

## Indigenous Self-Determination and Decolonization of the International Imagination: A Plea<sup>1</sup>

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[I]t could be said that at heart of all the violations of our human rights has been the failure to respect our integrity, and the insistence in speaking for us, defining our needs and controlling our lives. Self determination is the river in which all other rights swim.

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### I. HUMAN RIGHTS AND DIALOGUES OF RECOGNITION

The most basic point I would like to make is that the draft United Nations Declaration on the Rights of Indigenous Peoples (draft Declaration) is about recognition and about being human. It is about the right to be recognized as

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1. This contribution to the *Human Rights Quarterly* reproduces an intervention by the author on 23 November 1995 at the first session of the Open-Ended Inter-Sessional Working Group established in accordance with United Nations Commission on Human Rights, Resolution 1995/32 (CHR Working Group). See U.N. Doc. E/CN.4/1995/L.11/Add.2 (3 Mar. 1995), reprinted in 34 I.L.M. 535 (1995). The first session of the CHR Working Group was held from 20 November through 1 December 1995. The author attended the first session as an academic observer and member of the Delegation of the Grand Council of the Crees.

Resolution 1995/32 of the UN Commission on Human Rights (UNCHR) assigned this working group the mandate of elaborating a draft declaration for consideration and adoption by the UN General Assembly on the basis of the draft United Nations Declaration on the Rights of Indigenous Peoples (draft Declaration), prepared over the past decade by the Working Group on Indigenous Populations (WGIP), and adopted without amendment by the UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities. See U.N. Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994), reprinted in 34 I.L.M. 541 (1995).

Resolution 1995/32 envisages that the CHR Working Group will be structured so as to include the participation of delegations of indigenous peoples' organizations. The first session consisted of an exchange of views on the entire text of the draft Declaration amongst the state and indigenous delegations. No substantive decisions on the draft text

human whatever one's difference, rather than having difference serve as a basis for exclusion from the rights to which all humans are supposed to be universally entitled.

Human rights have developed within the United Nations through a constant attention to two questions. The first question: what interests are so important that they are worthy of protection as universal values? We can call this the *freedom* question. The second question: who is worthy of recognition as being fully human? We can call this the *equality* question.

In fact, the content of human rights has evolved as a kind of constant dialogue between this freedom question and this equality question. Freedom says there should be a right to vote; equality replies: then, how can you exclude women? Freedom says that there should be a right to protection from physical harm; equality asks: so, why do you exclude children? Freedom says that there is a right to a fair hearing; equality responds: then, how is it that you can exclude refugees? Freedom says that there should be a right to health; equality replies: then, why is it that the poor are excluded? Freedom says that there should be fair working conditions; equality asks: how can it be that this right is less available to migrant workers?

For a half century, throughout the processes of the United Nations, freedom has also said that a people has the right to self-determination. All

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were made at this first session. Written submissions received prior to the start of the session were issued as official UN documents, but submissions to the working group at the session itself were not issued as official documents. No official transcript (i.e., Summary Record) was kept of the oral interventions at the first session. Documents issued with respect to the CHR Working Group appear in the UN document series E/CN.4/1995[et. seq.]/WG.15.

To no one's surprise, the aspect of the WGIP draft Declaration that attracted the most attention of the assembled delegates was draft Article 3, which reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." U.N. Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994), *supra*. Draft Article 3 precisely tracks the wording of common Article 1, paragraph 1, found in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, except that common Article 1, paragraph 1, begins with: "All peoples. . . ." International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, U.N.T.S. 999 171 (*entered into force* 23 Mar. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). It is primarily draft Article 3 of the draft Declaration which is the subject of the author's intervention at the first session of the CHR Working Group.

The views contained herein do not necessarily represent the views of the Grand Council of the Crees or any other indigenous people's organization. The author would like to thank Ambassador Ted Moses for inviting the author to contribute to the CHR Working Group proceedings. He would also like to acknowledge the assistance of the Social Sciences and Humanities Research Council of Canada.

