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Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: The role of the Permanent Forum on Indigenous Issues and other indigenous specific mechanisms (article 42)

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I welcome the opportunity to participate in this international expert group meeting on implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). I am pleased to submit this statement on best practices and challenges in the implementation of the UNDRIP in North America and hope to help identify potential ways that the three UN mechanisms (United Nations Permanent Forum on Indigenous Issues, the United Nations Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples) can support implementation Indigenous rights implementation on the national, regional and global levels.

Indigenous Rights Compliance Patterns

The UN Declaration on the Rights of Indigenous Peoples places political and moral demands on states by asking them to adopt constitutional, legislative, and domestic policies that recognize and protect the individual rights of Indigenous citizens, but also their collective rights as peoples, including land, resources and self-determination.

Earlier this year, I published a book titled *Global Indigenous Politics: A Subtle Revolution* (Routledge, 2016). One element of this book is a cross-national comparative study of Indigenous rights compliance behaviour across sixty countries, each with significant Indigenous populations. I constructed a database of these countries' compliance with Indigenous rights, as of December 31, 2014. Using this database, I then compared each state's rhetorical and treaty commitments to international Indigenous rights instruments with their actual legal, policy and constitutional conduct. My analysis of the sixty state dataset shows that two states (3.4 percent) comply with Indigenous rights, meaning that their behaviour nearly matches their high commitment. Ten states (17.2 percent) are non-compliant, meaning that their commitments to Indigenous rights and their behaviour are both low. I also found some unexpected patterns of state behaviour vis-a-vis Indigenous rights.

Selective Endorsement

First, I observed pattern that I call "selective endorsement." After originally voting against the UNDRIP in 2007, the four countries of the "Anglosphere" (Canada, the USA, Australia and New Zealand, also known as the CANZUS states) each later shifted their official positions on the Declaration to "support" or "endorsement" during 2009 and 2010. Each of these four countries also included important qualifiers and exclusions about how the Declaration is to be interpreted in domestic law. Far from a full endorsement of Indigenous rights, these four countries actually engaged in a more nuanced behaviour. I argue that by selectively endorsing Indigenous rights, these four countries attempted to express their rhetorical support for Indigenous rights while also strategically, collectively and unilaterally writing down the global consensus on Indigenous rights and constraining them so that these countries' current laws, polices and practices will then align with their own interpretation of the expectations of the global human rights consensus.

"Over-Compliance"

Second, I discovered a similar, related concept of "over-compliance." In this chapter of the book, I look at global patterns of state compliance with Indigenous rights. While compliance is normally considered only as a compliant or non-compliant binary calculation, my analysis shows

five possible outcomes in Indigenous rights compliance by states: compliance, non-compliance, under-compliance, partial compliance, and a new concept, which I am terming "over-compliance." Four states (the USA, Australia, New Zealand and Canada) are "over-compliant."

An "over-compliant" state as one that paradoxically takes constitutional, legal and/or policy actions that recognize specific rights or a category of rights that go beyond that state's international human rights treaty obligations or its normative commitments. The term "over-compliance" does not indicate or imply that such states are complying with, or even exceeding, international Indigenous rights standards—they are not—only that these states are performing above the level that would be expected based upon their low level of commitment to Indigenous rights. These countries demonstrate moderate to strong levels of legal, constitutional and policy practices in Indigenous rights implementation but are reluctant to make a high commitment to Indigenous rights instruments. "Over-compliance" is a nuanced behaviour that seems, like selective endorsement, to keep these countries' expectations low enough that they can interpret and proclaim their legal, policy and constitutional status quo as already in line with international Indigenous rights standards.

Best Practices: North American States

Canada

As the UN Special Rapporteur's 2014 Report on the situation of Indigenous peoples in Canada found,

> Canada's relationship with the indigenous peoples within its borders is governed by a well-developed legal framework that in many respects is protective of indigenous peoples' rights. Building upon the protections in the British Crown's Royal Proclamation of 1763, Canada's 1982 Constitution was one of the first in the world to enshrine indigenous peoples' rights, recognizing and affirming the aboriginal and treaty rights of the Indian, Inuit and Metis people of Canada. Those provisions protect aboriginal title arising from historical occupation, treaty rights and culturally important activities.[1]

As a direct result of heavy Indigenous activism and advocacy, the 1982 Canadian Constitution included Section 35, which recognizes existing Aboriginal and treaty rights. Various Supreme Court rulings, including the most recent 2014 *Tsilhqot'in* decision,[2] affirm the existence of these rights. Canada also has institutions and procedures in place, such as comprehensive land claim agreements, specific claims process, and a treaty process in British Columbia, to address treaty and aboriginal rights gaps and grievances. However, each of these "best practices" comes with attendant challenges, which will be discussed in more depth below.

