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Waiting for Some Angel: Indigenous Rights as an Ethical Imperative in the Theory and Practice of Human Rights

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ABSTRACT – *This article uses the stalled Draft Declaration on the Rights of Indigenous Peoples as the impetus for an examination of arguments championing and opposing the framing of Indigenous rights as human rights. Failings both theoretical and practical – in the conceptualisation, promulgation and interpretation of human rights – have long left Aboriginal peoples at a disadvantage. The dual focus of Indigenous claims is unique in the rights lexicon, asserting the right to be simultaneously different from and equal to the majority population. Yet Indigenous rights are often perceived, by governments with the power to block their progress, as a threat to state sovereignty; to the equality of citizens; to national unity; to the sanctity of private property; and to the fostering of a free-market economy. A concerted effort to broaden existing conceptions and frameworks to include not only group rights, but those specific rights essential to Aboriginal collectivities, is imperative to the survival of Native peoples as peoples. Additionally it has much to offer the discourse of human rights itself.*

RÉSUMÉ – *Cet article utilise le projet de Traité de déclaration sur les droits des peuples autochtones comme l'élan derrière une analyse des arguments qui défendent et s'opposent à l' équivalence des droits des autochtones comme droits de l'homme. Des échecs tant au niveau théorique que pratique – dans la conceptualisation, promulgation et interprétation des droits humains – ont longtemps laissé les Autochtones en désavantage. La dualité des réclamations autochtones est unique dans le lexique des droits, affirmant le droit d'être à la fois différents de, mais égaux à, la majorité de la population. Cependant, les droits des autochtones sont souvent perçus, par des gouvernements en mesure d'interrompre leurs progrès, comme une menace à la souveraineté de l'Etat ; à l'égalité des citoyens ; à l'unité nationale ; à la sainteté de la propriété privée ; et au développement d'une économie marché libre. Un effort soucieux d'élargir les conceptions existantes et d'inclure non seulement les droits de groupes, mais aussi les droits spécifiques et essentiels aux communautés autochtones, est impératif à la survie des Indigènes et a également beaucoup à offrir au discours des droits de l'homme.*

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"*We could wait for some angel, but it is we who must act.*"[2]

INTRODUCTION AND BACKGROUND

The world currently contains 370 million Indigenous[3] peoples, located in seventy countries, on every inhabited continent on Earth (UNPFII par.1). Their traditional lands constitute one-fifth of the surface of the planet and hold eighty percent of its biological diversity (IISD par. 11). Of the approximately six thousand distinct cultures in the world, between four and five thousand are Indigenous; of the six thousand languages one may hear across the globe today, about three-quarters are spoken by Native peoples (OHCHR 1).

Despite this physical presence and persistence – and despite their existence as objects of international political and economic concern for centuries – the first inclusion of Native peoples in international rights instruments did not occur until 1990, through four brief mentions in the *International Convention on the Rights of the Child* (Sanders 86). Five years later, the *Draft Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations' Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities (Burger 6). This document has been described as "the closest contemporary approximation to a 'universal' indigenous rights praxis" (Corntassel and Holder 141), having involved the input of 400 Indigenous delegations,[4] over an eight-year period, without state interference (Burger 6). The specific goals of Indigenous rights, as outlined in the *Declaration*, are cultural continuity, a halt to the ongoing processes of assimilation and 'ethnocide'[5], and the attainment of 'substantive equality' (defined as an equality of outcomes in the face of effects-based discrimination, which would allow Native people to attain conditions relevantly similar to those enjoyed by their non-Native counterparts). The dual focus of Indigenous claims is therefore unique in the rights lexicon, asserting the right to be simultaneously *different from* and *equal to* the majority population.

Yet Indigenous rights are often perceived, by governments with the power to block their progress, as a threat to state sovereignty; to the equality of citizens; to national unity; to the sanctity of private property; and to the fostering of a free-market economy (Ketley 363). The *Draft Declaration* was meant to yield a fully-formed human rights convention by the end of the International Decade of the World's Indigenous Peoples (1994-2004), but this process has utterly stalled. An impasse has emerged, rooted in the refusal of states to acknowledge more than two of the *Declaration*'s forty-five articles[6] (Bianchi par. 10). It is also rooted in the refusal of

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[2] Statement by the Delegation of Bolivia to the November 1995 first session of the Open-Ended Inter-Sessional Working Group [to elaborate a Draft United Nations Declaration on the Rights of Indigenous Peoples] (as cited in Barsh, 1996, p. 782).

