USING THE UN FRAMEWORK TO ADVANCE AND PROTECT THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN CANADA

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INTRODUCTION

The United Nations (UN) framework of treaties and covenants guarantees equality rights, self-determination of peoples, respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, religion and conditions of economic and social progress and development.[1] These are basic rights that all human beings share by virtue of being human.

Canada, as a signatory to a number of international treaties and covenants, has acknowledged its international obligations toward indigenous peoples. In addition to the 1945 Charter of the United Nations, these instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol; and the Vienna Declaration and Programme of Action's International Convention on the Elimination of All Forms of Racial Discrimination.[2] These instruments affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development. These (and other UN instruments) provide the human rights standards that bind Canada with regard to all Canadians inclusive of the indigenous population (Anaya, Falk and Pharand 1995).

The Canadian Crown/Aboriginal fiduciary obligation is also seen as an aspect of Canada's obligations as a party to the Charter of the United Nations — "the most important multilateral treaty establishing the parameters of world public order" (Anaya 1996, 2). The charter integrates the key principles of "equal rights and self-determination of peoples" (ibid.) Anaya explains the charter's acceptance by the international community: "The charter's general requirement to uphold human rights attaches to all human rights norms whose contents become generally accepted by the international community. As indicated by contemporary developments, norms concerning Indigenous peoples are a matter of human rights whose core elements are generally accepted today" (ibid).

International law principles are seen in agreements or through the formal constitutional procedures and practices of states. The practices are "the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold close to home,

1 See United Nations (1945, art. 1, para. 1–3, art. 55). See also Anaya (1996).

2 See United Nations (1945; 1961); United Nations General Assembly (1966a; 1966b; 1966c).

we shall look in vain for progress in the larger world" (Roosevelt quoted in Henderson 2008, 31).[3]

First Nation elders, leaders and organizations saw the UDHR as a critical tool for decolonizing indigenous peoples as it affirmed human rights in international law (Henderson 2008, 21). Law Professor Sákéj Henderson notes: "Along with the Universal Declaration, other declarations have reformed the customary law of the colonial era and generated post-colonial customary law, conventional law, and pre-emptory norms in international law. As well, the General Assembly of the United Nations, by binding conventions and multilateral treaties, sustained an international consensus that moved the inherent rights of humans into an internationally protected code of human rights, one to which all nations can subscribe and to which all people can aspire" (ibid.).

Many regional systems of human rights codes have been created and states have developed their own domestic human rights codes. Canada has fully implemented international law domestically through the enactment of the Canadian Human Rights Act (CHRA) in 1977 where "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have" (Government of Canada 1976-1977) free from discrimination. It is key human rights principles found in the international instruments that form the basis for the CHRA. The UN Charter and the UDHR provide models for human rights protections in the CHRA. The UDHR has 30 articles; each article details freedoms that people are guaranteed. It is prefaced by a preamble, which includes the statement: "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (ibid.). The name of the document is a direct reflection that it applies to *all* people (including indigenous people).

UNDRIP

On September 13, 2007, 370 million indigenous people in 70 countries applauded the adoption of UNDRIP as an important step in addressing human rights violations against them. The vote was 144 states in favour and four (Canada, the United States, New Zealand and Australia) opposed. Canada did not sign UNDRIP, even though it was involved in the 22-year drafting process. The Canadian government stated that UNDRIP "might not fully accord with the norms and precedents that have been established through judicial decisions and negotiations on land claims and self-government" (Canadian Human Rights Commission 2010). The government also noted that its decision to oppose UNDRIP was the "right one" and it had "principled and well-publicized concerns"[4] while dealing with indigenous issues "openly, honestly and with respect" (Strahl 2008). However, on March 3, 2010, the Speech from the Throne stated that the Government of Canada would now endorse UNDRIP in a manner consistent with Canada's Constitution and laws.

The Office of the High Commissioner for Human Rights (OHCHR) has noted that UNDRIP "provides the foundation — along with other human rights standards — for the development of policies and laws to protect the collective human rights of Indigenous peoples" (OHCHR n.d.).