On June 11, 2008, Prime Minister Stephen Harper issued a public and formal apology to the former students of Canada's Indian residential schools in the House of Commons. In this

[1] United Nations General Assembly, 2014. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Canada UN Doc A/HRC/27/52/Add.2,* p. 5.
[2] *Tsilhqot'in Nation v British Columbia*, [2014] 2 S.C.R.

apology, the Prime Minister expressed regret over the forcible removal and treatment of children in the schools. He noted that, as a tool of assimilation, the schools prohibited the speaking of Indigenous languages and the practice of Indigenous cultures. He also acknowledged the widespread reports of neglect and abuse of children at the schools.

In June 2015, Canada's Truth and Reconciliation Commission (TRC) announced the release of its summary report.[3] The TRC, which was authorized to settle class action legal claims brought forward by residential school survivors, conducted an extensive study of the century-long, church-run, and government-funded Indian Residential Schools program in order to reveal the truth about the program and its long-term impacts on Indigenous peoples. The second part of the TRC's mandate was to make recommendations on healing. Citing the 1996 *Report of the Royal Commission on Aboriginal Peoples* as a lost opportunity for fundamental change, the TRC included 94 'Calls to Action' as part of its report. These 94 recommendations, which were intended to form the blueprint for reconciliation into the future, calls upon all layers of government – federal, provincial, territorial and municipal – to make fundamental changes in policies and programs in order to repair the harm caused by residential schools. Central to these recommendations is a call for all levels of government to fully adopt and implement the ***UN Declaration on the Rights of Indigenous Peoples*** as the framework for reconciliation in Canada, including a national action plan for implementation. In total, 12 of the 94 Calls to Action referenced the Declaration.

While Conservative Prime Minister Stephen Harper refused to consider adoption and implementation of the Declaration, Liberal Prime Minister Justin Trudeau, elected in October 2015, promised a renewed nation-to-nation relationship between Canada and Indigenous peoples based on respect and grounded in the principles of the Declaration, which he promised his government would adopt and implement. The newly elected Prime Minister Trudeau crafted a cabinet that included two Indigenous members, and his mandate letters to ministers included directives to implement the recommendations of the TRC including implementation of the ***UN Declaration on the Rights of Indigenous Peoples***. In May 2016, two members of Trudeau's cabinet appeared before the United Nations Permanent Forum on Indigenous Issues with an announcement that Canada now pledged unqualified support for the Declaration and that it intended to adopt and implement it. In the meantime, New Democratic Party Member of Parliament Romeo Saganash tabled legislation that would ensure that the laws of Canada align with the Declaration.

United States of America

The United States recognizes and respects broad powers of inherent sovereignty of American Indian tribes as "domestic dependent nations," including many forms of legal jurisdiction. As the Special Rapporteur's 2012 report noted, the United States

[3] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg, Manitoba, 2015), accessed November 1, 2016, http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf.

> Supreme Court and lower courts have often been protective of indigenous peoples' rights by affirming original Indian rights to the extent consistent with the operative doctrine, or more often by enforcing treaty norms, legislation, or executive decisions that are themselves protective of indigenous rights.[4]

Federal policy toward tribes has been guided by the principle of self-determination since 1973. Therefore, the US supports tribal authority over internal matters such as membership, education, culture, social welfare, family relations, public safety, land and resources management, and economic development. During the self-determination policy period, tribal court systems have developed, matured, and withstood multiple challenges in federal courts and the US Supreme Court, including the most recent case, *Dollar General Stores v. Mississippi Band of Choctaw Indians*[5] that was decided in favour of tribal jurisdiction.

The US Congress has passed numerous pieces of legislation that support Indigenous rights, especially the self-government of tribes. Examples include the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978, the American Indian Religious Freedom Act of 1978, the Native American Languages Act of 1990, the Native American Graves Protection and Repatriation Act of 1990, and, most recently, the 2013 Violence Against Women Reauthorization Act which supports tribal legal jurisdiction over domestic violence cases. Numerous executive orders also support tribal self-government and administration.

Many Indigenous-specific agencies and programs exist throughout the US government and more Indigenous individuals are holding high-level appointments within those agencies and programs than ever before. President Barack Obama has held annual White House Tribal Nations Conferences since taking office in 2009.

Indigenous-Led Self-Determination Practices

Indigenous-led organizations, institutions, and legislatures all over the world are increasingly representing, aggregating, and practicing collective forms of self-determination at the tribal level, provincial/state level, nationally and globally. Indigenous peoples are sometimes exercising self-determination in ways that resemble the external sovereignty of states. Emerging forms of self-determining practice by Indigenous peoples include:

1) **Indigenous Passports:** Some Indigenous nations issue and routinely travel on their own passports, including the Haudenosaunee Confederacy, the Aboriginal Provisional Government in Australia, Haida Gwaii, and the Kichwa Confederacy, Ecuador.