2. Statement of 24 November 1995, to the first session of the CHR Working Group (on file with *Human Rights Quarterly*).

peoples. The prevailing understanding at the time of the drafting of the UN Charter—and I would emphasize that this was the understanding of the states that dominated that process—was that the right of peoples to self-determination contained in the Charter was, in essence, another way of referring to the right of the populations of current states (a good number of them colonial powers) to their sovereignty. Their own sovereignty. Almost from the first day after the adoption of the UN Charter, equality began to ask questions. The answers always were resisted at first, but, with time, the moral force of the equality argument resulted in the gradual inclusion of previously-excluded societies within the prevailing understandings of those entitled to be regarded as peoples.

However, the lines of arbitrary exclusion were not erased. They merely shifted. The understanding of colonialism was artificially narrowed to include only the most recent wave of colonization, primarily in Africa and Asia. In the meantime, old and new states began to argue that self-determination after decolonization was to mean either the right of populations of entire states to freedom from external domination and interference, or the right of entire populations to freedom from undemocratic rule (as defined in terms of liberal representative democracy of the one person, one vote kind). A few further concessions were made, namely in the case of minority racist rule (Namibia, South Africa, Rhodesia) and also in the case of the Palestinian people who the UN, in the late 1960s, began to treat as a people and no longer as merely falling into the category of refugees.

But the moral force of the argument based on equality and consistency cannot forever be kept barricaded behind arbitrary lines that continue to divide the world into the human and the not-so-human. Self-determination of peoples, as the UN has many times declared, is a *human* right (a collective human right, contrary to the view advanced by the honorable Delegate of Japan this morning that the United Nations has only ever recognized the existence of the rights of individuals).<sup>3</sup> 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. Some state delegations would argue that other human rights categories are more appropriate, such as the rights of “minorities” or of “people” or simply of “individuals.” These delegations are obviously sincere in their belief that this does treat indigenous persons and peoples as fully

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3. Oral intervention of Japan, recorded by the author; no written version available. For a pre-session submission by Japan that makes a similar point, see *Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received From Governments: Addendum*, U.N. Doc. E/CN.4/1995/WG.15/2/Add.1, submission of Japan, at 2 (1995).

human. Yet, I would urge delegates to see that this kind of categorical allocation is ultimately a form of categorical denial. It is a denial of indigenous peoples' own self-conception, fundamental to their members' identity (their identity as individuals, I might emphasize) and a denial of the inconvenient social, historical and political fact of their peoplehood. In the end, it amounts to a form not just of nonrecognition, but, more seriously, of misrecognition.

And there can be no doubt that the substitution of the expression "indigenous people" for the expression "indigenous peoples" would be a profound case of misrecognition. It is not simply a question of Members of the United Nations wishing to avoid certain feared implications of a right to self-determination, namely a right to secede from existing states—a fear to which I shall return. It is also a question of using a term which, in English in any case, is the plural form of the word "person" or the word "individual." As such, the use of the word "people" in this fashion denies the collective dimensions of indigenous rights, collective rights which are fundamental to many indigenous communities and are certainly central to the draft Declaration that is currently before us.

## II. DISCRIMINATORY EXCLUSION

Earlier, Ambassador Moses of the Grand Council of the Crees drew the attention of the CHR Working Group to the definition of racial discrimination found in Article 1(1) of the Convention on the Elimination of Racial Discrimination.<sup>4</sup> This definition must surely be regarded as reflective of a customary legal obligation on all states. It reads (and I read it once again because its message needs reiteration):

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>5</sup>

The exclusion of an indigenous people from the status of being a "people" has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination. It is important to acknowledge that, for many

4. International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965 (entered into force 4 Jan. 1969), 660 U.N.T.S. 195.

