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***Reconciling Differences between the Law of Indigenous Peoples and State Law***

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**Introduction:**

Amongst the many pressing issues of the world in which the UN intervenes for the protection of rights, one age-old issue continuing today is the conflict over indigenous rights versus those of the state. This issue affects many states, reaching all corners of the world. Although there are various groups that have secured their rights to their cultural traditions, territory, language, etc, they still fight marginalization from Multinational Corporations (MNCs) seeking to invade territories for resources, as well as state governments seeking to enhance its looming power. Many indigenous groups are considered lower on the social strata in which the indigenous groups feel crippled by the current global economic situation. Protests by indigenous groups and their supporters have become a global measure of the problems. Some groups have resorted to violent attacks as well.

The conflict between indigenous legal rights and the legal power of UN member states is generally framed by the 1948 *Universal Declaration of Human Rights* (UDoHR). UN member states have tried to use the General Assembly and special meetings like the UN World Conference on Indigenous People (WCIP) to build international support and maximize the rights of indigenous groups. Other governments are very resistant to any dilution of their legal supremacy, some subtly and others with complete explicitness.



Rigoberta Menchú, Guatemalan indigenous leader and Nobel Laureate, at the opening of the General Assembly World Conference on Indigenous Peoples, 22 September 2014, New York. Photo/Cia Pak

Advocates maintain it is crucial to preserve the legal rights and differences of indigenous peoples around the world so their cultures can prosper in their distinct identities survive. In the 2007 UN *Declaration on the Rights of Indigenous Peoples*, a majority of member states agreed that indigenous populations have the same human rights as the rest of the world's populations including the access to

education, sanitation, employment, housing, and their resources for medical purposes.<sup>1</sup> Whether this extends to include a guarantee to separate and traditionally-inspired legal systems is a crucial question for indigenous rights and authority. Some states are hesitant to share such authority. Some are antagonistic. This conflict is an international issues centered around human rights versus the sovereignty of states and the fairness of legal systems.

### **Historical Background:**

This conflict has reached back into history, stretching to the dawn of colonization. As states were seeking to expand their national power and influence across oceans and lands, the preexisting tribal peoples were destroyed or conquered. Deemed as barbaric, they were enslaved, forcefully assimilated into the new European society, mixed into the other various cultures around them, or as in Asia and other regions the act of diluting populations to assimilate them. Native populations have plummeted from disease, displacement, Civil Wars, and companies and corporations coming into their lands to extract resources, meanwhile killing native populations and destroying the land after their usage. This was the beginning of Indigenous rights, from then up until the present these natives would fight and protest the colonization that had encroached on their territories.



Before the birth of the United Nations, indigenous rights groups pleaded for assistance and protection of their rights. Soon after the League of Nations, the predecessor to the UN, was created, Iroquois Chief Deskaheh in 1923 sought the League of Nations' assistance to protect rights to their practices and territories. He was turned away, not recognized because he was not a representative of a member state (on the legal presumption that his government spoke for him), but his perseverance would inspire other groups to continue his plead for their own cultures. Similarly, Maori leader T. W. Ratana from New Zealand sought the League's assistance to preserve the Treaty of Waitangi with King George III of the United Kingdom, the treaty that allowed Maori ownership of their territory. Ratana was denied also.<sup>2</sup>

<sup>1</sup> UN Dec of Indig Rights, pg. 9.

<sup>2</sup> United Nations Permanent Forum on Indigenous Issues, "History of Indigenous peoples and the international system." <http://undesadspd.org/IndigenousPeoples/AboutUsMembers/History.aspx>

The creation in 1982 of the *Working Group on Indigenous Populations* (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights, which was then recognized as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, led to the opening of doors for indigenous groups worldwide. It was in this particular forum that the indigenous peoples could address their global concerns; it was the Working Group that propelled their organizing on the issue into a more integrated body for awareness in which their fundamentals would serve as the action points for the Programme of Activities as part of the International Decade of the World's Indigenous People. Later, in 1989, Chief Ted Moses of the Crees in Canada was elected the first indigenous person to discuss racial discrimination in accordance with the economic and social conditions for indigenous peoples. After other indigenous rights leaders were elected.<sup>3</sup>

In 1993, the *Second World Conference on Human Rights* in Vienna continued the push for indigenous rights. In 1994, the General Assembly spearheaded the *International Decade of the World's Indigenous Peoples* to further administer to the protection of native peoples and launching projects including: "health, education, housing, employment, development and the environment that promote the protection of indigenous peoples and their traditional customs, values and practices."<sup>4</sup>