[3] For the purposes of this essay, the terms "Indigenous", "Native", and "Aboriginal" will be used interchangeably to refer to "those [peoples] which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." This is the definition developed by/for the United Nations, in 1984 (qtd. in *Indigenous Peoples Human Rights Project*, par. 3).

[4] This group included traditional leaders, representatives from Aboriginal women's groups, youth organizations, and communities worldwide, as well as Native activists and lawyers (Burger 6).

[5] Defined as the intentional eradication of a culture, ethnocide is the cultural variant of genocide.

[6] The forty-five articles are contained in nine sections of the *Draft Declaration* which, in their current form, address:
(1) rights to self-determination, participation in the life of the State, nationality and freedom from discrimination
(2) threats to the survival of indigenous peoples as distinct peoples
(3) the spiritual, linguistic and cultural identity of indigenous peoples
(4) education, information and labour rights
(5) participatory rights, development and other economic and social rights

Indigenous peoples to corrupt what they perceive as the conceptual core of the *Draft Declaration*, while their disinclination to reach an agreement merely for the sake of reaching an agreement reflects the preference for consensus decision-making and dialogic justice, as well as an emphasis on the long-term stability of political and social initiatives, found in many Aboriginal societies.

Problems with the implementation of the *Draft Declaration* parallel those in the literature on human rights. These issues (either ironically or fittingly, depending on your perspective) map directly onto the most unique and essential aspects of Indigenous rights, as well as those Aboriginal claims that hold the most promise for enriching the discourse and language of rights. Rather than discussing the *Draft Declaration* itself, this paper will examine the barriers to its acceptance and implementation, and will present the set of such problems as defined by both the opponents and champions of Indigenous rights. In the course of this discussion, the benefit, necessity, and urgency of honouring Aboriginal claims will demonstrate that Indigenous rights are nothing less than an ethical imperative in the theory and practice of human rights.

THE PROBLEM OF THE GROUP IN 'MAINSTREAM' RIGHTS THEORY

Non-Aboriginal group rights theories fall somewhere on a continuum between the liberal-individualist and the corporatist, pacing with the philosophical debate between whether the group or the individual is 'ontologically prior':

> Liberal-individualist approaches are distinguished by their focus on fundamental individual interests as the only acceptable grounds for according the status of a moral right to claims advanced by collectivities. In contrast, corporatist approaches focus on the community as a previously existing base from which individual action departs. (Corntassel and Holder 130-1)

Both extremes view group membership and its importance to the individual as primarily psychological – a sort of 'psychological good'. Unfortunately, a conception of the importance of group membership that focuses on psychological well-being downplays or omits the fact that certain strong groups may play a role in securing more tangible aspects of one's well-being (Corntassel and Holder 135). It additionally paves the way for the claim that individuals may function just as well psychologically "in the absence of secure identification" (Corntassel and Holder 135). In mainstream rights theory, the influence of community is mental instead of actual, psychological instead of political, and emotional instead of social, with the result that physical and economic security are not at stake. Yet protecting and improving the physical and economic well-being of Aboriginal people is the principal concern of Native groups and, contrary to common assertions, these goals are neither fully nor easily realized via the nation-state.

Ultimately, despite a rich discourse, the theoretical development of group rights in the 'mainstream' fails to address key aspects of Indigenous rights. In order to embrace Native concerns within group rights, "[...] the material and pragmatic interests served by collective claims must be integrated with symbolic and psychological interests in a way that preserves the symbiotic nature of their relationship" (Corntassel and Holder 150). The corporatist's view of the importance of collective life and the individualist's view of the value of individual persons are *both* necessities (Corntassel and Holder 151). The inclination to reify or essentialize either 'communal identity' or 'personal identity' should be recognized as constituting a false dichotomy in group rights theory.