5. *Id.* at art. 1, ¶ 1.

members of state delegations in this room, the struggle against racial discrimination is simultaneously a profound personal commitment and a central plank of state policy. The United Nations itself has played a role of high leadership over the decades on the question of racial discrimination, notably in relation to helping rid the world of (second wave) colonialism and apartheid. Once UN delegates are made aware that the exclusion of indigenous peoples from the right to self-determination (which, it bears repeating, is the *human* right to self-determination) is a distinction that is discriminatory, Member States of the United Nations will surely wish to rectify this inconsistency of treatment. They will want to make such a rectification not least because they will realize that what at one point is discriminatory only in effect will become discriminatory in purpose if a conscious decision has been taken not to remedy such effects-based discrimination once the existence of the exclusionary effects has been made known to them.

### III. DECOLONIZING OUR IMAGINATIONS

Many states are of course resisting the recognition of the right to self-determination because they understand that right to entail a right to secede and to do so unilaterally. International law on self-determination nowhere says that all peoples have the right to secede from existing states by virtue only of the right to self-determination. In this respect, we are all perhaps living a bit too much in the past. By equating all self-determination questions with the historically-specific question of Twentieth Century African, Asian, Pacific, and Caribbean decolonization and by then equating decolonization with secession, we are closing off a creative variety of possible futures—what the Friendly Relations Declaration of 1970 refers to as the choice of “other political status.”<sup>6</sup> I would venture to say that we have actually allowed a kind of new colonization to take place—a colonization of our minds and our imaginations. In particular, we are closing our minds to the pragmatic (and I emphasize this word—pragmatic), yet creative, possibilities of the draft Declaration.

It is important to note, in this regard, that indigenous peoples have often sent a message, both in the past and here at this meeting, that, for some

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6. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, *adopted* 24 Oct. 1970, G.A. Res. 2625 (Annex), U.N. GAOR, 25th Sess., Supp. (No. 28), at 122, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970).

reason, has not been heard by a number of state delegations. If one listens, one can often hear the message that the right of a people to self-determination is not a right for peoples to determine their status without consideration of the rights of other peoples with whom they are presently connected and with whom they will continue to be connected in the future. For we must realize that peoples, no less than individuals, exist and thrive only in dialogue with each other. Self-determination necessarily involves engagement with and responsibility to others (which includes responsibility for the implications of one's preferred choices for others). Self-determination thus has a necessary procedural dimension. The need and the requirement in an interdependent world for peoples to negotiate peacefully, and in good faith, the ways in which their respective jurisdictional powers and obligations are to be allocated and are to interact, as interact they necessarily must.

We have to move beyond the unimaginative, indeed sterile, view that peoples' rights to self-determination are mutually exclusive and the view that, somehow, recognition by one people of another people's rights entails the exclusion of the first people's own rights. In this regard, it does not help to hold onto certain dichotomies. According to such dichotomies, either you are this people or you are that people, not, Heaven forbid, both. Either you are within this state's jurisdiction or you are outside this state's jurisdiction, not, Heaven forbid, both. This kind of approach to the question of self-determination is a recipe for futility and even, I fear, conflict. We need to begin to think of self-determination in terms of peoples existing in relationship with each other. It is the process of negotiating the nature of such relationships which is part of, indeed at the very core of, what it means to be a self-determining people. Viewed in this light, express recognition of the right of indigenous peoples to self-determination represents not a threat, but rather an opportunity for the United Nations and its members to help set a new constructive spirit for our all-too-turbulent times.

#### IV. A PLEA

It is precisely in this spirit that I would ask, urge, indeed plead with delegations of the states gathered in this room to approach the task before it. The WGIP draft Declaration is perhaps the most representative document that the United Nations has ever produced. Representative in the sense that the document's normative statements reflect, in a more than token way, the experience, perspectives, and contributions of indigenous peoples. In a word, it is a document that was produced in a decade-long spirit of equal dialogue and mutual recognition. I would, accordingly, like to echo the

proposal made at the beginning of this week by the Four Directions Council, that the CHR Working Group should approach the WGIP draft Declaration before it on the basis of a high presumption of validity of its provisions.<sup>7</sup> In light of what I have tried to communicate about the right to self-determination, such a high presumption must apply to Article 3 of the WGIP draft Declaration—the right of all peoples to self-determination.

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7. Oral intervention of the Four Directions Council, recorded by the author; no written version available.