The General Assembly followed this with the *Second International Decade of the World's Indigenous People* (2004-2015) to issue developmental goals to be achieved by 2015 which calls upon the international realm to assist in the protection of indigenous rights in all facets of life not just including territory, cultural traditions, language, education, health, and religion, but also those rights associated with human rights: development regarding the social, economic, and environment.<sup>5</sup>

Also, under the UN Office of the High Commissioner for Human Rights, the *Vienna Declaration and Programme of Action* was adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In this declaration there is an entire section dedicated to the indigenous people, in which it discusses the convergence of indigenous rights with those of human rights and fundamental rights. It discusses the development of programs for the indigenous peoples, funding for the Centre for Human Rights to assist natives, the participation of natives in decisions, especially those related to them, and the importance of the goals set for the international decade for the indigenous peoples as well as the consideration of an establishment of a permanent forum for the indigenous people.<sup>6</sup>

However, it was on September 13, 2007, that the *UN Declaration on the Rights of Indigenous Peoples* was established in the General Assembly. Out of the 143 nations voting on this declaration, the nations with a substantial indigenous populations originally voted against the declaration including Canada, the United States, Australia, and New Zealand; however, they did vote in favor later on. Eleven nations abstained from voting on the Declaration including Russia and Colombia, and 34 nations did not vote at all. Since then there has been a push to meet several developmental goals which secure the rights of the world's indigenous population. This UN declaration serves as a supplement to the UN Human Rights Council. In 2007, the *Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP) was established under the Human Rights Council to serve as an advisory board of experts and conducts research on indigenous rights. It confirms their rights and recommends advice based on studies. It reports findings to the Human Rights Council. The Mechanism conducts yearly sessions in which indigenous representatives are invited from the Special Rapporteur on the rights of indigenous peoples and the Permanent Forum on Indigenous Issues.

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<sup>3</sup> UNPIL

<sup>4</sup> UNPIL

<sup>5</sup> UNPIL: "Second Decade of the World's Indigenous Peoples"

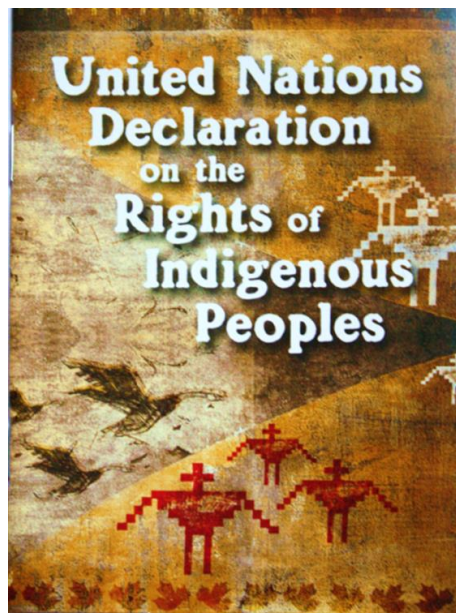
<sup>6</sup> Vienna Declaration and Programme of Action, "Indigenous People", <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>

**Current Situation:**

According to the United Nations' Permanent Forum on Indigenous Issues, "Today, there are more than 370 million indigenous peoples in some 90 countries worldwide."<sup>7</sup> These indigenous populations deserve to be treated and respected worldwide, as well as have the right to participate in decisions regarding world issues, especially those with the potential to concern their lands. Sadly, the current conflicts regarding indigenous rights are an ever present issue. Still today, groups are fighting and protesting for their rights and necessities as a people.

While it is the duty of the UN and other organizations, namely NGOs like Amnesty International, Cultural Survival, and Indigenous Movement for example, to protect the rights of the people, it can directly interfere with the interests and rights of a state actor. In the *UN Declaration on the Rights of Indigenous Peoples* it states that peoples and states alike cannot "dismember or impair...the territorial integrity or political unity of sovereign and independent states."<sup>8</sup> However, it is the right of the state, according to the UN, to administer assistance and protections upon the indigenous peoples living within the states' jurisdiction; it is the states' responsibility to protect the natives, yet they seek to protect their own interests and power as a rational actor in the international system. Hence, the conflict at its heart.

Multinational corporations, sometimes sponsored or supported by the states, encroach on the territories of the indigenous to extract resources and materials. Such businesses as natural gas, oil, mining, lumber and sugar cultivation all have extracted materials from native lands and displaced natives. Environment degradation such as slash and burn tactics, petroleum fracking, and pollution have all led to the violation of the protection of native lands by the state. Native populations, many in Brazil, are being displaced, attacked or repressed by companies infringing on their lands for the extraction of resources. Leaders of indigenous rights groups and organizations have been imprisoned for demonstrations against such practices.