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(6) land and resource rights
(7) the exercise of self-determination, indigenous institutions
(8) the effective implementation of the Declaration and general concluding provisions (two parts)

THE PROBLEM OF THE GROUP IN 'MAINSTREAM' RIGHTS PRACTICE

In constructing an argument for (or indeed against) Indigenous rights, it cannot be forgotten that definitions have conceptual and practical usefulness. Definitions of Aboriginality, within or in conjunction with the language of rights, have thus far been used to omit Native peoples from political consideration through stressing a conceptual universalism that undermines equality in the practical sense. Procedural limitations thus created are used to avoid the issues of collective rights in general, and claims of the right to self-determination in particular. The existing language of "people," "populations," and "persons who are members," as well as the continued controversy over the term "peoples," constitute evidence of an "atomistic bias that does not adequately protect those for whom communal life is vital" (Corntassel and Holder 127).

Recognizing collectivities as rights-bearing entities is key to the just resolution of some of the most urgent Aboriginal issues. For Native peoples, outside determination of membership criteria – determining who is and is not Native – is commonplace, violating (among other things) individuals' freedom of association. There is little doubt that, with respect to Indigenous peoples, "[s]tates have used the power of definition, historically and still today, to avoid their human rights obligations under international law" (Ketley 332). From the Aboriginal perspective, then, "[...] collective rights claims are, first and foremost, about the concrete implications of the manner in which one's communal membership links one to the social world outside one's group" (Corntassel and Holder 138). Yet while there has been some recent recognition of the rights inhering in groups, individual rights – rights of *persons belonging to groups* – remain the sole enforceable claims. Human rights bodies will not hear claims presented by Aboriginal groups, particularly those which pertain to the collective right of self-determination (Ketley 353). Further, even though claimants must be individuals asserting that their existing human rights have been violated, and no one has yet been internationally recognized as *legitimately* representing a Native collectivity.

The idea of personal compensation for the violation of rights (especially as commonly framed, in terms of financial reimbursement to the individual for property devalued, confiscated, or destroyed) is also utterly insufficient vis-à-vis Native claims. Even when the discussion is limited to talk of material losses, for example of traditional lands, the existing language of rights is inadequate. Land, rather than a commodity, is perceived as a link to one's ancestors, part of a 'spiritual compact' of stewardship and an essential component of cultural continuity; it cannot, therefore, be reduced to its market price, nor can adequate reimbursement ever be provided for the loss or pollution of traditional territories and resources. Other aspects of cultural erosion are even more difficult to quantify: for example, how is a group to be justly compensated for the loss of a language? Ultimately, "not accepting that collectivities are (at least in the abstract) potential rights-holders is close to impossible without discarding most indigenous practice altogether" (Corntassel and Holder 130).

Temporality in approaches to rights practice is also a barrier to the pursuit of Aboriginal claims. Current rights measures tend to be ahistorical, looking neither very far back nor very far into the future, while impacts on Indigenous cultures are both incremental and cumulative (Ketley 360). In light of deliberate erosions and manipulations of Native 'status' on the part of the state, the degradation of and encroachment on traditional lands, and the lack of effective support of Native languages and material and spiritual traditions, long-term assessments and future prognoses are essential to the survival of Aboriginal peoples. Additionally, cultural preservation by its very definition calls for the consideration of future generations, to whom Native peoples believe they have concrete responsibilities, yet this 'inter-generational equity' is not recognized in either conventional human rights theory or practice (Ketley 366).

THE PROBLEM OF THE UNSUITABILITY OF MINORITY STATUS

Because attention to 'Indian' concerns paced with the rise of the civil rights movement in North America, it was not until the 1970s that the United Nations would discuss Aboriginal issues as anything other than a problem of discrimination against minorities (Ketley 337). Despite their coincident broths, minority and Indigenous claims were, from the outset, already estranged,[7] since the "[...] Indian orientation towards separatism and self-determination was at variance with the black concern at that time for integration" (Svensson 431).

Minority rights should be credited as the avenue through which group rights have entered into political and legal practice, as they "[...] have served to focus the attention of the international community on the cultural dimensions of human rights, developing this culturalism within the interstices of sovereignty" (Thornberry 416). These instruments are not without their limitations, though, and shortcomings announce themselves quickly when minority rights are employed in the service of Indigenous claims. Both minorities and Indigenous peoples aim for perpetuation as distinct groups, including the preservation and promotion of their culture, customs, and language, and both are in a non-dominant position in the wider society. Indigenous peoples, however, have several distinctive features that mark them as a non-minority: the centrality of land in group identity, including a claim to land rights; a focus on internal self-determination as a principal goal, signifying autonomy, self-directed development, and *communal control of traditional resources*; collective decision-making as a norm; self-identification, on the part of the group and individual, as the basis for membership; and a shared history of injustices and continuing state of inequality based solely on Indigenous status. Minority rights instruments, by way of contrast, typically omit any reference to autonomy as a group right (Thornberry 414), targeting instead "[...] discrete individuals unjustly treated as members of a disadvantaged group defined racially" (Svensson 430), while access to *state-provided resources*, and the state's sanctioning of minority identity and citizenship rights, are principal aims.