2) **Independent trade or diplomatic missions**: Direct international trade and diplomatic missions constitute a growing arena for the exercise of self-determination. Indigenous trade missions in recent years include: an Assembly of First Nations trade mission to China, a Māori

[4] United Nations General Assembly, 2012. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America UN Doc A/HRC/21/47/Add.1,* p. 7.

[5] 579 US _(2016)

Party-led trade mission to Korea, the Yidinji nation of Australia meeting with ambassadors as a nation, and tribal leaders from the National Congress of American Indians' engaging in a independent diplomatic mission to Cuba.

3) **Involvement in elements of state external sovereignty**: In New Zealand and Canada, Indigenous peoples may play a stronger role in consultation over immigration, defense policy consultations, foreign and trade policy. Māori iwi are demanding consultation with the New Zealand government over climate change, trade agreements like the Trans-Pacific Partnership, and other issues. Canada has recently held consultation meetings with Indigenous peoples on defense policy.

4) **Treaty relations**: Some Indigenous peoples are entering into treaty or partnership agreements with other groups, in conjunction with state institutions, or outside state purview. Twenty Indigenous nations along the Canada-US border have signed the 2014 Iinnii (Buffalo) Treaty, and 85 Indigenous nations signed a treaty, in September 2016, to jointly fight pipelines that carry tar sands oil. The International Indian Treaty Council has held treaty conferences without state participation since 1974.

5) **Territorial self-determination**: Indigenous peoples are asserting self-determination as guardianship assertions over traditional lands, even absent technical sovereignty or jurisdiction. Instructive cases include: pipeline resistance in the US and Canada and a protest against an observatory on the sacred site at Mauna Kea, Hawaii.

Challenges of Indigenous Rights Implementation in North America

Each and every "best practice" of Indigenous rights in North American has attendant corollaries that present particular challenges to implementation of the Declaration. The most difficult and outstanding issues in Indigenous rights implementation in both countries center on:

- Lands, territories and resources,
- Treaties,
- Self-determination, and
- Free, prior and informed consent (FPIC).

While Section 35 of the Canadian Constitution recognizes existing Aboriginal and treaty rights, it does not define them and leaves definition to be decided by the Canadian courts on a case-by-case basis. This not only translates into an arduous and expensive process for Indigenous peoples, but it also maintains a problematic and inequitable colonial decision making structure since decisions about the very definition and scope of Aboriginal title and treaty rights lie exclusively in the hands of only one party to the treaty: the Canadian state and its courts. Even the landmark 2014 *Tsilqot'in* decision that broadly affirmed Aboriginal title left open the potential for the Canadian state to override that title if it has certain compelling reasons to do so.

Comprehensive land claims agreements, the specific claims process, and the British Columbia treaty processes are all extremely difficult and expensive. Indigenous groups must take out loans to proceed, and these loans remain owed even if negotiations stall or are broken off by the state party. Most of these processes require Indigenous peoples to extinguish Aboriginal rights and title and the government insists on agreements being "full and final" which raises the stakes for Indigenous groups as they then need to make any agreement as comprehensive as possible.

The 2008 Canadian apology was carefully constrained and limited in scope. It was offered only to former students of Indian Residential Schools. To date, there has been no recognition or acknowledgement of such longstanding issues like land dispossession or paternalistic and assimilative laws and policies. The United States included an apology in the 2010 defense appropriations bill, but no public announcement or ceremony was ever held.

Just weeks after Canada made its public announcements of unqualified support for the Declaration at the UN Permanent Forum in May 2016, the Justice Minister indicated in a speech to the Assembly of First Nations that whole-scale adoption of the Declaration into Canadian law would be "unworkable" and a "simplistic approach" to implementation. She stated that implementation would be a slow and deliberate process, a mixture of legislation, policy and action initiated by Indigenous peoples. Many Indigenous people have expressed disappointment with the Trudeau government's apparent downshift in enthusiasm for implementing the TRC Calls to Action and the Declaration. The former chairman of the TRC has complained that the Trudeau government's lack of a national action plan for implementing the 94 Calls to Action and the UN Declaration is undermining reconciliation efforts.[6]

In the United States, all federal Indian law and policy is subject to the doctrine of Congressional plenary power, meaning that Congress has the ultimate power to unilaterally modify, limit or even extinguish Indigenous land rights, treaties and tribal sovereignty. Therefore, the entire body of protective law, legislation, and even treaty rights could potentially be completely overturned or reversed with a new anti-Indian rights policy framework coupled with a similarly oriented Supreme Court and federal court system.