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<sup>7</sup> <http://undesadspd.org/IndigenousPeoples/AboutUsMembers/History.aspx>

<sup>8</sup> UN Declaration on Indigenous Rights, Article 46 pg. 14



### **Role of the United Nations and Landmark Resolutions:**

According to the UN's *Permanent Forum on Indigenous Issues*: "Indigenous peoples are the inheritors and practitioners of unique cultures and ways of relating to other people and to the environment. Indigenous peoples have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, the various groups of indigenous peoples around the world share common problems related to the protection of their rights as distinct peoples."<sup>9</sup> Additionally, in the *UN Declaration on the Rights of Indigenous Peoples* it states:

States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.<sup>10</sup>

This is the core definition of indigenous rights, namely their right to the protection of their culture, tradition, and territories for their right to economic and sustainable development.

The *UN Declaration on the Rights of Indigenous Peoples* is one of many documents published to further protect the rights of the natives. Within the document itself it acknowledges past documents congruent with indigenous rights, namely the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, and the Vienna Declaration and Programme of Action. It is a document explaining the rights that these people have to their cultural traditions, their territories and its resources within, and their right as a people to self-determination; therefore, the encroachment of Western ideals on a traditional or primitive society is wrong if the people do not desire it. It further affirms that the historical injustices and discrimination towards indigenous populations is unjust and unacceptable. They have a rich diversity and culture, just as every member within the UN. The future generations of these people likewise have the rights to the land and practices--the preservation of heritage.

Moreover, it is in the *Declaration* that the indigenous peoples have the same fundamental human rights as other population worldwide. There should not be child labor, or exploitation, and there should be the protection of women and children--these all are linked in the *Declaration* as key points for the protection of indigenous rights and human rights as a whole. Similarly, the native populations should not have to suffer genocide or discrimination. However, historically, there were races and ethnicities were seen and deemed as superior to that of the indigenous; today, the effects of colonization and colonialism have tormented and exacerbated the current conflicts regarding indigenous rights. Therefore, it is in this document that the UN urges cooperation of the states and global population.

The *UN Second Decade of the World's Indigenous Peoples* is the current program to strengthen the rights of indigenous peoples. It calls upon international cooperation to fulfill this goal and was a resolution adopted by the General Assembly; its official title is *A/59/174 Second International Decade of the World's Indigenous People*. This resolution clearly outlines the procedures needed to effectively promote the world's indigenous peoples' campaign on an international scale including funds for such

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<sup>9</sup> UNPII

<sup>10</sup> UN Declaration on Indigenous Rights, article 8, pg 5.

procedures, organization for coordination of the decade, cooperation with other UN bodies and commissions, calling upon governments to adapt the decade's initiative and contribute to the funding, implementing a International Day of Indigenous People, establishing the completion of the draft of the declaration itself and a program of action to oversee the procedures.

The UN also works to ensure proper care for the environment through sustainable development. Therefore, it is important the indigenous population recognize this goal and continue to abide it. However, with the MNCs continuing to invade and encroach on native lands for the extraction of resources, the UN is ever more incessant on the environmental degradation that is occurring and being tied to the rights of indigenous peoples.

### **Country Positions:**

The legal rights of indigenous populations is a contentious issue worldwide. While most indigenous groups desire the same objectives, there are vast regional, national, and individual differences within the indigenous populations. Upon examining the various desires and their importance to the survival of each native group, the geographic component is essential when studying the effects on each group. Even though indigenous rights are a global issue, the regional and even national issues are greater in the treatment of the indigenous within the confines of their own state. Hence, the importance of the cooperation of the state government to ensure the protection of their rights.

#### *Africa*

Africa has had a rough evolution from the European conquests. Many groups in Africa had been subject to devastating wars and historical clashes over religion, specifically the Christianity that the Europeans brought and Islam, superimposed boundaries drawn by the Europeans, and the sheer volume of land that encompasses Africa itself, filled with natural resources. The tribes, among them: the Tuaregs, Berbers, Tebu's, Masai, and Zulu's, all have experienced in some way displacement, poverty, civil war, and aliens within their own territory according to the government. The Tebu where in particular stripped of their rights with harsh discrimination in Libya under the "Arabization" of Gaddafi regime.