Perhaps most importantly, because Indigenous groups see themselves as 'first peoples', distinct from minorities, the complexity, confidence, and visibility of Indigenous identity and Aboriginal claims call for consideration in a separate category of rights (Thornberry 416). Ultimately, even the best intentions employed in bringing Indigenous peoples under the 'shelter' of existing human rights through minority status amount to "a denial of the inconvenient social, historical, and political fact of [Indigenous] peoplehood" (Scott 816-17).

THE PROBLEM OF THE STATE AS THE ARBITER OF RIGHTS

While the right to political autonomy was prioritized in the latter half of the twentieth century, with newly and not yet independent colonies the world over calling attention to the injustices of the former European empires, the concept of sovereignty was narrowed in order to address *only* these concerns. Colonization became, in the United Nations system, defined so as to practically omit all peoples whose 'conquerors' still lived among them. This inclusion of territorial geography and ethnic/cultural criteria to establish the legitimacy of claims to self-determination is known as 'salt-water colonialism' (Vamvakas par. 13) – wherein your colonizer's seat of power is an ocean away – and it still serves to frame Indigenous issues as domestic matters[8] within international law. In the domestic arena, the conflict of interest in

[7] The history of the pairing of these 'classes' of issues is typically ironic: "No minority rights provisions had been written into the Covenant of the League of Nations, apparently because Australia and New Zealand wanted to avoid any international scrutiny of their treatment of Aboriginals and Maori" (Sanders 73).

[8] Even Canada, a country lauded for its attitude toward multiculturalism and its reputation as a 'peacekeeping' nation, has hidden behind this barrier. "When Canada accepted the jurisdiction of the World Court in 1931, it made a reservation concerning domestic issues. Prime Minister Bennett, speaking in the House of Commons, stated that the reservation would prevent any discussion of Indian treaties or the treatment of Indians" (Sanders 74).

having states and state-oriented bodies as the arbiters of Indigenous rights is self-evident: "The state cannot be the source of justice for self-determination claims on behalf of Indigenous peoples because of its interest in the outcome. Even international governing organizations are biased toward the state, as they generally represent the interests of a population of states" (Smith 1236-7).

Political and legal objections to the notion of sovereignty are plentiful in discussions of Indigenous issues, and have been points of contention from the start, yet "claims that self-determination and self-government are divisive and impossible in practice miss the heart of what Indigenous people are seeking" (Behrendt 8). Such claims rest on an ongoing mischaracterization, in which certain detractors either confuse or conflate the concepts of 'self-determination' and 'statehood' (Boldt and Long 553; Wheatley 88). While both of these concepts serve the idea of autonomy, at their heart they are not relevantly similar, for self-determination shows a distinctively *inward* orientation. Indigenous groups, for the most part, seek some form of political and spiritual insulation from state encroachment (as well as control of certain pragmatic resources[9]), but do not harbour separatist ambitions (Boldt and Long 547; Niezen 126; Corntassel and Holder 149; Thornberry 419; Ketley 357). Not only are Indigenous concepts of self-determination almost universally restricted to control over their own (internal) affairs, rather than political representation in the broader system (Boldt and Long 553), Craig Scott has also commented that,

> If one listens, one can 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. (819)

Given the existence of treaty documents (at least in the 'settlement Commonwealth' nations of Australia, Canada, and New Zealand, as well as in the United States), the recent insistence on the characterization of Aboriginal groups as 'domestic dependent nations' is at least contradictory, if not actually ironic. International in nature, 'Indian' treaties – legal and binding documents, since abrogated by states – promised Native nations most of the very same rights now being debated (Clinton 746).