The rights of indigenous peoples and individuals are human rights and are addressed as such by the international system. Article 1 of UNDRIP affirms: "Indigenous peoples have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law" (United Nations 2008).

UNDRIP affirms the "minimum standards for the survival, dignity and well-being of the indigenous people of the world" (ibid., preambular para. 7 at art. 43). These promote a human rights-based approach to addressing issues faced by indigenous peoples and provide a just legal framework for "achieving reconciliation, redress and respect."[5] The declaration has been described as a "just document" that "expresses minimum standards of human rights" (Henderson 2008, 75). "It is an interpretive document that explains how existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights. In Indigenous legal traditions, it embodies some of our teachings about human rights and being human in a complex world" (ibid.).

3 See also Lennox and Wildeboer (1998, 7).

4 See "Letter from Minister of Indian Affairs and Northern Development, Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (December 10, 2007)." In *From Development to Implementation, An Ongoing Journey*, edited by Jackie Hartley, Paul Joffe and Jennifer Preston. Saskatoon: Purich Publishing Ltd.

5 Ibid.

Indigenous leaders and human rights advocates brief journalists on the status of UNDRIP on December 12, 2006. From left to right: Alison Graham, International Service for Human Rights; Roberto Borrero, Indigenous Peoples' Caucus; Elsa Stamatopoulou, Chief, Secretariat of the UN Permanent Forum on Indigenous Issues and moderator; and Phil Fontaine, National Chief, Assembly of First Nations. UN Photo/Marie Gandois.

UNDRIP acknowledges a range of international legal instruments that provide for self-determination and the internal right of self-government.[6] Together, the UDHR and UNDRIP form self-determination in international law to all people. For indigenous peoples in Canada, UNDRIP principles are not only reflected in the CHRA, but the Supreme Court of Canada has also held that international declarations should be used to interpret the Charter of Rights and Freedoms. The following are some useful ways of implementing the standards set out in UNDRIP.

IMPLEMENTING UNDRIP

The Government of Canada has argued that UNDRIP is not legally binding and is only political in nature, that it does not create any procedural or substantive rights and that it is not customary international law. Canada also claims that "UNDRIP is a non-legally binding aspirational document" (Aboriginal Affairs and Northern Development Canada n.d.). While it is true that a declaration alone does not create binding legal obligations, other assessments have found that the key provisions of UNDRIP can be regarded as equivalent to already established principles of international law. This fact alone implies the existence of equivalent and parallel international obligations that states are legally bound to comply with. It is also clear from several Supreme Court of Canada decisions that international law informs the interpretation of domestic law and assumes conformity with domestic law.[7] UNDRIP sets out minimum standards of the collective and individual rights of indigenous people. The scope of UNDRIP is broad and covers almost all aspects of indigenous lives and is a highly relevant international human rights instrument informing the inherent right of self-determination through articles 19, 21 and 43:

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocation training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Many communities endorse UNDRIP as an important tool of self-determination to promote self-governance and have found it useful when drafting their own laws and policies to meet the collective standards set out in UNDRIP.[8]

Reliance upon the standards in human rights cases, conventions and judicial decisions may also be put forward before the decision makers in domestic Canadian court cases to guide an interpretation of Aboriginal and treaty rights as protected by section 35 of the Constitution Act, 1982. Chief Justice Brian Dickson confirmed that the Charter of Rights and Freedoms held "the various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for the interpretation of the Charter's provisions."[9] It

6 See Articles 2, 4, 9, 33–35, 38, 43-44.

7 *R. v. Hape*, 2007 SCC 26 at para. 53–55.

8 See, for instance, the Assembly of First Nations at www.afn.ca.

9 See Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at para. 80.

logically follows that if the Supreme Court of Canada uses international declarations to interpret the charter, then section 35 of the Constitution Act may similarly be interpreted using international declarations. This line of reasoning may be considered when drafting domestic pleadings.

