina at Chapel Hill. She is the Vice-President of Sociologists Without Borders.