Aboriginal persons harbour the same need expressed in the 'mainstream': to participate in their governing institutions, and to have the institutions most directly involved in their communities accurately reflect *their* needs and *their* identities (Niezen 133). Some of the most democratic states show a surprising lack of comprehension of this particular issue. Equally surprising is the lack of recognition of the fact that international law does not now, and has not ever affirmed a right to unilateral separation from existing states, even if the separatist group has an internationally recognized right to self-determination (Scott 818). In light of these facts, "leaving statehood as the only way for a people to achieve recognition of their right to self-determination is, on the face of it, *more* likely to encourage strident irredentism" (Niezen 140). On the whole, state resistance is neither necessary nor well justified. In the *Report of the United Nations Meeting of Experts on Practical Experience in the Realization of Internal Self-government of Indigenous Peoples*:

> [...] experts concluded that indigenous peoples have the right of self-determination as provided for in the International Covenants on Human Rights. [...] They also considered that indigenous self-government was not merely a right

[9] For example, in the Canadian context, the right to use traditional hunting or fishing grounds, and what has come to be known as 'Native control of Native education'.

> of indigenous peoples, but also could be beneficial to the state and the natural environment. (qtd. in Burger 13-4)

Native people assert the right and ability to hold a sort of 'dual' or 'multi-constitutional citizenship', in which their duties flow through and link relationships at the level of the person, nation, and nation-state (Corntassel and Holder 129). Given the existence of federalism as a functioning political system, not to mention the corpus of international law that exists above the state's domestic functioning, it cannot be said that different layers or spheres of rights are unworkable in practice. As Craig Scott notes, "[...] 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" (819). In the final assessment of self-determination (and opposition to the concept), continued state insistence that Indigenous rights are merely cultural and do not include aspects of national autonomy, "perpetuates the Euro-centric view of Indigenous peoples as 'cultural artefacts' rather than dynamic communities with complex social, political, and economic systems" (Ketley 362). The ethnography thus constructed describes a disadvantaged, confused people articulating a misdirected longing for a romanticized and irretrievable past – a characterization that has proven useful in assimilationist campaigns for literally hundreds of years.

THE PROBLEM OF ACCOUNTABILITY

Part of the argument against Indigenous rights rests on the assertion that group rights tend toward repression of the individual. Again, the contention is rooted in an odd, almost defiant mischaracterization of both human rights and Aboriginal claims. Since 'mainstream' rights are fundamentally about balancing the interests of the individual against broader concerns, human rights, in both theory and practice, are *already* embroiled in the 'contest' between the personal and the greater good. Still, multitudes proclaim the 'possibility of tragedy', while few entertain the 'possibility of congruence' if group rights and individual rights were both to be put into practice, and thereafter found in one other's company (Garret, qtd. in Johnston 26). Ironically, states – the principal opponents to the recognition of Aboriginal rights as group rights – routinely suspend the human rights of Aboriginal persons under the rubric of respect for the 'special character' of Native groups.[10] It is for this reason that Johnston urges that "[t]he inclination of the anxious individualist to dismiss the claims of communality [...] be tempered by the record of atrocities committed against groups in the modern era" (26). It is interesting to note that states are collectivities (representing and housing populations), yet these entities are neither painted as unaccountable nor as necessarily repressive. Indeed, on the international stage, states appear to be individuals writ large, and bear certain rights and responsibilities accordingly (Niezen 139).

A fuller understanding of the (apparent) mutual exclusivity of individual and group rights may be gained via an examination of the evolution of the liberal-individualist position. Svensson describes the dominant liberal democratic concept of individual rights as, at its root, a reactionary idea which emerged to counter the medieval doctrine of the supremacy of the group (424). Unfortunately, the groups that were philosophically targeted in the Middle Ages – the socio-political entities of Church, monarchy/aristocracy, and guild – were not the only ones to fall:

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[10] Aboriginal peoples in Canada, for example, are not in practice covered by the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act*, omissions justified by appeals to their status as separate and distinct peoples. This amount to a reprehensible (if creative) use of the *idea* of Native self-government against the *realization* of Native self-government. See, among others, Kent McNeill, *Aboriginal Governments and the Canadian Charter of Rights and Freedoms* (http://www.yorku.ca/ohlj/PDFs/34.1/mcneil.pdf).

> As the monarchy rose above the traditional communities of medievalism, it attempted to utilize them as instruments of its own power. Thus community *per se* came to be branded with the stigma of oppression. [...] Those multidimensional communities (bound by ties of race, religion, language, culture, lifestyle, economic system and social order all at once) which continued to exist were, in effect, defined out of political existence, at least in received theory" (Svensson 422, 426).