Neither the United States nor Canada recognizes their historic treaties with Indigenous peoples as the supreme law of the land. Treaty rights disputes are handled in the courts of the state party to the treaties. No impartial or bilateral mechanism exists to resolve treaty disputes. There is no international accountability for Indigenous peoples' treaties.

Both the United States and Canada have policies and practices in place to consult with Indigenous peoples on issues that impact them, but to date, both countries have interpreted this "duty to consult" as a thin and technical requirement where Indigenous peoples are not presumed to have the right to say "no" to development projects. Officials in both countries also have a tendency to use the term "consultation" as an improper synonym for "free, prior and

[6] Mia Rabson, "Feds Accused of Failing to Push Reconciliation," *Winnipeg Free Press,* January 4, 2017, accessed January 12, 2017, http://www.winnipegfreepress.com/local/feds-accused-of-failing-to-push-reconciliation-409617725.html.

informed consent." Unlike consultation, the process of free, prior and informed consent gives Indigenous peoples the right to say "no" or "yes" to development project that not only pass through their territories but that may directly impact them. These issues are currently "hot" in both the United States and Canada as tensions have built over the lack of free, prior and informed Indigenous consent practices in multiple resource extraction projects, including the Dakota Access Pipeline at Standing Rock Reservation in South Dakota, the LNG and Kinder Morgan pipelines as well as the Site C Dam in British Columbia.

Knowledge of the ***United Nations Declaration on the Rights of Indigenous Peoples*** among Indigenous peoples in North America seems to be growing and, as a result, Indigenous rights and treaty rights are increasingly being asserted. However, there seems to be widespread ignorance and fear about Indigenous rights among many non-Indigenous peoples, especially around expectations for implementation. There is a broad tendency for non-Indigenous peoples to view Indigenous rights as something to be feared or even as a threat, especially to political stability and economic growth, rather than viewing Indigenous rights as the best potential pathway to peaceful co-existence and conflict resolution.

Recommendations for the UN Mechanisms

Recognize assertions and expressions of self-determination by Indigenous peoples. Provide rhetorical and material support for, and encourage states to recognize, Indigenous self-determination assertions that are in compliance with Article 46, i.e. assertions that do not threaten the existence or territorial integrity of nation states.

Promote and assist with information dissemination on these self-determining practices among other Indigenous peoples and states within the region and globally. Support Indigenous nations in their initiatives to help them build capacity and encourage more Indigenous nations to assert themselves in thoughtful and creative self-determining practice.

Create a new status for Indigenous nations participating in the three Indigenous-specific UN mechanisms. Indigenous nations or confederations of Indigenous nations who present themselves to UN bodies and the international community as governments and nations should be recognized and treated as nations and governments, rather than as non-governmental organizations (NGOs.)

Encourage states to adopt defined constitutional protection of Indigenous rights to provide an important legal foundation for Indigenous rights that cannot be easily reversed with new legislation and policies.

Urge states to offer meaningful public apologies to Indigenous peoples as an important symbolic gesture of a new relationship built on mutual respect and grounded in the principles of the Declaration.

Conduct a global study on extinguishment practices by states in land rights negotiations.

Create a "best practices" guide for FPIC in resource development projects. How is it achieved? Who gets a say? How do we know when we have it? How much consensus is required? How does it achieve more peaceful and harmonious relationships between Indigenous and non-Indigenous peoples?

Educate state parties on Indigenous rights, particularly FPIC. Produce educational materials to judiciaries, the private sector, all levels of government, and civil society organizations.

Create a reporting mechanism for nation states to report on compliance with Indigenous nation treaties on an ongoing basis. Integrate Indigenous-state treaty compliance into existing enforcement mechanisms like the UPR and CERD.

Support or facilitate establishment of bi-lateral mechanisms for resolution of treaty disputes.

Conduct a review of countries' existing laws, policies and programs related to Indigenous peoples. Include these lists in UNSR country reports and human rights treaty monitoring reports.

Develop an annual reporting mechanism on Indigenous rights compliance (similar to IWGIA annual reports), citing specific laws, policies and practices of each country that violate and that support UNDRIP.

Encourage states to consult and dialogue with Indigenous nation leaders, Indigenous organizations, institutions, UN agencies, and other concerned sectors to discuss UNDRIP compliance in specific national contexts. Urge states to develop national action plans for UNDRIP implementation.

Initiate long-term planning discussions on a series of Indigenous rights conventions, following the lead of the major human rights conventions that began with the Universal Declaration on Human Rights and then, later evolved into a social, cultural and economic rights convention and a political and civil rights convention, with optional protocols.