It should also be noted that the Supreme Court of Canada relied on UNDRIP to interpret Aboriginal rights even prior to its endorsement by Canada in *Mitchell v. Minister of National Revenue*.[10] Since Canada has endorsed UNDRIP, the Federal Court has accepted that UNDRIP applies to the interpretation of domestic human rights legislation.[11] Courts around the world that have endorsed UNDRIP have relied on its provisions to interpret their own domestic law. The Chief Justice in *Cal v. Attorney General (Belize)*, elaborated on his finding of a violation of customary international law, and held that "this Declaration, embodying as it does general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it."[12]

It is also noteworthy that Bolivia made a 2009 constitutional change that allows for collective rights to language, community justice and land. Bolivia's National Law 3760 of November 7, 2001, incorporates UNDRIP without change. Regionally, in 2007, the Organization of American States' Inter-American Court of Human Rights (IACHR) in *Saramaka People v. Suriname*[13] affirmed the existence of an indigenous people's collective right to its land. The IACHR *Saramaka* referred specifically to article 32 (2), the consultation and cooperation requirement in order to obtain indigenous peoples' free, prior and informed consent with respect to any project affecting their lands and resources. In the Philippines, UNDRIP has already formed the basis for domestic legislation in the Indigenous People's Rights Act.[14]

Although Canada claims that it merely "supports" UNDRIP, the government may be persuaded to use similar logic as the IACHR, Belize, Bolivia and Philippines and recognize and apply UNDRIP in Canada based on the fact that they endorsed the declaration. UNDRIP alone, however, may not be enough to protect or promote Aboriginal and treaty rights within the Canadian Constitution. With the implementation of UNDRIP, a dovetailing approach may be utilized within the Canadian legal framework of Aboriginal and treaty rights. In addition, the process for accessing the international courts is cumbersome — domestic avenues must be exhausted before the international courts can be accessed. However, once an international ruling has been garnered, then the domestic courts may be obliged to implement the use of UNDRIP. Once cited, the courts are bound to use a flexible and generous approach when applying it, as they would when interpreting any constitutional documents.[15]

A multi-faceted approach to implementing the principles of UNDRIP should be utilized. Law professor Brenda Gunn (2011) notes that there should be ongoing legal academic consideration of how principles symbiotically fit within the Canadian legal landscape. It would also be useful to expand into other areas of academia and policy making. For instance, education on what UNDRIP is and how the principles may be applied to government policy may provide for interesting workshops and education plans for civil servants. Education for the public and, in particular, for indigenous peoples would provide a useful venue for exploring how these important principles may be implemented to improve the position of indigenous peoples in Canada.

Canada has stated that UNDRIP is not representative of customary international law. While it is true that a declaration alone does not create binding legal obligations, other assessments have found that the key provisions of UNDRIP can be regarded as equivalent to already established principles of international law. This fact alone implies the existence of equivalent and parallel international obligations that states are legally bound to comply with. The scope of UNDRIP is broad and covers almost all aspects of indigenous lives. It is also an important document for advancing inherent rights for indigenous peoples in Canada and should be used in all legal strategies, agreements and negotiations involving First Nations, Metis and Inuit when advancing and protecting inherent rights.

10 *Mitchell v. Minister of National Revenue*, [2001] 1 SCR 911.

11 See *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras. 351–54, aff'd 2013 FCA 75.

12 *Cal v. Attorney General (Belize)*, 18 October 2007, Claim Nos 171 and 172 of 2007 at para. 132.

13 *Case of the Saramaka People v. Suriname*, Judgment, IACHR Series C, No. 172 (November 28, 2007).

14 See the Office of the President of the Philippines (2011).

15 See *R. v. Sparrow* [1990] 1 S.C.R. 1075.

Implementing UNDRIP will take a concerted effort from legal practitioners (domestically and internationally), academics, policy makers, educators and the indigenous and non-indigenous public. The goal is to have these principles used in agreements, negotiations and in all jurisprudence dealing with Aboriginal and treaty rights. These principles may also be useful as an evaluation method to assist in determining if the laws and policies that affect indigenous peoples are improving or denigrating their position. UNDRIP is an excellent and useful tool to promote and protect inherent indigenous rights.

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