Contemporary multiculturalism, then, is truly the flowering of political individualism, in which the co-existence of countless groups represents the triumph of none[11] (Svensson 422). Concordantly, though communities may enjoy certain privileges, there are no true group rights in contemporary practice (Johnston 24; Svensson 438).

There *is* a certain amount of tension between individual and collective rights; however, "that [groups] may also stifle their members on occasion does not invalidate their positive aspects" (Svensson 435-6). Negotiated limits on Indigenous self-government can – and should – address the human rights of individual members (Sanders 85), while the wider society and its legal and political institutions provides an ever-present 'last line of defence' against groups' oppression of individual members, who may opt to leave the collectivity or to pursue personal protection under domestic or international human rights instruments. Nevertheless, there is a strong case to be made for the conceptual compatibility of collective rights as external protections *promoting fairness between groups*, and individual rights as internal protections *targeting persons within groups* (Niezen 137). "The objective is not to downplay equal treatment for individuals but to extend to groups equal rights to preserve their integrity" (Boldt and Long 550).

THE PROBLEM OF UNIVERSALITY AND CULTURAL RELATIVISM

The human rights movement is, by its very nature, profoundly antirelativist (Niezen 116). Universal treatment, connoting universal equality, is not only an alluring concept, but is also designated a bulwark against cultural relativism. Special measures within human rights, however, are not properly characterized as relativistic. They do not herald the elimination of ethical standards and a free-for-all in claims of moral behaviour, but are instead necessary for the securing of 'substantive equality' (Behrendt 6; Scott 818; Das 302-3). Gunther describes the universalism of human rights as, in its intent, not a 'simple universalism', "abstract, epistemic, and essentialist", but a 'complex universalism', which is procedural, deliberative, and dialogical, and which "makes the step from difference to dialogue" (qtd. in Thornberry 114). Special rights, then, constitute an ethically defensible form of differentiation (Svensson 429; Niezen 115). As Judge Kotaro Tanaka[12] famously said, "[t]he principle of equality before the law means [...] the principle to treat equally what are equal and unequally what are unequal. [...] To treat unequal matters differently according to their inequality is not only permitted but required" (qtd. in Jonas and Donaldson 19).

While sovereignty is the most difficult aspect of Indigenous rights for states to endorse, special rights or special measures present the biggest obstacle to the acceptance of Aboriginal rights within public opinion. Ordinary citizens have taken to heart what has been called the "new political formula of justice = equality = sameness" (Svensson 430), and show either a lack of understanding, or a certain amount of personal resentment of 'special' treatment. The fact is,

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[11] It can, therefore, be argued that Liberalism is fundamentally at odds with the idea of the 'persistent' group, as "It was one of the prime justifications of the superiority of democracy that it did not allow permanent minorities" (Svensson 425-6).

[12] Dissenting opinion in the *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Second Phase), 1966. For an excellent discussion of the principle described by Judge Tanaka, see Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford: Clare Press, 1991.

though, that declarations of equality and the prohibition of racial discrimination are just that: declarations and prohibitions, relatively ahistorical and surprisingly passive. They cannot, alone, undo centuries of unequal historical treatment, which has served to overwhelmingly deprive and impair Aboriginal peoples within their 'host' state's legal and political systems. Rights and 'special measures' must be paired, however, in order to have any meaningful effect, as "[w]ithout special measures, rights would be empty rhetoric, ineffective in achieving real equality. Without rights as their objective, special measures would be no more than gifts from the advantaged to the disadvantaged" (Jonas and Donaldson 17).