#### *China*

China has a multitude of issues surrounding the indigenous legal rights conflict. China uses "Sinicization," to unify China into a cohesive culture. This privileges the position of the country's ethnic Han majority. However, the Tibetan people have been persecuted as a different ethnic background with nationalist dreams. Another persecuted and marginalized group within China is the Uighurs. They are a Muslim ethnic group in the Xinjiang Autonomous region. They have been accused or terrorist attacks and increasingly suppressed politically. The Chinese government has been berated for its violation in human rights which has been demonstrated through its treatment of its indigenous ethnic minorities within its borders. It tries to suppress international consideration of indigenous rights issues, which could rebound against the stability of Chinese Communist Party rule and the centrality of the Beijing government.

### *Latin America*

Latin America is greatly affected by large and increasingly politicized indigenous populations. Bolivia has been a particularly interesting location to observe the various indigenous groups banding together to promote their rights; however, the Bolivian government is not one to concede, but rather continuously puts indigenous leaders in jail and rule harshly against the movements. However, the election and rise of Evo Morales as president to Bolivia in 2006, led Bolivia into a reformation period where indigenous fundamentals were promoted, including anti-racism campaigns, and policies for land reform, a historically controversial issue in Central and Latin America. The Andes region has a plethora of ethnic minorities, but Peru, Bolivia, and Ecuador show to have the largest indigenous populations. One group that has been particularly discriminated against is the Yanomami people of Venezuela and Brazil, who have suffered at hands of miners encroaching on their lands. However, Fundação Nacional do Índio (FUNAI) or National Indian Foundation has sought to protect the rights of the Yanomami as well as other groups.

### *North America*

For the Northern Hemisphere countries of the United States and Canada, the indigenous rights groups are equally unsatisfied with their conditions and recognition status. The United States, although a proponent of human rights, has yet to address the conditions of the Native American reservations within its own borders including the deplorable poverty, education, health, and living conditions all without representation. Similarly, in Canada, there are groups fighting for their rights as natives to practice native rituals for hunting and gathering, namely the Eskimos. The insufficient support for the Native American and Canadian groups is astonishing considering the resources and capabilities of the governments. There several groups have argued for their rights to fishing, logging, and hunting as natives to the territory. Additionally, they argue for sustainable environmental practices as the devastating results from fracking, mining, and gathering natural resources on or near indigenous lands. In the United States, treaty rights give many tribes separate legal systems. But more recently, several states (provinces) in the United States have begun to pass new laws prohibiting separate legal systems. They are driven largely by fear of Islamic (sharia) law, but the precedents of these bans has obvious consequences for indigenous groups also.

### *South and Southwest Asia*

South and Southwest Asia has experienced numerous issues regarding indigenous and minority rights. India and Pakistan have a constant duel over the Kashmir region in which wars has ensued. This disputed area has been a source for contest as a result form Buddhist and Muslim rights to the area. Similarly in Sri Lanka the situation is mirrored in which the Hindu Tamil Tigers grapple with the Buddhists. Both of these areas result in riots and major violence which has exacerbated the conflict.

### **Conclusion: The foundations of further action**

There are many facets to indigenous legal rights. Ties to homeland and cultural priorities are vital for most groups, striving to preserve their identities for generations. The encroachment of *statizations*, globalization of business and commercial culture are danger their traditions. The need to modernize and adapt has to be balanced with other needs.

Similarly, UN member states have their own priorities, usually including preservation of their legal sovereignty and ability to maintain fair legal systems. While many governments seek to maximize rights and sovereignty of indigenous groups, others are suspicious and resistant; worried about the loss of authority and power, or concerned about the problem of legal double standards and the potential for legal chaos.

The United Nations tends to avoid resolutions that make specific recommendations to particular countries. Instead the member states prefer to establish universal principles that all or most states can accept, especially recommendations to be implemented through each country's domestic law. The United Nations also tends to support resolutions stressing *best practices*, or previously tried and tested approaches, that states can apply and tailor for their own particular needs. Indigenous groups have been impatient with this tendency, which they say gives final authority to state governments. Many groups and their supporters prefer strongly worded international statements that they can use to pressure their governments.

The most sophisticated legal critique comes from legal advocates for acceptance of indigenous legal traditions, who maintain that law must above all be legitimate; accepted as just and fair by the people it affects. An illegitimate legal system is not sustainable, they argue. Acceptance of indigenous legal theory and procedures, they maintain, is the only way to insure the full legitimacy of the law for all residents of a country. While this approach is not accepted by all states, it increasingly motivates indigenous people, their supporters, and government where they have a meaningful voice.

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