THE PROBLEM OF DILUTION AND THE SPECTRE OF INTOLERANCE

'Purists' often cite the weakening of standards as an inevitable consequence of the addition of Indigenous concerns to the current roster of international human rights. Brownlie, for example, bemoans "the proliferation of academic inventions of new human rights and the launching of new normative candidates by anyone who can find an audience" (as cited in Niezen 133). While there is merit to the assertion that the future strength of human rights lies in the protection of a core of the most widely applicable and defensible claims, that core need not exclude group rights to remain strong (if it is particularly strong now, that is, and properly regarded as sacrosanct). Human rights standards must not be allowed to devolve into an aloof stasis, or used as an excuse for outright intolerance (Thornberry 426). The inclusion of different rights perspectives in global manifestos is, at least potentially, itself a great good. Up until the *Draft Declaration on the Rights of Indigenous Peoples*, cultures "long accustomed to bureaucracy and law" provided the only representatives in the drafting of international rights instruments, despite the vast numbers of peoples whose traditions are found outside of – and may therefore serve to interrogate, balance, or enrich – such forms (Niezen 97). Indeed, the broadening of language of human rights to more pointedly address issues relevant to women, ethnic minorities, and religious and linguistic groups has helped to define and spur action on practices and conditions that had previously proven both theoretically and practically vague (including, inter alia: apartheid, armed ethnic conflict, and modern slavery) (Thornberry 102). Concordantly, it is worth remembering that neither the *United Nations Charter* nor the *Universal Declaration of Human Rights* contain any mention of minority rights or decolonisation (Sanders 74), while the concept of ethnocide is mentioned only in the *Draft Declaration on the Rights of Indigenous Peoples* (Burger 7).

General Assembly Resolution 41/120 of the United Nations sets out specific criteria[13] for new human rights standards, none of which are especially easy to satisfy, while rights theorists have proposed salient procedures by which new standards may be developed (or the existing set pared down or strengthened).[14] Ultimately, that a particular undertaking may prove difficult to plan or execute is not sufficient justification for the abandonment of ethical causes. The language of human rights offers critical advantages in the service of Indigenous claims, to the extent that no other vehicle can be said to serve the same purpose. As Behrendt has observed,

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[13] According to this resolution, new human rights standards should:
(a) be consistent with the existing body of international human rights law;
(b) be of fundamental character and drive from the inherent dignity and worth of the human person;
(c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
(d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
(e) attract broad international support.

[14] For a particularly cogent and compelling discussion of these procedures, see James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, Berkeley: University of California Press, 1987.

> The rhetoric of rights [...] offers a means of communication and discourse, a way of expressing harms felt and identifying and communicating aspirations. We now also, due to the international human rights regime, have a set of international standards against which we can measure our treatment by government action and laws and more objectively provide evidence of violation and abuse. (4)

CONCLUSION

Native groups constitute a collectivity of individuals, rather than a collection of individual interests or cultural affectations. Aboriginal people are not properly characterized as minority group members holding individual rights; what is at stake in their claims is not just personal well-being, but collective well-being and, indeed, their very existence. Since collective rights *do* serve the well-being of persons who are members of the collectivity, the protection of group rights thus protects individual rights. Further, since Indigenous rights provide a means by which equality may be achieved by hitherto omitted groups, these rights absolutely honour widespread concepts of the universal worth of the human being – concepts at the heart of human rights in both theory and practice. Problems with Indigenous rights lie mainly in their acceptance and implementation, wherein a certain fear and misunderstanding on the part of non-Native actors can be found to have greater influence than any philosophical or practical weakness in the argument for the rights themselves. Despite the fact that Native peoples have expressed a desire to "maintain and freely develop their identities *in coexistence with* other sectors of humanity" (Das 302, emphasis added), fears and misunderstandings remain. It is for this reason that Russel Lawrence Barsh has fittingly called the elaboration of, and countervailing resistance to Indigenous rights, "a case of the immovable object and the irresistible force" (782).

The hallmark of Native claims have been their consistency; the hallmark of Native groups as claimants, their patience. Both have already spanned centuries, showing a tenacity which acknowledges that self-determination is a goal that will require work in both theory and practice, involving dialogue that may prove uncomfortable for actors who remain haunted by the idea that Indigenous rights encroach upon the sovereignty of states (Niezen 116). In the final assessment, an attempt to conceptualize, justify, and promulgate Indigenous rights enriches our understanding of human rights, broadens the scope of acts constituting human rights violations, encourages democratic dialogue, offsets the extremes of cultural intolerance and cultural relativism, and promotes substantive equality – an equality of outcomes, rather than of mere intentions. Such an attempt, in the words of Ronald Niezen, "is an effort to find a conceptual and moral orderliness out of the chaos of globalized differences, through structured consensus rather than auto-da-fe or sword of truth" (95). Indeed, in an age of globalization and multiculturalism, the Native perspective is especially salient, asserting "[...] the right to be recognized as 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" (Scott 814-5). A concerted effort to broaden existing conceptions and frameworks to include not only group rights, but those specific rights essential to Aboriginal collectivities, is not only imperative to the survival of Native peoples *as peoples*, but also offers much to the discourse of human rights itself.

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